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Export of Defense Items, the German Experience (compared with Japan): Controversial issues

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Materials	Handout [PDF:984KB]

Introduction: Weapons export hypotheticals

Harald HOHMANN

I've selected two hypothetical cases which are abstracted from real cases. In the **first case**, Company G is a German company that produces ballistic-resistant body armor, which are vests that protect only against bullets from handguns and pistols. G wishes to export them to police forces in Vietnam, Thailand, and Kazakhstan. The end use in those countries is the protection of police officers against illegal shootings. However, the German export agency, BAFA, refuses to grant an export license to G. What should G do?

Case two: G produces tanks and wishes to export them to Saudi Arabia. Can the German government issue a so-called preliminary decision in favor of granting an export license to G even if it believes Saudi Arabia to be a repression state? (A preliminary decision is a formal procedure that can be employed before money is spent on a project. If the preliminary decision is favorable, funds can be invested because when the law and the facts are more or less the same, there is the right to obtain an export license).

Meanwhile, the German branch of Amnesty International is incensed about these planned exports and announces that it intends to take legal action to revoke the export licenses. Mr. M, a member of the German parliament, would like to know whether the German government has decided or intends to decide in favor of granting the export licenses or this preliminary decision.

The German government, Amnesty International, and Mr. M all want an answer. What do we say to them?

Comparing Germany and Japan

Let's start by comparing Japan and Germany, whose regulations have different backgrounds. While Article 9 of the Constitution of Japan demonstrates Japan's strong commitment to peace, it does not provide a clear picture of whether weapons may be exported to other countries.

The Three Principles of 1967/76 enunciated prohibitions on exporting arms to specific countries. The 1980s saw the advent of a few rather vague exceptions stating that further exports should be allowed but without clearly defining the parameters. Last year, the new Three Principles were issued, clarifying cases in which transfers are prohibited and cases in which they are limited only to those, which contribute to peace/cooperation, and those, in which appropriate controls (regarding unauthorized use and evasion) are ensured.

There are a few differences compared with Germany. While the Japanese feeling of victimhood is defined by the Hiroshima experience, Germany's sense of shame and penitence is defined by the Holocaust. Japan was isolated, but Germany became a member of the North Atlantic Treaty Organization (NATO) and the European Union (EU) very quickly. Obviously, NATO membership is incompatible with a constitutional guarantee which says nothing about whether weapons exports are allowed. Germany's equivalent to Article 9 of the Constitution of Japan is Article 26. Paragraph 2 thereof states that weapons exports are permitted if the exporter obtains a license from the German government. The important EU document for this was developed within the Common Foreign and Security Policy (CFSP). It's a coordination mechanism within the EU. The 2008 EU Common Position on Arms Exports provides eight principles which must be taken into account in a member state's decision to export to a third country. These principles include compliance with international commitments and human rights norms, consideration of national security/development issues, and a prohibition on arms deliveries to parties involved in armed conflict. In Germany, these principles of the 2008

Common Position and of its predecessor, the 1999 EU Code of Conduct, were implemented by the German Government Principles of 2000. The German Government Principles of 2000 make a very clear distinction: weapons exports to NATO/major allies are nearly always allowed with very few exceptions, while exports to all other states are very heavily restricted and must take the Common Position of the EU into account.

We should next compare the principles of the EU with the new Japanese principles. One feature in common is the obligation to comply with international commitments. Japan is particularly mindful of commitments such as nonproliferation agreements and United Nations (UN) sanctions. Germany adds commitments under human rights agreements to these. The main difference between the two countries here is the explicit recognition of compliance with international human rights norms under the German principles. Japan acknowledges them but not explicitly. It is important to be explicit.

Both Japan and Germany accept the obligation to take peace and security into account. Japan will allow exports, which contribute to the promotion of peace, international cooperation, and Japan's security. The EU will not allow deliveries to parties involved in armed conflict and will take into account the impacts on security issues, foreign affairs, and development issues. There is a small difference here. Foreign affairs and security interests, from the EU and German perspective, allow Germany to consider (in addition to its own interests) the foreign affairs and security interests of its allies, not only those of Germany itself.

Both countries take end-use controls into account in more or less the same way. The Japanese regime is somewhat stricter. The government of Japan must always consent before a re-export takes place. In Germany, this is necessary only for weapons of war and nearly war weapons.

The company perspective

I will speak about companies and their understanding on these principles. The German government is very satisfied with the hardening of the law in 2008, from the 1999 EU Code of Conduct to this Common Position of 2008. Looking more closely reveals some hidden and consistent critiques by companies. The first is a criticism of the ambiguity of the principles. What is a "repression state"? What does consideration of "regional peace, security, and stability" mean in practice? The desirability of a guidance document therefore is apparent. We will talk about such a document later: the EU User's Guide.

The next consideration is whether the playing field is truly level. Germany's implementation obviously is the strictest. Due to its history, Germany wants to be very ethical when it comes to weapons exports. There is a certain similarity to Japan.

The result of Germany's strictness is very clear. Companies will deliver these weapons to their subsidiaries in France and Great Britain, removing them from the purview of the German agencies. The best would be to have completely non-German equipment to eliminate the strictest controls. If the first member state refuses to grant the license, the company can go to a second member state, provided there is consultation between the two. The second member state can hear from the former member state as to why they did not grant the license and can then decide whether to do so itself or to react differently.

The next critique is that the Common Position may not constitute "hard law." There is sometimes a feeling that it is "soft law"; something which is "nice to have" but not obligatory. The Treaty on European Union states that this Common Position is legally binding on EU member states. This means that lawsuits are possible against member states in the Court of Justice of the European Union in the event of an open violation. It is therefore a legally binding instrument. On the other hand, companies sometimes feel that the government treats it more as soft law.

Relevant reform

With regard to the review procedure, total reform was hoped for in 2013, which would have made these principles more precise, and more open to current requirements. However, after discussion, it was agreed that a more specific guidance document was needed-the current User's Guide should be updated and made more specific. It is clear that this guidance document assumes a leading role in the interpretation of the Common Position.

Transparency is the hottest issue. Members of the German Parliament, especially from the opposition parties, are frustrated with the government. In 2012, the Social Democratic Party (SPD) made three proposals. First, arms export reports should be published earlier and be biannual rather than annual. This has been more or less implemented. Second, Parliament should be more integrated into the decisions of the German Federal Security Council (FSC). In the FSC, everything is secret, even the agenda and the decisions. This offends members of Parliament. Third, end-use controls should be introduced.

The Green Party made a stronger proposal. The first was for more reports: four annually. (My comment: it would be too high of a burden for the Federal Ministry for Economic Affairs and Energy to fulfill this). The second was that members of Parliament be informed before decisions are made by the FSC, and that a parliamentary committee on arms exports be established. Third, post-shipment controls on end-use should be introduced. Fourth, the Principles of the Common Position should become enforceable legal rights, thus allowing class actions even by non-governmental organizations. The fifth point is very difficult to understand: the Foreign Office of Germany would be given final authority rather than the Federal Ministry for Economic Affairs and Energy.

Most of the SPD proposals were implemented. The nature of the post-shipment controls is still an open question. The Green Party's proposals were heavily criticized. When Germany introduced the new Export Control Act, a Parliamentary hearing was conducted. I was honored to have been one of the experts invited to testify. All of the experts heavily criticized a special aspect of the Green Party proposal to be mentioned later (class action).

Each member of the German Parliament has the right to control the government (separation of powers, Article 38), raising the possibility of conflict between Parliament and the government. However, as a practical matter, case law has held that the German government has a certain right to make independent decisions without interference by members of Parliament. Article 26 states that weapons exports are possible provided that a license is obtained from the government. The government must have the right to decide whether to grant a license without being subjected to questions from members of Parliament. A very recent constitutional court decision held that the German government has exercised its right to decide independently after a decision on an arms export application was finally taken by the FSC. This means that the German government is obligated to answer a question by a member of Parliament as to whether an application for an export license has been granted after the FSC has made its decision. Only in very rare cases will the government refuse to answer for security reasons, and even then it must offer a reasoning why security reasons prevent the government from answering to this question by the Parliament member.

Return to the two cases

Case 1: Turning to the protective vest case, G should begin by taking legal action against the denial by BAFA. This will continue as a lawsuit in the administrative court of Frankfurt, a special chamber, which handles license applications of this kind.

The protective vests are defense items, and thus it is clear that an export license is required to ship them to third countries. Now, Principle 2 of the EU Common Position 2008 must be applied: the license application must be rejected "if a clear risk exists that the defense items might be used for internal repression." BAFA must demonstrate two points: that the country of end-use is clearly a "repression state," and that the goods to be exported are clearly "repression goods." "Repression" is defined with a focus on torture, willful arrest, arbitrary killing, etc.

In principle, G's legal redress very likely will be successful because none of the proposed countries (Kazakhstan, Vietnam, etc.) are clearly repression countries. The answer would be different for countries such as Saudi Arabia, Libya, the Philippines, the United Arab Emirates (Dubai), and it is very unclear whether a ballistic protective vest could be regarded as a clear repression good. The following questions are pending in the administrative court of Frankfurt: First, does BAFA have unlimited discretion in this area because such a decision affects the field of foreign affairs? And, second, is this discretion limited by EU law? Very clear principles are enunciated in the guidance document for the Common Position. It asks very clear questions, especially the following: Can the goods in question really be used for repression purposes? Is the use of the goods by the end-user for repression purposes obvious? Is the end-use country unwilling to accept human rights obligations, or instead is it currently involved in human rights dialogues with EU member states? If BAFA were forced to answer these questions, G would win the case. It is also possible that the judge would find that the decision involves foreign affairs and therefore that the government has unlimited discretion.

Case 2: With regard to the tank case, a tank is clearly a repression good and Saudi Arabia is obviously a repression state. Germany could satisfy its transparency obligations by amending the Principles of 2000 and publishing a list of regional allies outside of NATO/major allies, which receive special privileges. Companies want to know what they can do, and they want open discussion.

Amnesty International could try to challenge such a decision by the FSC by arguing that a class action should be possible based on the Green Party's draft bill. But it is clear that Germany will never introduce a class action for export law.

Mr. M in principle should be informed that while he appears to have the right to find out the decision, the constitutional court unfortunately has made a distinction between preliminary decisions and final decisions, and that no such right exists for preliminary decisions.

We believe that the Common Position is a very balanced legal document which effectively manages the tension between public welfare and individual freedom.

Conclusion

Three recommendations have been made with regard to the critiques of companies. The first is that the Common Position should be implemented in Germany by a legally enforceable act; possibly the German Export Control Act. Second, the Common Position should be more specific. Clarification is particularly necessary with regard to whether the User's Guide, the guidance document, is legally enforceable (i.e., whether a company can sue for failure to comply with it) or whether it is not legally enforceable. Third, greater transparency between the government and Parliament would be desirable.

Let me mention three points. If you were to ask me what I would recommend for Japan, the first would be to harden the new principles by introducing a guidance document, something which can be flexible at the outset and be made stricter and eventually legally enforceable later. Second, I would recommend explicitly mentioning human rights as an additional welfare interest for weapons export decisions. Third, I think the

transparency issues between Parliament and the government must be resolved.

Comment by WATAI Rikako

Thank you Dr. Hohmann for your presentation. I would like to comment from an administrative point of view. It has been a year since the Japanese government announced the three new principles and guidelines on arms exports which are an update to the original 1967 principles. The new principles are supported by the United States and other key partners. This has made it easier for Japan to join in the multinational development of arms and defense equipment projects and has opened markets for the Japanese defense industry. Japan has a great deal to learn from the German experience at this point.

Some issues mentioned by Dr. Hohmann already are under debate in Japan. Japan should continue its efforts to meet the level of standards as in the EU's Common Position. Japan could consider having an Export Control Council like that in Sweden that would provide non-binding, but respected advice from the Parliament to the government.

To summarize the Japanese arms export regulations, in addition to the three principles on defense equipment transfers, several international treaties apply, and Japan is also a member of the Wassenaar Arrangement. The domestic law governing arms exports is the Foreign Exchange and Foreign Trade Act, which governs exports and technology transfers.

Japan so far has introduced an export control scheme that is clear and explicit on maintaining "peace and security." At the same time, there are some inherent problems similar to Germany's repression goods issue. It is never easy to define the term "peace and security," and the meaning can change and expand over time.

As for the U.S. experience in defining "peace and security," U.S. law on export controls or investment regulations also uses the term "security" or "national security" as a rationale, but this has never been legally defined. While the law remained the same, its application since 9/11 changed to cover not only defense industries but also homeland security or critical infrastructure. There is a need to control the discretion or exercise of decision-making power of the government.

As for the possibility of judicial review, how can we control the exercise of decision-making power to stop its abuse? Bringing lawsuits or challenging government decisions is one solution. However, Japan does not have a constitutional court system like that of Germany, making the judicial system of little use in controlling governmental discretion, so another avenue is needed.

The exercise of discretion in Japan should be controlled by making the export control system transparent and accountable. The Japanese government publishes annual reports on arms exports. Efforts have been made to improve the transparency of the decision-making process. Arms export is a policy choice, but giving permission under the law is a legal issue. Japan's export control system has been sufficient so far, but it still has some ways to go. I agree completely with Dr. Hohmann's suggestion that the new principles and guidelines should be made into hard law. Perhaps it is also time for Japan to enunciate its opposition to human rights violations. Formulating effective regulations is most important of all.

Harald HOHMANN

How Parliamentary control of export law is exercised is a very good question. This is difficult to answer because most members of parliament possess little knowledge on export law. However, during the discussions regarding the adoption of the German Export Control Act, a special committee was formed, and a few of these members of Parliament have some knowledge as a result.

I agree with most of the conclusions by Professor Watai. I would like to add something: it is very difficult to introduce class actions for export law. Nearly all countries are leery of class actions. What are the possible alternatives? Is it possible to improve lawsuits challenging export license rejections by making the process shorter or more efficient? Normally the process is very clear: first you have legal redress and if BAFA denies it, you must challenge this in the administrative court. No one really wants to sue in Germany. Therefore, a question has arisen as to the possibility of the German export agency addressing the case a second time, with new arguments. BAFA has been willing to accept this in some cases because it sometimes hears additional facts which might have influenced the first decision if they had been known previously.

Concerning Japan, the question arises whether business associations in Japan (e.g., the Japanese Machine Center) could bring a lawsuit on behalf of their members. This idea has also been discussed in Germany, but it was rejected in Germany. This is not a class action. Maybe that is a possibility to think about.

Q&A

Q1. Can you explain why it would be a bad idea to transfer responsibility for export control from the Federal Ministry for Economic Affairs and Energy to the Foreign Office of Germany?

Harald HOHMANN

The most natural ally or ministry in relation to export control is the Federal Ministry for Economic Affairs and Energy. Nevertheless, the solution in Germany is as follows: controversial issues are not handled by the Federal Ministry for Economic Affairs and Energy alone; they are submitted to a council consisting of foreign

affairs, defense, and the Federal Ministry for Economic Affairs and Energy. This means that other ministries are integrated into the decision. Giving main responsibility to the Foreign Office of Germany would give the impression that foreign policy concerns are paramount rather than economic issues. The process is already difficult enough in Germany. There's a constant struggle between foreign affairs, economy, and defense. Even now, the Federal Ministry for Economic Affairs and Energy is unwilling to rein in foreign affairs. If foreign affairs were given the main responsibility, life could become very difficult for exporters.

Q2. Isn't there a conflict of interest where the same ministry—Federal Ministry for Economic Affairs and Energy—is responsible for promoting and controlling an industry (e.g., the defense industry)?

Harald HOHMANN
Maybe, but they manage it very well. The three ministers try to reach a unanimous decision, and spend much time in doing so. Normally these are unanimous decisions. Sometimes they may take majority decisions, but we don't know as the proceedings are secret.

Q3. We understand that repression is a kind of human rights violation, so I cannot understand the difference between the two concepts you mentioned: repression and human rights violations.

Harald HOHMANN
There is no real difference, but when one looks very closely, it is about two different situations. There are two alternatives mentioned in this principle. The first applies where a country is clearly a repression state, and the other is where the UN or the EU has stated that a gross violation of human rights exists. It's more common to speak about repression because it is defined. A very tough question is how you can reach the conclusion that a regime is repressive. Only looking at reports by Amnesty International could give you a skewed or exaggerated picture. That is why I think the guidance document is important.

Q4. Companies, which are the players that export arms, care about profits first and are sometimes very greedy. In the case of Germany, how is this profit-first mentality on the part of the defense industry managed?

Harald HOHMANN
There are several complicating factors. German companies care about more than profits; they are also very concerned about their reputation, which can include ethical conduct. Media reports of unethical conduct by a company would negatively impact the company's reputation. I would say that making money and having a good reputation are equally important. How is it possible to profit while not exporting to any repressive regimes? Take the example of Vietnam. It was a surprise to me that BAFA said this is a repression state, and then later said that it no longer is one. In our view, the agency should concentrate on the hardcore issues—very clear repression states. The new minister is trying to be more restrictive. The secret is to combine legal measures with ethically responsible treatment and apply them to clear cases. Companies complain that BAFA says something different every year and has no clear rationale. The rules are not clear, except in cases where the User Guide is strictly complied with.

Comment by WATAI Rikako
I think it all comes down to control of discretion in terms of property rights and national security.

Harald HOHMANN
A short current case: G receives an end-use certificate that weapons will be exported to the U.S. Army in the United States. Later, G finds out that the United States exported them to a repression state in South America. Can this German company rely on the end-use certificate it has received? There is now a criminal case against this weapons-exporting company with both ethical and legal aspects. If you have reason to assume that you could be wrong, try to stop it, go to BAFA, and say there could be a mistake or error with the end-use certificate, and then maybe BAFA can stop it before an export to a repression state occurs. Doing nothing would be unethical and legally critical.

*This summary was compiled by RIETI editorial staff.

Top