



HOLE IN THE NET: US ARMS EXPORT CONTROL GAPS IN COMBATING CORRUPTION

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ABBREVIATIONS

- AECA** – Arms Control Export Act
- BIS** – Bureau of Industry and Security
- CAT** – Conventional Arms Transfer
- CCL** – Commerce Control List
- CTA** – Country Team Assessment
- DCS** – Direct Commercial Sales
- DDTC** – Directorate of Defense Trade Controls
- DoD** – Department of Defense
- DSCA** – Defense Security Cooperation Agency
- EAR** – Export Administration Regulations
- ECRI** – Export Control Reform Initiative
- FAA** – Foreign Assistance Act
- FMS** – Foreign Military Sales
- GAO** – Government Accountability Office
- IG** – Inspector General
- ITAR** – International Traffic in Arms Regulations
- LOR** – Letter of Request
- NATO** – North Atlantic Treaty Organization
- NVD** – Night Vision Device
- SAMM** – Security Assistance Management Manual
- SME** – Significant Military Equipment
- TACCGG** – Transparency, Accountability, Counter-Corruption & Good Governance
- TI-DS** – Transparency International Defence and Security Program
- UAV** – Unmanned Aerial Vehicle
- UN** – United Nations
- US** – United States
- USML** – US Munitions List

EXECUTIVE SUMMARY

Corruption is widely recognized as one of the major stumbling blocks in US government efforts to improve the capacity of foreign defense forces to address shared international security threats over the past 15 years. According to Retired American General John Allen, former commander of US Forces in Afghanistan, “for too long we focused our attention solely on the Taliban as the existential threat to Afghanistan,” but “they are an annoyance compared to the scope and the magnitude of corruption.”¹ Defense analysts have shown how corruption has weakened militaries’ effectiveness, contributed to the diversion of US weapons, and fueled terrorist recruitment in countries from Iraq to Mali.² In response, the US government has pushed to expand oversight of US grants of arms and military training to foreign countries by enhancing risk assessments, monitoring, and evaluations on annual basis.

By contrast, the United States has gradually sought to reduce what the US government oversees for US sales of arms and related services to foreign countries even though the arms sales present significant corruption risks. In 2014, for instance, the US government discovered that employees of the US firearms manufacturer Smith & Wesson had offered bribes to officials in Bangladesh, Indonesia, Nepal, Pakistan, and Turkey to help win firearms sales.³ Increasingly seen as a key tool to build relations with US foreign partners and support the US defense industry, the US government has adopted and proposed major reforms to US arms export laws and controls over the past decade. These efforts have been largely focused on reducing some US arms export requirements to enhance US defense companies’ competitiveness. Some of these reforms appear to have added major holes in US checks on arms sales that the United States has used for decades to help prevent bribery, fraud, embezzlement, or other corrupt practices by US and foreign entities.

One of the most significant reforms in US arms export controls came from the Obama administration’s Export Control Reform Initiative (ECRI). From 2013 to 2016, the US government moved tens of thousands of military items considered less critical to the US military’s technological advantage over other countries from the more strictly controlled State Department US Munitions List (USML) to the more loosely controlled Commerce Department

Commerce Control List (CCL) as part of ECRI.⁴ The laws and regulations for the CCL were originally created to oversee sales of civilian goods with potential military applications (often called dual-use goods). More recently, the Trump administration has proposed to move many types of semi-automatic firearms and sniper rifles from the USML to the CCL.⁵

The Trump administration has also removed key initiatives the Obama administration started to better assess and mitigate corruption risks in US grants and sales of arms and related training. In 2016, the State Department created a new assessment framework that required US officials to ask several key questions about corruption when reviewing proposed arms sales. Some of these questions included whether the intended recipient of arms is “known to be or reported to be corrupt, through acts such as permitting illicit trafficking across borders, buying and selling positions or professional opportunities, stealing government assets and resources, engaging in bribery, or maintaining rolls of ghost personnel.”⁶ However, the Trump administration overrode this new framework when they created their new Conventional Arms Transfer policy.

This report assesses the current state of US arms export controls to identify and curb corruption in US arms sales. It first highlights critical corruption risk factors the United States should consider in order to help prevent corruption and fraud in its arms sales. The report then assesses US laws, policies, and regulations aimed at identifying and mitigating corruption and fraud risks in US arms sales. In particular, the report identifies gaps in three US government programs: Foreign Military Sales (FMS), Direct Commercial Sales (DCS), and 600 Series sales. The FMS program is overseen by the State Department but implemented by the Defense Department and covers government-to-government arms sales. The DCS program covers commercial arms sales between US companies and foreign governments, and it is overseen and implemented by the State Department. The Commerce Department oversees commercial arms sales through its 600 Series program. The report concludes with policy recommendations to help fill these gaps in oversight of US arms sales.

4 Colby Goodman, “Key Questions about the US Export Control Reform Initiative,” Security Assistance Monitor, April 18, 2016, https://securityassistance.org/fact_sheet/key-questions-about-us-export-control-reform-initiative.

5 Mike Stone and David Shepardson, “Trump administration moves closer to easing gun exports,” Reuters, November 7, 2019, <https://www.reuters.com/article/us-usa-trump-guns-exclusive/exclusive-trump-administration-rule-changes-to-ease-gun-exports-progress-idUSKBN1XH2Y>.

6 Daniel Mahanty, Annie Shiel, Rachel Stohl, “With Great Power: Modifying US Arms Sales to Reduce Civilian Harm,” Center for Civilians in Conflict, Stimson, Page, 31, <https://civiliansinconflict.org/wp-content/uploads/2018/01/With-Great-Power.pdf>.

1 Colby Goodman and Christina Arabia, “Corruption in the Defense Sector: Identifying Key Risks to US Counterterrorism Aid” Security Assistance Monitor, September 2018, Executive Summary, https://www.securityassistance.org/sites/default/files/SAM%20Corruption%20Report%20Final_1.pdf

2 Colby Goodman and Christina Arabia, “Corruption in the Defense Sector,” page 2.

3 Sam Perlo-Freeman, “Smith & Wesson’s Foreign Bribery Settlement,” Compendium on Arms Trade Corruption, <https://sites.tufts.edu/corruptarmsdeals/smith-wessons-foreign-bribery-settlement/>.

WHAT IS CORRUPTION?

Transparency International defines corruption as the ‘abuse of entrusted power for private gain.’ This definition includes subversion or illegitimate use of resources or authority meant for a particular purpose to further another goal. Corruption in the international arms trade is about much more than bribery, inflated prices, and kickbacks to divert public funds. Government officials in countries receiving arms may divert some elements of the provided arms, services, or investments to provide backing (or “patronage”) for political, territorial, or factional purposes. Government authorized individuals or companies in arms supplier countries may also use their authority to manipulate defense procurement in the purchasing country to favor them over others, which can result in the buyer country obtaining faulty or unnecessary military equipment.

Assessment Gaps in all Corruption Risk Factors

The United States has developed comprehensive laws, policies, and regulations to oversee US arms sales, and it has been a leader in creating laws and regulations to prevent irresponsible arms brokering, defense company bribes, and unwanted re-transfers. Despite these comprehensive efforts, the United States increasingly shows major gaps in its efforts to assess key aspects of corruption risks for proposed arms sales. **The five priority risk factors for identifying corruption in arms sales are: 1) undisclosed and ill-defined military justification for arms; 2) unfair military promotions and salaries; 3) under-regulated and illegitimate arms brokers; 4) ill-monitored defense offsets; and 5) undisclosed, mismatched, or secretive payments.** These gaps vary somewhat among the three prominent US arms sales programs (see Table 1).

The regulatory structure for the DCS program shows the least number of gaps in US efforts to assess corruption risk factors. This program provides robust oversight of agents and brokers, often considered one of the highest corruption risk factors. However, the State Department does not regularly assess the military justification for proposed arms sales as well as the Defense Department does for FMS Sales. When it does review corruption in the recipient country, it often looks at corruption within the recipient government more generally rather than within the specific military units that will receive the arms. There are also some notable gaps in State Department efforts to review defense offsets (see subsection on defense offsets) and to conduct post-export checks.

Type of Check	Foreign Military Sales	Direct Commercial Sales	600 Series
Discusses military justification of arms with foreign officials	Yes	Limited	Limited
Reviews any unfair military promotions or salaries practices	Limited	Limited	Limited
Screens all parties to a proposed arms sale, including finance and insurance brokers	No	Yes	No
Checks all parties against the State Department Watch List	Unlikely	Yes	No
Collects company information on all US and foreign controlled subsidiaries and affiliates	No	Yes	No
Approves arms broker license requests	No	Yes	No
Reviews any political contributions, marketing fees, or commissions	Yes	Yes	No
Assesses corruption risks in defense offsets	No	No	No
Physically checks certain US arms 90 days after they were delivered	Yes	No	No

Table 1: Key Differences in US Anti-Corruption Checks on Arms Sales

The US arms sales program with the most gaps in its efforts to assess corruption risks in proposed arms sales is the 600 Series sales program, which permits US companies to sell arms directly with foreign countries or companies with Commerce Department approval. Critically, the Commerce Department does not collect key information on arms agents or brokers before approving arms deals. They do not require companies to notify them of any political contributions, marketing fees, or commissions or any defense offsets they provide as part of arms deal, both of which can help prevent bribery and other forms of corruption. The Commerce Department also has key limitations in its efforts to weed out unwanted parties to an arms deal compared to the State Department (see subsection on effective screening tools) and to conduct post-export reviews of US arms sales.

Under-scrutinized Defense Offset Contracts

The US government’s efforts to identify and prevent corruption in defense offset contracts presents clear challenges across all three US arms sales programs. Defense offsets exist when an “exporting company agrees to spend money [sometimes more than half of the total cost of the arms deal] in the recipient

country to ‘offset’ the foreign currency cost of the arms deal.⁷ While many of these offset deals are legitimate, major arms corruption deals in the past have often included offsets as way to hide bribery or payments to supporters of political leaders in the country buying the weapons. According to the World Peace Foundation, 11 of their 40 cases of arms sales corruption included defense offsets.⁸ US defense company attorneys have also been aware of foreign offset advisors knowingly encouraging US companies to provide funds to a shell company, which was used to funnel money to a foreign official.⁹

However, the Defense and State Departments take a very hands off approach to reviewing US defense company offsets in connection with proposed arms deals, especially when the offsets do not include US government-controlled defense articles or services. The Pentagon does not participate in negotiations between foreign countries and US companies on defense offsets. In some cases, the Pentagon has not notified Congress of defense offsets when they exist in proposed major arms sales. It also appears that the State Department requirement for US companies to notify them of any political contributions, marketing fees, and commissions does not apply to many types of defense offsets. At the same time, US defense companies may receive reimbursements from the Defense Department for certain FMS sales, which could result in US taxpayer money fueling corruption in a foreign country.

7 Sam Perlo-Freeman, “Red Flags and Red Diamonds: the warning signs and political drivers of arms trade corruption,” World Peace Foundation, Occasional Paper #21, September 2019, page 16, <https://sites.tufts.edu/wpf/files/2019/09/Red-Flags-Red-Diamonds-final-20190930.pdf>,

8 Ibid.

9 Bill Steinman, “Can You Trust Your Offset Advisor,” The FCPA Blog, August 3, 2017, <https://fcpcbog.com/2017/8/3/bill-steinman-can-you-trust-your-offset-advisor/>. For more information on defense offset contracts associated with American defense firms, see the Transparency International Report A Mutual Extortion Racket: The Military Industrial Complex and US Foreign Policy—The Cases of Saudi Arabia and UAE.

POLICY RECOMMENDATIONS

Executive Branch

Recognize the need to assess corruption risks in State and Defense Department policies or guidance on arms sales.

While the Trump administration’s new Conventional Arms Transfer (CAT) policy includes a few criteria that could require US government officials to review corruption risks in arms sales, it does not explicitly call on the US government to assess corruption. As more than 100 countries have done when they agreed to the UN Arms Trade Treaty, the US government should consider adding a specific reference to assessing corruption in

Effective Screening Tool Sidelined

As the main regulator of US defense companies engaged in exporting and brokering US arms exports around the world, the State Department has developed a comprehensive private watch list to identify any suspect individuals or companies included in a proposed arms sale. According to the Government Accountability Office (GAO), this list includes over 200,000 entries in which the State Department or other US agencies or law enforcement entities have questioned the entries’ legitimacy. In 2004, for instance, the State Department added an entry to this list that says one person is an “identified arms trafficker in Czech Republic – should be denied.”¹⁰ In another case, the State Department stated “there appear to be several suspicious characteristics of this company...,” future arms export applications should be “very carefully scrutinized.”¹¹ The State Department uses this list to push defense companies to change their arms sales application or deny the application.

However, the Commerce Department does not regularly check this list in their efforts to screen proposed arms sales. The Commerce Department does have its own internal watch list it uses to identify suspect individuals or companies for dual-use and arms exports, but Commerce Department officials have said the State Department list includes more useful information because of the State Department’s long history in reviewing arms sales applications. Both State and Commerce Department officials are working together to try to share the list more regularly, but State Department officials say the Commerce Department’s legal and regulatory differences are complicating the effort. In particular, the Commerce Department requires more burden of proof for denying arms sales applications.

10 US House of Representatives, “The AEY Investigation,” Committee on Oversight and Government Reform, Majority Staff Analysis, June 24, 2008, page 9, <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/migrated/20080624102358.pdf>.

11 Ibid, page 8. <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/migrated/20080624102358.pdf>.

its implementation guidelines for the new CAT policy. It should also introduce specific guidance on how to better assess corruption risks, including what to assess, when to assess it, and how to go about obtaining key information.

Enhance Commerce Department corruption risk assessment controls for 600 Series sales.

The Commerce Department can plug many of its gaps in identifying and mitigating corruption by changes in regulation. A key priority is for the Commerce Department to require more information about any agents or brokers, including financiers, involved in an arm

deal and any defense company political contributions, marketing fees, and commissions and defense offsets. Another priority is for the Commerce Department to obtain access and use of the State Department’s private watch list as a tool to vet arms export applications. The Commerce Department should also consider collecting more information on defense companies’ parent firms, owners, board of directors, and US and foreign controlled subsidiaries that participate in arms sales.

Strengthen Country Team Assessments and end-use checks to better assess corruption risks in proposed arms sales.

State Department Country Team Assessments (CTA) and pre-export end-use checks provide a unique opportunity to conduct more robust assessments of risk in proposed US arms sales. However, these assessments often look at corruption concerns more broadly in the country, if at all, and are not always triggered for corruption-related concerns. The State Department could change that by broadening when checks are triggered and the types of assessment questions it uses to evaluate proposed arms sales. For instance, a check could be triggered when there is a poor military justification for weapons, corruption concerns within the proposed military unit, reports of bribery or contract manipulation, or other corruption risk factors identified below.

Improve oversight on defense offset deals. While the State Department has increasingly sought to better understand the risks of defense offset deals, the focus of its efforts are on protecting US jobs and military technology. Defense offsets, however, provide clear risks of fueling corruption in recipient countries. The World Trade Organization forbids offset contracts for other economic sectors except the defense sector. The United States should seek to close this loophole and end defense offset contracts. As a stop gap measure, the Defense and State Departments can mitigate the situation by elevating their reviews of offset arrangements. The State and Defense Departments should also consider prohibiting companies from providing cash in lieu of offset contracts and require defense companies to provide summary information on offset contracts to the public.

Congress

Enhance reporting on defense offset contracts and disclosures on political contributions, marketing fees, or commissions in notifications on major arms sales to Congress.

Congress should require that the Defense and State Departments provide information on any offset advisors and potential recipients of offset agreements to help Congress assess corruption risks in defense offsets. Congress should request that GAO conduct a study on any reimbursements the Defense Department has provided to defense companies that engage in defense offsets as part of the Foreign Military Sales program. A key research question would be for the GAO to evaluate whether any of the recipients of defense offset arrangements have or could pose risks for corruption.

Legislate that firearms and associated components remain categorized as a munition.

Though many types of small arms may be commercially available in the United States, the potential effects of easing export controls of these arms to US foreign policy and national security could be significant, and in some cases, even catastrophic. Many of the US arms export laws and the International Traffic in Arms Regulations (ITAR), including requiring brokers to register and receive a license before engaging in brokering activities, were created with concerns about the effects of firearms trafficking in mind.

Improve the standard terms and conditions for government-to-government and commercial arms sales, especially for high risk items and/or high-risk recipients.

Congress should require the Defense, State, and Commerce Departments to strengthen their standard terms and conditions for all arms sales. These new terms and conditions should require that the recipient of US arms comply with the US Foreign Corrupt Practices Act and the OECD Anti-bribery Convention as well as all international humanitarian and human rights law.¹² For all direct commercial sales and 600 series arms sales, Congress should also consider expanding the requirement for companies to obtain a certification from the prospective end-user that they will not re-export the items or use them in contravention of US arms and dual-use export laws and regulations.

12 The full name is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The convention is available here <http://www.oecd.org/corruption/oecdantibriberyconvention.htm>

KEY CORRUPTION RISK FACTORS FOR ARMS SUPPLIERS

The key to more effectively reducing corruption in the arms trade lies in understanding where the common risk factors exist and finding ways to minimize these risks. The five most common types of corruption risk factors for countries exporting defense goods and services can be broadly categorized into the following: 1) justification for the purchase of arms is not well defined and linked to national defense strategy; 2) military personnel structures and practices allow for strong favoritism and deep divisions between and within military and security force units; 3) under-regulated and illegitimate agents and brokers; 4) ill-monitored defense offset contract arrangements; and 5) unknown, secretive, or off-budget payment schemes. But how does one assess these risks for arms supplier countries?

The below descriptions of the risk categories and related questions provide an overview of how to assess these risk factors. Much of the descriptions and questions are based on Transparency International Defence and Security Program (TI-DS) research on defense sector corruption, its two global indexes, and a recent publication by the World Peace Foundation highlighting critical red flags for identifying corruption in arms sales. TI-DS' Government Defense Anti-Corruption Index (GDI) identifies corruption risks within national defense sectors in five key areas – political, financial, personnel, operations, and procurement.¹³ TI-DS' Defense Companies Index (DCI) assesses top defense companies on ten key corruption risk areas.¹⁴ The five risk assessment factors are explained in greater detail below.

1. Ill-defined and Unlinked Military Justification

When a country's request to purchase major weapons systems "seem[s] out of proportion to a country's [military] capabilities and requirements" or unlinked to its defense strategy, this is a clear signal that corruption may be involved.¹⁵ In South Africa, for instance, many defense experts questioned why the country needed 27 advanced combat aircraft and three submarines given that they faced limited national threats when the country requested to buy them in the 1990s.¹⁶ It later came out that the companies involved in the deal had paid "bribes to the tune of hundreds of millions of dollars" to South African officials so they

13 Oliver Cover and Saad Mustafa, "Identifying Corruption Risks in the Defense and Security Sector: Empirical Evidence using the Government Defense Anti-Corruption Index," *The Economics of Peace and Security Journal*, Vol. 9, No. 2 (2104), <http://ti-defence.org/wp-content/uploads/2016/03/141027-Identifying-corruption-risks-in-the-defence-and-security-sector.pdf>.

14 Katherine Dixon, Charlotte Linney, Mia Paukovic, Andrew Watson, "Out of the Shadows: Promoting Openness and Accountability in the Global Defence Industry," September 2018, http://ti-defence.org/wp-content/uploads/2018/09/Out_of_the_Shadows_WEB3.pdf

15 Sam Perlo-Freeman, "Red Flags and Red Diamonds: the warning signs and political drivers of arms trade corruption," World Peace Foundation, Occasional Paper #21, September 2019, page 12, <https://sites.tufts.edu/wpf/files/2019/09/Red-Flags-Red-Diamonds-final-20190930.pdf>.

16 World Peace Foundation, "The South African Arms Deal," *Compendium of Arms Trade Corruption*, <https://sites.tufts.edu/corruptarmsdeals/the-south-african-arms-deal/>

would favor their weapons systems over other competitors.¹⁷ One South African official even "unilaterally decided to remove cost as a consideration" for the combat aircraft. Despite the large amount of money the South African's spent on the combat aircraft, most of them are no longer operational.¹⁸ Of course, there may be other reasons why countries chose to buy weapons that do not fit their national security needs, including strategic relationship building or national image, which is why it is important to review the below questions.

Military Justification Risk Questions

- 1) Are the arms and related services sufficiently described and linked to a national security strategy or legitimate national security threats?
- 2) Will the arms compliment currently known weapons systems or clash with them? Do they seem redundant or of questionable functionality? Does the country have the personnel and logistics or a realizable plan to use and maintain the weapons?
- 3) Are defense procurement oversight mechanisms, including through legislative bodies, in place and are these oversight mechanisms active and transparent? Are defense procurement orders released publicly?
- 4) Does the country have legislation covering defense procurement with clauses specific to corruption risks, and are any types of defense procurement exempt from these laws?
- 5) Is the weapons contract a single-source contract? Are there any signs of contract manipulation to favor one or more sellers or bribery?
- 6) Are there other indicators of corruption involved in the sale, such as questionable agents, brokers, consultants, defense offset contracts, or payments?

2. Undisclosed or Unfair Promotions and Salaries

In Iraq, Mali, Nigeria, Yemen, Somalia, and other countries, persistent corruption and divisions within the military and security force personnel have severely limited these forces' abilities to respond to terrorist threats and in many cases fueled terrorist recruitment.¹⁹ US senior military personnel and defense analysts have said that the Iraqi military's lack of success against ISIS under former Prime Minister Nuri al-Malki was directly

17 <https://sites.tufts.edu/wpf/files/2019/09/Red-Flags-Red-Diamonds-final-20190930.pdf>

18 Ibid. Page 13, <https://sites.tufts.edu/wpf/files/2019/09/Red-Flags-Red-Diamonds-final-20190930.pdf>.

19 Colby Goodman & Christina Arabia, Security Assistance Monitor, "Corruption in the Defense Sector," page 2, https://www.securityassistance.org/sites/default/files/SAM%20Corruption%20Report%20Final_1.pdf.

connected to corruption. TI-DS found that senior Iraqi military leaders, "appointed on the basis of factional and sectarian loyalty [frequently with Shia supremacist convictions]...were far more focused on amassing personal fortunes through corrupt practices, including the embezzlement of public resources and extortion of those under their command, than on maintaining an effective fighting force and assessing intelligence accurately."²⁰ These appointments, including new special units under direct command of al-Malki, created strong divisions within the military and security forces. "Corrupt practices similarly resulted in black market sales of military fuel, ammunition, spare parts, and service tools required to keep military equipment running."²¹

Promotions and Salary Risk Questions

- 1) Is it clear which military or security force unit will receive the arms?
- 2) What is their position within the overall military structure? Do they fall outside the regular command structure and take orders directly from a senior political leader?
- 3) Are there any reports of military unit leaders paying for their posts? Do the unit soldiers receive salaries and benefits comparable to other similar military units? Have there been any protests or mutinies within this unit?
- 4) Do they take precautions to prevent corruption, including theft or diversion of arms?
- 5) Is there any information on the military unit being involved in illicit trafficking or connections with organized crime or terrorist organizations?
- 6) Are there any reports of ghost soldiers or ghost units?
- 7) Have they engaged in serious human rights violations in the recent past? If so, what are the reasons behind those violations? Were investigations sufficiently investigated and any guilty parties prosecuted?

3. Under-scrutinized and Illegitimate Agents, Brokers, and Consultants

The use of agents, middlemen, brokers, or consultants to help facilitate an arms sale, including soliciting, promoting, financing, transporting, and much more, is widely recognized as one of the "highest risk factors for corruption" in arms sales.²² In 2016, a global survey of compliance officers found the "main reasons behind increases in company bribery and corruption risks were perceived to be increases in the number of third

20 Karolina MacLachlan, "The Fifth Column: Understanding the Relationship Between Corruption and Conflict," *Transparency International Defence & Security*, July 2017, pages 24-26, http://ti-defence.org/wp-content/uploads/2017/09/The_Fifth_Column_Web.pdf.

21 Ibid. Page 26, http://ti-defence.org/wp-content/uploads/2017/09/The_Fifth_Column_Web.pdf.

22 Katie Fish, Michelle Man, "License to bribe?: Reducing corruption risks around the use of agents in defence procurement," *Transparency International Defence & Security*, June 2016, page 7, <http://ti-defence.org/wp-content/uploads/2016/06/Licence-to-Bribe-web.pdf>.

party relationships, as well as global expansion, and increased enforcement of regulations.²³ According to a TI-DS study in 2016 on arms brokers in defense procurement, some of the key risks in employing agents and brokers in arms sales are the manipulation of contract requirements, conflict of interest problems, the delivery of offset arrangements to politically connected individuals, and the facilitation of bribery, among others.²⁴ In 2010, BAE Systems pled guilty and paid a \$400 million fine in the United States for its actions, including the use of agents and shell companies, to bribe Saudi officials into buying their military aircraft.²⁵

Agents and Brokers Risk Questions²⁶

- 1) Are all arms brokers involved in the deal, including those promoting, financing, freight forwarding, and transporting, identified to governmental authorities for approval of arms sales?
- 2) Who are the beneficial owners of the companies acting as brokers? Do the agents or brokers have connections with politicians accused of corruption in the recipient country? Are they owned or significantly influenced by foreign governments or entities?
- 3) Have any of the parties to the deal been charged or convicted of bribery, fraud, smuggling, trafficking, espionage, or similar crimes in the United States or other countries? Is there any information of other related activities, including arms stockpiling?
- 4) Have any of the brokers provided political contributions, gifts, or charitable donations as part of the deal?
- 5) Is the brokering company relatively new? Does it have a physical address, a staff, relevant work experience? Do the agents or brokers use shell companies to hide practices?
- 6) Does the transportation route appear unusually circuitous?

23 Katie Fish, Michelle Man, "License to bribe?: Reducing corruption risks around the use of agents in defence procurement," *Transparency International Defence & Security*, June 2016, Page 7, <http://ti-defence.org/wp-content/uploads/2016/06/Licence-to-Bribe-web.pdf>.

24 Ibid, pages 12-14, <http://ti-defence.org/wp-content/uploads/2016/06/Licence-to-Bribe-web.pdf>.

25 US Department of Justice, Office of Public Affairs, "BAE Systems PLC Pleads Guilty and Ordered to Pay \$400 Million Criminal Fine," *Justice News*, March 1, 2010, <https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine>. World Peace Foundation, The Fletcher School, "The Al Yamamah Arms Deals," *Compendium of Arms Trade Corruption*, <https://sites.tufts.edu/corruptarmsdeals/the-al-yamamah-arms-deals/>.

26 Sam Perlo-Freeman, "Red Flags and Red Diamonds: the warning signs and political drivers of arms trade corruption," World Peace Foundation, Occasional Paper #21, September 2019, page 12, <https://sites.tufts.edu/wpf/files/2019/09/Red-Flags-Red-Diamonds-final-20190930.pdf>.

4. Ill-monitored and Under-publicized Defense Offset Contracts

The frequent lack of transparency and oversight over defense offset contracts and the increased enforcement of anti-bribery laws makes defense offsets another key corruption risk in arms sales. Defense offsets, sometimes also called “industrial participation,” exist when an “exporting company agrees to spend money [sometimes more than half of the total cost of the arms deal] in the recipient country to ‘offset’ the foreign currency cost of the [arms] deal.”²⁷ In short, they are “sweeteners” associated with the arms deal. In the World Peace Foundation’s online “Compendium of Arms Trade Corruption,” which includes 40 cases of corruption, at least 11 cases included defense offsets.²⁸ US defense company attorneys have also highlighted how foreign offset advisors have pushed US companies into funneling money to inappropriate foreign officials.²⁹

Companies and foreign governments with corrupt intentions may be attracted to defense offsets because they “create an extra layer of distance and deniability between the company and the corruption....”³⁰ They can also provide income or employment to a wide range of people, and thus it can be an easy way for the political elite to provide benefits to their key supporters. Many of these contracts are opaque or even entirely off the books; the lack of transparency on both direct (related to the defense industry) and indirect (unrelated to the defense industry) defense offsets may allow defense companies to skirt anti-bribery efforts.³¹ Even more problematic can be offset “credits” and the brokers associated with them. Since offset deals and the associated credits are usually opaque, they have been considered a high risk for corruption.

Defense Offset Contract Risk Questions³²

- 1) Has the defense company provided detailed information, including all the recipients, deliverables, contract value, and offset credits, of all of the planned defense offsets?
- 2) Who are the beneficial owners of the companies slated to receive the offsets? Do the owners or individuals in the

27 Sam Perlo-Freeman, “Red Flags and Red Diamonds: the warning signs and political drivers of arms trade corruption,” World Peace Foundation, Occasional Paper #21, September 2019, page 16, <https://sites.tufts.edu/wpf/files/2019/09/Red-Flags-Red-Diamonds-final-20190930.pdf>,

28 Ibid.

29 Bill Steinman, “Can You Trust Your Offset Advisor,” The FCPA Blog, August 3, 2017, <https://fcpcbog.com/2017/8/3/bill-steinman-can-you-trust-your-offset-advisor/>. For more information on defense offset contracts associated with American defense firms, see the Transparency International Report A Mutual Extortion Racket: The Military Industrial Complex and US Foreign Policy—The Cases of Saudi Arabia and UAE.

30 Ibid.

31 Katherine Dixon, Charlotte Linney, Mia Paukovic, Andrew Watson, “Out of the Shadows: Promoting Openness and Accountability in the Global Defence Industry,” Transparency International Defence & Security, September 2018, Page 16, http://ti-defence.org/wp-content/uploads/2018/09/Out_of_the_Shadows_WEB3.pdf.

32 Sam Perlo-Freeman, “Red Flags and Red Diamonds: the warning signs and political drivers of arms trade corruption,” World Peace Foundation, Occasional Paper #21, September 2019, page 12, <https://sites.tufts.edu/wpf/files/2019/09/Red-Flags-Red-Diamonds-final-20190930.pdf>.

companies have connections with the political elite or are there other conflicts of interest?

- 3) Do the individuals or companies have any prior work expertise in the areas they will fulfill as part of an offset agreement?
- 4) Will the exporting defense company be required to use any brokers in the recipient country to find individuals or companies to perform offset requirements? If so, how are these brokers connected with the political elite or other companies?
- 5) Are any shell companies involved in the defense offsets?

5. Undisclosed, Mismatched, or Secretive Payments

How governments plan to pay for an arms sale is another key corruption risk factor. In countries where senior political leaders in charge of defense and security have complete, unquestioned control over the country’s treasury or natural resources, there is a strong risk that these leaders will use corrupt practices to purchase weapons. In Nigeria, former military leaders’ theft of up to \$15 billion using various fraudulent arms procurement scams paralyzed their military efforts to combat Boko Haram. As part of their corrupt scheme, the Nigerians reportedly “skimmed \$20 million from an internet surveillance contract directly awarded to an Israeli company in defiance of public procurement competition rules” in 2013.³³ They also embezzled millions via “seven arms contracts directly awarded to a Ukrainian company.”³⁴ Even in countries that provide some minimal transparency on military budgets, they may choose to pay for the arms using various off-budget mechanisms with more limited oversight potential because it is easier to hide bribes and other corruption. Saudi Arabia regularly uses these off-budget mechanisms to pay for arms sales.³⁵

Price and Payment Risk Questions

- 1) What is the level of transparency, accountability, and corruption within the defense procurement system of the purchasing government?
- 2) Does the overall price of the arms deal or the price per unit of military items seem significantly higher than the market norm?
- 3) Are there any discrepancies between the price of what the purchasing government requested and what the company has provided?
- 4) How does the government plan to pay for the weapons? Is

33 Katherine Dixon, Andrew Watson and Gavin Raymond, “Weaponizing Transparency: Defence Procurement Reform as a Counterterrorism Strategy in Nigeria,” Transparency International Defence & Security, May 2017, Page 12, http://ti-defence.org/wp-content/uploads/2017/05/Weaponising_Transparency_Web.pdf.

34 Ibid.

35 “Saudi Arabia Government Defence Anti-Corruption Index 2015” (London, UK: Transparency International Defence and Security Program, 2015), http://government.defenceindex.org/generate-report.php?country_id=6333.

the money coming from the normal source of government procurement funds or is it coming from off-budget mechanisms?

- 5) Has the government official(s) requesting to the purchase been accused of fraud or bribery? Is he or she under the

authority of the government office that typically procures weapons for that military or security force?

- 6) Would the purchase of the arms compromise other key economic or social needs of the country?

STATUTORY BASIS FOR MITIGATING CORRUPTION RISKS IN EXPORTS

Arms Export Control Laws

The United States has long recognized the importance of comprehensive oversight of arms sales abroad, including related to corruption. During the Nixon and Ford administrations, the United States was aggressively pushing US arms sales abroad including to countries such as Iran, Saudi Arabia, and Kuwait without much congressional and public knowledge.³⁶ These administrations sought to use arms sales to strength relations during the Cold War and to help maintain a steady supply of oil. Some members of Congress, however, feared that the sales could drag the United States into another armed conflict like Vietnam without Congress or the public even debating the issue. According to US Senator Gaylord Nelson (D-WI) in 1973, foreign military sales involve the United States in military activity and “has gotten us [America] into trouble in the past and could easily do so again.”³⁷ Congress was also worried about the administration’s apparent lack of analysis on the potential ramifications of embracing governments such as Shah in Iran that “unabashedly violate[d] almost every human rights guarantee...” to maintain their power.³⁸

At the same time, Congress was uncovering how US defense companies were threatening US foreign policy interests by paying large bribes to individuals in Europe, East Asia, and Latin American to help secure major arms sales. In 1975, US Senator Frank Church, chair of the Subcommittee on Multinational Corporations, organized hearings to investigate allegations of foreign bribery by two US defense companies (Lockheed and Northrop) and two oil companies.³⁹ These hearings revealed that Lockheed had made bribes to several people associated with the Japanese government, including an individual that been imprisoned as “Class A war crimes suspect”

36 Peter K. Tompa, “The Arms Control Act and Congressional Codetermination over Arms Sales,” American University International Law Review, 1986, vol.1, Issue 1, Article 14, Pages 293-299, <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1654&context=auilr>.

37 Ibid. Page 294 footnotes, <https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1654&context=auilr>.

38 Stephen B. Cohen, “Conditioning US Security Assistance on Human Rights Practices,” Scholarship @ Georgetown Law, 1982, page 251, <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2605&context=facpub>.

39 Hans H. Baerwald, “Lockheed and Japanese Politics,” Asian Survey, Vol. 16, No. 9 (Sep., 1976), Pages 817-829, online at https://www.jstor.org/stable/2643243?read-no-w=1&refreqid=excelsior%3Aeb1ccf1c148b977de1ab38185d685b45&seq=1#page_scan_tab_contents.

and the Prime Minister to encourage Japan to buy their military aircraft.⁴⁰ In response to the allegations, Japan canceled all potential purchases of certain US arms and sacked their prime minister. The subcommittee also discovered that some defense companies may have been bribing Latin American government officials to buy expensive US aircraft instead of providing sorely needed funds for their country’s healthcare and education services.⁴¹

In response to the above concerns, Congress passed two key pieces of legislation to govern US arms sales in the mid-1970s: the Arms Export Control Act (AECA) and revisions to the Foreign Assistance Act (FAA). These laws established several criteria the US government must review before approving arms sales that are strongly connected to corruption risks in foreign countries. According to these laws, the President is required to assess several aspects when considering a proposed arms sale, including whether or not a proposed arms sale would ignite or exacerbate an ongoing conflict, be used in human rights violations, contribute to an arms race, support international terrorism, or “adversely impact the financial or economic situation in the recipient country,” among others.⁴² Annual congressional appropriation bills also regularly ban US arms exports to countries whose elected leaders are deposed by a military coup d’état.⁴³ Corruption is often one of the main reasons behind a military coup d’état and can contribute or fuel arms races, armed conflict, human rights violations, terrorist recruitment, and depleted national budget funds for economic or social programs. **However, neither the AECA nor the FAA specifically call on the US government to assess corruption risks in arms sales to foreign countries.**

40 Ibid. Page 817.

41 Author interview with one of the staff members of the Church Committee at the time in October 2017.

42 Arms Export Control Act of 1976, Pub. L. No. 90-629, Section 36, Page 34, online at <https://legcounsel.house.gov/Comps/Arms%20Export%20Control%20Act.pdf>.

43 Alexis Arief, Marian L. Lawson, Susan G. Chesser, “Coup-Related Restrictions in US Foreign Aid Appropriations,” Congressional Research Service, In Focus, Updated July 23, 2019, <https://fas.org/sgp/crs/row/IF11267.pdf>

The Links between Corruption and Conflict

There is a growing body of research that links corruption and armed conflict. Some experts such as Sarah Chayes have argued persuasively that corruption has been a root cause of the Arab Spring protests and regime changes, as well as the rise of some violent extremist groups. Systemic corruption--repurposing the functions of state for the benefit of narrow elites--helped create conditions that brewed discontent, including declining economic opportunities for the many.

Large-scale analysis conducted by the Institute of Economics and Peace (IEP) suggests there is also 'tipping point' beyond which any increase (even small) in perceived corruption levels results in an increased risk of internal conflict and violence. Once a country crosses the 'tipping point' – around the Corruption Perception Index score of 40 out of 100 points - it sees an increase in indicators of conflict, including political terror and instability, violent crime, organized conflict, and access to small arms and light weapons.

Institutional fragility is particularly dangerous when it affects institutions responsible for security

and access to justice. Corruption in the police and the judiciary appears to have the most statistically significant relationship with indicators of peace. In countries with high levels of corruption in the defense sector, it is also unlikely these defense forces will be capable of responding to insecurity or protecting the population, should the country tip into conflict.

The above information is taken directly from TI-DS's report entitled *The Fifth Column: Understanding the Relationship between Corruption and Conflict* published in July 2017.

The AECA also establishes a specific set of controls and requirements to mitigate corruption risks from US and foreign defense companies through commercial arms sales. The law requires US defense companies to first register with the US government and then to request permission (a license) on a transaction-by-transaction basis to export arms abroad. In the mid 1990s, Congress amended the AECA to curb arms brokers that were greasing their way past national and international arms embargoes in Africa and beyond by operating in multiple countries and hiding behind various activities and shell companies.⁴⁴ These legal provisions require US persons brokering US or foreign weapons in the United States or abroad and foreign persons brokering US weapons anywhere to register and obtain a license from the US government.⁴⁵ Exporters and brokers must also certify to the US government that none of

44 Loretta Bondi and Elise Keppler with a Preface by Kathi Austin, "Casting the Net? The Fund for Peace, Arms and Conflict Program," https://www.files.ethz.ch/isn/92945/200101_Casting%20the%20Net.pdf.

45 Arms Export Control Act of 1976, 22 USCS § 2778 (2019).

their employees or affiliates have been involved in fraud, bribery, and smuggling, among other items.⁴⁶

US laws also requires the President to establish a list of defense articles and defense services that should be controlled for export (the US Munitions List – USML) and to make a determination as to which of those items constitutes Significant Military Equipment (SME) (see table 2 below).⁴⁷ The United States also classifies SME with a "nonrecurring research and development cost of more than \$50 million or a total production cost of more than \$200 million" as Major Defense Equipment.⁴⁸

Category	Significant Military Equipment (SME)	Not SME
I: Firearms*	Automatic and semi-automatic firearms, combat shotguns, silencers	Riflescopes, parts and components for firearms
IV: Launch Vehicles, Guide Missiles, etc.	Rockets, missiles, bombs, torpedoes	Rocket motors
VII: Ground Vehicles	Tanks, armored vehicles	Armored hulls, armored turrets, and turret ring
VIII: Military Aircraft	Fighter jets, attack helicopters, UAVs	Some military transport planes
IX: Military Training	Training on classified items	Military training not directly related to US arms
XII: Fire Control, Imaging, Guidance	Bomb sights, night vision goggles	Parts and components

* The Trump administration has proposed to move the firearms in italics from the US Munitions List to the Commerce Control List.
Source: International Traffic in Arms Regulations, "US Munitions List," Part 121.

Table 2: Examples of US Defense Articles and Services on the USML

To help prevent bribery in government-to-government and commercial arms sales, the AECA stipulates that the President establish regulations to provide "adequate and timely reporting on political contributions, gifts, commissions, and fees" as part of these agreements.⁴⁹ The law stipulates that no such contribution shall be made unless the amount is "reasonable, allocable to such contract, and not made to a person who has solicited, promoted, or otherwise secured such sale, or has held himself out as being able to do so, through improper influence."⁵⁰ A separate law requires US companies to report annually on defense offsets in connection with the sale of arms on the USML where the offset agreements exceed \$5 million.⁵¹

The AECA placed a high importance on ensuring US arms are not misused or diverted to unwanted end-users by creating an end-use monitoring program for both government-to-government and commercial arms sales. It states that the end-

46 Arms Export Control Act of 1976, 22 USCS § 2778 (2019).

47 Arms Export Control Act of 1976, 22 USCS § 2778 and 22 USCS § 2794 (2019).

48 International Traffic in Arms Regulations, "Part 120 – Purpose and Definitions," 2019, https://www.ecfr.gov/cgi-bin/text-idx?SID=70e390c181ea17f847fa696c47e3140a&mc=true&node=pt22.1.120&rgn=div5#se22.1.120_18.

49 Arms Export Control Act of 1976, 22 USCS § 2779 (2019).

50 Ibid.

51 The Defense Production Act Amendments of 1992, see <https://www.govinfo.gov/content/pkg/CFR-2016-title15-vol2/pdf/CFR-2016-title15-vol2-part701.pdf>.

use monitoring program should identify arms exports that are "high-risk," including companies or individuals that have been indicted or convicted of certain types of crimes or are otherwise prohibited from participating in US government contracts.⁵² The program must also seek a "reasonable assurance" that the recipient is complying with contractual requirements and that US arms are "being used for the purposes for which they were provided."⁵³ The law calls on the President to verify the end-use for US arms that include sensitive technology or are vulnerable to diversion or misuse. The AECA also states that the President must provide a report to Congress on its end-use monitoring activities and if a recipient of US arms violates the AECA.

Congress also added several other mechanisms to improve congressional oversight of US arms sales. In a rebuke to President Nixon and President Ford's secretive arms sales, the AECA stipulates that the President must notify Congress of proposed major arms sales that meet a certain dollar threshold (see Table 4 for details). These notifications must also include information on any political contributions and defense offsets.⁵⁴ Congress may then choose to block the sale with a joint congressional resolution of disapproval or ignore the sale.⁵⁵ If, however, senior leaders from both political parties in Congress agree to oppose the sale, often with support of the public, an official vote may not be needed. Congress also requires the President to submit a report at the beginning of each year and quarterly outlining planned sales of government-to-government and commercial arms sales.⁵⁶ At the end of the year, the law requires the administration to provide an annual report to Congress, which is made public, with details on arms sales authorizations and deliveries to every country for both government-to-government and commercial arms sales.

Dual-Use Export Control Laws

In comparison to US arms export laws, Congress sought to provide a much more permissive environment for US companies when they created US laws governing the export of dual-use items starting in the 1960s. Dual-use items are traditionally considered as goods that are predominantly used for civilian purposes, but may be used for military purposes. In the 1950s, the United States had imposed a complete embargo on all trade with countries in the Soviet bloc to slow the economic and military growth of the Soviet Union.⁵⁷ By the late 1960s, however, Congress was increasingly concerned that the embargo was

52 Arms Export Control Act of 1976, 22 USCS § 2785 (2019).

53 Ibid.

54 Arms Export Control Act of 1976, 22 USCS § 2776 (2019)

55 Paul K. Kerr, "Arms Sales: Congressional Review Process," Congressional Research Service, Updated August 14, 2019, <https://fas.org/sgp/crs/weapons/RL31675.pdf>.

56 Arms Export Control Act of 1976, 22 USCS § 2765 (2019).

57 Christopher J. Donovan, "The Export Administration Act of 1979: Refining United States Export Control Machinery, Boston College International and Comparative Law Review, Vol. 4, Issue 1, Article 5, 1981, <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1577&context=iclr>.

not achieving its intended goals.⁵⁸ Instead, they worried the controls were just hurting US businesses and trade. In response, Congress passed a new version of the Export Administration Act in 1979 that directed the administration to "give economic factors more weight when using controls to further the foreign policy or national security" of the United States.⁵⁹ It established six criteria the administration should use when considering whether or not to establish controls on dual-use goods, including the likely impact of the controls on the US economy.

Much of the same approach to governing US exports of dual-use items is included in a law passed in late 2018 entitled the Export Control Reform Act (ECRA), which replaced the 1979 act. However, members of Congress that approved the key arms export laws in the 1970s would probably not have guessed that the laws governing dual-use goods would one day govern many arms and related parts widely used by foreign militaries. Importantly, the ECRA does not have as many anti-corruption provisions as the AECA.

The ECRA authorizes the President to impose controls on the export of dual-use and arms or military equipment (600 series) on the Commerce Control List (CCL) for a select set of reasons (see Table 3 for examples of the types of items that are now controlled under the CCL). The President may use export controls "only after full consideration of the impact on the economy of the United States and only to the extent necessary...to restrict the export of items which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States..." among other reasons.⁶⁰ Similar to the AECA and the FAA, the ECRA calls on the President to control dual-use and military items to protect "human rights and the promotion of democracy" and to ensure these items are not used in "acts of terrorism" and the "acquisition of destabilizing numbers or types of conventional weapons."⁶¹ However, there is no mention of controls on items that could "adversely impact the financial or economic situation in the recipient country," which is included in the AECA.

58 Christopher J. Donovan, "The Export Administration Act of 1979: Refining United States Export Control Machinery, Boston College International and Comparative Law Review, Vol. 4, Issue 1, Article 5, 1981, <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1577&context=iclr>.

59 Ibid. Page 89. <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1577&context=iclr>. Page 89.

60 Export Control Reform Act of 2018, 50 USCS § 4811 (2019).

61 Ibid.

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Category	Dual-Use	Arms (600 Series)
9: Aerospace and Propulsion	Space launch vehicles, spacecraft, including satellites, non-military unmanned aerial vehicles (UAV), and certain turbojet engines	Parts for fighter jets, attack helicopters, and military UAVs, military cargo aircraft and helicopters, military aircraft and helicopter engines, and UAV production facilities
5: Telecommunications	Encryption equipment and related technology and software and surreptitious interception devices and related software	Telecommunications equipment specially designed for military application
3: Electronics Design, Development, and Production	Integrated circuits, electronic assemblies, and high-speed pulse generators	High-frequency surface wave radars and certain integrated circuits
1: Materials, Chemicals, Toxins	Depleted uranium, metal power production equipment, metal alloys, and non-military body armor	Propellants, detonators, tear gas, and riot control agents
0: Nuclear Materials and Miscellaneous	Software for some nuclear reactors, oil and gas exploration equipment, law enforcement striking weapons, and hunting shotguns	Parts for tanks and armored vehicles, including diesel engines, stun hand grenades, unarmed and unarmored military vehicles

Source: Export Administration Regulations, "Commerce Control List."

Table 3: Examples of Dual-Use and Military Items on the Commerce Control List (CCL)

The ECRA also requires the President to create a licensing system whereby US companies or individuals must apply for US government approval before exporting certain items and services. The law creates three new criteria the administration should use in weighing whether or not to oppose a proposed export license that could cause a significant negative impact on the US defense industrial base. For instance, the administration should weigh whether or not a proposed export would result in a reduction "in the employment of United States persons

whose knowledge and skills are necessary for the continued production of an item" that would likely be acquired by the US government.⁶² The law also calls on the President to establish and maintain a list of foreign persons and end-uses that are determined to be a threat to US foreign policy and creates policies and procedures to monitor the end-use items controlled by the CCL.

The ECRA leaves out some key provisions included in the AECA that help prevent corruption and fraud in US arms sales. There is no requirement for companies to register or apply for a license to broker sales of dual-use or 600 series arms on the CCL. US companies are also not required to notify the US government of any political contributions, marketing fees, or commissions associated with an export of these items or to provide an annual report to the US government on any defense offsets.

The ECRA also has very minimal congressional reporting requirements on dual-use and 600 series exports compared to what is required under US arms export control laws. The administration is only required to notify Congress of proposed exports of arms on the CCL if the items are considered to constitute major defense equipment (Table 4). The administration is required to submit an annual report to Congress. This report must include information on export enforcement actions, but the report does not regularly include key information on reasons for unfavorable checks as included in end-use reports for arms on the USML.⁶³ There is also no obligation that the administration provides an annual report on US approved licenses and actual exports of dual-use and arms around the world, which can help Congress and the public ensure the executive branch is following US law and policy in its approved sales of arms controlled by the Commerce Department.

62 Export Control Reform Act of 2018, 50 USCS § 4815 (2019).
 63 US Department of Commerce, Bureau of Industry and Security, Annual Report to the Congress for Fiscal Year 2017, <https://www.bis.doc.gov/index.php/documents/policy-guidance/2366-bis-annual-report-fy-2017/file>.

CONGRESSIONAL NOTIFICATIONS

30 Calendar Days

before final steps to conclude government-to-government sale / * approve license for export

All countries except NATO member states, Japan, Australia, Israel, Jordan, South Korea, and New Zealand	Major defense equipment	\$14 million or more
	Defense articles or services	\$50 million or more
	Design and construction services	\$200 million or more
	*Commercially license sale of firearms controlled by USML	\$1 million or more

15 Calendar Days

before final steps to conclude government-to-government sale / * approve license for export

NATO member states, Japan, Australia, Israel, Jordan, South Korea, and New Zealand	Major defense equipment	\$25 million or more
	Defense articles or services	\$100 million or more
	Design and construction services	\$300 million or more
	*Commercially license sale of firearms controlled by USML	\$1 million or more

Table 4: Congressional Notification Timelines. Source: With Great Power: Modifying US Arms Sales to Reduce Civilian Harm.

15. HOLES IN THE NET: US ARMS EXPORT CONTROL GAPS IN COMBATING CORRUPTION

CORRUPTION RISK-RELATED CRITERIA IN THE US CONVENTIONAL ARMS TRANSFER POLICY

Over the past 40 years, different US Presidents have created five Conventional Arms Transfer (CAT) policies to help implement the AECA and the FAA. As the agency in charge of overseeing and regulating US arms sales, the State Department leads efforts to create CAT policies with help from other agencies such as the Defense, Commerce, and Energy Departments, intelligence community, and the White House. These policies set the President's goals for US arms sales and the criteria they plan to use to review proposed arms sales. Like peeking through the curtain into a US embassy meeting room, CAT policies provide a picture of the internal discussions of an administration's decision-making process for all arms sales. The most recent version of the Conventional Arms Transfer policy created by the Trump administration includes a few criteria that are similar to the key questions TI-DS has identified above to help assess a foreign country's corruption risks.⁶⁴

The Trump Administration's Criteria for Making Decisions on US Arms Sales

The Trump administration's Conventional Arms Transfer policy states that it will take into account 16 different criteria when approving US arms sales abroad. Below, please find all of these criteria shown exactly as they are worded in the policy.

National Security

- The appropriateness of the transfer in responding to United States interests.
- The degree to which the transfer contributes to ally- and partner-burden-sharing and interoperability in support of strategic, foreign policy, and defense interests.
- The transfer's consistency with United States interests in regional stability, especially when considering transfers that involve power projection, anti-access or area denial capability, or the introduction of a capability that may increase regional tensions or contribute to an arms race.
- The transfer's effect on the technological advantage of the United States, including the recipient's ability to protect sensitive technology, the risk of compromise to United States systems and operational capabilities, and the recipient's ability to prevent the diversion of sensitive technology to unauthorized end-users.
- The recipient's nonproliferation and counterproliferation record.
- The transfer's contribution to efforts to counter terrorism,

64 Presidential Memoranda, "National Security Presidential Memorandum Regarding US Conventional Arms Transfer Policy," National Security & Defense, Issued on April 19, 2018, <https://www.whitehouse.gov/presidential-actions/national-security-presidential-memorandum-regarding-u-s-conventional-arms-transfer-policy/>

narcotics trafficking, transnational organized crime, or similar threats to national security.

Economic Security

- The transfer's financial or economic effect on United States industry and its effect on the defense industrial base, including contributions to United States manufacturing and innovation.
- The transfer's effect on the recipient's ability to obtain comparable systems from competing foreign suppliers.

Relationship with Allies and Partners

- The degree to which the transfer meets the objectives of bolstering the security and counterterrorism capabilities of US allies and partners and contributes to international peace and security.
- The degree to which the transfer increases access and influence in ways that support US strategic, foreign policy, and defense interests.
- The recipient's ability to field, support, and employ the requested system effectively and appropriately in accordance with its intended end-use.
- The likelihood of the transfer reducing ally and partner dependence on United States adversaries.
- The risk that the transfer will have adverse economic, political, or social effects within the recipient country.

Human Rights and International Humanitarian Law

- The risk that the transfer may be used to undermine international peace and security or contribute to abuses of human rights, including acts of gender-based violence and acts of violence against children, violations of international humanitarian law, terrorism, mass atrocities, or transnational organized crime.
- Whether the United States has actual knowledge at the time of authorization that the transferred arms will be used to commit any of the following: genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, serious violations of Common Article 3 of the Geneva Conventions of 1949, attacks intentionally directed against civilian objects or civilians who are legally protected from attack, or other war crimes as defined in section 2441 of title 18, United States Code. If the United States has such knowledge, the transfer must not be authorized.

Nonproliferation

The risk that the transfer could undermine the integrity of international nonproliferation agreements and arrangements that prevent proliferators, programs, and entities of concern

from acquiring missile technologies or other technologies that could substantially advance their ability to deliver weapons of mass destruction, or otherwise lead to a transfer to potential adversaries of a capability that could threaten the superiority of the United States military or our allies and partners.

In particular, the CAT policy says it will review whether the sale “meets the objectives of bolstering the security and counterterrorism capabilities of US allies and partners...,” which seems to require an assessment of the military justification for the sale. The US government will also review whether a proposed arms sale, particularly sensitive technology, poses a risk of diversion. The CAT policy’s assessment as to whether a sale may cause an “adverse economic, political, or social effect within the recipient country” could also be helpful in identifying whether a foreign country seeks to buy weapons in part to steal

money from their national treasury. Lastly, the State Department said it will be examining US policy on defense offsets.⁶⁵ However, the CAT policy does not include criteria that directs the US government to assess corruption risks more broadly. It also does not reference corruption in specific areas where it is relevant such as the risk of diversion, which was agreed to by more than a 100 countries in 2013 as part of the UN Arms Trade Treaty.⁶⁶

65 US Department of State, “Conventional Arms Transfer (CAT) Policy Implementation Update,” Fact Sheet, Office of the Spokesperson, May 1, 2019, <https://www.state.gov/conventional-arms-transfer-cat-policy-implementation-plan-update/>.

66 Transparency International, “Transparency International Welcomes the Historic Adoption of UN Arms Trade Treaty,” https://www.transparency.org/news/pressrelease/20130402_transparency_international_welcomes_historic_adoption_of_un_arms. United Nations Treaty Collection, “Arms Trade Treaty,” April 2, 2013, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=XXVI-8&chapter=26&clang=_en.

REGULATORY REQUIREMENTS FOR CORRUPTION RISK MITIGATION

While US export laws and the CAT policy form the basis for US arms export control standards, it is the regulations that show how the executive branch plans to implement and enforce them. As such, US regulations on US arms sales and related implementation policies provide more detail on US corruption risk mitigation efforts in arms sales. The below section provides an overview of the regulations and processes the US government uses to review arms sales and the gaps in US efforts to mitigate corruption for three key US arms sales programs. For government-to-government arms sales, the US government, primarily the Defense Department, uses the Defense Federal Acquisition Regulations (DFAR) and the Security Assistance Management Manual (SAMM). The Obama administration’s Export Reform Control Initiative split US government oversight of commercial arms sales into two main regulatory frameworks. The State Department oversees commercial sales of defense articles and services on the US Munitions List using the International Traffic in Arms Regulations (ITAR). The Commerce Department oversees commercial sales or arms on the Commerce Control List (CCL) using the Export Administration Regulations (EAR).

Foreign Military Sales (Government-to-Government)

The United States authorizes government-to-government arms sales through the Foreign Military Sales (FMS) program. In FY 2018, the United States authorized a total \$55.6 billion in arms sales abroad.⁶⁷ The FMS program includes robust US

67 Aaron Mehta, “America sold \$55.6 billion in weapons abroad in FY18 – a 33 percent jump,” Defense News, Defense Security Cooperation Agency, <https://www.dsca.mil/news-media/news-archive/america-sold-556-billion-weapons-abroad-fy18-33-percent-jump>

government involvement from the initial discussions about a proposed arms sale to long after the arms sale has been delivered, which allows the Pentagon to more closely assess the military justification of the proposed sale, any concerns about the specific military units who will receive the arms, and irregularities in contracts and payment. However, there are limited policies that call on the Pentagon to inquire about corruption risks in these issues. It also appears that there are key regulatory and policy gaps in US checks on subcontractors and defense offsets. US government oversight can be separated into four broad stages: arms sale request, request review, agreement, acquisition, and delivery, and post-export checks. The State Department officially oversees the FMS program, but it is the Defense Department’s Defense Security Cooperation Agency (DSCA) that manages it. The Defense Department also regulates other government-to-government arms sales programs, such as the Excess Defense Articles program, in similar ways.

Arms Sale Request

When a foreign government expresses an interest in buying weapons from the US government, the US military (often through defense attachés in the respective country or other representatives of the US Air Force, Army, or Navy) initiates a process to identify their eligibility and needs. The appropriate US military representative is required to examine whether the foreign purchaser is eligible for US arms based on several factors, including unnecessary military expenditures, misuse of US weapons in the past, involvement in a consistent pattern of gross human rights violations, recent military coups d’état, or

defaults in payment on other arms purchases, among others.⁶⁸ The US military will also seek information from the purchasing government about whether or not they can provide the same level of security for the weapons that the US government provides and about requiring US consent for re-transferring US-provided weapons.⁶⁹ However, the United States rarely determines a country to be ineligible for the above reasons because of a strong belief that maintaining some type of military relationship—especially through US arms sales—will more effectively serve US national interests. There are, however, some notable exceptions, especially for military coup d’états.⁷⁰

Once a country is determined eligible, the US military representative works with the foreign military or government to create a formal Letter of Request (LOR) for US military equipment. The representative will help identify the weapons system and the support needed to achieve the desired capability. According to GAO, for instance, “if a foreign government seeks to acquire an aircraft, DoD [the Defense Department] will also ensure the customer considers factors such as the operational environment in which the aircraft will be used, the capacity of its forces to operate and maintain the aircraft, and spare parts needed, among other things.”⁷¹ The US military will also determine which foreign military unit will receive the weapons and how they plan to use the weapons. They will discuss with the buying government payment options, including whether they want US financial assistance in acquiring the weapons.⁷² However, there is no mention in US regulations for US officials to inquire about any corruption issues connected with payment or foreign military units. The information Pentagon officials collect goes into the foreign country’s LOR.

Evaluation of Proposed Arms Sale

Once the LOR is submitted by the purchasing government, a US government review of the arms sale is triggered. If the requested item is likely to require a congressional notification, would be the first introduction of a new military capability, or is sensitive equipment, the request proceeds to the appropriate US embassy for a Country Team Assessment (CTA).⁷³ This assessment includes 11 key questions about the proposed sale, many of which are from past or present Conventional Arms Transfer policies (see Appendix I). For instance, a US embassy assessment of a proposed sale of 200 anti-radiation

68 “C4 - Foreign Military Sales Program General Information,” Defense Security Cooperation Agency, Security Assistance Management Manual, <https://www.samm.dsca.mil/chapter/chapter-4>

69 Ibid.

70 Alexis Arieff, Marian L. Lawson, Susan G. Chesser, “Coup-Related Restrictions in US Foreign Aid Appropriations,” In Focus, Congressional Research Service, Updated July 23, 2019, <https://www.hsdl.org/?view&did=827697>.

71 Elizabeth Field, “Conventional Arms Transfer Policy: Agency Processes for Reviewing Direct Commercial Sales and Foreign Military Sales Align with Policy Criteria,” GAO-19-673R, US Government Accountability Office, September 9, 2019, Page 6, <https://www.gao.gov/assets/710/701248.pdf>.

72 Figure C5.F14. Generic Letter of Request (LOR) Checklist, <https://www.samm.dsca.mil/sites/default/files/C5.F14.pdf>

73 Defense Security Cooperation Agency Security Assistance Management Manual, C5 – FMS Case Development, <https://www.samm.dsca.mil/chapter/chapter-5>

guided missiles to the United Arab Emirates (UAE) in 2010 included information on the military justification of the weapon. It also stated that there were no concerns about the economic impact of the sale as “the UAE is still able to fund major civil and defense projects and purchases.”⁷⁴ If the requested defense articles or services are considered “Significant Military Equipment” but do not include one of the factors that would trigger a CTA assessment, the US embassy is not required to conduct this assessment. Instead, the LOR proceeds to the next step in the review process (see figure 1).

After the Country Team Assessment is completed or avoided, the LOR proceeds to various offices within the Defense and State Departments. US military services, Pentagon special committees, and the Defense Technology Security Administration review the proposed sale for any risks in releasing or compromising US military technology. The Defense Security Cooperation Agency (DSCA) and various offices within the State Department, such as the Office of Regional Security and Arms Transfers, assess the sale for similar or other national security and foreign policy concerns.⁷⁵ The State Department’s Bureau of Political-Military Affairs and regional bureaus evaluate the sale for regional impact. State Department officials may also review the overall level of corruption in a country; however, few US officials have expertise in assessing foreign country corruption risks.⁷⁶ The appropriate US embassy will also review all proposed sales. For some countries, the Bureau of Democracy, Human Rights, and Labor (DRL) looks into the potential human rights implications of the proposed sale. The Bureau of International Security and Nonproliferation may also assess any proliferation risks. The proposed sale may also go to other US departments such as the Energy Department for review, depending on the circumstances.

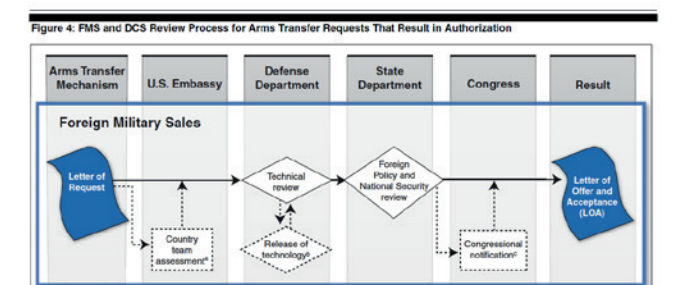


Figure 1: FMS and Direct Commercial Sales [DCS] Review Process. Source: Government Accountability Office.

74 “Country Team Assessment for Transfer Advanced Anti-Radiation Guided Missile (AARGM), Public Library of US diplomacy, February 4, 2010, https://wikileaks.org/plusd/cables/10AUBDHAB159_a.html.

75 Elizabeth Field, “Conventional Arms Transfer Policy: Agency Processes for Reviewing Direct Commercial Sales and Foreign Military Sales Align with Policy Criteria,” GAO US Government Accountability Office, September 9, 2019, Page 5 and 6, <https://www.gao.gov/assets/710/701248.pdf>.

76 Mark Pyman, “Corruption Threats & International Missions Practical guidance for leaders,” Peace & Conflict, Transparency International UK Defence and Security Programme, September 2014, <http://ti-defence.org/wp-content/uploads/2016/03/140930-Corruption-Threats-International-Missions.pdf>

Each of the US government offices reviewing the sale may move the LOR forward (to approve the sale) or back (to slow it down or deny the sale) and some offices are more influential than others in this regard. One of the more common ways an LOR is denied or held up is when a DoD office decides there is a high risk of valued US military technology reaching the wrong hands. In some cases, the LOR can remain on hold for months while the various offices debate the issues. Alternatively, a State Department regional bureau can help approve the proposed arms sale by arguing the sale would tighten relations with the recipient country. Perhaps the weakest office in this process is the State Department's DRL. Even though this bureau may raise concerns, their ability to effectively stop or amend a sale has proven limited.⁷⁷ In general, US government personnel are incentivized for approving a sale. In rare cases, disagreements between offices are sent up to the assistant secretary or secretary levels within the State or Defense Department to make the determination on the proposed sale.⁷⁸

In certain circumstances, the Pentagon is required to notify Congress and the public of the proposed sale (see Table 4 above). This notification includes a summary of the weapons offered, the value of the deal, the US company involved (if possible), and whether or not there have been any defense offsets and sales commissions and fees, among other items.⁷⁹ However, US arms export control experts have said the Defense Department does not always include information on commissions and fees or defense offsets in the notifications.⁸⁰ For defense offsets, Congress receives a confidential description of the offset agreement, including whether the offsets will be direct or indirect and the estimated percentage of each type.⁸¹ In most cases, the Defense Department will notify the appropriate committees (the Senate Foreign Relations and House Foreign Affairs Committees) informally before the formal notification in case there may be opposition within Congress.⁸² During the informal and formal notification period, Congress may put a hold on the sale until they receive more information. As mentioned earlier, Congress can block the sale if it passes a joint resolution. Congress may also request that the administration notify it 30 days before the proposed arms sales is to be exported as sometimes the situation in the countries change substantially.⁸³

77 Author interview with US government official in August 2016.

78 Daniel Mahanty, Annie Shiel, Rachel Stohl, "With Great Power: Modifying US Arms Sales to Reduce Civilian Harm," Center for Civilians in Conflict, Stimson, Page, 31, <https://civiliansinconflict.org/wp-content/uploads/2018/01/With-Great-Power.pdf>.

79 <https://www.samm.dsca.mil/chapter/chapter-5#C5.4>.

80 Security Assistance Monitor, "Tackling Corruption in the Global Arms Trade," Event, November 2, 2017, <https://securityassistance.org/blog/event-tackling-corruption-global-arms-trade>.

81 <https://www.samm.dsca.mil/sites/default/files/C5.F10.pdf>

82 Paul K. Kerr, "Arms Sales: Congressional Review Process, Congressional Research Service, Updated August 14, 2019, <https://fas.org/spp/crs/weapons/RL31675.pdf>. Page 1.

83 US Code §2776. Reports and certifications to Congress on military exports, Legal Information Institute, Cornell Law School, <https://www.law.cornell.edu/uscode/text/22/2776>.

Agreement, Acquisition, and Delivery

Once the US government approves the sale, the Defense Department sends the purchasing government a Letter of Offer and Acceptance (LOA). The LOA describes the defense articles and services offered and sets the terms of the agreement for the sale. For instance, the recipient government must use the proposed weapons only for the purposes outlined in the AECA or "any other bilateral or regional defense agreement" between the United States and the purchasing government.⁸⁴

The recipient government must allow the US government to identify whether or not US weapons have been used for these purposes. The purchasing government is also required to take precautions to ensure that US weapons are not diverted to anyone who is not an employee, officer, or agent of the purchaser and that sufficient security is provided for the weapons.⁸⁵ The standard terms and conditions note the purchasing government's obligations under international humanitarian and human rights law, but there is no specific mention of the need to comply with anti-corruption provisions.

The Defense Department then initiates a process guided by DFAR to buy some or all of the weapons from the US defense industry and deliver them to the foreign government. In some cases, the Defense Department may simply deliver US defense equipment to the purchasing government from US arms stockpiles. In more limited cases, the Defense Department may act as a sort of middleman to help a foreign partner buy foreign-made weapons. In choosing a contractor to fulfill the contract, the Pentagon checks with various public government lists to ensure that any prime contractor or subcontractor has not been "debarred, suspended, proposed for debarment, or declared ineligible for a DoD contract."⁸⁶ The Defense Department also relies on their prime contractors to ensure that their first-tier subcontractors, anyone on their board of directors, or a consultant, agent, or representative for them has not been convicted of fraud or any other felony in violation of state or Federal criminal statutes.⁸⁷ The Defense Department may also assess any agents' fees and sales commissions.⁸⁸ However, the Pentagon's Inspector General has identified cases in 2011 where

84 Figure C5.F4., Letter of Offer and Acceptance (LOA) Standard Terms and Conditions, https://www.samm.dsca.mil/sites/default/files/C5.F4_2.pdf

85 Ibid. https://www.samm.dsca.mil/sites/default/files/C5.F4_2.pdf

86 Colby Goodman, "The Pentagon's Missing Controls on Contractors Engaged in Arms Transfers," Amnesty International USA, September 2009, Page 10-11, <https://securityassistance.org/sites/default/files/Dealing%20with%20Arms%20Intermediaries%20Policy%20Briefing%20--%20FINAL%20Sept%2021%2009.pdf>. Neil Gordon, "DoD Suspension and Debarment: The Good, The Bad and the Ugly, Project on Government Oversight, Analysis, August 9, 2011, <https://www.pogo.org/analysis/2011/08/dod-suspension-and-debarment-good-bad-and-ugly/>. Defense Federal Acquisition Regulation Supplement, Part 209-Contractor Qualifications, Subpart 209.4-Debarment, Suspension, and Ineligibility, Revised April 30, 2019, https://www.acq.osd.mil/dpap/dars/dfars/pdf/current/20191001/209_4.pdf.

87 Defense Federal Acquisition Regulation Supplement, Part 252-Solicitation Provisions and Contract Clauses, 252.203-7000 Requirements Relating to Compensation of Former DoD Officials, Revised August 9, 2019, <https://www.acq.osd.mil/dpap/dars/dfars/pdf/current/20191001/252203.pdf>.

88 Defense Security Cooperation Agency, Security Assistance Management Manual, C5 – FMS Case Development, <https://www.samm.dsca.mil/chapter/chapter-5#C5.5>. Acquisition.GOV, "Part 3 – Improper Business Practices and Personal Conflicts of Interest," FAC 2019-06/10-10-2019, <https://www.acquisition.gov/content/part-3-improper-business-practices-and-personal-conflicts-interest>.

the Defense Department has hired several contractors that have been debarred or suspended.⁸⁹ Defense company executives that have been indicted for bribery and fraud have also received Pentagon funds to supply foreign-sourced arms to Syria.⁹⁰

While Pentagon officials are required to report to Congress on defense offsets, they take a very hands-off approach to overseeing them. According to SAMM, "any purchaser requesting offset arrangements in conjunction with FMS should be informed that the responsibility for negotiating offset arrangements and satisfying all related commitments resides with the US firm involved." For the Defense Department official, "involvement in any discussion of offset costs (beyond confirmation of the inclusion of these costs in price estimates) must be avoided." The Defense Department "may not discuss with the purchaser the nature or details of an offset arrangement." There is no requirement for the Pentagon to check the proposed offset advisors and recipients of offset agreements to see if there might be bribery or patronage involved. US defense companies are also allowed to be reimbursed for the costs of providing defense offsets to foreign countries in certain FMS-related contracts.⁹¹

Post-Export Checks (Golden Sentry)

As stipulated in the LOA, foreign governments that purchase US weapons are required to allow the US government to conduct post-export checks on all defense articles sold via FMS. DSCA oversees and manages these efforts through their Golden Sentry program, but it is the US defense attachés, embassy personnel, and military departments that often do the individual checks. The goal of the Golden Sentry program is to ensure that the foreign recipients of US weapons respect US laws and contractual requirements regarding the "use, transfer, and security of defense articles and defense services."⁹² According to SAMM policies, "the program must also provide for the end-use verification of defense articles and services that incorporate sensitive technology, and/or are particularly vulnerable to diversion or other misuse, or whose diversion or other misuse could have significant consequences."⁹³ The Defense Department uses two basic types of post-export checks, enhanced and routine, to meet the goals of the Golden Sentry program.

The Defense Department conducts enhanced end-use checks for weapons such as Javelin and Stinger missiles, certain

89 Neil Gordon, "DoD Suspension and Debarment: The Good, The Bad, and The Ugly," Project on Government Oversight, Analysis, August 9, 2011, <https://www.pogo.org/analysis/2011/08/dod-suspension-and-debarment-good-bad-and-ugly/>.

90 Ivan Angelovski, Lawrence Marzouk and Roberto Capocelli, "Pentagon Hired Questionable Contractors for Syria Arms Purchases," Organized Crime and Corruption Reporting Project (OCCRP), September 15, 2017, <https://www.occrp.org/en/makingkilling/pentagon-hired-questionable-contractors-for-syria-arms-purchases>.

91 Defense Security Cooperation Agency, Security Assistance Management Manual, C6 – Foreign Military Sales Case Implementation and Execution, <https://www.samm.dsca.mil/chapter/chapter-6>

92 Defense Security Cooperation Agency, Security Assistance Management Manual, C8 – End-Use Monitoring (EUM), <https://www.samm.dsca.mil/chapter/chapter-8>

93 Ibid. <https://www.samm.dsca.mil/chapter/chapter-8>

portable night vision devices (NVD), infrared countermeasures, and some drones. Although the type of enhanced check varies depending on the weapons system, they generally require "physical security assessments of the storage facilities and serial number inventories..." at regular intervals, including 90 days after delivery.⁹⁴ As of August 2011, for instance, the Defense Department had conducted enhanced end-use checks on 7,964 of the total 10,549 NVDs sent to Saudi Arabia since the US government started recording such sales.⁹⁵ Routine end-use checks are typically conducted in connection with other US official visits with foreign militaries. US officials might observe how a host country's military is using US equipment while providing foreign military training or some other activity. DoD policies state that US officials should focus on a specific set of weapons for routine checks, such as "armored combat vehicles, artillery systems, unmanned aerial systems, and night vision systems."⁹⁶

Direct Commercial Sales (Commercial Arms Sales)

US arms sales negotiated directly between defense companies and foreign governments are administered via the Direct Commercial Sales (DCS) program.⁹⁷ In FY 2018, the State Department authorized over \$63 billion in arms sales around the world through this program. Unlike the FMS program, it is US companies instead of the US military that work directly with the foreign government from the initial discussions about their weapons requirements to the delivery of the arms. As a result, US officials overseeing DCS generally have a weaker insight into the buying governments' military justification and needs. US government regulations for DCS require thorough checks on exporters, brokers, and political contributions and gifts, which can help reduce corruption risks, though there appear to be gaps in US efforts to review political contributions, defense offsets, and post-shipment end-use checks. US oversight of DCS can be separated into three stages: license request, license review, and post-export checks. The State Department's Directorate of Defense Trade Controls (DDTC) oversees and regulates the DCS program using the International Traffic in Arms Regulations (ITAR).

94 Defense Security Cooperation Agency, Security Assistance Management Manual, C8 – End-Use Monitoring (EUM), <https://www.samm.dsca.mil/chapter/chapter-8>

95 United States Government Accountability Office, "Persian Gulf Implementation Gaps Limit the Effectiveness of End-Use Monitoring and Human Rights Vetting for US Equipment," GAO-12-89, Report to Congressional Requesters, November 2011, Page 16, <https://www.gao.gov/assets/590/586356.pdf>.

96 Defense Security Cooperation Agency, Security Assistance Management Manual, C8 – End-Use Monitoring (EUM), <https://www.samm.dsca.mil/chapter/chapter-8>

97 US Department of State, "Report to Congress on Direct Commercial Sales to Foreign Countries and International Organizations for Fiscal Year 2018," Directorate for Defense Trade Controls, October 7, 2019, Last page, https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=9ed13b5ed504090529d368d7c96195d.

License Request

Before a US company may apply to the US government to export any defense articles or services through the DCS program listed on the US Munitions List (USML), the State Department requires them to register with DDTC annually and pay a fee of at least \$2,250. According to GAO, this “registration provides important information on the identity and location of defense companies and conveys management responsibility for compliance with export control laws.”⁹⁸ As part of the registration, the company must inform DDTC if they or any parent firm, owner, board of director, or controlled subsidiary or affiliate as well as members of the company have been indicted or otherwise charged with, or have been convicted of, violating several US laws, including those related to US arms sales, the smuggling of goods, espionage, bribery, and support for terrorism, among others.⁹⁹ They are required to list whether their company is foreign owned or foreign controlled. A US individual or company must also first register with DDTC if they want to apply for US government approval to broker certain types of arms, regardless of whether the arms are in the United States or abroad.¹⁰⁰

After a US company has registered, they must seek a license (US government approval) from DDTC to export or broker arms for each arm deal separately. In limited situations, companies can use a license exemption to export defense articles or services without US government prior approval, such as for many arms exports to Australia, Canada, and the United Kingdom. Companies are required to provide several key pieces of information and documentation as part of the export license request. For instance, companies must identify the type, value, and quantity of the defense article or service.¹⁰¹ The US company must also include certification from the foreign purchaser regarding the specific end-user and end-use of the items. It does not appear that the US company or foreign buyer are required to identify the specific military or security force unit to receive the weapons. For Significant Military Equipment, the company is required to obtain certification that the buyer will not re-export the items without US approval or use the items for purposes other than those outlined in the AECA or as agreed.¹⁰² The company also needs to identify “all US consignors/freight forwarders and all foreign consignees and foreign intermediate

consignees involved in the transaction” as well as any brokers and the buyer and seller connected with the proposed sale.¹⁰³

US companies must also disclose whether they provided any political contributions, fees, and commissions in connection with proposed arms sales valued at \$500,000 or more for foreign armed forces.¹⁰⁴ **Former US government officials involved in overseeing commercial arms sales under the Clinton administration said they have used these disclosures to identify and stop bribery or other questionable activities a few times a year.**¹⁰⁵ The Justice Department has also charged companies for their failure to disclose political contributions, fees, and commissions, such as the BAE Systems settlement mentioned in previously. However, interviews with former US government officials in 2016 indicated that these disclosures may not be prioritized for checks as much as other compliance items.¹⁰⁶ Some US arms export control experts have also indicated that these disclosure requirements do not likely apply to some types of defense offsets, including indirect offsets.¹⁰⁷ It is unclear if companies must also provide information to the State Department on any defense offsets involved in an arms deal.

Major Changes to the US Munitions List (USML)

In 2010, the Obama administration determined that the US arms export control system was overly complicated and trying to protect too many types of arms. As such, it was “undermining the competitiveness” of key defense industry sectors and “diminishing” US efforts to focus on items that are the most critical to US national security.¹⁰⁸ In response, the administration began implementing its Export Control Reform Initiative in 2014. A key part of the ECRI was moving many defense articles deemed less critical to the US military’s technological advantage over other countries and more widely available around the world from the State Department controlled USML to the Commerce Department controlled list for dual-use goods, the Commerce Control List (CCL).

While the administration did not provide an estimated number of defense articles that moved from the USML to the CCL, they did provide a picture of the scale of the move. For instance, the White House estimated that around 90 percent of the total number of defense articles approved for export under the military

98 United States Government Accountability Office, “Export Controls, State and Commerce Should Share Watch List Information If Proposed Rules to Transfer Firearms are Finalized,” GAO-19-307, Report to Congressional Requesters, March 2019, Page 14, <https://www.gao.gov/assets/700/697202.pdf>.

99 International Traffic in Arms Regulations, “Part 120-Purpose and Definitions,” https://www.ecfr.gov/cgi-bin/text-idx?SID=70e390c181ea17f847fa696c47e3140a&mc=true&ode=pt22.1.120&rgn=div5#se22.1.120_127

100 International Traffic in Arms Regulations, “Part 129 – Registration and Licensing of Brokers,” <https://tinyurl.com/tn7ahma>.

101 US Department of State, “Guidelines for Completion of a Form DSP-5 Application/License for Permanent Export of Unclassified Defense Articles and Related Unclassified Technical Data,” Directorate of Defense Trade Controls, https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=cfd37af0db199f00d0a370131f96199d.

102 US Department of State, “Instructions for DSP-83,” 05-2018 https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=f51159edd0bdf9f005564ff1e0f96190d.

103 US Department of State, “Guidelines for Completion of a Form DSP-5 Application/License for Permanent Export of Unclassified Defense Articles and Related Unclassified Technical Data,” Directorate of Defense Trade Controls, https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=cfd37af0db199f00d0a370131f96199d.

104 International Traffic in Arms Regulations, “Part 130 Political Contributions, Fees and Commissions,” <https://tinyurl.com/vffwijn>

105 Author interview with former State Department official in March 2014.

106 Author interview with former State Department official in April 2016.

107 Event: “Tackling Corruption in the Global Arms Trade,” Security Assistance Monitor, November 2, 2017, <https://securityassistance.org/blog/event-tackling-corruption-global-arms-trade>.

108 William Daley, “Highlights Priority for the President’s Export Control Reform Initiative,” The White House, Office of Press Secretary, July, 10, 2011, <https://obamawhitehouse.archives.gov/the-press-office/2011/07/19/white-house-chief-staff-daley-highlights-priority-presidents-export-cont>.

vehicle category in 2009 would be moved from the USML to the CCL. Senior Commerce Department officials have also said that as many as 30,000 or more military items may no longer require control on the State Department’s USML or a license to be exported.¹⁰⁹ As of May 2019, the Obama and Trump Administrations have either moved or proposed to move defense articles from the USML to the CCL for all 21 different military categories on the USML.¹¹⁰

The majority of the defense articles that have moved to the CCL are parts and components for sophisticated and unsophisticated US military systems, including the F-16 aircraft, Apache helicopters, and M1A1 tanks. The Obama administration has also placed on the CCL some complete military systems without their munitions or armor, including military transport vehicles, utility helicopters, amphibious warships, and military vehicles.¹¹¹ Perhaps most controversially, the Trump Administration has proposed moving many types of semi-automatic firearms and sniper rifles from the USML to the CCL.

Export License Review

When a US company submits an export license request to DDTC for review, a DDTC licensing officer then checks to ensure the applicant has provided all of the necessary information in their application. The licensing officer will enter all of the names and companies in the license request into a DDTC private watch list of over 200,000 entries of suspect individuals or companies to see if there are any concerns about the proposed exporter, buyer, or broker.¹¹² Then, the licensing officer examines several aspects of the license request to assess the risk of US arms being diverted to unwanted users. For instance, the licensing officer will examine the consistency between the quantities and prices of the weapons listed in the license request and those stated on the foreign buyer’s purchase order. He or she may also examine whether there is a mismatch between the requested weapons and the recipient’s weapons systems. If there are questions about the license request, the licensing officer may seek a pre-license Blue Lantern end-use check (see Figure 2). However, a March 2019 State Department Inspector General report noted that DDTC had approved five export applications that should have been returned to the companies, including

109 Colby Goodman, “Key Questions about the US Export Control Reform Initiative,” Security Assistance Monitor, April 18, 2016, https://securityassistance.org/fact_sheet/key-questions-about-us-export-control-reform-initiative.

110 International Traffic in Arms Regulations, “Latest USML Updates”, Directorate of Defense Trade Controls, https://www.pmdtc.state.gov/ddtc_public?id=ddtc_kb_article_page&sys_id=70757839db30d30044f9f621f961992.

111 Colby Goodman, “More than F-16 Bolts: A Problematic Ruse on Export Reform,” Project on Government Oversight, Analysis, June 6, 2014, <https://www.pogo.org/analysis/2014/06/more-than-f-16-bolts-problematic-ruse-on-export-reform/>.

112 United States Government Accountability Office, “Export Controls, State and Commerce Should Share Watch List Information If Proposed Rules to Transfer Firearms are Finalized,” GAO-19-307, Report to Congressional Requesters, March 2019, Pages 16-17, <https://www.gao.gov/assets/700/697202.pdf>.

two applications in which the total value “exceeded one of the supporting documents.”¹¹³

The licensing officer then determines whether the request needs to be sent to other State or Defense Department offices for a wider US CAT policy review (see Figure 2.). According to a GAO report in 2002, DDTC sends about a third of its total license applications per year to other State or Defense offices for review.¹¹⁴ When the license request is sent around to other State and Defense Department offices, the review is similar to the US government-wide review of arms sales through the FMS program as outlined above, but without the Country Team Assessment. Each State or Defense Department office responds to DDTC with either their approval, approval with special conditions, or denial. The license request is also sent to Congress for their review in certain circumstances. However, unlike with FMS sales, the public does not receive the notification until months after Congress was required to make a decision on the sale, and the information the public receives often leaves out key information such as the total value of the deal and the name of the company.¹¹⁵ For a select few countries, the US government may allow foreign governments to finance some or all of their DCS purchases through Foreign Military Financing.¹¹⁶

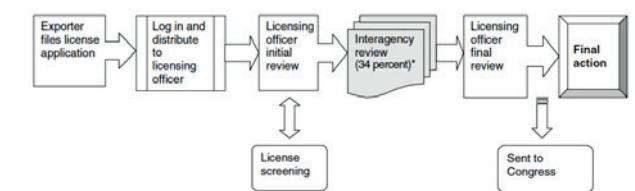


Figure 2: Export License Review Flowchart. Source: Government Accountability Office.

Pre- and Post-License End-Use Checks

Before or after the State Department has approved an export license, DDTC may conduct a pre- or post-license end-use check, commonly referred to as a Blue Lantern check. The focus of DDTC’s end-use checks is to prevent the diversion of US weapons and sensitive technology.¹¹⁷ In most cases, DDTC will ask US embassy employees in the respective country to conduct the check. In select cases, DDTC will send officials from Washington, DC to the country to investigate. Pre-license

113 Office of Inspector General, “(U) Audit of Department of State Directorate of Defense Trade Controls Export Licensing Processes,” United States Department of State, AUD-SI-10-07, February 2019, <https://www.stateoig.gov/system/files/aud-si-10-07.pdf>.

114 United States General Accounting Office, “Export Controls, State and Commerce Department License Review Times Are Similar,” GAO-01-528, June 2001, Page 8, <https://www.gao.gov/new.items/d01528.pdf>.

115 Bureau of Political-Military Affairs, Directorate of Defense, “Trade Controls: Notifications to the Congress of Proposed Commercial Export Licenses,” Federal Register, The State Department, 02/28/2019, <https://www.federalregister.gov/documents/2019/02/28/2019-03516/bureau-of-political-military-affairs-directorate-of-defense-trade-controls-notifications-to-the>

116 Derek Gillman, “Foreign Military Sales,” Robert Nichols, Jade C. Totman, Christing Minarich, Covington & Burling, “Direct Commercial Sales, September 30, 2014, Page 21, https://www.dsca.mil/sites/default/files/final-fms-dcs_30_sep.pdf.

117 Author interview with State Department official on September 23, 2019.

checks may seek to “confirm the bona fides of an unfamiliar consignee or end-user, verify that the end-user listed in the license request actually intends to purchase the arms, or ensure the arms depots where the items will be stored are secure.”¹¹⁸ A post-export check may confirm the exported items have been received by the foreign end-user. If the State Department cannot complete these confirmations or identifies other problems, this is identified as an unfavorable check. In FY 2018, the State Department closed 585 end-use checks, and of those checks, 168 were unfavorable, according to DDTC’s report to Congress.¹¹⁹

The State Department’s procedures for post-license checks for DCS, however, are not as thorough as FMS checks. The State Department, for instance, does not have to conduct an onsite verification by serial number of all high-technology night vision devices sold through DCS to countries outside NATO within 90 days of delivery and thereafter on an annual basis.¹²⁰ Instead, DDTC conducts its checks based on several risk factors, including unfamiliar end-users, inconsistencies in the license application, sensitive technology, and/or unusual or multiple countries in a transportation route. As a result, for instance, the State Department reportedly conducted checks on 9 of the 34 export licenses or 2,242 of the 8,757 night vision devices exported to Persian Gulf countries from 2005 through 2010.¹²¹ More recently, DDTC conducted only nine pre- or post-end-use checks on arms export licenses for the Middle East and North Africa in FY 2018, which is a notable drop from FY 2016 when DDTC initiated 67 pre- or post- end-use checks for the same region.¹²²

Type of Check	Foreign Military Sales	Direct Commercial Sales	600 Series
Discusses military justification and use of arms with foreign officials	Yes	Limited	Limited
Assesses specific corruption risks with proposed military unit	Limited	Limited	Limited
Screens all parties to a proposed arms sale, including brokers	No	Yes	No
Checks all parties against the State Department Watch List	Unlikely	Yes	No

118 International Traffic in Arms Regulations, “End-Use Monitoring of Defense Articles and Defense Services Commercial Exports FY 2018,” Department of State, https://www.pmddtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=d53a84efdb9177045564ff1e0f961910.

119 Ibid. https://www.pmddtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=d53a84efdb9177045564ff1e0f961910

120 Unites States Government Accountability Office, “Persian Gulf, Implementation Gaps Limit the Effectiveness of End-Use Monitoring and Human Rights Vetting for US Military Equipment,” GAO-12-89, Report to Congressional Requesters, November 2011, <https://www.gao.gov/assets/590/586356.pdf>

121 Ibid., Page 20, <https://www.gao.gov/assets/590/586356.pdf>.

122 US Department of State, “End-Use Monitoring of Defense Articles and Defense Services Commercial Exports,” FY 2018 and FY 2016, Page 2 https://www.pmddtc.state.gov/ddtc_public?id=ddtc_public_portal_news_and_events&cat=Report.

Type of Check	Foreign Military Sales	Direct Commercial Sales	600 Series
Collects information on all US and foreign controlled subsidiaries and affiliates	No	Yes	No
Approves arms broker license requests	No	Yes	No
Reviews political contributions, marketing fees, or commissions	Yes	Yes	No
Assesses corruption risks in defense offsets	No	No	No
Physically checks certain US arms 90 days after they were delivered	Yes	No	No

Table 5: Key Differences in US Anti-Corruption Checks on Arms Sales

600 Series Program (Commercial Arms Sales)

Similar to the State Department’s Direct Commercial Sales program, the Commerce Department’s oversight of arms exports on the Commerce Control List (CCL) is largely focused on regulating the US defense companies and individuals exporting these items to foreign governments and commercial entities. However, the US government’s controls are less strict than the controls governing arms exports on the USML. **Under the CCL, companies have more opportunities for exporting 600 series arms without US government pre-approval or a license, including to countries such as Turkey and India.**¹²³

There is no requirement for brokers to register and apply for a license to engage in brokering activities. The Commerce Department also takes a more limited approach to preventing bribery and conducting end-use checks on arms already delivered. The procedures for US oversight of 600 series sales can be separated into three broad categories: no-license-required and license exemptions, license requirements and review, and post-export checks. The Commerce Department’s Bureau of Industry and Security (BIS) manages and regulates 600 series exports. The main regulations are found in the Export Administration Regulations.

License Requirements and Review

When the Commerce Department does require companies to apply for an export license to export 600 series arms, they must meet several requirements. US companies are required to provide details on the arms, prices, end-user, end-use, and key parties involved in the proposed export.¹²⁴ However, companies are not required to provide information on brokers that do not take possession of the arms. Companies may not apply for

123 Export Administration Regulations, “Part 740 – License Exceptions, <https://www.bis.doc.gov/index.php/documents/regulations-docs/2341-740-2/file>.

124 Export Administration Regulations, Part 748 - Applications (Classification, Advisory, and License) and Documentation, <https://www.bis.doc.gov/index.php/documents/regulations-docs/2349-748-10-30-18/file>.

an export license if they have been convicted for violating a narrower set of laws than what is required for DCS.¹²⁵ Unlike DCS, defense companies do not have to provide details on their owners, board of directors, and US or foreign controlled subsidiaries and affiliates in the United States or abroad before exporting.¹²⁶ Companies are only required to obtain certification that the end-user will not re-export the items or use the items in contravention of Export Administration Regulations for certain exports to China, firearms exports to some Latin American countries, and those arms classified as major defense equipment.¹²⁷ There is no requirement for companies to notify the Commerce Department of any political contributions or marketing fees associated with 600 series export applications.

Once the Commerce Department’s BIS receives an arms export application, they will assign a licensing officer to review the application and identify any inconsistencies or concerns with the application. Similar to the State Department, they review the parties identified in the arms export application and check their own private watch list to see if there is any negative information on these parties. However, the Commerce Department does not have regular access to DDTC’s private watch list, which includes more derogatory information on individuals and companies exporting arms.¹²⁸ If BIS license officers identify a concern, they may flag a particular export license for extra review.¹²⁹ This could include asking the arms export applicant to provide more information on the brokers or other parties or transportation routes. BIS does not focus on pre-export end-use checks for 600 Series exports like the State Department does for DCS sales.

The BIS licensing officer will also start a process to review each arms export application according to the policies connected with its reasons for control. For instance, the EAR indicates that export applications for arms controlled for national security reasons will generally be approved for many countries in the Middle East and North Africa if the proposed export is for “civilian

125 Ibid. Export Administration Regulations, “Part 736 – General Prohibitions, Supplement No. 2., <https://www.bis.doc.gov/index.php/documents/regulation-docs/413-part-736-general-prohibitions/file>.

126 Export Administration Regulations, Part 748 - Applications (Classification, Advisory, and License) and Documentation.

127 Ibid.

128 Government Accountability Office, “Export Controls: State and Commerce Should Share Watch List Information If Proposed Rules to Transfer Firearms are Finalized,” GAO-19-307, March 2019, Summary, <https://www.gao.gov/assets/700/697202.pdf>.

129 Author interview with Commerce Department official in July 2018.

use or would otherwise not make a significant contribution to the military potential of the country that would prove detrimental” to US national security.¹³⁰ In order to make that determination, the Commerce Department, with help from the State and Defense Departments and sometimes the intelligence community, reviews how the proposed exports will be used, among other considerations. The Commerce Department will also determine whether or not an export application is consistent with US foreign policy interests, including human rights, for arms that are controlled for regional security reasons. If the proposed export is considered major defense equipment, BIS sends a notification to Congress for their review.¹³¹ If BIS denies a company’s arms export application, the company can appeal the decision.¹³²

Pre- and Post-Export Checks

Like the State Department, the Commerce Department conducts end-use checks both before and after dual-use articles and arms have been exported. In fact, the Commerce Department conducts end-use checks, which include a “physical verification on site with a party to the transaction,” on a larger percentage of exports than the State Department does for arms on the USML. However, the Commerce Department focuses predominantly on post-export end-use checks of items that were exported using a license exception or without US approval while the State Department focuses on both pre- and post-export checks on licensed checks.¹³³ In 2017, the Commerce Department completed 1,089 end-use checks in 58 countries.¹³⁴ The majority of these checks were done by Export Control Officers stationed in Beijing, Dubai, Frankfurt, Hong Kong, Istanbul, New Delhi, and Singapore. The Commerce Department also relies on officials from Washington, DC and foreign commercial service officers in US embassies for post-export checks

130 Export Administration Regulations, “Part 742 - Control Policy—CCL Based Controls,” Page 8 – 10, <https://www.bis.doc.gov/index.php/documents/regulations-docs/2342-742-10-24-18/file>.

131 Export Administration Regulations, “Part 743 - Special Reporting and Notification,” <https://www.bis.doc.gov/index.php/documents/regulation-docs/2256-part-743-special-reporting-requirements-1/file>.

132 Export Administration Regulations, “Part 756 – Appeals,” <https://www.bis.doc.gov/index.php/documents/regulation-docs/427-part-756-appeals/file>.

133 Government Accountability Office, “Export Controls: State and Commerce Should Share Watch List Information If Proposed Rules to Transfer Firearms are Finalized,” March 2019.

134 US Department of Commerce, Bureau of Industry and Security, “Annual Report to the Congress for Fiscal Year 2017, <https://www.bis.doc.gov/index.php/documents/policy-guidance/2366-bis-annual-report-fy-2017/file>.

POLICY RECOMMENDATIONS

Strengthen Corruption Risk Assessments of Proposed Recipients

Executive Branch

Recognize the need to assess corruption risks in State and Defense Department policies or guidance on arms sales. The State Department's new "Framework for Policy Review and Risk Assessment of Proposed SSA Activities," which included key questions to help officials assess foreign country corruption risks, provided a clear sign that it was important for State Department and US Embassy officials to review corruption risks, build their knowledge and understanding of corruption, and potentially task staff to support the new assessment effort. A new US government guidance on assessing corruption risks, which provides more detail on what to assess, when to assess it, and how to go about obtaining key information, could reignite this critical effort.

Strengthen Country Team Assessments and Blue-Lantern end-use checks to better assess corruption risks of proposed arms sales. State Department Country Team Assessments (CTA) and pre-export Blue Lantern checks provide a unique opportunity to conduct more robust assessment of risks in proposed US arms sales. However, these assessments often look at corruption concerns more broadly in the country, if at all, and are not always triggered for corruption-related concerns. The State Department could change that by broadening when Blue-Lantern checks are triggered and the types of assessment questions it uses to evaluate proposed arms sales. For instance, a Blue Lantern check could be triggered when there is a poor military justification for weapons, corruption concerns within the proposed military unit, reports of bribery or contract manipulation, or when the Transparency International Corruption Perception Index score of the country is assessed at 40 or below.

Provide education and training on transparency, accountability, counter-corruption, and good governance (TACCGG) for US officials in charge of reviewing and assessing US arms sales. In 2014, TI-DS released a report entitled *Corruption Threats & International Missions: Practical guidance for Leaders*, which identified that "mission leaders, national officials and their civilian and military staffs charged with leading, planning, and implementing international missions often lack the understanding and skills to tackle the corruption issues that can have such a devastating impact on operational goals."¹³⁵ As a 2019 Center for Strategic and International Studies defense simulation exercise demonstrated, corruption risk mitigation is

still a major problem for US officials in charge of overseeing and approving US arms sales. In order to improve US government officials' efforts to better identify, assess, and mitigate corruption risks, the Defense, State, and Commerce Departments should invest in education and training on the relationship between conflict, corruption, and arms sales, the major dangers and risks, and the key factors to look at for a proposed arms sale.

Congress

Legislate requirements that US officials consider recipients' levels of democratic consolidation and their transparency, accountability, counter-corruption, and good governance (TACCGG) records. Assessments can be based on a bespoke TACCGG survey as recommended by the Combating Global Corruption Act (Senate Bill 1309), which was re-introduced in May 2019, or on existing TACCGG indices from recognized expert organizations such as the World Bank, Freedom House, and Transparency International. States displaying low levels of TACCGG should be required to undergo much higher levels of scrutiny over defense export approvals. As part of that assessment, the US should consider whether US defense industry sales to that country are likely to improve TACCGG or likely to degrade the current TACCGG situation, and if defense contracts are approved, develop mitigation strategies to better ensure those contracts improve TACCGG. US Senator Ben Cardin (D-MD)'s legislation that would require the President to certify that certain proposed arms sales recipients have made significant efforts to ensure "accountability for significant acts of corruption," could also be helpful if it is expanded.

Strengthen anti-corruption strategy requirements for US arms sales. The 2018 National Defense Authorization Act (FY2018 NDAA) requires the Secretaries of State and Defense plus the Administrator of USAID to jointly develop a strategy to prevent corruption in reconstruction efforts associated with US contingency operations, including measurable benchmarks to be met as a condition for disbursement of funds for reconstruction efforts. This is important legislation, as it marks the beginning of American efforts to tackle corruption across a broad spectrum of contingency operations, rather than focusing on specific, discrete operations such as Afghanistan or Nigeria. Many requirements for improving transparency and accountability of US foreign assistance, including those related to the security sector, were stripped out of the original bill. These proposals should be reconsidered for future bills.

¹³⁵ Transparency International, "Corruption Threats & International Missions: Practical guidance for leaders," <http://ti-defence.org/wp-content/uploads/2016/03/140930-Corruption-Threats-International-Missions.pdf>.

Enhance Oversight of Defense Companies Exporting Arms

Executive Branch

Strengthen Commerce Department anti-corruption controls for 600 Series exports. The Obama administration's move of tens of thousands military equipment from the State to Commerce Department oversight has put clear holes in the US government's efforts to reduce corruption risks in arms sales. However, some of these holes can be easily plugged by changes in regulation. For instance, the Commerce Department could require more information about defense companies' parent firms, owners, board of directors, and US and foreign controlled subsidiaries when they apply for an export license. They could also require companies to provide more information on any of the brokers, including financiers, involved in a proposed sale. The Commerce Department should also seek to obtain access and use of the State Department private watch list as a tool to vet arms export applications.

Improve oversight on defense offset deals. Many of the major cases of corruption in arms sales have included defense offsets. The US government, however, has taken a hands-off approach to overseeing defense offsets. The US government should take a more hands-on approach in order to curb corruption. Defense and State Departments can accomplish this by elevating their reviews of offset arrangements, especially for indirect offsets, by asking the key questions on defense offsets included above in the section on key corruption risk factors. Summaries of these assessments should be included in State and Defense Department notifications to Congress on major arms sales. The State and Defense Department should also consider prohibiting cash in lieu of offset contracts and providing summary information on these offsets for the public.

Implement the State Department Inspector General's (IG) recommendations rigorously and do a post implementation study. The IG recommended that DDTC implement eleven recommendations to improve their "internal controls" and processes for reviewing arms export applications. Several of these recommendations appear more important than others. For instance, a key recommendation requests DDTC to "develop and implement an action plan to attain" the staffing resources necessary to effectively check proposed export applications. Another recommendation calls on DDTC to "establish and maintain a database" on DDTC end-use checks to help reduce delays. Another recommendation requests the DDTC add a second signature process to help "reduce the risk of errors." There are other recommendations that ask DDTC to enhance their training of staff. In order to ensure these recommendations are followed, however, the IG office should conduct a follow-up review.

Congress

Enhance Defense Department oversight of contractors and subcontractors involved in arms exports. When the Defense Department approved contracts to supply arms to Afghanistan and Iraq security forces with at least two arms brokers that were on a State Department private Watch List in mid-2000s, it was a wakeup call to an oversight challenge.¹³⁶ More than a decade later, there continue to be reports of Pentagon officials approving contracts with individuals that have been charged of bribery or fraud or that have been barred or suspending from participating in Defense Department contracts. It also remains unclear if the Defense Department is using the State Department's Watch List to verify that none of the prime or subcontractors or agents or brokers are on the list. As such, it seems a fitting time for the Government Accountability Office to conduct an assessment on the Defense Department's ability to effectively vet to ensure no prime contractors, subcontractor, agent, or broker have a background that could pose risks for bribery, fraud, and the diversion of weapons.

Enhance the breadth of disclosures on political contributions, commissions, and fees. US defense company disclosures on political contributions, commissions, and fees in connection with proposed arms sales can provide the US government with key information to help curb corruption and encourage companies to establish robust compliance systems. It can also help US law enforcement investigate cases of bribery. However, it appears that the disclosures do not apply to certain types of defense offsets such as indirect defense offsets. A renewed US government effort to use these disclosures and to broaden out the scope of the regulations would likely strengthen US government efforts to combat bribery and other forms of corruption in arms sales and defense offsets. Similarly, Congress should consider requiring companies to disclose any contributions, commissions, and fees as part 600 Series arms sales.

Improve the standard terms and conditions for government-to-government and commercial arms sales, especially for high risk items and/or high-risk recipients. Congress could require the Defense, State, and Commerce Departments to strengthen their standard terms and conditions for all arms sales. These new terms and conditions should require that the recipient of US arms comply with all international humanitarian and human rights law and the US Foreign Corrupt Practices Act and the OECD Anti-bribery Convention.¹³⁷ For all DCS and 600 series arms sales, Congress should also consider expanding the requirement for companies to obtain a certification from the prospective end-user that they will not re-export the arms items or use the arms in contravention of US law or regulations.

¹³⁶ Colby Goodman, "Dealing with Arms Intermediaries: The Pentagons Missing Controls on Contractors Engaged in Arms Exports," September 2009, <https://securityassistance.org/sites/default/files/Dealing%20with%20Arms%20Intermediaries%20Policy%20Briefing%20--%20FINAL%20Sept%202021%202009.pdf>.

¹³⁷ The full name is the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The convention is available here <http://www.oecd.org/corruption/ocdantibriberyconvention.htm>

Require all contractors and subcontractors to list their beneficial owners and establish vendor vetting units to ensure compliance. Anonymous shell companies are a well-established means of diverting contract funds to political cronies and those tied to insurgents, terrorists, warlords, criminal networks, and other malign actors. American defense industry contracts should list the beneficial owners of entities involved in all contracts and sub-contracts. Vendor vetting cells should be established within the contracting or intelligence communities to verify the beneficial owners and ensure there are no links to malign actors. When US government officials identify US or foreign companies use of shell companies, this should trigger a concern and further investigation into what the US or foreign companies may be hiding.

Review potential defense company reimbursements for defense offsets. According to the Security Assistance Management Manual, US defense companies can be reimbursed for their costs of fulfilling defense offset agreements with foreign countries as part of certain FMS deals. However, the Defense Department’s use of this type of reimbursement is largely unknown and understudied. Congress should consider requesting the Government Accountability Office to conduct a study on defense offset reimbursements, including the original defense offsets in question, to assess the Defense Department’s oversight and accounting of these reimbursements. A key research question would be for the GAO to also evaluate whether any of the recipients of defense offset arrangements have or may pose any risks for corruption.

Legislate that firearms and associated components will remain categorized as a munition. Though these arms may be commercially available in the United States, the potential effects of easing exports of these arms to US foreign policy and national security could be significant, and in some cases, even catastrophic. Many of the US arms export laws and ITAR regulations presented above, including requiring brokers to register and receive a license before engaging in brokering activities were created with firearms trafficking in mind.

Enhance Oversight of Defense Companies Exporting Arms

Enhance transparency on arms sales reports. Some of the State Department’s reports to Congress on commercial arms sales have become too summarized over the years. As a result, the reports have lost some of their earlier utility for Congress or the public. For instance, the State Department’s annual reports on approved and exported arms to all countries around the world (the 655 Report) includes much less detail on the type of weapons than it did before. It seems that technological advances in the US customs database would also provide all of the information needed on actual defense article exports by weapon category, but the 655 Reports do not include that data. The State Department’s reports on pre- and post-end-

use also used to provide helpful charts of end-use checks by weapon category. In some cases, these reports also highlighted specific examples of unfavorable end-use checks. Reinserting this key information should be relatively easy and provide valuable information to Congress and the public.

Direct Commercial Sale congressional notifications for the public. As the executive branch continues to propose many major arms sales through the Direct Commercial Sales program, Congress should consider mandating that key information included in congressional notifications are made public. At the moment, the public can only see the type of weapon and recipient country being proposed months after the notification has been sent to Congress. This level of detail is starkly less than what the public views for Foreign Military Sales. In response to public requests for the State Department to release more detail, including the total value of the contract and the company, the State Department has said US regulations or law restrict them from releasing that data. The basis of the assertion seems to be a very narrow reading of the law. The State Department also argues that releasing the information could also provide key information to competing defense companies. However, the value of this minimal information becoming public seems to outweigh any defense company concerns.

Require the Commerce Department to report on 600 series exports to all countries. In 2016, the Commerce Department’s Bureau of Industry and Security published a detailed report on all exports of items controlled under the Commerce Control List in calendar year 2015. This downloadable Excel file included data on the category of goods, the dollar value, the recipient country, the categorization identification code, the type of license or license exception used, and other data. However, the Commerce Department has refused to provide similar types of data. The Commerce Department also stopped providing information on some exports to certain risky countries as it has for decades. If, however, Congress wants to ensure that the Commerce Department is approving arms exports in accordance with US law and in the national interest, it should require the Commerce Department to renew its publication of the Excel file mentioned above.

APPENDIX A: COUNTRY TEAM ASSESSMENT REQUIRED ELEMENTS

Country Team Assessment Common Required Elements, from SAMM Manual, Chapter 5

#	Required Element
1	Reason the purchaser desires the defense articles or services and description of how the country or organization intends to use them
2	Appropriateness of the proposed sale in responding to legitimate recipient security needs
3	Impact of the proposed sale on the military capabilities of the proposed recipient, including the ability of the proposed recipient effectively to field, support, and appropriately employ the requested defense articles in accordance with their intended use
4	Source of financing and risk of adverse economic, political, or social impact within the recipient nation and the degree to which security needs might be addressed through other means
5	The human rights, terrorism, and proliferation record of the proposed recipient and the potential for misuse of the defense articles in question
6	How the articles or services would contribute to both the US and the recipient’s defense/security goals
7	The proposed recipient’s will and ability to account for and safeguard sensitive technology from transfer to unauthorized third parties or in-country diversion to unauthorized users
8	The availability of comparable systems from foreign suppliers
9	How the proposed sale would contribute to US security and foreign policy goals
10	How the proposed sale would affect the relative military strength of the countries in the region and its impact on US relations with countries in the region. This is especially important when considering sales involving power projection capability or the introduction of a system that could conceivably increase tension or contribute to an arms race.
11	Possible impact or reaction to any in-country US presence that might be required to carry out the sale or provide training.

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