



*Approaches to Enhanced
Prosecution and Sanctions
for Dual-use Export Control
Violations*

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Part I

*Introduction: Putting the subject
into a context*



An export control system must

- ✧ Include policy, legislation, licensing, industry outreach, international co-operation/info exchange and law enforcement
- ✧ Seek to prevent illegal activities
- ✧ Address negligence, ignorance, conspiracy and intent
- ✧ Recognize and address weaknesses in the system (breakdown in communication, corruption etc.)
- ✧ Deserve the name 'system': clear procedures, allocation of responsibilities and tasks, legal basis, institutional memory



Export control requires 3 c's

Mechanisms to facilitate coordination, communication (two-way!), co-operation at international, inter-agency, intra-agency levels through

- ✧ Agreements (MoU ...)
- ✧ Structures (inter-agency working group...)
- ✧ Infrastructure (electronic communications, shared databases)



Enforcement tasks

- ✧ prevent and detect violations of national laws and regulations
- ✧ deny exports that lack authorization
- ✧ investigate and prosecute suspected violations
- ✧ help partners in international law enforcement cooperation



Distribution of enforcement tasks

Organizational distribution of legal powers to perform these tasks and their implementation vary

Enforcement involves involving customs, border police, police, prosecutors, intelligence



Enforcement tools include

- ✧ Risk analysis
- ✧ Product identification
- ✧ Company audits
- ✧ Investigations
- ✧ Interagency cooperation with licensing officers, the police, border police, intelligence, the foreign office, prosecutors
- ✧ International cooperation



An enforcement officer needs

- ✧ Sufficient legal powers, e.g. to stop the shipment and to confiscate goods
- ✧ Incentive to act
- ✧ Speedy access to information/intelligence
- ✧ Access to technical expertise
- ✧ Equipment
- ✧ Continual training
- ✧ Contact with industry



German customs has legal powers to

- ✧ physically examine goods
- ✧ take samples
- ✧ examine documents (e.g. bookkeeping)
- ✧ search property and persons
- ✧ seize evidence
- ✧ monitor the market
- ✧ preventively monitor/intercept telecommunications and mail
- ✧ conduct its own investigations




Part II

Legislation

Appropriate sanctions

Case studies



Purpose of dual-use legislation

To prevent/restrict the proliferation of WMD
(+ Promote trade)

How accomplish? By enforcing dual-use legislation (and political goals) found in national legislation, international treaties, SC resolutions, multilateral regimes

In consequence - No end in itself to have same legislation in all states



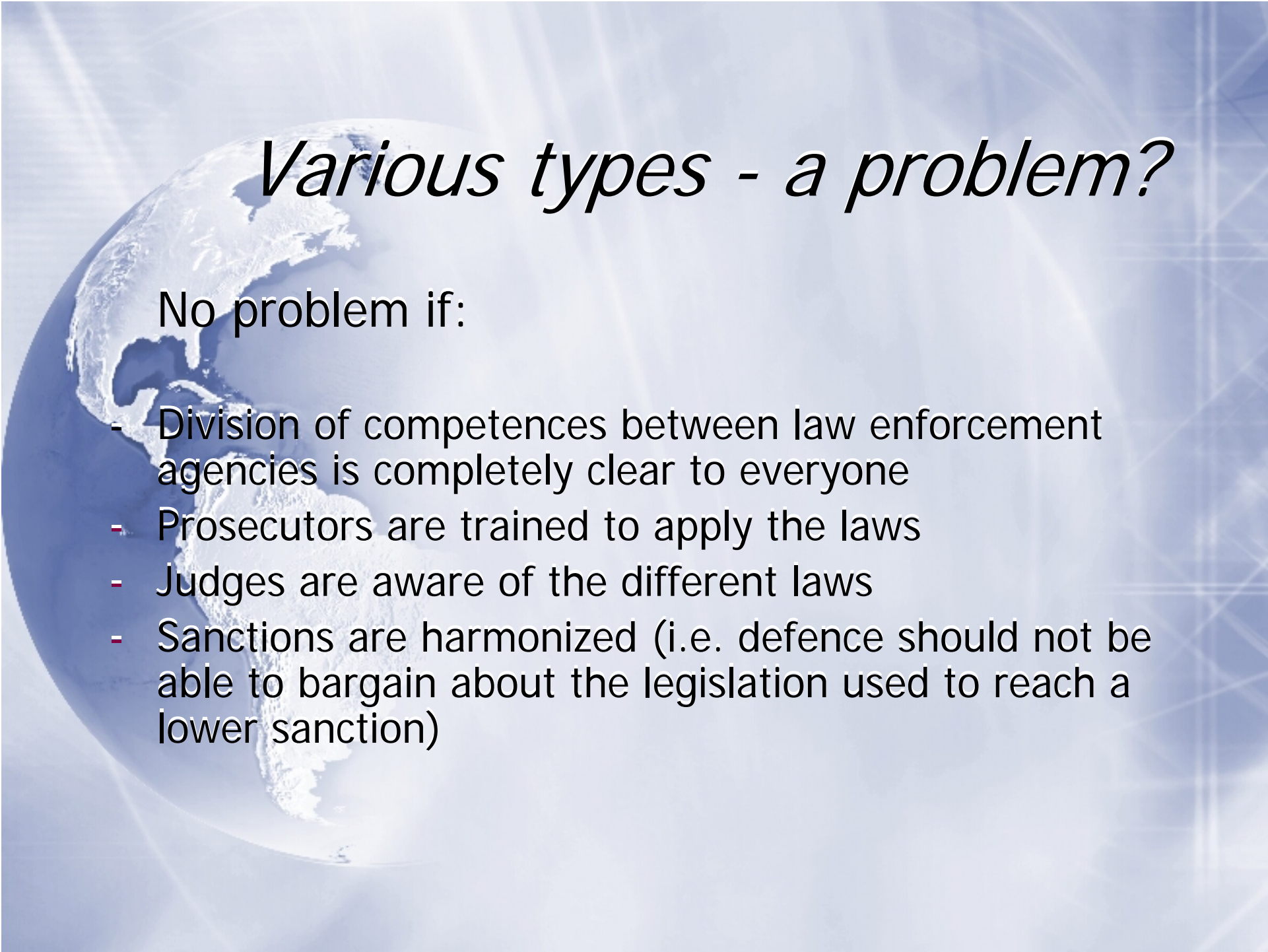
Examples of national legislation

- ✧ Specific export control laws
- ✧ Smuggling laws
- ✧ Penal code including statutes on e.g. falsification of documents
- ✧ Terrorist legislation
- ✧ Acts implementing international conventions (E.g. Genocide Convention)
- ✧ EC Dual-use Regulation (EU states)



Intent or negligence?

- ✧ Selection of legislation dependent on the intent of the offender
- ✧ Could be difficult to prove intent, therefore crucial to punish negligence



Various types - a problem?

No problem if:

- Division of competences between law enforcement agencies is completely clear to everyone
- Prosecutors are trained to apply the laws
- Judges are aware of the different laws
- Sanctions are harmonized (i.e. defence should not be able to bargain about the legislation used to reach a lower sanction)



Appropriate sanctions

Serve two main functions:

- a) General prevention: deterring factor
- b) Special prevention: practical factor
(by removing offenders from the criminal arena)



Type of offender

- ❖ A proliferator of WMD
- ❖ A willing manufacturer or broker of dual-use goods
- ❖ A negligent exporter



Types of sanctions

(addressing the different types of offenders)

✧ Criminal sanctions:

- prison terms, fines, suspended sentence

✧ Administrative sanctions

- e.g. loss of right to export privileges (e.g. simplified procedures), loss of property rights



Criminal sanctions in the UK

- ✧ Deliberate offences up to 10 years imprisonment and/or unlimited fine
- ✧ Any offence can result in a fine of 3 times the value of the goods
- ✧ For less serious breaches, traders may pay a compound penalty or restoration fee



Criminal sanctions in Germany

- ✧ Fines to 2 years of imprisonment, applied primarily to negligent offences
- ✧ For very serious crimes, from 2 years to 15 years of imprisonment



Case studies

Germany

Sweden

The Netherlands (x2)

The UK



Germany: Truppel's aluminum tubes

Conclusion: In the end a successful conviction although 'with God's help and a toothbrush' (i.e. luck)

German licensing authority trusted negligent exporter to not make another attempt to export aluminum tubes to North Korea

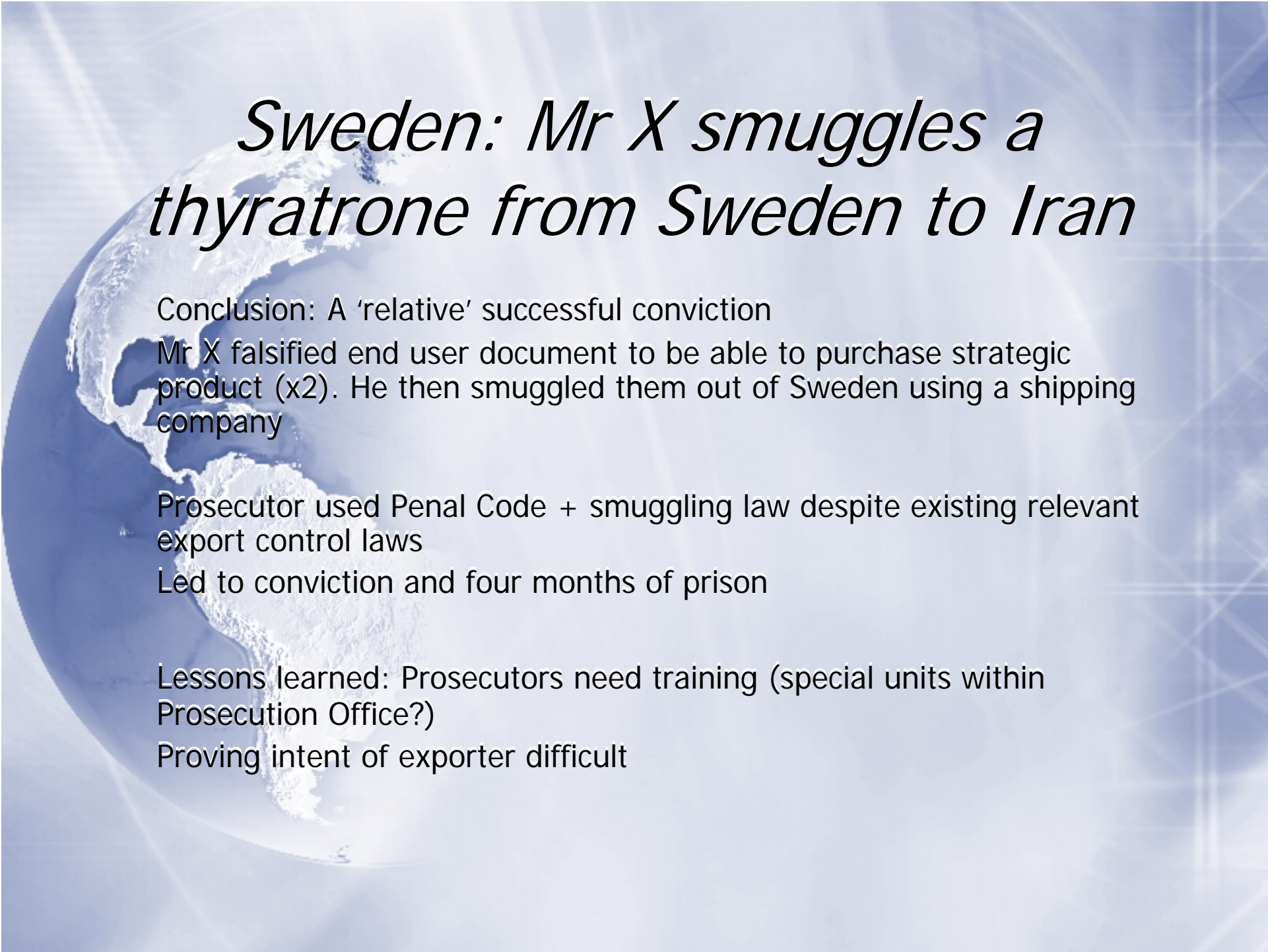
Due to alert customs criminological office, mistake was found before the goods had left the country (effective interdiction)

Led to conviction and 4 years of prison

Lessons learned:

Preventive confiscation of goods should be in place

An alert customs criminological office with experience helps



Sweden: Mr X smuggles a thyratrone from Sweden to Iran

Conclusion: A 'relative' successful conviction


Mr X falsified end user document to be able to purchase strategic product (x2). He then smuggled them out of Sweden using a shipping company

Prosecutor used Penal Code + smuggling law despite existing relevant export control laws

Led to conviction and four months of prison

Lessons learned: Prosecutors need training (special units within Prosecution Office?)

Proving intent of exporter difficult



The Netherlands, businessman makes money on illegal exports

Conclusion: Failed prosecution


Siebos is believed to have illegally exported dual-use products to Pakistan. Based on a tip from German intelligence service Dutch licensing authority issued a catch-all warning

(+ several convictions and other charges over the years)

The Court was unable to use evidence because it had been collected in violation of Dutch procedural laws

Lessons learned: Important to send catch-all clause warnings to correct address

Procedural laws may challenge implementation of laws if not applied adequately



The Netherlands, the export of chemicals to Saddam Hussein

Conclusion: A successful conviction

Van Anraat prosecuted for conspiracy to commit war crimes under Genocide Convention

Dutch prosecutors saw van Anraat on public TV and chose to prosecute under an international offence, using universal jurisdiction, since national export laws had expired

Lessons learned: Special Dutch prosecution unit dealing with international crimes proves to be efficient, alternative legislation



The UK, examples of sanctions

Conclusion: Successful prosecution

Man convicted by UK Court of 12 specimen counts under the Customs and Excise Management Act for knowingly exporting aircraft parts to Iran without an export licence in contravention of an export prohibition

Led to;

- 18 months imprisonment suspended for 2 years
- banned from being a company director for 10 years
- £70,000 asset confiscation



Other cases of concern

- ❖ Belgian case shows importance of communicating relevant intelligence information
- ❖ UK case shows importance of parliamentary scrutiny



Part III

*Summary of lessons learnt from
successful and failed prosecutions*



Legislation


- ✧ Comprehensive and clear legislation
- ✧ Awareness among prosecutors
- ✧ Legislation should include:
 - liability for exporters, producers, shippers, traders, brokers, financiers
 - crimes of intent, negligence and conspiracy
 - a catch-all clause
 - link from export control law to criminal law
 - administrative and criminal penalties
 - sanctions for individuals and companies
 - procedural laws (e.g. capacity to search houses)



Catch-all in EU dual-use regulation (Art. 4)

Authorisation requirement if the exporter has been informed by the authorities that the items in their entirety or in part are, or may be intended,

- a) 'for use in connection with the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices...



Catch-all (2)

or the development, production, maintenance or storage of missiles capable of delivering such weapons'

- b) For military end-use in an embargoed destination
- c) As parts or components of an illegally exported military item

And: notification requirement for exporter if aware



Regular legal revision

- ✧ Political changes
- ✧ Technological developments
- ✧ Trading patterns
- ✧ Loopholes found by proliferators
- ✧ Legal loopholes identified through prosecutions
- ✧ Periodic reviews to harmonize and streamline regulation



Detection

- ✧ Access to intelligence
- ✧ Enforcement officers need regular contacts with industry, including company audits
- ✧ Different regulators need to harmonize inspections and exchange information about visits
- ✧ Risk management
 - result of inter-agency cooperation
 - should include risk profiles on persons, items, places and routes
 - use databases for info gathering



Interdiction

- ✧ Legal and technical capacity to stop the shipment
- ✧ Legal and technical capacity to confiscate goods
- ✧ Preventive confiscation?



Investigation

- ✧ Decide who is in charge (lead agency, joint team?)
 - ✧ Investigation powers:
 - ✧ search premises
 - ✧ access bank and credit records
 - ✧ electronic / telecommunications surveillance
 - ✧ at what point do you require judicial approval?
 - ✧ what are you allowed to do outside your territory?
- Bilateral agreements on extradition and mutual assistance on criminal procedures in place?



Prosecution

- ✧ Who is legally competent to prosecute?
 - Does the customs agency have its own prosecution service?
 - In which country if crimes committed in more than one country?
 - Federal, regional, local level within a state?
- ✧ Which laws are you going to apply?
 - Problem of double criminality
- ✧ Duty to prosecute?
- ✧ Awareness among prosecutors (and judges)
- ✧ Which of the actors involved in the violation can be prosecuted?
- ✧ Centralize expertise among prosecutors in specialized units?



Penalties

- ✧ What level is a deterrent for individuals and companies?
- ✧ Type of penalties (financial, criminal, administrative)



Regional and international harmonization?

Although it is up to each State to decide on appropriate and effective sanctions it could be worth harmonizing sanctions with other members of your multilateral arrangements to maintain a credible system for export controls, remembering that violations against export controls are international crimes



Cooperation

❖ Intra-agency cooperation

- ❖ develop expertise in e.g. prosecutor's office
- ❖ awareness among other prosecution offices dealing with potentially related cases such as organized crime

❖ Interagency cooperation

- ❖ flow of information (e.g. of denials) between all relevant institutions: customs, licensing, police, intelligence, foreign ministry, prosecutor's office

❖ International cooperation

- ❖ in particular with neighboring countries
- ❖ formal agreements



Some advice based on experience

- ✧ Conduct training courses with all agencies involved
Purpose: Establish roles and responsibilities, avoid duplicate work
- ✧ Ensure that there are legal routes for the sharing of information
E.g. Remove possible data protection obstacles
- ✧ Establish what intelligence is available to each partner
Share intelligence and results
- ✧ Remove potential competition between agencies and ministries



Concluding remarks

- ✧ Catch the items before they have left the country: conspiracy for violations
- ✧ Don't trust party denied an export to comply: confiscate goods
- ✧ Raise awareness along the supply chain to prevent unintended violations
- ✧ Companies are key partners in enforcement



THANK YOU

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