



Joint Support Command  
Ministry of Defence

# THE MINISTRY OF DEFENCE PROTECTS OUR VITAL INTERESTS



***"The integrity of the MoD's export control system"***

*The use of "INFORMATION FUSION" when making  
DECISIONS with imposed legal constraints  
from the export compliance domain.*



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Master in Customs and Supply Chain Compliance

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## EXECUTIVE SUMMARY

While writing this Thesis the regulatory regime of 'strategic' military exports is at a crossroads. In the conventional defence trade (and logistics), export control laws and regulations are fairly well understood. But what if we are not fighting the enemy? And we have to train how we fight, are export control laws and regulations still well understood?

The first ripple came in 2014, when the Royal Netherlands Air Force was informed that Fokker Services B.V. (a provider of air and space services based in the Netherlands) had signed a SETTLEMENT AGREEMENT<sup>1</sup> with the U.S. government regarding alleged violations of U.S. sanctions for the re-exports of U.S. controlled aircraft components, technology and services to Iran and Sudan.

By signing this settlement agreement and paying the fine, Fokker Services B.V. recognizes the extraterritoriality of U.S. export laws and regulations and confirms the degree of control over the defence industry in the Netherlands, regardless of where it is located in the world.

Due to the extraterritoriality principle of U.S. export control laws and regulations, the Dutch Ministry of Defence must then also comply with both national and U.S. export regulations. Serving two masters and thus complying with two parts of sometimes conflicting regulations can pose both deployment and legal challenges. Because what choice do you make between compliance with one over the other? And where are the biggest 'operational' risks?

To fully integrate export compliance with the Ministry of Defence's operations, the use of extraterritorial jurisdiction and international legal cooperation is recommended.

Before the Ministry of Defence will determine the future route to export compliance, it will first have to decide what level of integrity it wants to achieve - The Cheshire Cat<sup>2</sup> even said on the subject: "*(That)* It depends a good deal on where you want to get *(to)*," - "*(Then)* Whether it *(doesn't)* matters which way you go."

It has been established, however, that compliance with national and international laws and regulations in the performance of the duties of the Ministry of Defence has demonstrated a strong commitment to controlling the proliferation of WMD-related goods and technology. The efforts of the Ministry of Defence in this area are increasing, with the risk that such actions could also damage the confidence of

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<sup>1</sup> Fokker Services B.V. voluntarily self-disclosed its sales of aircraft parts to customers in Iran, Sudan, and Burma (Myanmar) to OFAC and BIS. Available at [https://home.treasury.gov/system/files/126/20140605\\_fokker.pdf](https://home.treasury.gov/system/files/126/20140605_fokker.pdf)

<sup>2</sup> L. Carroll (1865), Chapter 6 Pig and Pepper of Alice's Adventures in Wonderland.

our allies when it comes to the consistent implementation of trade control standards and obligations, as found in Resolution 1540.

The general recommendation is therefore that the Ministry of Defence should invest efforts in finding a balance between extraterritorial 'enforcement' activities from the U.S. and ensuring a consistent and multilateral approach to global non-proliferation targets.

To support the Ministry of Defence efforts against the proliferation and illicit trafficking of weapons of mass destruction in the field of export controls, to ensure international security, I make two general recommendations:

**I** The affiliated NATO countries could set up one integrated NATO Stock Number (NSN) database containing (at least) information about refused parties and product classifications. Such a database would allow a wide variety of authorised 'military' personnel members to quickly access the information they need, to take effective action if necessary (robustness) and respond adequately to the rapid and unpredictable changes that are occurring in the world around us (agility).

**II** In addition, I propose to use the risk and compliance framework from chapter 7.2 (Multi-domain operation activity compliance model). This model guarantees Risk Adaptive Access Control (RAdAC) because it is based on simplification of export controls in the Ministry of Defence supply chain, by working with standard military operational procedures, which are based on risk and not on the origin of the item.

The views expressed in this thesis do not necessarily reflect the official policy or position of the Ministry of Defence, but it describes a set of legal paradigmatic assumptions<sup>3</sup> within the military export compliance domain that have been elaborated by the writer.

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<sup>3</sup> Cambridge online dictionary: - *An assumption that is so foundational that it is particularly hard to uncover and even harder to challenge.*

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## Introduction

The phrase "***The Ministry of Defence stands for stability and security throughout the world***"<sup>4</sup> is based on the Charter and the Constitution of the Kingdom of the Netherlands. This overarching mission of the Ministry of Defence comprises three main tasks, of which the protection of national territory and that of our allies is one with the greatest legal and political impact.

This protection of national territory has led to our country becoming a member of the North Atlantic Treaty Organization (NATO), whereby Article 5<sup>5</sup> obliges us to achieve mutual defense of fellow members. NATO invoked this collective defense clause (Article 5) for the first time in response to the terrorist attacks on September 11, 2001.

*After this attack, it was no longer possible to speak only of national security issues, because the terrorist group Al-Qaida killed thousands of civilians by hijacking an aircraft and using it as an improvised weapon of mass destruction hereby threatening international security.*

The Dutch Ministry of Defence, as a member of NATO, must be able to take effective action if necessary (***robustness***) and respond adequately to the rapid and unpredictable changes that are occurring in the world around us (***agility***).

Resolution 1540 of the United Nations Security Council was unanimously adopted on 28 April 2004 on the non-proliferation of weapons of mass destruction (WMD). The resolution sets out the obligations for all Member States to develop and enforce appropriate legal and regulatory measures against the proliferation of chemical, biological, radiological and nuclear weapons and their means of delivery to non-state actors.

One of the sayings of P. Achilleas about free 'military' trade: "*In a globalized world, the free movement of goods and technologies can lead to the proliferation of WMD that can be used for hostile purposes*"<sup>6</sup>, can therefore conflict with (inter)national security. Given the international need for advanced technology, export controls are becoming increasingly important to prevent our technologies from falling into the wrong hands. That is why it is crucial for our daily activities to ensure end-to-end compliance with (inter) national laws and regulations in the field of export control throughout the supply chain. Also with the requirements that all our allies in this supply chain are compliant<sup>7</sup> as well.

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<sup>4</sup> Defence White Paper (2018) **Investing in our people, capabilities and visibility**. Ministry of Defence. Available from <https://english.defensie.nl/downloads/policy-notes/2018/03/26/defence-white-paper> (Accessed 24 November 2019).

<sup>5</sup> The North Atlantic Treaty (1949) Washington D.C. - 4 April 1949

<sup>6</sup> Achilleas, Philippe. (2017). Introduction Export Control. 10.1007/978-981-10-5960-5\_1.

<sup>7</sup> Aubin, Y. & Idiart, A. (2016) **Export Control Law and Regulations Handbook (Online)**. Third Edition: Wolters Kluwer. Available from <https://wkldigitalbooks-integra-co-in.eur.idm.oclc.org/scripts/PDFViewer/web/viewer.html> (Accessed 24 November 2019), pp. 9.

# CHAPTER ONE

## RESEARCH CONTEXT

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To get profit without risk, experience without danger, and reward without work, is as impossible as it is to live without being born.

A.P. Gouthey

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# 1. Research context

## 1.1 Organisation

The Dutch Ministry of Defence consists of 7 organisational elements, in which both the Minister of Defence and the Chief of Defence have their offices in The Hague. The Central Staff makes Defence policy. The 4 armed forces ensure that military personnel and equipment are mission-ready. The Joint Support Command and the Defence Materiel Organisation support the armed forces by providing goods and services. The Minister of Defence is at the head of the defence organisation and the State Secretary of Defence being the executive Minister of Defence.

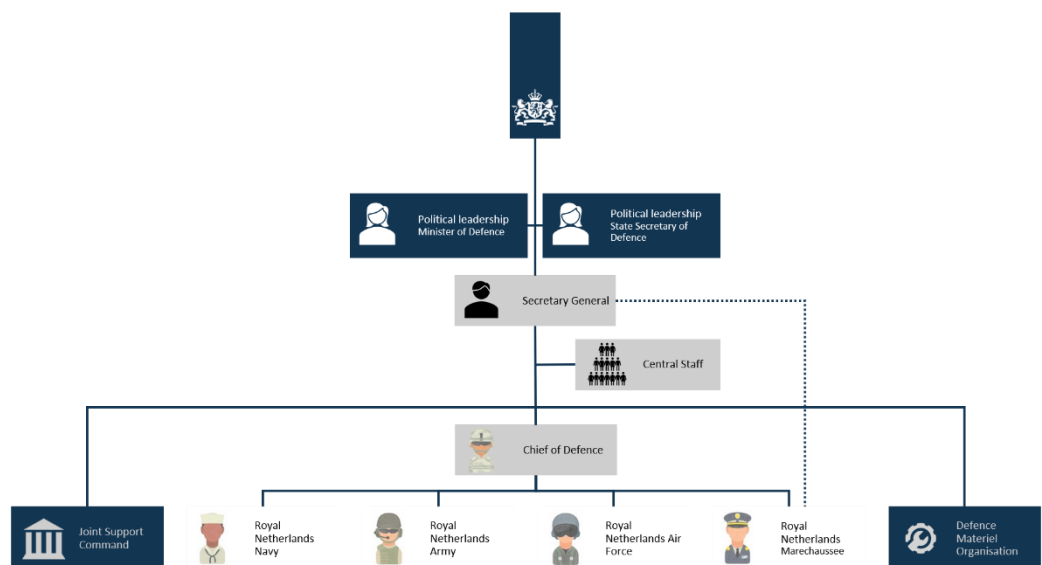


FIGURE 1 MINISTRY OF DEFENCE ORGANISATIONAL STRUCTURE

## 1.2 Proces Model Management (PMM)

Referring to the disclosure by the Royal Netherlands Air Force in 2014, the Ministry of Defence has set up an export compliance working group led by the Central Staff. This group consists of representatives from all 7 organisational elements, the Chief Compliance Officers and the security authority. In addition, each organisational element has been mandated to implement an Internal Compliance Program (ICP) to mitigate the risk of non-compliance situations in the future.

In addition, the responsibility and decision-making powers are laid down in a Process Model Management framework, from which we can identify the following roles: Process Model Owner, Process Model Holder and Coordinating Process Manager.

## 1.3 Problem definition

Most of the export control challenges that the Ministry of Defence has faced to date concern the potential unauthorised transfer of controlled goods and technology to third parties (permanent or temporary). The process of obtaining the right authorisation can affect the deployment of these goods and technology by our armed forces at home and abroad when they are shared with parties that are not compliant with the international export control regime.

These are the 'issues' that the Ministry of Defence is confronted with, when visualizing the supply chain of goods, services and technology originating from the legal domain. Complying with laws and regulations that have an extraterritorial effect can prevent data from being shared with officials in the supply chain. In order to make this controlled data visible to the licensing authorities and also to maintain our strategic lead, one-off cases are used in the supply chain that are of a controlled nature.

These 'issues' are believed to stem from the extraterritoriality of the International Traffic in Arms Regulations (ITAR) regarding the export and re-export of defense items and services identified on the United States Munitions List (USML), set forth under 22 CFR § 121.1.

The re-export and re-transfer of defense articles, parts or components (even when legally owned by the Ministry of Defence) is subject to a strict license regime.

## 1.4 Research question(s)

This thesis aims to evaluate to what extent U.S. law and regulations can influence a legal decision in the supply chain of the Ministry of Defence within the export compliance domain and the conflict it can have with standard military operational procedures in the field?

RQ 1: Is it indeed a conflict with the sovereignty of the Netherlands, in the case that the exporting entity is accountable to a foreign government outside of the EU prior to the export after getting the license issued by the national authority?

RQ 2: Which preconditions (evidence) must be met for which type of legal decision in terms of exercise, deployment or mission (Ministry of Defence case contribution)?

RQ 3: How can we conceptualize and visualize critical decisions from an international legal perspective in a complex, uncertain and ever-changing environment?

## 1.5 Reading guide

There were two phases to this study (two pillars) with 1 general denominator - *export compliance* - in chapter 6 these two pillars are combined in a decision model that is composed with information obtained through research.

Part 1 (chapter 2 – 4) deals with the legal context of justification for directly applying U.S. export control laws and regulations to the Netherlands Ministry of Defence.

Part 2 (chapter 5 – 7), the information fusion will bring case law and the deployment of the Ministry of Defence together in a model to make decisions with legal restrictions within the export compliance domain (scope).

The research method that will be applied is a qualitative case study<sup>8</sup> against the background of an empirical legal research. The methodology for research for this thesis also includes literature reviews and interviews with government representatives of the Ministry of Defence (classified-not included).

The goal of this case study research is either theory building or theory testing: *it concerns unusual events in a specialized international legal domain, Export Control.*

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<sup>8</sup> Voss, C., Tsiriktsis, N., & Frohlich, M. (2002). **Case research in operations management**. International Journal of Operations & Production Management, 22(2), 195-219.

# CHAPTER TWO

## THE POSITION OF TREATY LAW IN THE INTERNATIONAL LEGAL ORDER

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“In an increasingly interconnected world,  
progress in the areas of development, security  
and human rights must go hand in hand.  
There will be no development without security  
and no security without development.  
And both development and security also depend  
on respect for human rights and the rule of law.”

In larger freedom: towards development,  
security and human rights for all

21 march, 2005

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## 2. The position of treaty law in the international legal order

### 2.1 Definitions and more on treaties (explanatory remarks)

Treaty law has been an important part of the establishment of our current export control regime within the Ministry of Defence - according to *Andrea Bianchi*<sup>9</sup>, the methodology used to separately investigate the export control domain within the much broader domain of extraterritoriality issues requires some explanatory remarks.

Because of the particularly strong political interests in (inter)national security, the export control subject deserves a somewhat autonomous treatment in this thesis in relation to the military domain.

*(Translation NL origin-ENG)* The Dutch armed forces work in many different areas with foreign (military) partners. This varies from developing and acquiring advanced (weapon) systems to international coordination of transport and crisis management operations all over the world. For the conclusion of agreements for this international military cooperation, countries can opt for treaties within the meaning of the Vienna Convention<sup>10\*</sup>. In addition, there is a widespread practice of using less formal, non-contractual agreements instead of what we refer to as Memoranda of Understanding (MOU).<sup>11</sup>

*\*Article 2, 1(a) Vienna Convention on the Law of Treaties:*

*“treaty” means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.*

In addition to ensure national security, the Ministry of Defence also has another, underexposed task, that of international cooperation in the field of defence procurement.

This cooperation is also evidenced by the Authorised Economic Operator (AEO) certificate, of which the Ministry of Defence is the holder. This chapter will therefore also describe how and which special "contracts" can be concluded in issues where the Ministry of Defence is an entrepreneur in controlled commodities.

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<sup>9</sup> Bianchi, A. (1992) **Extraterritoriality and Export Controls: Some Remarks on the Alleged Antimony between European and U.S. Approaches**. German Yearbook of International Law, 35, 366-434.

<sup>10</sup> Vienna Convention on the Law of Treaties (23-05-1969). Available at <https://wetten.overheid.nl/BWBV0003441/1985-05-09> (Accessed 16 February 2020).

<sup>11</sup> Mr. dr. J.E.D. Voetelink (2007) **Chapeau Agreement, militaire samenwerking met de Verenigde Staten juridisch onderbouwd?** Netherlands Military Law Review, MRT 2007 afl. 8.

In addition to the Vienna Convention on the Law of Treaties (1969), a Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations<sup>12</sup> (1986) was also published.

The scope of this Convention applies to treaties\* between one or more States and one or more international organizations, and treaties between international organizations.

*\* Article 2, 1(a) Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations: "treaty" means an international agreement governed by international law and concluded in written form: (i) between one or more States and one or more international organizations; or (ii) between international organizations.*

A treaty is therefore in both cases a binding formal agreement, contract or another written instrument that establishes obligations and has no retrospective effect\* between two or more subjects of international law (primarily states and international organisations).

*\* Article 4 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations: Without prejudice to the application of any rules set forth in the present Convention to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the Convention, the Convention applies only to such treaties concluded **after the entry into force of the present Convention** with regard to those States and those organizations.*

## 2.2 Introduction 'What is extraterritoriality?'

*Extraterritoriality* is a "situation in which state powers (legislative, executive or judicial) govern relations of law situated outside the territory of the state in question".<sup>13</sup>

Not because of the lack of interest, but from the point of view of relevance to the underlying chapter of this thesis, I have only analysed enacted U.S. laws and regulations prior to the establishment of the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR).

In the timeline as shown, I have listed the enacted organisations and laws that are part of the established U.S. export control regimes.

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<sup>12</sup> Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (Vienna, Austria 18 February – 21 March 1986). A/CONF.129/15. Available at [https://treaties.un.org/doc/source/docs/A\\_CONF.129\\_15-E.pdf](https://treaties.un.org/doc/source/docs/A_CONF.129_15-E.pdf).

<sup>13</sup> Jennifer A. Zerk (2010) **Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Area**. Working Paper n°59. Available at [https://www.pantheonbonne.fr/fileadmin/IREDIES/Contributions\\_en\\_ligne/H\\_ASCENSIO/Extraterritoriality\\_Human\\_Rights\\_and\\_Business\\_Enterprises.pdf](https://www.pantheonbonne.fr/fileadmin/IREDIES/Contributions_en_ligne/H_ASCENSIO/Extraterritoriality_Human_Rights_and_Business_Enterprises.pdf) (Accessed 14 February 2020).

<i>Name</i>	<i>Year</i>
Trading with the Enemy Act (TWEA)	1917
The Export Control Act	1949 - 1969
(extension and amendment on) The 1949 Export Control Act	1969
Coordinating Committee for Multilateral Export Controls (COCOM)	1950
Multilateral organization composed of Japan and all the North Atlantic Treaty Organization (NATO) countries, excluding Iceland and Spain. The main function of this organization was to establish and then to review three lists of goods, products and technologies which are embargoed: Munitions List, the Nuclear Power List and the Dual-Use list.	
Mutual Security Act	1954
Foreign Assistance Act	1961
Foreign Military Sales Act	1968
The Export Administration Act (EAA)	1969-1989
National Emergencies Act (NEA)	1971
<i>International Security Assistance and Arms Export Control Act (AECA)</i>	1976
This act provides the authority for both Foreign Military Sales and Commercial sales	
International Traffic in Arms Regulations (ITAR)	1976
International Emergency Economic Powers Act (IEEPA)	1977
The Export Administration Amendments Act	1977 -1979
Expansion of jurisdiction (1969) to "any goods and technology exported by any person subject to the jurisdiction of the United States."	
Export Administration Regulations (EAR)	1979
<i>Export Control Reform Act (ECRA)</i>	2018

According to Little<sup>14</sup> et al., the suggestion that U.S. export laws "follow the part" is supported by more specific provisions of the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR) that clarify that *foreign persons* should abide by restrictions on (re-)exports of U.S. controlled goods and technology.

thereof the following new paragraphs:

"It shall be the policy of the United States to exert leadership in the world community to bring about arrangements for reducing the international trade in implements of war and to lessen the danger of outbreak of regional conflict and the burdens of armaments. United States programs for or procedures governing the export, sale, and grant of defense articles and defense services to foreign countries and international organizations shall be administered in a manner which will carry out this policy.

"It is the sense of the Congress that the President should seek to

## FIGURE 2 ARMS EXPORT CONTROL ACT (AECA) OF 1976

The presumption that not only the United States can invoke the extraterritoriality principle for a world free from the dangers of armaments and war is supported by the first sentences of the AECA (Figure 2) as well in the Preamble in the Charter of the United Nations (1953): *WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, AND FOR THESE ENDS to unite our strength to maintain international peace and security.*'

<sup>14</sup> Kathleen C. Little, Suzanne D. Reifman, Amanda J. Dietrick (2001) **U.S. export controls apply extraterritorially, Circumstances In Which Foreign Persons Are Subject To U.S. Export Laws And Regulations.**

We can assume that Congress's intention to extend U.S. jurisdiction extraterritorial over U.S. controlled goods and technology is established by determining that it will be managed in a manner that will implement the policy of the AECA.

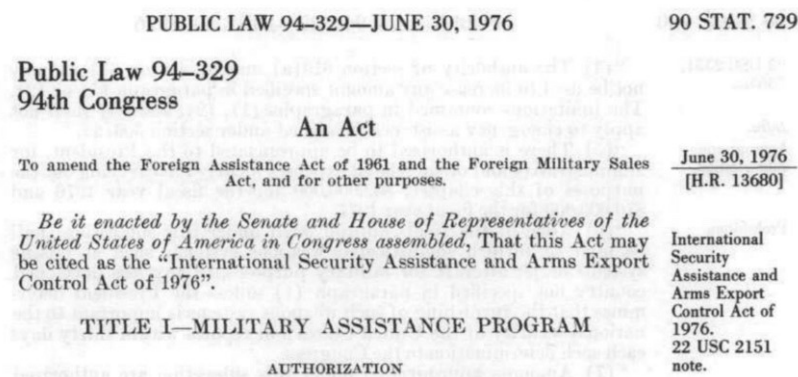
Before converting the U.S. export control regime into a "framework legislation", I will first clarify some legal provisions that have been in force since 1976 so that conclusions can be drawn and leading case law analysed.

### 2.2.1 Jurisdiction and the Arms Export Control Act (AECA)

Jurisdiction<sup>15</sup> is '*the right in international law for a state to exercise authority over its nationals and persons and things in its territory, and sometimes abroad.*'

The 1976 AECA<sup>16</sup> amends the Foreign Assistance Act of 1961 and the Foreign Military Sales Act of 1968 and states that presidential control of exports and imports of defense articles and services is in *furtherance of world peace and the security and foreign policy of the United States*.

The 1976 Arms Export Control Act (AECA) actually stems from a parliamentary motion with the then-sitting President G. Ford, who had the executive authority not to disclose notifications regarding any international sale of arms. This discretion of sale of arms already gave President Nixon in 1973 the opportunity to "secretly" sell advanced weapons to Iran, Saudi Arabia and Kuwait. Later, in 1985, when the AECA was already in force, this provisions of the AECA lead to the aborted sale - *on the grounds that it would pose a potential threat to the security of Israel* - of five Advanced Warning and Control Systems (AWACS) to Saudi Arabia true President Reagan.



<sup>15</sup> Anthony Aust (2007) **Modern treaty law and practice**, Cambridge University Press.

<sup>16</sup> Arms Export Control Act of 1976, Pub. L. No. 94-329, tit II, §212(a)(1), 90 Stat. 744, codified as amended at 22 U.S.C. § 2778. Available at <https://www.govinfo.gov/content/pkg/STATUTE-90/pdf/STATUTE-90-Pg729.pdf#page=1>



CONTROL OF LICENSES WITH RESPECT TO ARMS EXPORTS AND IMPORTS

22 USC 2778.      SEC. 212. (a) (1) Chapter 3 of the Foreign Military Sales Act is amended by adding at the end thereof the following new section:  
Regulations.      "SEC. 38. CONTROL OF ARMS EXPORTS AND IMPORTS.—(a) (1) In furtherance of world peace and the security and foreign policy of the United States, the President is authorized to control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services. The President is authorized to designate those items which shall be considered as defense articles and defense services for the purposes of this section and to promulgate regulations for the import and export of such articles and services. The items so designated shall constitute the United States Munitions List.

**FIGURE 3 ARMS EXPORT CONTROL ACT (AECA) OF 1976**

Both the AECA and the Export Administration Act<sup>17</sup> (EAA) empowered the President to:

(citation AECA) - 'control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services,' and

(citation EAA) - '*prohibit or curtail the export of any goods or technology subject to jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States.*'

Because the main focus of this thesis is on the ITAR, thus the AECA, due to the export and re-export of defense articles, services and technology, the EAA<sup>18</sup> will only be cited when relevant to the topic.

TITLE III—AMENDMENTS TO THE EXPORT ADMINISTRATION ACT OF 1969

AUTHORITY TO REGULATE EXTRATERRITORIAL EXPORTS

SEC. 301. (a) The first sentence of section 4(b)(1) of the Export Administration Act of 1969 is amended to read as follows: "To effectuate the policies set forth in section 3 of this Act, the President may prohibit or curtail the exportation, except under such rules and regulations as he shall prescribe, of any articles, materials, or supplies, including technical data or any other information, subject to the jurisdiction of the United States or exported by any person subject to the jurisdiction of the United States."  
(b) (1) Section 4(b)(2)(B) of such Act is amended—  
    (A) in the first sentence, by striking out "from the United States, its territories and possessions,"; and  
    (B) in the second sentence—  
        (i) by striking out "from the United States"; and  
        (ii) by striking out "produced in the United States" and inserting in lieu thereof "which would be subject to such controls";  
(2) Section 6(c)(2)(A) of such Act is amended by striking out "from the United States, its territories or possessions,".

Approved December 28, 1977.

**FIGURE 4 AMENDMENTS TO THE EAA OF 1969**

<sup>17</sup> The EAA focuses on the regulation of exports of civilian goods and technology that have military applications (dual-use items).

<sup>18</sup> The EAA was in effect from 1969 - 1979. The authority of the EAA was continued through the enactment of the International Emergency Economic Powers Act (IEEPA) in 1979.

*In the EAA, the single term "person" includes the singular and the plural and any individual, partnership, corporation, or other form of association, including any government or agency, while the term "person from the United States" means any resident or citizen of the United States.*

*In 1979, the United States Congress extended with this clause ('exported by any person subject to the jurisdiction of the U.S.') the extraterritoriality reach of the Export Administration Act<sup>19</sup>, giving the president the authority to "include also foreign persons under the jurisdiction of the United States." Since Congress did not clearly state the intention of this addition in 1979, there was room for interpretation by the Presidents to subsequently apply the notion of 'foreign' including property.*

In the Executive Order<sup>20</sup> of March 8, 2013, the President delegates<sup>21</sup> his statutory authority given in the AECA to control the export of defense articles and services<sup>22</sup> to the Secretary of State with concurrence of Secretary of Defense required for designations of items or categories of items which are considered as defense articles or services subject to export control.

### 2.2.1.1 United States Air Force (USAF) Weapons Project

*"Safeguarding sensitive military technology vital to our nation's defense."*

In July 2009<sup>23</sup>, 'Professor' J. Reece Roth was sentenced to 4 years imprisonment for violating the Arms Export Control Act (AECA) by conspiring to illegally export and actually export technical data related to a U.S. Air Force (USAF) research and development contract.

Technical information, better known as "technical data", was the main focus of this verdict in 2009. The "technical data" in question related to specific information derived from scientific tests intended for military unmanned aerial vehicles (UAV's).

### 2.2.1.2 The Indictment: Export Control Violations

The Arms Export Control Act (AECA) prohibits the export of defense-related materials, including the technical data, to a foreign national or a foreign nation.

'Professor' Roth was therefore indicted in 2009 on the following charges:

1. National exports to a Chinese and Iranian Foreign National
2. Foreign exports to China during a lecture in May 2006

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<sup>19</sup> PUBLIC LAW 96-72—SEPT. 29, 1979. "**Export Administration Act of 1979**".

<sup>20</sup> 78 FR 16127

<sup>21</sup> 3 U.S.C. 301 - General authorization to delegate functions; publication of delegations

<sup>22</sup> 22 U.S.C. 2778 - Control of arms exports and imports

<sup>23</sup> Available at: <https://www.justice.gov/archive/usao/tne/news/2012/February/020112%20Roth%20Sentence%20Foreign%20Export%20Control%20Act.html>

Roth and others said: "That the AECA, as applied in his case, would violate academic freedom and force professors to discriminate against students on the basis of nationality."

The Assistant U.S. Attorney, in turn said: "Today's guilty verdict should serve as a warning to anyone who knowingly discloses restricted military data to foreign nationals."<sup>24</sup>

Far more important than setting a precedent that technological advances always involve risks to national security is that Professor J. Reece Roth knowingly broke the law. This establishes that technological progress and export controls cannot coexist without the risk of breaking the law.

### 2.2.1.3 What exactly made this a crime under the AECA?

Establishing the legal framework requires an understanding of the grounds on which U.S. export control jurisdiction is vested in the applicable laws and regulations in 2009.

#### U.S. EXPORT CONTROLS

- Arms Export Control Act (AECA) - 1976 - 22 USC 2778
- International Traffic in Arms Regulations (ITAR) - 22 CFR 120-130
- United States Munitions List (USML) - 22 CFR 121

"Defense Articles and Services"



- Export Administration Act (EAA) - 1979
- Export Administration Regulations (EAR) - 15 CFR 730-774
- Commerce (Commodity) Control List - 15 CFR 774.1

"Strategic Dual-Use Goods and Technologies"



- (1) 'Professor' J. Reece Roth **exported**, attempted to export, or caused to be exported to a foreign national ... or from the United States of America to a foreign country;

*The International Traffic in Arms Regulations (ITAR), 22 Code of Federal Regulations (CFR) - §120.17 Export*

*(2009) EXPORT: Sending or taking a defense article out of the United States in any manner ... or disclosing (including oral or visual disclosure) or transferring technical data to a foreign person ... in the U.S. or abroad.*

- (2) A **defense article** or **defense service**, or **technical data** directly relating to such an item, that is listed on the United States Munitions List (USML);

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<sup>24</sup> Patrick Rowan, Assistant US Attorney for National Security, DOJ PR, 3/8/2008

*The International Traffic in Arms Regulations (ITAR), 22 Code of Federal Regulations (CFR) - §120.6 Defense article*

*(2009) DEFENSE ARTICLE : Any item or "directly related" technical data that is listed in the USML... "includes technical data recorded or stored in any physical form, models, mockups or other items that reveal technical data directly relating to items designated" in the USML.*

*The International Traffic in Arms Regulations (ITAR), 22 Code of Federal Regulations (CFR) - §120.9 Defense service*

*(2009) DEFENSE SERVICE: (1) The furnishing of assistance, including training, to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, etc. of defense articles; and (2) The furnishing to foreign persons of any controlled technical data.*

*The International Traffic in Arms Regulations (ITAR), 22 Code of Federal Regulations (CFR) - §120.10 Technical data*

*(2009) TECHNICAL DATA: Information which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance, or modifications of defense articles (blueprints, etc.).*

*The "Technical Data" in the USAF project related to the USML derived from scientific tests designed to develop plasma actuators as aeronautical control of "aircraft, including drones, specially designed for military purposes " (22 C.F.R. 121.1, Category VIII<sup>25</sup>(a) & (i)).*

- (3) Without having first obtained a **validated license** or written approval from the State Department and
- (4) Acted **knowingly** and **wilfully**.

## 2.3 Jurisdictional Codes of Conduct

The first extraterritorial enforcement of "multilateral" violations of the EAA occurred in 1981-1982 and involved the transfer of advanced U.S. origin technology to the Soviet Union without authorisation.

According to Kenneth W. Abbott, 'the Euro-Siberian gas pipeline project<sup>26</sup> has led for the first time in history to active submission to the U.S. export control regime. The Soviet Union, however, believed that this American interference was in violation of international law because this so-called violation had no direct effect on the *national security* of the United States.' Previously, such equipment was eligible for export to the Soviet Union under a 'general license'.

There are principally two types of export licenses: (1) the **general license** and (2) the validated license. A general license does not resemble a real license because

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<sup>25</sup> Category VIII—Aircraft and Related Articles, (a) Aircraft, whether manned, unmanned, remotely piloted, or optionally piloted, as follows (MT if the aircraft, excluding manned aircraft, has a range equal to or greater than 300 km).

<sup>26</sup> Abbott, Kenneth W. (1984) "**Defining the Extraterritorial Reach of American Export Controls: Congress as Catalyst**," Cornell International Law Journal: Vol. 17: Iss. 1, Article 3. Available at <http://scholarship.law.cornell.edu/clj/vol17/iss1/3>

no formal document is issued. Instead, it is *a general authorization given to exporters that allows the shipment of specified goods and technology to different destinations without individual transaction assessment.*

In this case<sup>27</sup>, according to Abbott, the ‘then-reigning President R. Reagan abused an economic power block to regulate technology trade for its own benefits’. He used the International Emergency Economic Powers Act (IEEPA) as a means of limiting U.S. exports and re-exports of goods and services related to oil and gas production.

President R. Reagan issued Executive Order 12444 on October 14, 1983, finding that “unrestricted access of foreign parties to United States commercial goods, technology, and technical data and the existence of certain boycott practices of foreign nations constitute, in light of the expiration of the Export Administration Act of 1979, *an unusual and extraordinary threat to the national security.*”

‘Dual-use’ export controls were an essential part of these 1981 trade sanctions (embargo’s) against the Soviet Union. The Department of Commerce extended for the first time existing controls by requiring validated licenses for exports of equipment and related technical data from the United States to the Soviet Union.

This extension of the law was in the eyes of the U.S. necessary. In order to insure national security, they had to place adequate safeguards to regulate advanced technology to the East.

In contrary to previous export restrictions, this adjustment also included goods with U.S. origin that were already abroad or already in use. In response to these embargo’s, many other European countries have attempted to address the effect of the infringement of their sovereignty by the U.S. through legal action, but without success.

A valuable contribution to this case was the participation of the Netherlands in the construction of the NATO’s pipeline system during the Cold War: the Central Europe Pipeline System (CEPS). It crossed Belgium, France, Germany, Luxembourg and, of course, the Netherlands to ensure that alliance forces were supplied with fuel at all times and everywhere. This pipeline is still operational today.

I chose this specific case, because the Netherlands Defence Organisation<sup>28</sup> (Ministry of Defence) owns this underground pipeline network since 1956 for the transport of aviation fuels to military and civilian airports.

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<sup>27</sup> Patrizio Merciai (1984) **The Euro-Siberian Gas Pipeline Dispute - A Compelling Case for the Adoption of Jurisdictional Codes of Conduct**, 8 Md. J. Int’l L. 1. Available at <http://digitalcommons.law.umaryland.edu/mjil/vol8/iss1/3>.

<sup>28</sup> Defence Pipeline Organisation (DPO) “**Fuelling your wings, that is what the DPO is all about.**” Available at <https://english.defensie.nl/topics/defence-pipelines/documents/leaflets/2017/06/01/corporate-brochure-dpo-fueling-your-wings>.

The end-use<sup>29</sup> characteristics are both civil and military, but the impact on national security is enormous when the technology that maintains this system is transferred to a hostile state.

## 2.4 Extraterritorial jurisdiction

The most important changes to extraterritorial policy in relation to export controls took place after the terrorist attacks of 9/11 (2001). First, Article 377 of the 2001 USA PATRIOT Act<sup>30</sup> extended the ability of enforcement agencies to indirectly enforce U.S. rules and regulations outside the United States. Secondly, the USA PATRIOT Act has extended jurisdiction to both individuals and property. This has strongly curbed the lively trade in goods that can be used for (terrorist) attacks.

*Article 377, EXTRATERRITORIAL JURISDICTION, USA PATRIOT Act:*

*Section 1029<sup>31</sup> of title 18, United States Code, is amended by adding at the end the following:*

*“(h) Any person who, outside the jurisdiction of the United States, engages in any act that, if committed within the jurisdiction of the United States, would constitute an offense under subsection (a) or (b) of this section, shall be subject to the fines, penalties, imprisonment, and forfeiture provided in this title if—*

*“(1) the offense involves an access device issued, owned, managed, or controlled by a financial institution, account issuer, credit card system member, or other entity within the jurisdiction of the United States; and*

*“(2) the person transports, delivers, conveys, transfers to or through, or otherwise stores, secretes, or holds within the jurisdiction of the United States, any article used to assist in the commission of the offense or the proceeds of such offense or property derived therefrom.”.*

Some countries, like the United States and Canada, have interpreted the nationality principle in a rather broad context to include citizens, companies, and *property (items with U.S. origin)* under its jurisdiction.

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<sup>29</sup> The pipeline itself is owned by the Ministry of Defence and therefore does not have the character of a dual-use defense article. It is part of NATO's mission to supply aviation fuels to both military and civilian airports.

<sup>30</sup> UNITING AND STRENGTHENING AMERICA BY PROVIDING APPROPRIATE TOOLS REQUIRED TO INTERCEPT AND OBSTRUCT TERRORISM (USA PATRIOT) ACT OF 2001. PUBLIC LAW 107-56—OCT. 26, 2001.

<sup>31</sup> United States Code (Title 18; CRIMES AND CRIMINAL PROCEDURE ) §1029. Fraud and related activity in connection with access devices and United States Code (2018 Edition), Title 50 - WAR AND NATIONAL DEFENSE.

## 2.4.1 Curtailment of executive extraterritorial powers<sup>32</sup>

Between 1945 and 1977, the Trading with the Enemy Act (TWEA) was the government's primary legal 'weapon' for imposing economic sanctions on foreign entities. American Presidents used the TWEA to freeze assets, restrict trade, and seize property rights, among other things.

By law, the President, in exercising his power to impose a sanction, may also extend this initial sanction period by one year provided that any extension is determined to be in the national interest of the United States. However, practice has shown that many of these sanctions are not evaluated and therefore maintain their permanent active status.

The 1917 TWEA is a U.S. federal law that gives the President the power to oversee all trade between the United States and their enemies during times of war, but was extended in 1977 with the International Emergency Economic Powers Act<sup>33</sup> (IEEPA) to use also in times of peace. The 1977 IEEPA allows the President to respond to any "unusual and extraordinary threat".

SITUATIONS IN WHICH AUTHORITIES MAY BE EXERCISED

Unusual and extraordinary threat, Presidential declaration of national emergency. 50 USC 1701.

SEC. 202. (a) Any authority granted to the President by section 203 may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b) The authorities granted to the President by section 203 may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this title and may not be exercised for any other purpose. Any exercise of such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.

Neither the law nor any case law reveals the definition of an unusual and extraordinary threat. However, there are examples where the President used his authority to invoke a national emergency that affected not only the United States, but the entire international community.

Listed below are two presidential examples that primarily consider the global interests that must be protected when invoking the IEEPA.

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<sup>32</sup> Christopher A. Casey (2020) **The International Emergency Economic Powers Act: Origins, Evolution, and Use**. Congressional Research Service (CRS). Available at <https://crsreports.congress.gov/product/pdf/R/R45618>.

<sup>33</sup> PUBLIC LAW 95-223—DEC. 28, 1977. Available at <https://www.govinfo.gov/content/pkg/STATUTE-91/pdf/STATUTE-91-Pg1625.pdf#page=1>.

38567

Federal Register  
Vol. 70, No. 126  
Friday, July 1, 2005

## Presidential Documents

Title 3—

Executive Order 13382 of June 28, 2005

The President

**Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), and section 301 of title 3, United States Code,

I, George W. Bush, President of the United States of America, in order to take additional steps with respect to the national emergency described and declared in Executive Order 12938 of November 14, 1994, regarding the proliferation of weapons of mass destruction and the means of delivering them, and the measures imposed by that order, as expanded by Executive Order 13094 of July 28, 1998, hereby order:

40803

Federal Register  
Vol. 63, No. 146  
Thursday, July 30, 1998

## Presidential Documents

Title 3—

Executive Order 13094 of July 28, 1998

The President

**Proliferation of Weapons of Mass Destruction**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), the Arms Export Control Act (22 U.S.C. 2751 *et seq.*) (AECA), and section 301 of title 3, United States Code,

I, WILLIAM J. CLINTON, President of the United States of America, in order to take additional steps with respect to the proliferation of weapons of mass destruction and means of delivering them and the national emergency described and declared in Executive Order 12938 of November 14, 1994, hereby order:

After 9/11 (2001), President George W. Bush issued an Executive Order to block the assets of terrorist organisations (for an explanation of the USA PATRIOT Act of 2001, see § 2.4 Extraterritorial Jurisdiction). By using the authority given to the president to impose sanctions in a 'national emergency', further danger can be averted.

A more recent example of the application of the IEEPA to a national emergency is Executive Order 13873<sup>34</sup>. On May 14, 2019, President Donald J. Trump issued an Executive Order to secure the information and communications technology (e.g. 5G) and services supply chain, authorizing the Commerce Secretary to regulate the acquisition and use of information and communications technology and services from a "foreign adversary". Through the authority of the IEEPA and NEA, the President issued this injunction to mitigate the economic and security risks posed by compromised communications technologies, operations, or data flows.

<sup>34</sup> Securing the Information and Communications Technology and Services Supply Chain (May 14, 2019).



## 2.5 Sovereignty and extraterritorial jurisdiction

Sovereignty - Is the highest, absolute state authority. A state's sovereignty means that it is legally independent from other states, including that a state can make its own decisions about how it behaves against other states and its own citizens,

unless

*there is a disproportionate abuse of this authority which in international law merely belongs to a sovereign state.*

### 2.5.1 Sovereignty - Foundational work in international law

In order to put sovereignty in a legal context and perhaps to explain the United States claim to the extraterritoriality principle, I have researched what might have been the connection between the origin of sovereignty with interstate 'war' (a more modern term is terrorism) and self-defence.

In his book 'On the Law of War and Peace' (1625), Hugo Grotius already distinguishes three types of rights to initiate war by a state: self-defence, property recovery and punishment. Each of these rights has its foundation in natural law, although the specific rights in question may arise from other sources, such as the law of nations. The right to self-defence arises from the natural permission each person must have to protect himself from injury.

According to E. de Vattel<sup>35</sup>, a sovereign state can therefore make agreements with another state about, for example, trade conditions, their mutual defence, of associations in war, by means of an agreement or treaty. This right is then acquired only through treaties and pertains to that branch of the law of nations that is called conventional. The treaty that gives commercial law is the measure and rule of that law.

According to Parrish<sup>36</sup>, at least since the end of World War II, three central principles of territorial sovereignty have been the pillars of the international system: "the notion of equal sovereignty of states, internal competence for domestic jurisdiction, and territorial preservation of existing boundaries<sup>37</sup>."

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<sup>35</sup> Emer de Vattel (2008) **The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury**, edited and with an Introduction by Béla Kaposy and Richard Whatmore (Indianapolis: Liberty Fund, 2008). Available at [https://oll.libertyfund.org/titles/2246#Vattel\\_1519\\_1456](https://oll.libertyfund.org/titles/2246#Vattel_1519_1456).

<sup>36</sup> Parrish, Austen L. (March 24, 2017), **The Interplay Between Extraterritoriality, Sovereignty, and the Foundations of International Law. Chapter 12 in: Standards and Sovereigns: Legal Histories of Extraterritoriality**, Forthcoming. Available at SSRN <https://ssrn.com/abstract=2940361>

<sup>37</sup> Elden, Stuart (2006), 'Contingent Sovereignty, Territorial Integrity, and the Sanctity of Borders', 26 SAIS Rev. 11.

So, three hundred and twenty years after the words of Hugo Grotius on self-defence, we find a simplified version in Article 2 and 51 of the Charter of the United Nations (1945): "The organization is based on the principle of the *sovereign equality of all its members*" and gives the "*right on individual or collective self-defence* if there is an armed attack against a member of the United Nations."

According to the Netherlands Institute of International Relations (Clingendael), there is also an 'declaration', hereinafter referred to as the Helsinki Final Act of 1975, which has never been passed by law. The origins of such a European security agreement go back to the 1950', where it was the desire of the Soviet Union to legitimize the sovereignty of the Baltic states once again after World War II.

The non-binding agreement, signed by 35 heads of state or government from European nations, U.S. (President Ford), and Canada, covered one of the most important concepts:

*Article I. Sovereign equality, respect for the rights inherent in sovereignty*

*The participating States will respect each other's sovereign equality and individuality as well as all the rights inherent in and encompassed by its sovereignty, including in particular the right of every State to juridical equality, to territorial integrity and to freedom and political independence. They will also respect each other's right freely to choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations.*

And, although the treaty was non-binding, it included a follow-up mechanism, and developed into an international organisation, the Organization for Security and Cooperation in Europe (OSCE) and the establishment of the U.S. Commission on Security and Cooperation Europe in the United States.

Under President Reagan, the conflict also took place over the Euro-Siberian gas pipeline project<sup>38</sup> that has sharpened the Soviet Union and the United States' relationship within the right to control U.S. origin exports.

## 2.5.2 Extraterritorial jurisdiction

In the exercise of extraterritorial jurisdiction, the literature on this subject pays most attention to "legislative" competence above all other legal "situations" (executive or judicial) of the sovereign state.

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<sup>38</sup> Abbott, Kenneth W. (1984) "**Defining the Extraterritorial Reach of American Export Controls: Congress as Catalyst**," Cornell International Law Journal: Vol. 17: Iss. 1, Article 3. Available at <http://scholarship.law.cornell.edu/cilj/vol17/iss1/3>

According to *Andrea Bianchi*<sup>39</sup>, by the restatement of the United States' Foreign Relations Law they have divided jurisdiction into three classes, namely (1) jurisdiction to prescribe, (2) jurisdiction to adjudicate and (3) jurisdiction to enforce. International practice, however, does not seem to support this categorization.

Jurisdiction, although primarily territorial, should also be presumed to be based on nationality or origin of the goods, while 'enforcement' is restricted by territorial factors only. The principle of nationality allows a sovereign state such as the U.S. to exercise jurisdiction over the export activities who are subject to its jurisdiction. Nationality is therefore a legal concept only applicable to persons but not to inanimate 'defence' articles, services or technology. Nor is there a specific law that has established or adopted the rules of origin of a 'defense' article in order to avoid the risk of illicit exports to a foreign entity.

U.S. authorities (like the Directorate of Defense Trade Controls) have historically maintained (re)export controls on foreign persons in accordance with laws and regulations, and have accused foreign companies of violations of the ITAR in some of these enforcement actions.

According to Little<sup>40</sup> et al: *'In 1992, Delft Instruments, N.V., by and through its subsidiaries and successors, was charged with transferring or causing to be transferred various advanced night vision equipment containing U.S. origin defense articles to Iraq and Jordan without the required export authorization from DDTC.'*

The reason for this indictment was because during the Gulf War of 1990-1991, American soldiers 'found' advanced night vision equipment at the front in Kuwait from Delft Instruments on Iraqi positions.

In retaliation against the export of U.S. origin goods to a country under embargo (Iraq) and the delivery of those goods without a license, the United States immediately decided to blacklist the Dutch company. In July 1992, the Delft Instruments criminal case ultimately resulted in a settlement of approximately two million euros. Because Delft Instruments was blacklisted, they were no longer allowed to import essential parts from the U.S. or supply non-military products to companies in the U.S..

A "voluntary submission" or "disclosure", such as in the Delft Instruments case expresses only the adoption of international rules restricting the exercise of state power. A state can therefore pass laws, such as the AECA (ITAR), which regulate

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<sup>39</sup> Bianchi, A. (1992) **Extraterritoriality and Export Controls: Some Remarks on the Alleged Antimony between European and U.S. Approaches.** German Yearbook of International Law, 35, 366-434.

<sup>40</sup> Kathleen C. Little, Suzanne D. Reifman, Amanda J. Dietrick (2001) **U.S. export controls apply extraterritorially, Circumstances In Which Foreign Persons Are Subject To U.S. Export Laws And Regulations.**

matters that are not exclusively of national interest, thereby diminishing the sovereignty of their own state.

The use of political compensation that can reduce or balance the effect of a negative of law is often applied within the military export control domain of the Netherlands. As a result, effective enforcement by the United States government will not take place by an AECA violations committed by the Department of Defence. For the Ministry of Defence, this could only lead to a loss of export privileges, modifications or the purchase of new weapon systems in the future.

Any extraterritorial application of U.S. jurisdiction that is judged critically from territorial sovereignty appears to violate a state's right to comply with its own laws and regulations.

## 2.6 Establishment of multilateral (military) Export Control Regimes

The core of export control law is the sovereign right of states<sup>41</sup>, which is strongly influenced by international law in the form of 'voluntary' multilateral treaties and decisions of international organisations (including the UN, NATO and the WTO). In addition, politically binding instruments, for example in the form of control regimes for conventional arms exports (e.g. embargoes), are playing an increasingly important role in nowadays trade compliance.

The use of treaties has increased in proportion to the international flow of 'defence'- and dual-use 'defence' articles since the World War I (examples include the United Nations Charter 1945 and The Wassenaar Arrangement). Such treaties have proven to be an effective way of adopting rules of international law - in particular when there is a need to respond quickly to changing circumstances or if the matter is not covered by any other agreement.

The following overview shows the most common agreements that the Ministry of Defence uses to be allowed to trade 'defense' articles with its allies.

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<sup>41</sup> Mineiro M.C. (2012) **Sovereignty as the Legal Basis of Export Controls: International Law and Space Technology Controls**. In: Space Technology Export Controls and International Cooperation in Outer Space. Space Regulations Library Series, vol 6. Springer, Dordrecht.

	<b>Agreement: Foreign Military Sales (FMS) or Direct Commercial Sales (DCS)</b>	<b>Treaty</b>	<b>Memoranda of Understanding (MOU)</b>
<b>Law</b>	(Inter)National	International	-
<b>Binding</b>	Legal	Legal	Politics/Integrity
<b>Legislative Authority</b>	Government	Kingdom of the Netherlands	Minister of Defence
<b>Circumstance</b>	Military- or Commercial sale	International cooperation	International cooperation (when a treaty is not necessary)
<b>Example</b>	Letter of Offer and Ac- ceptance (LOA) - FMS	North Atlantic Treaty Organization (NATO) United Nations Charter 1945 The Wassenaar Arrangement	Chapeau Agreement <sup>42</sup> NL – U.S.: bilateral defence cooperation (2018)

**FIGURE 5 DIFFERENCES BETWEEN (INTER) NATIONAL AGREEMENTS<sup>43</sup>**

### 2.6.1 Chemical Weapons Convention

The world's first multilateral treaty on disarmament of arms entered into force on April 29, 1997. The entry into force of the Chemical Weapons Convention (CWC) should provide for the elimination of an entire category of weapons of mass destruction within a specified time frame.

The treaty has an unlimited duration and is much more extensive than the 1925 Geneva Protocol. The Geneva Protocol does not prohibit the development, production or possession of chemical weapons. It only bans the use of chemical and bacteriological (biological) weapons in war.

*Chapter three will discuss this multilateral agreement on chemical weapons in more detail.*

### 2.6.2 Memorandum of Understanding (MOU)

*(1918) U.S. MOU's<sup>44</sup> - Open covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind, but diplomacy shall proceed always frankly and in the public view.*

<sup>42</sup> The agreement between the U.S. and the Netherlands has been designed to primarily support large projects, such as the replacement of the Boeing CH-47 Chinook and AH-64 Apache helicopters. The cooperation will also support the acquisition of General Atomics Aeronautical Systems' MQ-9 Reaper unmanned aerial vehicle (UAV), in addition to the exchange of data during replacements of submarines and frigates.

<sup>43</sup> Voetelink, J. E. D. (2009) **Militair operationeel recht: verdieping**. In P. J. J. van der Kruit (editor), *Handboek militair recht*. - 2e dr. (blz. 301-404). Breda [etc.]: Nederlandse Defensie Academie.

<sup>44</sup> Interpretation of President T. Woodrow Wilson's (1913-1921) *Fourteen Points* by Colonel House.

*A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small [states] alike.*

*The principle of a league of nations as the primary essential of a permanent peace has been so clearly presented by President Wilson in his speech of Sept. 27, 1918, that no further elucidation is required. It is the foundation of the whole diplomatic structure of a permanent peace<sup>45</sup>.*

(1945-2020) Most defence cooperation projects between the Netherlands and the United States are carried out by drawing up an MOU. This is because of the readily understandable need for confidentiality (not for conventional weapons, other than for the armaments of national troops for the defence of our territory) and the ease with which MOU's can be amended.

More perhaps because of the alleged requirements of U.S. federal law, the government has sometimes regarded MOU's as treaties. In the 1990's, the United States had some Memoranda of Understanding's with the United Kingdom. Some were clearly treaties, but the rest, although 'only' non-legally binding MOU's, were registered as treaties by the United States. This was unacceptable to the United Kingdom. Australia and Canada had the same problem with the United States. As a result, the United States entered into a so-called "Chapeau Agreement" with each of the three states. This is a treaty with ready-made provisions on matters such as the legal position of the armed forces and liability.

Although the Netherlands Government also has two of these so-called "Chapeau Agreements", it only provides for the legal position of persons<sup>46</sup> and not of goods.

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<sup>45</sup> Source: PRFA, 1918. Supplement 1: The World War, Vol. 1, pp. 405-413.

<sup>46</sup> Status of forces agreements (SOFA) and visiting forces agreements are in effect in many countries that allow visiting forces to exercise jurisdiction over members of their forces that are stationed in the host country.

# CHAPTER THREE

## HISTORIC BACKGROUND ON 'MILITARY' EXPORT CONTROL LAWS AND REGULATIONS

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“We who are vitally interested in the security of the North Atlantic area henceforth stand united in our resolve to repel aggression, just as we stand united in our resolve not to attack others.”

Dirk Stikker, Foreign Minister,  
speaking at the signing of  
the North Atlantic Treaty Washington, D.C.,  
4 April 1949

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## 3. Historic background on ‘military’ export control laws and regulations

### 3.1 The Hague Peace Conferences of 1899 and 1907

According to Mr. dr. J.E.D. Voetelink<sup>47</sup>, we have already established that many of the rules laid down in multilateral agreements have not prevented rules from being broken in, for example, the First World War.

An Treaty containing an act of war with chemical weapons for the first time can be found in: the Hague Convention of 1899<sup>48</sup> and the Amendment Haque Convention of 1907<sup>49</sup> – IV, 2 ‘*Laws of War: Declaration on the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gases.*’ This declaration was ratified by all major powers (incl. the Netherlands), except the United States.

The German invasion of Belgium in World War I, for instance, was a violation of Convention (III) of 1907, which states that hostilities must not commence without explicit warning. Poison gas was introduced and used by all major belligerents throughout the war, in violation of the Declaration (IV, 2) of 1899 and Convention (IV) of 1907, which explicitly forbade the use of "poison or poisoned weapons".

### 3.2 Geneva Protocol of 1925

A protocol that has entered into force on February 8, 1928 and heralded the birth of the current military export control regime, is the Protocol on the chemical and bacteriological war (The Geneva Protocol<sup>50</sup>).

Although the 1925 protocol only prohibits the use of those chemical and bacteriological resources, it says nothing about their production, storage or trade. A new Convention on the prohibition of the development, production and stockpiling or bacteriological (biological) and toxin weapons and on their destruction was concluded in 1972, which specifically supervises a prohibition on the production, storage and trade of these weapons.

Article 2 of this protocol states: „*Bij de bekrachtiging van het in art. 1 bedoelde Protocol zal het voorbehoud worden gemaakt, dat dit Protocol, voor zoover betreft den*

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<sup>47</sup> Mr. dr. J.E.D. Voetelink (2017) Exportcontrolrecht, Een verkenning. MILITAIRE SPECTATOR JAARGANG 186 NUMMER 9.

<sup>48</sup> The Hague Convention of 1899 consisted of three main treaties and three additional declarations.

<sup>49</sup> The treaties, declarations, and final act of the Second Conference (1907) entered into force on 26 January 1910. The 1907 Convention consists of thirteen treaties—of which twelve were ratified and entered into force.

<sup>50</sup> Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare. Signed at Geneva, June 17, 1925. Available at <https://zoek.officielebekendmakingen.nl/trb-1995-225.pdf>.



*chemischen oorlog, van rechtswege zal ophouden verplichtend te zijn voor de Nederlandsche Regeering tegenover iederen vijandelijken Staat, wiens strijdmacht of wiens bondgenooten de in het Protocol neergelegde verbodsbepalingen niet zouden eerbiedigen".*

Which means something like and what the Americans already described in 1956<sup>51</sup> as:

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HEADQUARTERS  
DEPARTMENT OF THE ARMY  
WASHINGTON, D. C., 15 July 1976

warfare and agree to be bound as between themselves according to the terms of this declaration. (Geneva Protocol of 1925.)  
*b. United States Reservation to the Geneva Protocol of 1925.* [ ] he said Protocol shall cease to be binding on the government of the United States with respect to the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials, or devices, in regard to an enemy State if such State or any of its allies fails to respect the prohibitions laid down in the Protocol.  
*c. Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents.* The United States renounces, as a matter of national policy, first use of herbicides in war except use, under regulations applicable to their domestic use, for control of vegetation within US bases and installations or around their immediate defensive perimeters, and first use of riot control agents in war except in defensive military modes to save lives such as:  
 (1) Use of riot control agents in riot control situations in areas under direct and distinct US military control, to include controlling rioting prisoners of war.  
 (2) Use of riot control agents in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.  
 (8) Use of riot control agents in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners.  
 (4) Use of riot control agents in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations.

**THE LAW OF LAND WARFARE**

FM 27-10, 18 July 1956, is changed as follows:

Page 5. Paragraph 5 a (13) is added:  
 (13) Geneva protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare of 17 June 1925 (T. I.A. S. —), cited herein as Geneva Protocol of 1925.

Page 18. Paragraph 37 b is superseded as follows:  
*b. Discussion of Rule.* The foregoing rule prohibits the use in war of poison or poisoned weapons against human beings. Restrictions on the use of herbicides as well as treaty provisions concerning chemical and bacteriological warfare are discussed in paragraph 38.

Page 18. Paragraph 38 is superseded as follows:

**38. Chemical and Bacteriological Warfare**  
*a. Treat Provision.* Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; and  
 Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and  
 To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations:  
 \* \* \* the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of

\* \* \* \* \*

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States of America by the Constitution and laws of the United States and as Commander-in-Chief of the Armed Forces of the United States, it is hereby ordered as follows:

SECTION 1. The Secretary of Defense shall take all necessary measures to ensure that the use by the Armed Forces of the United States of any riot control agents and chemical herbicides in war is prohibited unless such use has Presidential approval, in advance.

**FIGURE 6 THE LAW OF LAND WARFARE**

Under the following reservation (Geneva Protocol of 1925): *"That the said Protocol shall cease to be binding on the Government of the United States with respect to the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials, or devices, in regard to an enemy State if such State or any of its allies fails to respect the prohibitions laid down in the Protocol."*

Despite the fact that this reservation of "Article 2" was not yet recorded in 1918, the use of toxic chemicals as weapons became reality for the first time during World War I. The British were not sure how to retaliate against the first German gas attack in Ypres (Belgium) and were not willing to break international law or to move against public opinion, whether in Britain or abroad.

The British dilemma was described by Lieutenant-General Sir Charles Ferguson, commander of II Corps, and therefore cited in *No Place to Run: The Canadian Corps and Gas Warfare in the First World War*, with the following phrase:

"It is a cowardly form of warfare which does not commend itself to me or other English soldiers ... We cannot win this war unless we kill or incapacitate more of

<sup>51</sup> FM 27-10, 18 July 1956 The Law of Land Warfare

our enemies than they do of us, and if this can only be done by our *copying the enemy in his choice of weapons, we must not refuse to do so*<sup>52</sup>.”

The Geneva Protocol (1925) and the Convention (1972) are thus part of the humanitarian law of war and set limits on the use of chemical and bacteriological weapons in times of war. The Protocol thus brought the new export control regime to be adopted in 1925 in the direction of humanitarian war law, which on the one hand tries to protect specific vulnerable groups during armed conflicts and on the other hand wants to regulate hostilities by setting restrictions to the means and methods of warfare.

A detail that is considered noteworthy is that the aforementioned protocol from 1983 to 1992 includes some states that are parties to this treaty, which we later classify as an unreliable partner or even a forbidden country and declared it through a trade embargo.

A number of export control regimes and related arrangements have been established which help to prevent the proliferation of weapons of mass destruction and their means of delivery. Below is an explanation of the most important treaties so far.

### 3.1.1 Weapons of Mass Destruction

The Chemical Weapons Convention<sup>53</sup> (CWC) is administered by the Organisation for the Prohibition of Chemical Weapons (OPCW) of 1997 and is an arms control Convention which aims to eliminate an entire category of weapons of mass destruction. The States Parties, in turn, must take the necessary measures to enforce the prohibition of chemical weapons *within their jurisdiction*.

A number of export control regimes and related arrangements that contribute to the prevention of the proliferation of weapons of mass destruction and their means of delivery have been established in this convention. These include the following: the Australia Group, the Missile Technology Control Regime (MTCR), the Nuclear Suppliers Group (NSG), and the Wassenaar Arrangement.

The Second World War marked a fundamental change to the American foreign policy with regards to the arms trade. Prior to the United States involvement in this war, the Neutrality Act<sup>54</sup> of 1935 was revised in 1939, allowing the arms trade

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<sup>52</sup> T. Cook (2011) **No Place to Run: The Canadian Corps and Gas Warfare in the First World War**. UBC Press. Available at [https://books.google.nl/books?id=ZSvSZr\\_GdOUC&lpg=PP1&hl=nl&pg=PP1#v=onepage&q&f=false](https://books.google.nl/books?id=ZSvSZr_GdOUC&lpg=PP1&hl=nl&pg=PP1#v=onepage&q&f=false).

<sup>53</sup> Available at <https://www.opcw.org/chemical-weapons-convention>.

<sup>54</sup> The Neutrality Act, law passed by the U.S. Congress and signed by President Franklin D. Roosevelt in Aug., 1935. “It was designed to keep the United States out of a possible European war by banning shipment of war materiel to belligerents at the discretion of the President and by forbidding U.S. citizens from traveling on belligerent vessels except at their own risk.”

with belligerent nations (Great Britain and France) on a cash-and-carry basis. Thus the revised Neutrality Act of 1939 was ending the arms embargo until then.

When the United States Congress passed the Neutrality Act of 1935, the State Department set up a service to enforce the provisions of that law. The Office of Arms and Munitions Control, later renamed the Division of Controls in 1939, was founded.

One of the best known examples of arms support under this policy was the 1941 Lend-Lease program. In September 1940, the United States Congress approved the first designed exclusive agreement in U.S. history with Great Britain. 50 Destroyers were transferred in exchange for 99-year leases on eight British bases in the Western Hemisphere.

On 4 May 1982, during the Falklands War, the Royal Navy destroyer HMS Sheffield was sunk by the Argentine Navy with a *French Exocet*<sup>55</sup> missile.



**FIGURE 7 HMS SHEFFIELD - ANTI-AIR WARFARE DESTROYER**

This is an example of military technology being transferred (exported) by an ally from England (France) to another state (Argentina) and subsequently attacking England with 'one's own' technology.

After World War II, a number of Western states under the leadership of the United States started to coordinate and harmonize their policies concerning the restriction of transfers of military and dual-use goods and technologies to the states of the Eastern Bloc through the Coordinating Committee on Multilateral Export Controls<sup>56</sup> (COCOM).

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<sup>55</sup> The Exocet (French for "flying fish") is a French anti-ship missile. The Exocet was also heavily used in the Iran-Iraq War. It gained international notoriety when an Iraqi Mirage F1 pilot shot two Exocet missiles at the U.S.S. Stark, heavily damaging it.

<sup>56</sup> COCOM was established in 1950 and disbanded in 1994 after the dissolution of the Soviet Union and disintegration of the Warsaw Pact had essentially made it obsolete.

The role and coverage of these non-proliferation regimes of chemical, biological, radiological and nuclear (CBRN) weapons and their delivery systems has continuously expanded in the post-cold war period in response to cases of proliferation such as Iraq's conventional and WMD programmes and the activities of the A.Q. Khan<sup>57</sup> network.

In February 2004, Dr. Abdul Qadeer Khan, the former head of Khan Research Labs, confessed to the illicit transfer of nuclear weapons technology to Iran, Libya, North Korea and other countries. The exposure of the A.Q. Khan network and its key assistance to the clandestine nuclear programs of Libya, Iran, and North Korea revealed a series of flaws and failures in the system of multilateral nuclear export controls.

In 2004, United Nations Security Council Resolution 1540 first introduced the requirement that all states should have adequate export controls, in particular to prevent terrorists from purchasing CBRN weapons.

### 3.2 General 'military' export control regulatory scheme

According to Andrea Bianchi<sup>58</sup>, 'the main legislative instrument the Netherlands has enacted in the field of export control is the Import and Export Act of 1962', but this is not entirely accurate.

*The Strategic Goods Export Decree (Uitvoerbesluit strategische goederen) of 1963 (Stb. 128) was taken on the basis of the Import and Export Act (In- en uitvoerwet) of 1962, which replaced the Import and Export Regulation (Besluit regeling in- en uitvoer) of 1944.*

The Netherlands laid down national rules, among other things for the implementation of the COCOM agreements, in the 1963 Strategic Goods Export Decree (Uitvoerbesluit strategische goederen). This decision included an annex that was regularly updated and, like the COCOM lists, included a military<sup>59</sup>, nuclear and dual-use section. The goods mentioned therein were classified as strategic, which meant that they could only be exported with a license.

The import, export and transit of strategic goods and strategic services are all subject to (national) rules. Strategic goods are for that matter military goods and dual-use goods (for both civilian and military use). In many cases, you need a licence from the Central Import and Export Office (Centrale Dienst voor In- en

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<sup>57</sup> The Nuclear Suppliers Group (NSG) controls the technology to develop, make, or use any of the items it covers.

<sup>58</sup> Bianchi, A. (1992) **Extraterritoriality and Export Controls: Some Remarks on the Alleged Antimony between European and U.S. Approaches**. German Yearbook of International Law, 35, 366-434.

<sup>59</sup> COMMON MILITARY LIST OF THE EUROPEAN UNION (2018/C 098/01) Available at [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018XG0315\(01\)&from=NL](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52018XG0315(01)&from=NL).

Uitvoer [CDIU]) of the Tax and Customs Administration. *Companies* that trade in such goods must therefore comply with strict rules.

Criteria for the export of military goods: ‘The central government uses *8 criteria* to assess whether a *company* or *organisation* should be granted a licence to export military goods (military equipment and technology). These criteria are set out in the EU’s Council Common Position<sup>60</sup> on ‘conventional’ Arms Export Controls.

The Code of Conduct spelt out eight criteria for assessing arms exports. The first four criteria required denial of an export<sup>61</sup> licence, while the others are factors to be taken into account in examining an application:

1. Respect for international obligations and commitments, such as sanctions and non-proliferation agreements;
2. Respect for human rights in the country of final destination;
3. Internal situation in the country of final destination, such as tensions or armed conflicts;
4. Preservation of regional peace, security and stability;
5. *National security of members states as well as friendly and allied countries, including the risk of reverse engineering;*
6. *Behaviour of the buyer country with regard to the international community;*
7. *Risk of diversion or re-export under undesirable conditions; and*
8. *Compatibility of the export with the technical and economic capacity of the recipient country.*

### 3.3 Transfers of major weapons: Deals with deliveries or orders made for 1950 to 2018

*The Stockholm International Peace Research Institute (SIPRI<sup>62</sup>) is an independent international institute dedicated to research into conflict, armaments, arms control and disarmament. All available data on arms exports can be traced back to the 8 assessment criteria to establish that one acts in accordance with laws and regulations.*

Supplier/ recipient	No.	Weapon designatic description	Year(s) Weapon of order	Year delivery	of delivered	No. Comments	
<b>United States</b>							
R: Netherlands	22	F-16A	FGA aircraft	1980	1984-1985	22	\$245 m deal (offsets incl assembly in Netherlands and production of components for all F-16s in Netherlands); incl 4 F-16B
	18	F-16A	FGA aircraft	1981	1985-1987	18	\$220 m deal (offsets incl assembly in Netherlands and production of components for all F-16s in Netherlands)
	14	F-16A	FGA aircraft	1982	1989	14	F-16B version (offsets incl assembly in Netherlands and production of components for all F-16s in Netherlands)
	57	F-16A	FGA aircraft	1983	1987-1992	57	\$794 m deal (offsets 80% incl assembly in Netherlands and production of components for all F-16s in Netherlands)

**FIGURE 8 INFORMATION GENERATED: 20 FEBRUARY 2020 (SELECTION)**

<sup>60</sup> COUNCIL COMMON POSITION 2008/944/CFSP

<sup>61</sup> Available at <https://www.government.nl/topics/export-controls-of-strategic-goods/export-control-policy-for-strategic-goods>.

<sup>62</sup> Established in 1966, SIPRI provides data, analysis and recommendations, based on open sources. Available at <https://www.sipri.org>

### 3.4 Summary of the ITAR

The Department of State is responsible for the export (§120.17) and temporary import (§120.18) of defense articles (§120.6) and services (§120.9) governed by 22 U.S.C. 2778 of the Arms Export Control Act (AECA) and Executive Order 13637.

The International Traffic in Arms Regulations ("ITAR," 22 CFR 120-130) implements the AECA.

For the Ministry of Defence, the cornerstone concept under the ITAR contains a list of products called the U.S. Munitions List (USML). The USML covers the following categories of 'munitions':

<i>Category I</i>	Firearms and Related Articles
<i>Category II</i>	Guns and Armament
<i>Category III</i>	Ammunition and Ordnance
<i>Category IV</i>	Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs, and Mines
<i>Category V</i>	Explosives and Energetic Materials, Propellants, Incendiary Agents, and Their Constituents
<i>Category VI</i>	Surface Vessels of War and Special Naval Equipment
<i>Category VII</i>	Ground Vehicles
<i>Category VIII</i>	Aircraft and Related Articles
<i>Category IX</i>	Military Training Equipment and Training
<i>Category X</i>	Personal Protective Equipment
<i>Category XI</i>	Military Electronics
<i>Category XII</i>	Fire Control, Laser, Imaging, and Guidance Equipment
<i>Category XIII</i>	Materials and Miscellaneous Articles
<i>Category XIV</i>	Category XIV—Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment
<i>Category XV</i>	Spacecraft and Related Articles
<i>Category XVI</i>	Nuclear Weapons Related Articles
<i>Category XVII</i>	Classified Articles, Technical Data, and Defense Services Not Otherwise Enumerated
<i>Category XVIII</i>	Directed Energy Weapon
<i>Category XIX</i>	Gas Turbine Engines and Associated Equipment
<i>Category XX</i>	Submersible Vessels and Related Articles
<i>Category XXI</i>	Articles, Technical Data, and Defense Services Not Otherwise Enumerated

# CHAPTER FOUR

## MILITARY EXPORT CONTROL LAWS AND REGULATIONS IN THE 21<sup>ST</sup> CENTURY

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“Our eyes are in front

Because it’s more important to look ahead than  
to look back.

Don’t dwell on things in the past. Learn from  
them and keep moving forward”

[#emilysquotes.com](https://emilysquotes.com)

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## 4. 'Military' export control laws and regulations in the 21st century

In essence, export control is about controlling the trade in and exchange of 'military' goods, technology and services, and goods that can be used for both civilian and military purposes (dual-use).

The International Traffic in Arms Regulations (ITAR<sup>63</sup>) regulates the transfer of defence articles, defence services and related technical data. If we focus on the development of an information-driven organisation (visibility<sup>64</sup> [*noun*] of the Ministry of Defence supply chain) that always meets high quality and technological standards, not only will our robustness and agility increase significantly, but also the risk at a potential breach of national security.

Defence articles, defence services and technical data that are subject to control under legislation and regulations (e.g., the International Traffic in Arms Regulations [ITAR]) may not be transferred to persons, whether they are in the United States or abroad, without a valid license or agreement approved by the applicable government authority.

The export control measures mentioned by the ITAR have an extraterritorial effect<sup>65</sup>. In the total life phase of the equipment (acquisition, maintenance and disposal) the U.S. origin component retains its nationality. Even if it is incorporated into another equipment.

This extraterritorial effect of the ITAR has a negative effect on our participation in bilateral cooperation with our allies (as included in, among other things, the Technical Agreement (TA) and Memorandum of Understanding (MOU)), because we as a non-profit organisation are bound by strict laws and regulations and thus limits the defence industry economic competitiveness.

The European Union also has an export control regime for its Member States. The arms trade is the subject of a Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment.

These regulatory frameworks, including the most recent and anticipated regulatory amendments, definitions, classification and licensing requirements, dealing with (possible) non-compliance issues and essential steps to ensure compliance

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<sup>63</sup> International Traffic in Arms Regulations ("ITAR," 22 CFR 120-130). Available from [https://www.pmddtc.state.gov/ddtc\\_public?id=ddtc\\_kb\\_article\\_page&sys\\_id=24d528fddbfc930044f9ff621f961987](https://www.pmddtc.state.gov/ddtc_public?id=ddtc_kb_article_page&sys_id=24d528fddbfc930044f9ff621f961987) (Accessed 24 November 2019).

<sup>64</sup> Chung, J. & Wark, S. (2016) **Visualising Uncertainty for Decision Support**. Australia. Defence Science and Technology Group (page 1). "*The main goal of data visualisation is to communicate information clearly and effectively through graphical means.*"

<sup>65</sup> Tamada, D. & Achilleas, P. (2017) **Theory and Practice of Export Control**. Kobe University Social Science Research Series. Available from <https://eur-on-worldcat-org.eur.idm.oclc.org/oclc/1006502634> (e-book).



with the ITAR, should come together in a decision model<sup>66</sup> that the Ministry of Defence enables to take effective action and respond adequately if necessary

## 4.1 Export Control Reform

In 2009, the Export Control Reform initiative was launched, which would not lead to the adoption of the Export Control Reform Act until 2018.

On August 13, 2009, President Obama announced the launch of a comprehensive review of the U.S. export control system, the Export Control Reform. The main objective has been to make stricter more appropriate rules for fewer items. There were three phases to this 'Reform': **Phase I** - harmonize the Commerce Control List (CCL) with the U.S. Munitions List (USML), **Phase II** - a harmonized licensing system with two identically-structured tiered control lists and **Phase III** - establish a single licensing agency

**Table I. President's Export Control Reform Initiative**

Phase	Control List	Licensing	Enforcement	Information Technology
I	Refine, understand, harmonize definitions to end jurisdictional confusion between two lists; establish new control criteria	Implement regulatory-based improvements to streamline licensing	Synchronize and de-conflict enforcement; create Enforcement Fusion Center	Determine enterprise-wide needs
II (requires congressional notification; requires additional funding)	Restructure two lists into identical tiered structures; apply criteria; remove unilateral controls where appropriate; submit proposals multilaterally to add/remove controls	Complete transition to mirrored control list; fully implement licensing harmonization	Expand outreach and compliance	Transition toward a single electronic licensing system
III (requires legislation)	Merge two lists into a single list; implement process for updating list	Implement single licensing agency	Consolidate enforcement activities under one agency	Implement a single system for licensing and enforcement

**Source:** Prepared by Dianne Rennack, CRS, based on White House Fact Sheet, April 20, 2010.

### FIGURE 9 CONGRESSIONAL RESEARCH SERVICE

One of the most visible changes to date (2020) is the revision of the U.S. Munitions List (USML; ITAR) and the Commerce Control List (CCL; EAR). These lists have been revised with the intention of now basing the classification of key elements on objective criteria, rather than design intent, and when no ITAR review is required, this category moves from the USML to the CCL.

<sup>66</sup> Chapter seven, Information fusion and decision making with imposed legal Constraints from the Export compliance domain.

### 4.1.1 Export Control Reform (ECR) classification

In addition to ensuring fewer discrepancies between the various control regimes, the Export Control Reform (ECR) Initiative has also led to additional compliance risks. Many logistics systems (such as those of the Ministry of Defence) still contain a lot of article data from the 1960's and classification (both for internal logistics processes and for trade) is in accordance with the USML or the CCL. As a result of the Export Control Reform, in addition to the 'ITAR' and 'EAR' classification, a third is now added, the Export Control Reform (ECR) classification. Because how can you streamline the process to achieve reclassification of goods, technologies and services as such a large 24/7 operational organisation like the Ministry of Defence? And how do we ensure that our classification data is kept up to date with the recent changes in international laws and regulations?

### 4.1.2 Specially designed for national security duties

One of the intentions of the Export Control Reform (ECR) Initiative is for the Departments of Commerce (EAR) and State (ITAR) to come up with a common definition of "specially designed". The proposed "specially designed" definition would include the items currently defined under 22 CFR § 120.41 and 15 CFR § 772.1 respectively. It is noteworthy that all items in the United States Munitions List (USML) generally refer to the list of defence equipment checked for export in accordance with 22 CFR Parts 120 onwards and not to the list of defence equipment on the United States Munitions Import List (USMIL), controlled by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The USMIL is included in the importation of arms, ammunition and implements of war regulation, according to the requirements of CFR 27 § 447.21 - The U.S. Munitions Import List.

In accordance with section 38 (a) of the Arms Export Control Act, 22 U.S.C. 2778 (a), and E.O. 13637, "specially designed" defence equipment that is controlled for export or import will continue to be part of the USML under the AECA. Therefore, it can be concluded here that for the defence equipment audited by ATF through the USMIL when moving items from the USML to the CCL for export control purposes, it does not affect the list of defence equipment audited under the USMIL.

#### **Subpart C—The U.S. Munitions Import List**

##### **§447.21 The U.S. Munitions Import List.**

The following defense articles and defense services, designated pursuant to section 38(a) of the Arms Export Control Act, 22 U.S.C. 2778(a), and E.O. 13637 are subject to controls under this part. For purposes of this part, the list shall be known as the U.S. Munitions Import List (USMIL):

THE U.S. MUNITIONS IMPORT LIST

### 4.1.3 Balancing the Export Control Reform

This comprehensive reform of the export control regime initially focused on identifying current threats with the aim of being able to respond adaptively within the current 21st century technological landscape. Furthermore, the Ministry of Defence expected that the revision of export controls would also ensure that the risk of security implications in the supply of military equipment to coalition partners could be classified as low risk throughout the life of that equipment.

If we look back in time at the laws that were drafted to primarily protect national security, we can conclude in 2020 that the Export Control Reform Act (ECRA) has failed to achieve its intended goal. A distinction should be made here between transactions from government-to-government and between industry-to-government and vice versa, because, according to what seems to be the case, the Export Control Reform has achieved the most profit for small and medium-sized companies.

What the Ministry of Defence encounters in its operations is that the ECRA wants to limit exports of emerging and fundamental technologies that could potentially be used for civil and military purposes ('dual-use technologies') and that were not subject to export controls in the past. These targeted export restrictions make it clear why international ambitions to ensure national security must be balanced with support for new technologies and innovation within the military domain.

## 4.2 Inference Part 1 (chapter 2 -4)

*Part 1 (chapter 2 – 4) deals with the legal context of justification for directly applying U.S. export control laws and regulations to the Netherlands Ministry of Defence.*

In analysing the legal significance of export controls to the extraterritorial executive powers of the United States, it has been found that there are no discrepancies, but that there is room for interpretation that and whether U.S. export laws and regulations can be applied extraterritorial to military goods, technology and services.

From a U.S. perspective, national security and "aid to allies" are preferred, as agreed in treaties, which does not always justify the extraterritoriality of their regulations in a particular context.

A formal critical review of international export control laws and regulations indicates that when the Export Control Act came into effect in 1949, it initially envisioned a world free from the dangers of armaments and war.

The 1976 AECA states that presidential control over exports and imports of defense goods and services promotes world peace and the security and foreign policy of the United States.

The qualification is based on two possible extraterritorial interpretations of this law:

1. The President has executive power to approve international arms sales (and services) if they promote world peace and the security of the United States.
2. The President is responsible for providing and controlling guidelines for the import and export of defense items and services to foreign individuals.

The competing interpretation of extraterritoriality would conclude that the president is not entirely free to require a transfer license for all "defense equipment" and for all end users, such as the Ministry of Defence.

Such an interpretation has historically led to two notable legal rulings, both aimed at: 'transferring without authorisation advanced technology of American origin to any person or country.

Within the military export control domain, use is made of political compensation that can reduce the effect of a violation. As a result, effective enforcement by the United States government will not occur through an AECA violation committed by the Department of Defence.

Any extraterritorial application of U.S. jurisdiction that is critically assessed on the basis of territorial sovereignty appears to be contrary to a state's right to comply with and account for its own laws and regulations. Since 1990, arms exports have been accounted for from the SIPRI database.

In Chapter 4, special attention is paid to the most significant change in the view of the U.S. Export Control regime to date (2020).

In the revision of the U.S. Munitions List (USML; ITAR) and the Commerce Control List (CCL; EAR) it is intended that when there is no ITAR assessment required, so there is no threat to national security, this category will be moved from the USML to the CCL. Due to this shift, a relatively new player is entering the arena of license authorities, namely the Treasury's Office of Foreign Assets Control (OFAC).

One of the intentions of the Export Control Reform (ECR) initiative to come to a common definition of "custom designed" is remarkable unaffected by defense equipment listed on the United States Munitions Import List (USMIL). These items remain part of the USML and are not transported to the CCL, so the Ministry of Defence does not benefit from the Export Control Reform (ECR) initiative for many commodity groups.

# CHAPTER FIVE

## THE INTEGRITY OF MILITARY TRADE

*Tangible classification for procurement, maintenance and  
distribution of controlled technology*

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“It is far more important to be able to hit the  
target than it is to haggle over who makes a  
weapon or who pulls a trigger.”

Dwight D. Eisenhower

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## 5. The integrity of military trade

The integrity of trade in military goods between governments depends on being able to demonstrate compliance with (inter)national security rules. Security Assistance is therefore an umbrella term consisting of multiple components:

- (1) The Foreign Military Sales (FMS) program is a form of security assistance authorized by the Arms Export Control Act (AECA), as amended (22 U.S.C. 2751, et. seq.) and a fundamental tool of U.S. foreign policy.
- (2) The Direct Commercial Sales (DCS) program means that the vendor works directly with the foreign government customer to negotiate, finalize, and deliver a sale. Basically, DCS is any sale not through the FMS system.

### 5.1 Foreign Military Sales (FMS)

Under Section 3, of the AECA, the U.S. may sell defense articles and services to foreign countries and international organisations when the President formally finds that to do so will strengthen the security of the U.S. and promote world peace.

The FMS program exists, not necessarily for the purpose of providing a market for U.S. Contractors, but for the purpose of building relationships with foreign countries. This overriding purpose is codified into the statute governing the FMS program, the Arms Export Control Act (“AECA”), which provides:

“SEC. 21. SALES FROM STOCKS.— (a) The President may sell defense articles and defense services from the stocks of the Department of Defense to any eligible country or international organization if such country or international organization agrees to pay in United States dollars—



Defense Security Cooperation Agency  
**NEWS RELEASE**

On the web: <http://www.dsca.mil>

Media/Public Contact:  
pm-cpa@state.gov

Transmittal No. 20-22

**The Netherlands – Excalibur Projectiles**

WASHINGTON, April 10, 2020 - The State Department has made a determination approving a possible Foreign Military Sale to the Government of the Netherlands of one hundred ninety-nine (199) Excalibur Increment IB M982AI tactical projectiles and related equipment for an estimated cost of \$40.55 million. The Defense Security Cooperation Agency delivered the required certification notifying Congress of this possible sale today.

The Government of the Netherlands has requested to buy one hundred ninety-nine (199) Excalibur Increment IB M982AI tactical projectiles. Also included with this request is U.S. Government technical assistance, training, associated support equipment, and other related elements of logistics and program support. The total estimated program cost is \$40.55 million.

This proposed sale will support the foreign policy and national security of the United States by helping to improve security of a NATO ally which is an important force for political stability and economic progress in Northern Europe.

The Netherlands will integrate these munitions with conventional artillery units equipped with the PzH2000LE self-propelled howitzer (SPH) to provide precision fires capability in order to reduce collateral damage and increase effectiveness in various areas of operation. The Netherlands will have no difficulty absorbing this equipment into its armed forces.

The proposed sale of this weapon system will not alter the basic military balance in the region.

The prime contractor will be the Raytheon Company, Tucson, AZ. There are no known offset agreements proposed in connection with this potential sale.

Implementation of this proposed sale will not require the assignment of any additional U.S. Government or contractor representatives to the Netherlands.

There will be no adverse impact on U.S. defense readiness as a result of this proposed sale.

This notice of a potential sale is required by law and does not mean the sale has been concluded.

All questions regarding this proposed Foreign Military Sale should be directed to the State Department's Bureau of Political Military Affairs, Office of Congressional and Public Affairs, pm-cpa@state.gov.

Under FMS, the U.S. Government and a foreign government enter into a government-to-government agreement called a Letter of Offer and Acceptance (LOA).

In the figure on the left you can see an recent FMS contract between the Netherlands and the U.S..

## 5.2 Classification

According to *Bruce Webb*<sup>67</sup>, 'Compliance practitioners know that the export classifications are the essential first step in determining export control requirements, responsibilities and risks.'

### 5.2.1 National Stock Number (NSN)

A NATO Stock Number, or National Stock Number<sup>68</sup> (NSN) as it is known in the U.S., is a 13-digit numeric code, identifying all the 'standardized material items of supply' as they have been recognized by all NATO countries including the United States Department of Defense.

After World War II the NSN has been administered by the Defense Logistics Agency (DLA) within the U.S. Department of Defense. NSN's are nowadays used by all of the Tier 3 Nations: the Ministry of Defence, U.S. government and the North Atlantic Treaty Organization (NATO).

According to *Bruce Webb*<sup>69</sup>, 'the top of the NSN entry is a general description, whereas the body contains technical specifications and useful text descriptions of how and where the item is used. In many situations, the entry may also include information such as whether the item is ITAR-controlled or even the Export Control Classification Number (ECCN). Many NSN entries contain "Original Equipment Manufacturer" (OEM) part numbers, which allows the export compliance officer to search on various publicly available databases to find important technical details'.

NSN's are a vital part of the military's logistics supply chain used to manage, move, store and dispose of material throughout the life of the equipment and have a rich history of data with the need to share, e.g. for customs purposes.

The Ministry of Defence can take advantage of accessing the Nato Master Catalogue of References for Logistics (NMCRL) online, where suppliers and manufacturers can upload images with their unique part number.

In the example<sup>70</sup> below of the standard Issue Rifle of the armed forces, it is very simple to see without revealing classified data that the 1st four numbers (1005) indicate that this is a Rifle, made in Canada (20), so the origin is also provided and the last set of digits is the serial number (provided by the supplier).

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<sup>67</sup> Commonwealth Trading Partners.

<sup>68</sup> Available at [https://www.nato.int/structur/ac/135/ncs\\_guide/english/e\\_index.htm](https://www.nato.int/structur/ac/135/ncs_guide/english/e_index.htm).

<sup>69</sup> Commonwealth Trading Partners.

<sup>70</sup> M.H.D. Bruinsma (2020)

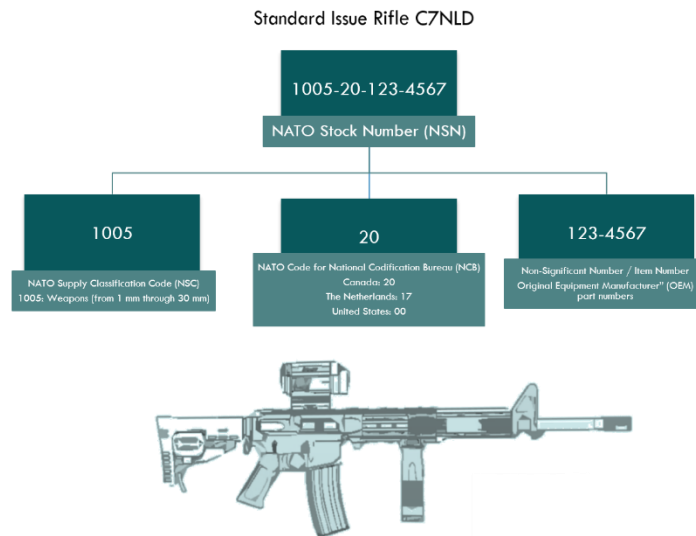


FIGURE 10 EXAMPLE FROM MINISTRY OF DEFENCE (NLD)

### 5.3 Avoiding trade in international security risks

If we look at the export control regulations that originated in the days of the World War II and were directed against 'them' - 'the enemy', who had access to technologies that were also essential to the national security of the U.S., regulations in 2020 no longer have the same application and no longer fit with the current concerns about (inter)'national' security.

If we limited the use of enforcement trade tools to those items where we would actually be at risk, based on a risk profile, we would now have been able to demonstrate compliance within the Ministry of Defence.

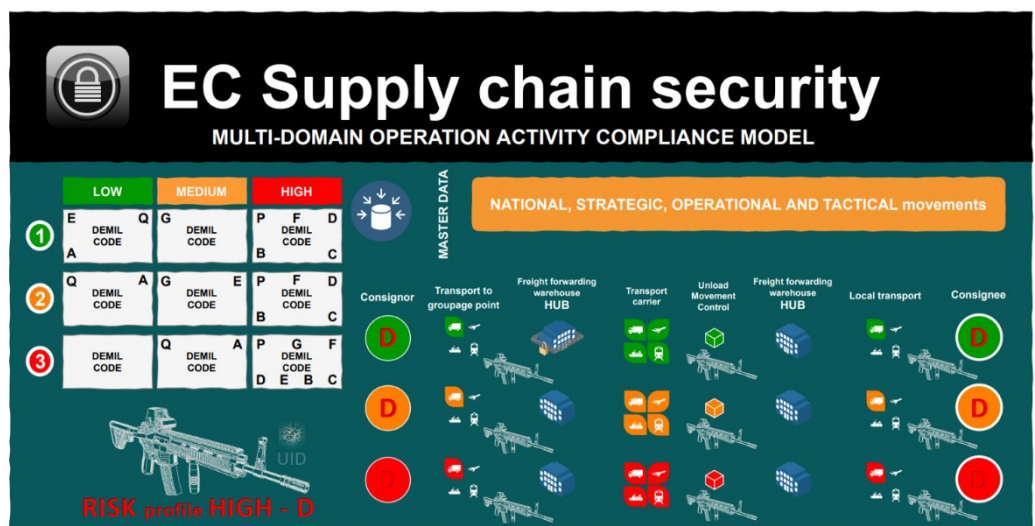


FIGURE 11 SUPPLY CHAIN - RISK D (§ 121.1 USML – DEMIL CODE)



# CHAPTER SIX

## THE MINISTRY OF DEFENCE

### CASE CONTRIBUTION

*Contribution for research and practice*  
*Inter Alia 'Among other things'*

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“The problem in defense is how far you can go  
without destroying from within what you are  
trying to defend from without.”

Dwight D. Eisenhower

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## 6. The Ministry of Defence case contribution

*Military goods are stolen from a secure cargo area, an airplane is shutdown overseas by a missile, the underground metro in a big city is attacked with poisonous gas. These are non-hypothetical situations where sensitive technology is used to harm innocent civilians.*

### 6.1 Case references from the past

In 2014, the Royal Netherlands Air Force was informed that Fokker Services B.V. (a provider of air and space services based in the Netherlands) had signed a SETTLEMENT AGREEMENT<sup>71</sup> with the U.S. government (Treasury's Office of Foreign Assets Control [OFAC]) regarding alleged violations of U.S. sanctions for the re-exports of U.S. controlled aircraft components, technology and services to Iran and Sudan.

By signing this settlement agreement and paying the fine, Fokker Services B.V. recognizes the extraterritoriality of U.S. export laws and regulations and confirms the degree of control over the defence industry in the Netherlands, regardless of where it is located in the world.

The Royal Netherlands Air Force was therefore involved in a voluntary disclosure with the U.S. government between 2014 and 2017, outlining potential violations of the AECA, related to various transfers of American technology to foreign and domestic repair companies and research institutes (including Fokker Services B.V.), without having the right authorisation.

In response to the voluntary disclosure by the Royal Netherlands Air Force, the Ministry of Defence has set up an export compliance working group led by the Central Staff. This group consists of representatives from all 7 organisational elements, the Chief Compliance Officers and the security authority. In addition, each organisational element has been mandated to implement an Internal Compliance Program (ICP) to mitigate the risk of non-compliance situations in the future.

### 6.2 Case contribution

Against the background provided in the research context, I want to make a contribution, demonstrating five examples how this research “fills a gap” in existing decision making models “technology specially designed for the ministry of defence”.

If all five cases are assessed according to the THREAT - VULNERABILITY - CONSEQUENCES (risk) method, then a different risk is likely to emerge from the current risk assessment. In addition, with this new method, a risk profile can be drawn up

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<sup>71</sup> Fokker Services B.V. voluntarily self-disclosed its sales of aircraft parts to customers in Iran, Sudan, and Burma (Myanmar) to OFAC and BIS. Available at [https://home.treasury.gov/system/files/126/20140605\\_fokker.pdf](https://home.treasury.gov/system/files/126/20140605_fokker.pdf)

per situation and per case, including an analysis of the applicable rules. Ultimately, a conclusion and a risk profile can be formulated for each case.

It is recommended that the model only be applied once it has been established by the stakeholders within the Ministry of Defence and U.S. Government State Department.

### 6.2.1 Scenario's

**Scenario I;** Closed containers are sent back from a mission area, to be prepared for dispatch for a next mission upon return to the Netherlands. Upon their return, these goods must first be selected (classified), cleaned and administratively processed. These goods are therefore transferred more than ones to a third party before being released. It is unclear in this supply chain which of the items in the container are 'controlled goods'.

**Scenario II;** A controlled item (eg a specially designed drone or a cryptographic radio) is affected during an exercise, deployment or mission. To limit the risk of transferring technological knowledge to unauthorized third parties, all similar items (with the same technology) must be withdrawn from circulation. The person in the supply chain who must make decisions over this kind of equipment during deployment (mission) do not have access to real-time data. There is a risk that our technology will fall into the hands of a potential enemy due to the lack of real-time data.

**Scenario III;** When importing goods into the United States, it must be indicated in advance whether it concerns a temporary or permanent import. In the case of temporary import, goods may remain in the U.S. for a maximum of 4 years. The risk that arises is that goods that remain in the U.S. for more than 4 years will be given a permanent status and have been definitively imported without the correct authorisation. As a result, the goods are not allowed to leave the U.S. until the non-compliance situation is resolved (by applying for a new license). It often happens that people think that the goods will only be used for a specific exercise, but realize afterwards from an efficiency point of view that the goods will remain permanently in the U.S. with a unit of the Netherlands.

**Scenario IV;** In the collaboration with third parties (Foreign Affairs, Economic Affairs, TNO, THALES, etc.) via the Ministry of Defence, the supply chains sometimes overlaps. The data for controlled goods do not do this. There is a risk that the data will not be available when decisions have to be made over the nature of the goods (classification). The Ministry of Defence often takes goods from these external parties for its own use. This allows the Ministry of Defence as a government organisation to make use of a number of exemptions that normally for industry would require a license.

## 6.3 Best practices (Australia and Great Britain)

The core problem is that Great Britain (and Australia) still needs new or additional licenses for technology transfers to or from the United States. This makes it difficult for their industries to work on upgrades or repairs, to make intra-company transfers, and in certain cases for U.S. allies to deploy armed forces and/or equipment authorised by U.S. licenses. This is the case even when a transfer does not change the end-user of the technology in question or when a British (or Australian) firm is bound by obligations of confidentiality to the British (or Australian) government.

# CHAPTER SEVEN

## INFORMATION FUSION AND DECISION MAKING WITH IMPOSED LEGAL CONSTRAINTS FROM THE EXPORT COMPLIANCE DOMAIN

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Facultas ejus, quod cuique facere libet, nisi quid  
vi, aut jure, prohibetur.

Its essence is the power of doing whatsoever we  
please, unless where authority or law forbids.

Fred B. Rothman & Co.

Littleton, Colorado

1993

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## 7. Information fusion and decision-making with imposed legal constraints from the export compliance domain

*This chapter will explain how the Ministry of Defence can comply with the export control legislation within the given frameworks by first determining the risks and the extent to which they occur and what the effect will be.*

Information fusion systems often process and assess large amounts of information from multiple sources within the supply-chain. The human factor in the supply chain can therefore be considered an integral part of this system and can make decisions that are sometimes too complex for computers.

Commanders in the 21<sup>st</sup> century are expected to always maintain awareness of the situation on the battlefield so that they can make time-critical decisions in a complex, uncertain and ever-changing environment. For example, they are increasingly used to carry out more supporting types of processes, provided they comply with national and international security laws and regulations<sup>72</sup>.

Being an information-driven organisation means that we must be capable of acquiring, processing and disseminating, in good time and at any level required, all relevant information so that, to the greatest extent possible, we can be in the right place at the right time with the specific military assets required in the given context.

One of the most common pitfalls in determining risks within the military export compliance domain, and in determining the degree of '**robustness**' and '**agility**', is that we make it too complicated to comply.

### 7.1 Use of the Threat, Vulnerability and Consequence (TVC) analysis for decision-making

In the military domain, according to Jacob Foster Davis<sup>73</sup> (Certified Chief Information Security Officer), there are two types of risk that commanders should always evaluate:

1. *Risk to mission.* For a given operation or task, and considering the tactical situation and the strategic situation, what is the risk to achieving your mission? If you were tasked to evacuate a village, what could prevent you from accomplishing that task?

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<sup>72</sup> Chung, J. & Wark, S. (2016) **Visualising Uncertainty for Decision Support**. Australia. Defence Science and Technology Group (page 19).

<sup>73</sup> <https://lantern.be/the-observer/humanity/keep-it-simple-stupid-risk-management-how-often-and-how-bad/>.

2. *Risk to forces.* (Sometimes phrased, “risk to personnel.”) In order to accomplish your task, you will need to use people, equipment, services, resources, etc (this is roughly translated to “forces” in military terms). What is the risk to these assets? In evacuating the village, is there anything that might threaten to destroy your equipment or harm your personnel?

Taking into account that export control regulations are designed to prevent technological knowledge from falling into the hands of our opponents and to prevent the subsequent use of this technology against us, the subject of illicit exports poses a security risk equivalent to at least one of the two identified risks by Jacob Foster Davis, namely the ‘*Risk to forces*’.

In 2002, NATO, in collaboration with RTO Studies, Analysis and Simulation Panel (SAS), drew up a Code of Best Practice<sup>74</sup> (COBP) to facilitate high quality assessments that support decision-making in the area of Command and Control (C2<sup>75</sup>).

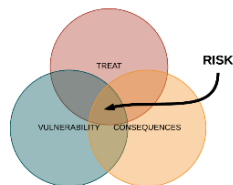
According to this NATO Code of Best practice, “*risk*” is defined as the possibility of suffering harm or loss and “*uncertainty*” can be defined as an inability to determine a variable or system state, or predict its future evolution.

According to Friedman<sup>76</sup> in ‘Visualising Uncertainty for Decision Support Visualisation<sup>77</sup>’, ‘Visualisation is the communication of data in a visible form that brings out relationships and features in data. The main goal of data visualisation is therefore to communicate information clearly and effectively through graphical means.’

### 7.1.1 Threat, Vulnerability and Consequence (TVC) Framework

By demonstrating a comparison of how ‘terrorism’ risks with other risk management decisions could provide benchmarks for which risks to control or not, Willis<sup>78</sup> unlocked for me a portal to an export compliance risk framework.

**Export Control Risk = Threat =  $p(\text{attack occurs}) \times \text{Vulnerability} = p(\text{attack results in damage}|\text{attack occurs}) \times \text{Consequence} = E(\text{damage}|\text{attack results in damage})$**



<sup>74</sup> AC/323(SAS-026)TP/40 - <https://apps.dtic.mil/dtic/tr/fulltext/u2/a422189.pdf>.

<sup>75</sup> NATO defines C2 as “The Organization, Process, Procedures, and Systems necessary to allow timely political and military decision-making and to enable military commanders to direct and control military forces.”

<sup>76</sup> Friedman, V. (2008) **Data Visualization and Infographics**. Smashing magazine.

<sup>77</sup> Chung, J. & Wark, S. (2016) **Visualising Uncertainty for Decision Support**. Australia. Defence Science and Technology Group (page 1). “The main goal of data visualisation is to communicate information clearly and effectively through graphical means.”

<sup>78</sup> Willis, H. (2007) **Guiding resource allocations based on terrorism risk**. Risk Analysis. Volume 27, Issue 3, 597–606.

A risk, such as a breach of national security, is measured as the probability of a "terrorist" attack and its consequences. The probability of such an attack is then measured against the threat and vulnerability of the target. The threat is measured as the probability that a specific target will be attacked in a certain way over a period of time. Vulnerability is measured as the probability of damage that can occur in the event of a threat. The consequences are the extent and type of damage caused by a successful terrorist attack.

The damage that can be done to the Ministry of Defence in relation to export controls can best be described as: damage to reputation or loss of trust with our coalition partners.

## 7.2 Multi-domain operation activity compliance model

In an article I came across the following sentence: "You can't mitigate a risk if you don't know it's there." But how do we know if we are at risk at all? And what is the probability that this risk will manifest itself? And is risk the same as compliance? Based on an integration of risk and compliance models, I designed a model that shows that by focusing on the situation (national, strategic, operational and tactical) and not just the single treat, the security of the entire supply chain can be guaranteed.

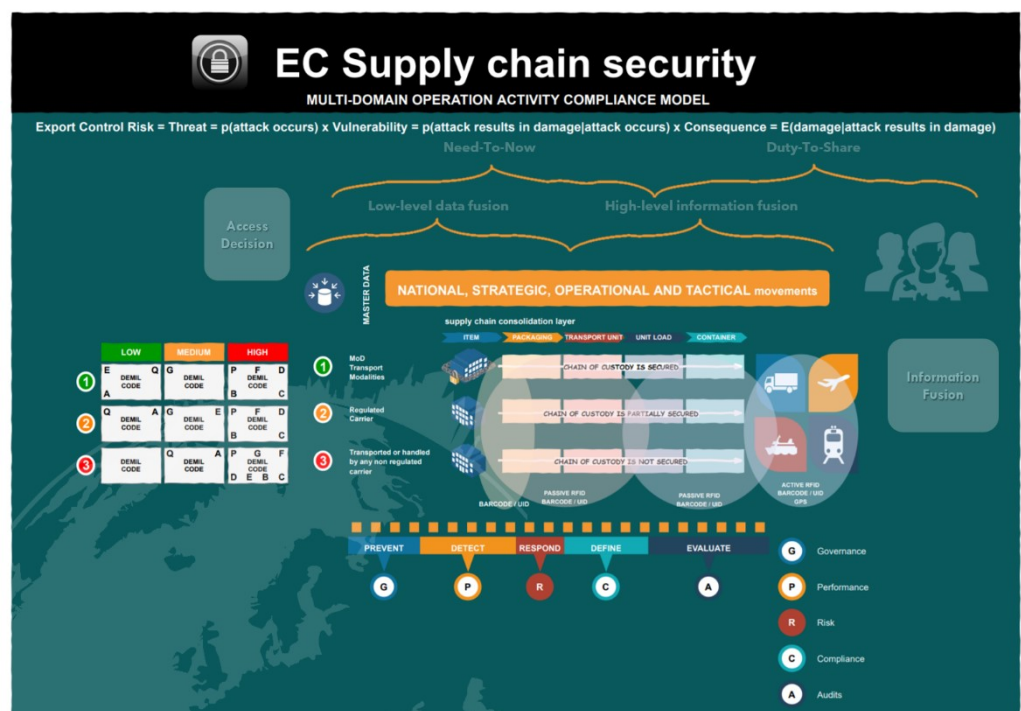


FIGURE 12 SCALE MODEL: SEE APPENDIX I FOR FULL SIZE MODEL



The scale model shows that 3 "tracks" were used:

1. Ministry of Defence (MoD) Transport Modalities - full use of military transport (NLD or NATO partner) and / or military personnel
2. Regulated Carrier - use of a contracted party where agreements have been made in the contract about export controls
3. Transported or Handled by any non-regulated carrier - use of occasional carrier and / or non-screened personnel

In the model, the risk and information fusion activities are shown above the orange dotted line and below the dotted line we speak of the compliance model, which includes data and information fusion.

### 7.2.1 Risk Adaptive Access Control (RAdAC)

*According to Robert W. McGraw<sup>79</sup>, adaptive access control is an example of context-aware access control that acts to balance the level of trust against risk.*

In his paper<sup>80</sup> on RAdAC, I see many similarities with the issues I address in my thesis about the sharing of 'classified' information (technology) in the supply chain and the impact on national security.

One of the most essential questions he asks is whether it is more important to share information in a given situation or context (Need-To-Now and Duty-To-Share) or to enforce security measures?

Looking at the decision-making process, we see that most of the standard risk approaches strictly adhere to laws, policies, and implementation of guidelines for the protection of classified information. For example, they require that the intended recipient of classified information has a security clearance corresponding to the classification of the information object (mandatory access control) and have a need-to-know for the information (discretionary access control). The problem with this approach, according to McGraw, is that from a Duty-To-Share perspective it is assumed that it is too risky to share information if these criteria are not met. This mindset does not recognize that in some operational military situations the consequences for national security of not sharing information are greater than sharing, even under high risk security conditions.

Finally, he indicates that this situation is not the reality, especially in a company as diverse, complex and situational as the Department of Defense (U.S.).

By integrating the two parts (RAdAC and information fusion), a model (7.2 Multi-domain operation activity compliance model) has been compiled that indicates

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<sup>79</sup> Information Assurance Architecture and Systems Security Engineering Group - National Security Agency (United States).

<sup>80</sup> Available at <https://csrc.nist.gov/csrc/media/events/privilege-management-workshop/documents/radac-paper0001.pdf>

which control measures are required for all our equipment based on a DEMIL code in combination with one of the three tracks to secure the supply chain.

For example, in the 'low-level data fusion' part one starts with the 'need-to-know' data sharing. This data is only available to users who have the screening level to be able to see this data - 'need-to-know'. In addition, in the 'high-level information fusion' part there is the obligation to apply 'duty-to-share'. This may be the case, for example, when serial numbers of weapons must be included in the customs (U.S.) declaration.

### 7.2.2 Single-source procurement

*Token-based authentication schemes can improve authentication security by requiring the user to possess a physical token (something you have) that the system can recognize as belonging to a particular user.*

In addition to sharing information, there is also data that can only be read by authorised 'military' personnel members and that is therefore part of the supply chain, but which will not lead to active data fusion. In the model these are the UID, Passive RFID and Active RFID.

The UID (Unique Item Identification) prescribed by NATO is used to track items. This guarantees lifelong traceability. This encrypted data, when associated with an NSN, provides enough secure data to meet the duty-to-share requirements.

NATO members can also purchase 'Supply Chain Tracking (SCT) Technology' active RFID and GPS based hardware and software directly from the NATO Support and Procurement Agency, as it uses wireless technologies to track containers, palletized goods and vehicles throughout the supply chain.

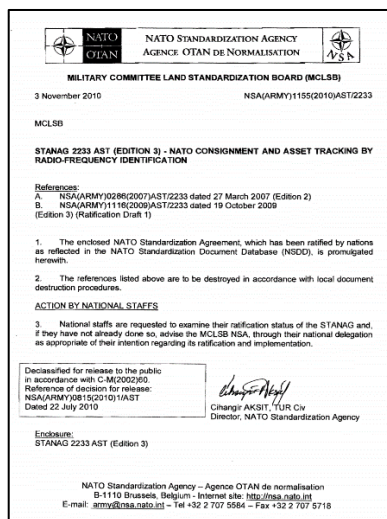


FIGURE 13 STANAG 2233 - NATO CONSIGNMENT AND ASSET TRACKING<sup>81</sup>

<sup>81</sup> Available at <https://nso.nato.int/nso/nsdd/stanagdetails.html?idCover=7909&LA=EN>

One of the standards arising from the Standardization Agreements (STANAG's<sup>82</sup>) concerns the following operation of the RFID. For example, the A tag on a consignment sent from country A will be read when passing a reader deployed by country B, but information regarding the consignment will only be provided to country B and other parties only if authorisation was given.

A real-life example where NATO (and the Netherlands as a NATO member) used the network to track multinational defence consignments along the supply chain was the deployment of the International Security Assistance Force (ISAF). This was a peacekeeping mission in Kabul, Afghanistan, which had been under NATO command since 2003. Here, 'Savi' brand readers and software were used to collect data and read it via RFID devices to integrate local encryption rules at nodes in the supply chain. This method has been applied at nine checkpoints and four countries: the Netherlands, Germany, Uzbekistan and Afghanistan.

### 7.2.3 Build integrity and reduce non-compliance risks in defence institutions

*(NATO 2004. NATO Code of Best Practice for Command and Control Assessment RTO TECHNICAL REPORT TR-081.), "risk" is defined as the possibility of suffering harm or loss and "uncertainty" is defined as an inability to determine a variable value or system state, or predict its future evolution. Security is therefore the confidentiality and integrity of data and Integrity is required for confidence of data.*

Laws, policies and frameworks at the MoD offer high-level principles and recommend general activities for effective management of 'integrity' risk, but often lack the specificity for understanding the "how" of effective risk management and control, using of examples relevant to export compliance.

The model (7.2 Multi-domain operation activity compliance model) highlights the most important compliance key elements within an organisation, from high-level commitment to effective monitoring and evaluation. As mentioned, the framework also outlines the topics for risk and compliance, as shown below the orange dotted line: Prevent - Governance, Detect - Performance, Respond - Risk, Devine - Compliance, Evaluate - Audits.

When these elements are applied as a continuous cycle, it will help the Chief Compliance Officer, Compliance Officers, Commanders and managers to better understand the maturity of these efforts in their own organisational unit to conduct export control management activities and to identify the key priorities for improvements.

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<sup>82</sup> A STANAG is a normative document that establishes an agreement between several or all NATO member states - ratified at the competent national level - to implement a standard in whole or in part, with or without reservation.

### 7.3 Correlation of USML, CCL (ECCN) and NSN DEMIL CODE classification

The framework (7.2 Multi-domain operation activity compliance model) also outlines the basis of the risk profile. Here is a correlation table (scale model: complete model is included in Appendix II) showing the classifications of goods in accordance with the USML, CCL (ECCN) and NSN DEMIL CODE<sup>83</sup> to demonstrate the method of risk assessment that should make it possible for the Ministry of Defence to shorten the lead time of the licensing system.

DEMIL code Defense Demilitarization: Demilitarization Coding			G	P	F	D	C	E	B	Q	A	
	§121.1 The United States Munitions List (USML)	Commerce Control List (CCL) and Export Classification Number (ECCN)										
	Category I	I firearms and Related Articles	N / A		X		X	X		X		
	Category II	Guns and Armament	N / A		X	X	X	X		X		
	Category III	Ammunition and Ordnance	N / A	X	X		X	X		X		
	Category IV	Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs, and Mines	Example: ECCN 9A604 Commodities related to launch vehicles, missiles, and rockets	X	X	X	X	X			X	
	Category V	Explosives and Energetic Materials, Propellants, Incendiary Agents, and Their Constituents	Example: ECCN 1C608 Energetic materials and related commodities	X	X		X				X	
	Category VI	Surface Vessels of War and Special Naval Equipment	Example: ECCN 8A609 Surface vessels of war and related commodities		X	X	X	X			X	X
	Category VII	Ground Vehicles	Example: ECCN 9A606 Ground vehicles and related commodities	X	X		X	X			X	X
	Category VIII	Aircraft and Related Articles	Example: ECCN 9A610 Military aircraft and related commodities other than those listed in 9A991		X		X	X			X	X
	Category IX	Military Training Equipment and Training	Example: ECCN 0A614 Military training equipment		X		X	X			X	
	Category X	Personal Protective Equipment	Example: ECCN 1A613 Armored and protective equipment and related commodities		X		X				X	X
	Category XI	Military Electronics	Example: ECCN 3A611 Military electronics	X	X		X	X			X	X
	Category XII	Fire Control, Laser, Imaging, and Guidance Equipment	Example: ECCN 7A611 Military fire control, laser, imaging, and guidance equipment		X		X				X	
	Category XIII	Materials and Miscellaneous Articles	Example: ECCN 0A617 Miscellaneous equipment, materials, and related commodities	X	X	X	X	X			X	X
	Category XIV	Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment	Example: ECCN 1A607 Military dissemination equipment for riot control agents, military detection, and protection equipment for toxicological agents ... and related commodities	X	X	X	X				X	
	Category XV	Spacecraft and Related Articles	Example: ECCN 9A515 Spacecraft and Related Commodities	X	X		X	X			X	X
	Category XVI	Nuclear Weapons Related Articles	N / A		X		X					
	Category XVII	Classified Articles, Technical Data, and Defense Services Not Otherwise Enumerated	N / A		X							
	Category XVIII	Directed Energy Weapon	Example: ECCN 6B619 Test, inspection, and production equipment and related commodities specially designed for the development, production, repair, overhaul, or refurbishing of commodities enumerated or otherwise described in USML Category XVIII		X		X				X	
	Category XIX	Gas Turbine Engines and Associated Equipment	Example: ECCN 0A619 Military gas turbine engines and related commodities		X		X	X			X	X
Category XX	Submersible Vessels and Related Articles	Example: ECCN 8A670 Submersible vessels, oceanographic, and associated commodities		X	X	X	X				X	
Category XXI	Articles, Technical Data, and Defense Services Not Otherwise Enumerated	N / A				X						

DEMIL code	Requirements
G	U.S. Munitions List (USML) or Commerce Control List (CCL) Military Items – DEMIL required – Ammunition and Explosives (AE) – (un)classified AE Items
P	USML Items – DEMIL required – Security classified items
F	USML / CCL Military Items – DEMIL required – special instructions from specialist
D	USML / CCL Military Items – DEMIL required – destroy item and components to prevent restoration or repair to a usable condition
C	USML / CCL Military Items – DEMIL required – remove or demilitarize installed key point(s) items as USMIL code 'U'
E	DEMIL code exclusive-use only for DoD Program Office
B	USML Items – MUT to the point of scrap required worldwide
Q	Commerce Control List Item (CCL) – MUT to the point of scrap required only outside the U.S.
A	Items subject to the Export Administration Regulations (EAR) in parts 730-774 or Title 15, Code of Federal Regulations (CFR)(CCL) or EAR99 – low risk DoD control

<sup>83</sup> DOD MANUAL 4160.28, VOLUME 2, 'DEFENSE DEMILITARIZATION: DEMILITARIZATION CODING'. Available at <https://www.esd.whs.mil/DD/>.

## 7.4 Inference Part 2 (chapter 5 – 7)

*Part 2 (chapter 5 – 7), the information fusion will bring case law and the deployment of the Ministry of Defence together in a model to make decisions with legal restrictions within the export compliance domain (scope).*

According to the AECA, the U.S. may sell defense items and services to foreign countries and international organisations if the president formally believes it will strengthen U.S. security and promote world peace.

The Foreign Military Sales (FMS) program has been around for 40 years and does not necessarily provide a market for the military industry, but mainly to build relationships with NATO countries. This primary purpose is enshrined in the statute of the FMS program, the Arms Export Control Act ("AECA"), which provides for trade in defense equipment and services from the stock of the United States Department of Defense (U.S. DoD). This virtual 'stock' can best be classified with a Nato Stock number (NSN), because it is not realistic to expect that every item is actually physically in stock.

An NSN can contain data from production to disposal and the entire life cycle of the item, making it possible to track this item both physically and administratively throughout the secure supply chain.

By linking different data, a standard Armed Forces Issue Rifle can be easily transported from point A to B without revealing secret data. Use of an NSN has also been internationally accepted by NATO, the U.S. DoD, and for customs purposes.

Another problem to be addressed in the context of the exchange of information on export controls is the need for better harmonisation and communication between multilateral export control regimes for "specially designed" defense equipment.

Such a database would allow a wide variety of authorised 'military' personnel members to quickly access the information they need, to take effective action if necessary (robustness) and respond adequately to the rapid and unpredictable changes that are occurring in the world around us (agility).

The model as designed (Compliance model for activities for several domains) stems from the correlation table drawn up by me (Appendix II). I extrapolated commodity codes from the USML to the various demilitarization codes (DEMIL) and then transported them to a risk matrix. The extrapolation was not done mathematically, but a formula was used:  $\text{Export control risk} = \text{Threat} = p (\text{attack occurs}) \times \text{Vulnerability} = p (\text{attack leads to damage} \mid \text{attack occurs}) \times \text{Consequence} = E (\text{damage} \mid \text{attack results in damage what})$ . On the basis of the risk profile - DEMIL, it is immediately clear whether additional control measures have been prescribed for the treatment of an article or service.

Laws, policies and frameworks at the MoD offer high-level principles and recommend general activities for effective management of 'integrity' risk, but often lack the specificity for understanding the "how" of effective risk management and control, using of examples relevant to export compliance.

Using the compliance and risk model to ensure that each military item and / or service is handled in accordance with the intended risk (threat, vulnerability and consequence) compliance can be demonstrated. This allows the Ministry of Defence to maintain its own national sovereignty and to comply with the extraterritorial effect of U.S. export control laws and regulations by focusing on a modern way of supply chain security.

# CHAPTER EIGHT

## CONCLUSION(S) AND RECOMMENDATION(S)

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[M]ost important of all, in God injustice finds an enemy, justice a protector. He reserves His judgements for the life after this, yet in such a way that He often causes their effects to become manifest even in this life, as history teaches us by numerous examples.

On the Law of War and Peace

De Jure Belli ac Pacis

by Hugo Grotius

1625

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## 8. Conclusion(s) and recommendation(s)

As to the extent to which U.S. export control laws and regulations can influence a legal decision in the Ministry of Defence's supply chain, the answer is that it depends on the given context and situation. However, it can be confirmed that the original purpose of drafting the "U.S. laws and regulations" on export controls and conventional arms trade in 2020 has only become more complex, which only makes the application of controls to ensure (inter)national security more complicated.

**RQ 1:** *Is it indeed a conflict with the sovereignty of the Netherlands, in the case that the exporting entity is accountable to a foreign government outside of the EU prior to the export after getting the license issued by the national authority?*

In analysing the legal significance of export controls to the extraterritorial executive powers of the United States, it has been found that there are no legal sovereign discrepancies, but that there is room for legal interpretation that and whether U.S. export laws and regulations can be applied extraterritorial to military goods, technology and services in the Netherlands.

Export controls are not only politically and multilaterally (treaties and contracts, but also event-driven. This means that each NATO country responds to changes in national and international security with its own interpretation of export control provisions.

By establishing where a particular export control system comes from and which laws and regulations underlie it, I mainly gained insight into the essence of the safeguards of national security in my analysis.

The most striking definition is that of the origin of an article, which then determines that this classification of origin prevails over the meaning of legislation and regulations and also determines the further authorisation route.

**RQ 2:** *Which preconditions (evidence) must be met for which type of legal decision in terms of exercise, deployment or mission (Ministry of Defence case contribution)?*

Export controls are primarily a trade tool to enforce international security goals in the context of non-proliferation of Weapons of Mass Destruction (WMD). With the emergence of various forms of terrorism and the efforts of NATO allies to acquire state-of-the-art technology, the threat to national and international security has increased and it is therefore essential to adopt an efficient system of export controls.

**R**ecommendation: The affiliated NATO countries could set up one integrated NATO Stock Number (NSN) database containing (at least) information about refused parties and product classifications.



In addition, the general objectives contained in treaties should prevent a country such as the U.S. from designing export controls that are not based solely on their own individual security interests. The Global Export Control Regimes raise common concerns due to technological developments and the availability of controlled items in international military trade, which is reflected in national regulations worldwide (including the Netherlands).

***RQ 3:** How can we conceptualize and visualize critical decisions from an international legal perspective in a complex, uncertain and ever-changing environment?*

The protection of national security has come under pressure internationally due to the advent of 'cyber' warfare, among other things, because those who knowingly transfer technological knowledge (with or without cryptographic keys) must have access to the same systems or equipment that terrorists can use. Cyber-attacks are one of the most dangerous threats facing NATO allies in the export compliance domain today. Such an attack usually occurs when a person is authorised to take certain actions within the supply chain and decides to abuse trust and harm the organisation. These attacks have a negative impact on the reputation of the organisation and in our case especially on the military deployment.

However, avoiding attacks from within is a daunting task. While it is necessary to give authorised personnel access to secure information so that they can perform their jobs efficiently, too many authorisations can be counterproductive when users accidentally or deliberately abuse their rights. That is why it is essential to find a middle way, where necessary powers are inventoried and the risk to abuse of powers is mitigated.

In my analysis of a secure supply chain for the Department of Defence, I have to conclude that the Netherlands is not (yet) one of the five closest security partners (not the same as an ally) that can receive certain sensitive U.S. technologies without a license.

This "Circle of Trust" between the 5 Eyes partners<sup>84</sup> is considered critical to U.S. national security interests and is highlighted in several national security strategies. Essential to this multilateral approach is that the U.S. asks these countries to protect advanced technologies and in return "reward" them with licensing for low-risk trade and transfers.

**R**ecommendation: In this thesis, I therefore propose to use a risk and compliance framework<sup>85</sup> that safeguards the Risk-Adaptive Access Control (RAAdAC) and simplifies export controls in the supply chain of the Ministry of Defence, thus providing for the standard military operational procedures in the field.

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<sup>84</sup> US, UK, Australia, Canada and New Zealand

<sup>85</sup> Multi-domain operation activity compliance model

## literature, references & database

- International Traffic in Arms Regulations ("ITAR," 22 CFR 120-130). Available from [https://www.pmddtc.state.gov/ddtc\\_public?id=ddtc\\_kb\\_article\\_page&sys\\_id=24d528fddbfc930044f9ff621f961987](https://www.pmddtc.state.gov/ddtc_public?id=ddtc_kb_article_page&sys_id=24d528fddbfc930044f9ff621f961987)

## International conventions and treaties:

*The Netherlands is party to the following conventions and treaties:*

- Non Proliferation Treaty (NPT)  
<http://www.iaea.org/Publications/Documents/Treaties/npt.html>
- Biological and Toxin Weapons Convention (BTWC)  
<http://www.opbw.org/convention/conv.html>
- "The Chemical Weapons Convention" (CWC)  
<http://www.opcw.org/chemical-weapons-convention/>

## International export control regimes

*The Netherlands participates in all existing export control regimes, mentioned below.*

- Australia Group (AG)  
[www.australiagroup.net](http://www.australiagroup.net)
- Missile Technology Control Regime (MTCR)  
[www.mtc.info](http://www.mtc.info)
- Nuclear Suppliers Group (NSG)  
[www.nuclearsuppliersgroup.org](http://www.nuclearsuppliersgroup.org)
- Wassenaar Arrangement  
[www.wassenaar.org](http://www.wassenaar.org)
- Zangger Committee  
[www.zanggercommittee.org](http://www.zanggercommittee.org)

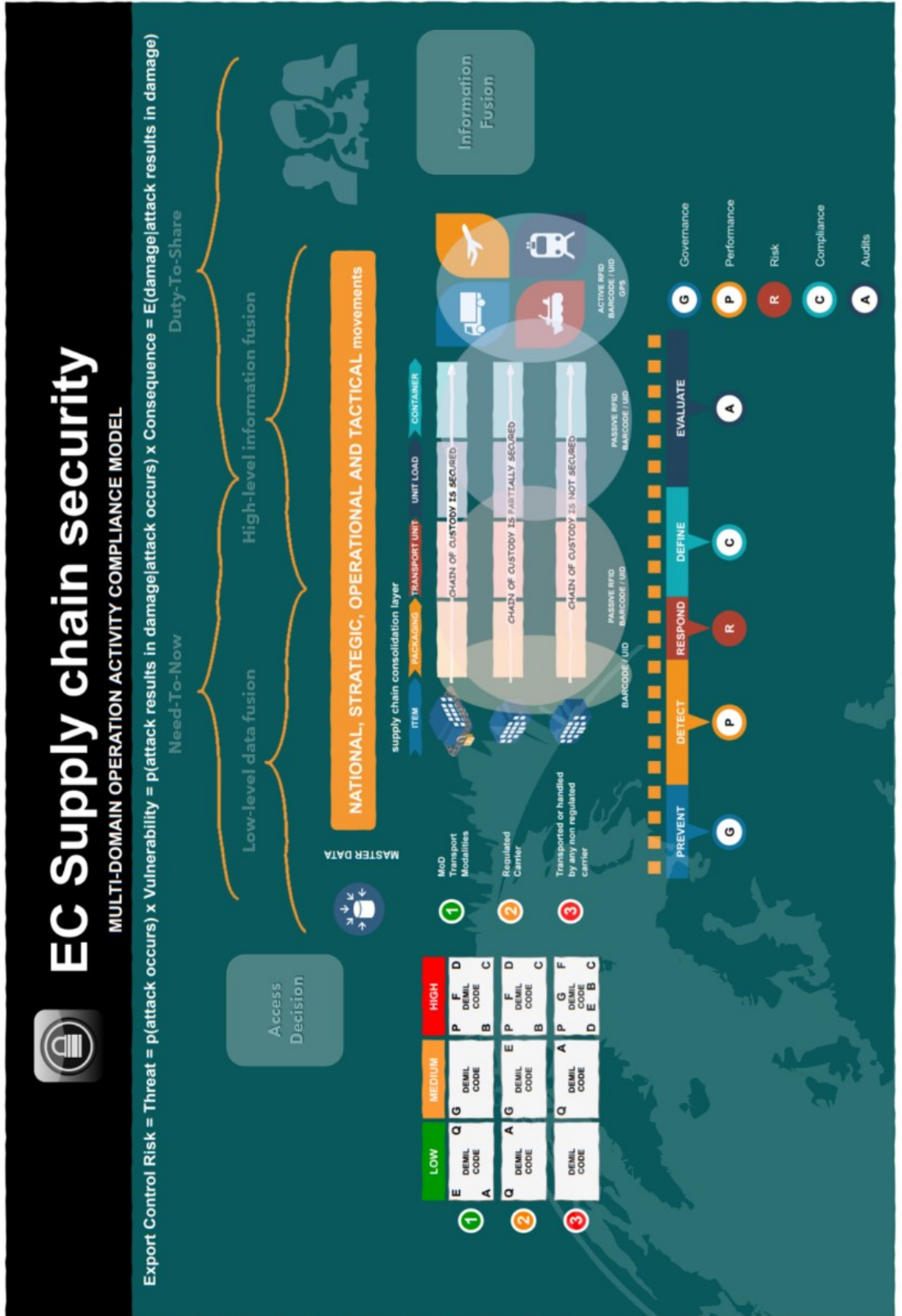
## Literature

*The citation is included in the footnotes on the same page where the reference is included.*

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# Appendix I



# Appendix II

DEMIL code Defense Demilitarization: Demilitarization Coding			G	P	F	D	C	E	B	Q	A
	§121.1 The United States Munitions List (USML)	Commerce Control List (CCL) and Export Classification Number (ECCN)									
	Category I	Firearms and Related Articles	N / A		X		X	X		X	
Category II	Guns and Armament	N / A		X	X	X	X		X		
Category III	Ammunition and Ordnance	N / A	X	X		X	X		X		
Category IV	Launch Vehicles, Guided Missiles, Ballistic Missiles, Rockets, Torpedoes, Bombs, and Mines	Example: ECCN 9A604 Commodities related to launch vehicles, missiles, and rockets	X	X	X	X	X			X	
Category V	Explosives and Energetic Materials, Propellants, Incendiary Agents, and Their Constituents	Example: ECCN 1CG08 Energetic materials and related commodities	X	X		X				X	
Category VI	Surface Vessels of War and Special Naval Equipment	Example: ECCN 8A609 Surface vessels of war and related commodities		X	X	X	X			X	X
Category VII	Ground Vehicles	Example: ECCN 0A606 Ground vehicles and related commodities	X	X		X	X			X	X
Category VIII	Aircraft and Related Articles	Example: ECCN 9A610 Military aircraft and related commodities other than those listed in 9A991.a.		X		X	X			X	X
Category IX	Military Training Equipment and Training	Example: ECCN 0A614 Military training equipment		X		X	X			X	
Category X	Personal Protective Equipment	Example: ECCN 1A613 Armored and protective equipment and related commodities		X		X				X	X
Category XI	Military Electronics	Example: ECCN 3A611 Military electronics	X	X		X	X			X	X
Category XII	Fire Control, Laser, Imaging, and Guidance Equipment	Example: ECCN 7A611 Military fire control, laser, imaging, and guidance equipment		X		X				X	
Category XIII	Materials and Miscellaneous Articles	Example: ECCN 0A617 Miscellaneous equipment, materials, and related commodities	X	X	X	X	X			X	X
Category XIV	Toxicological Agents, Including Chemical Agents, Biological Agents, and Associated Equipment	Example: ECCN 1A607 Military dissemination equipment for riot control agents, military detection, and protection equipment for toxicological agents ... and related commodities	X	X	X	X				X	
Category XV	Spacecraft and Related Articles	Example: ECCN 9A515 Spacecraft and Related Commodities	X	X		X	X			X	X
Category XVI	Nuclear Weapons Related Articles	N / A		X		X					
Category XVII	Classified Articles, Technical Data, and Defense Services Not Otherwise Enumerated	N / A		X							
Category XVIII	Directed Energy Weapon	Example: ECCN 6B619 Test, inspection, and production equipment and related commodities specially designed for the development, production, repair, overhaul, or refurbishing of commodities enumerated or otherwise described in USML Category XVIII		X		X				X	
Category XIX	Gas Turbine Engines and Associated Equipment	Example: ECCN 9A619 Military gas turbine engines and related commodities		X		X	X			X	X
Category XX	Submersible Vessels and Related Articles	Example: ECCN 8A620 Submersible vessels, oceanographic, and associated commodities		X	X	X	X				X
Category XXI	Articles, Technical Data, and Defense Services Not Otherwise Enumerated	N / A				X					

DEMIL code	Requirements
G	U.S. Munitions List (USML) or Commerce Control List (CCL) Military Items – DEMIL required – Ammunition and Explosives (AE) – (un)classified AE Items
P	USML Items – DEMIL required – Security classified items
F	USML / CCL Military Items – DEMIL required – special instructions from specialist
D	USML / CCL Military Items – DEMIL required – destroy item and components to prevent restoration or repair to a usable condition
C	USML / CCL Military Items – DEMIL required – remove or demilitarize installed key point(s) items as DEMIL code 'D'
E	DEMIL code exclusive-use only for DoD Program Office
B	USML Items – MUT to the point of scrap required worldwide
Q	Commerce Control List Item (CCLI) – MUT to the point of scrap required only outside the U.S.
A	Items subject to the Export Administration Regulations (EAR) in parts 730-774 or Title 15, Code of Federal Regulations (CFR)[CCLI or EAR99] – low risk DoD control

