



UNIDIR

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RESEARCH

Key Issues Brief

**Preventing Diversion in
Conventional Arms Transfers:**

**Exploring Contributions of
Industry and Private Sector Actors**

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About UNIDIR

The United Nations Institute for Disarmament Research (UNIDIR) — an autonomous institute within the United Nations — conducts research on disarmament and security. UNIDIR is based in Geneva, Switzerland, the centre for bilateral and multilateral disarmament and non-proliferation negotiations, and home of the Conference on Disarmament. The Institute explores current issues pertaining to a variety of existing and future armaments, as well as global diplomacy and local tensions and conflicts. Working with researchers, diplomats, government officials, NGOs and other institutions since 1980, UNIDIR acts as a bridge between the research community and Governments. UNIDIR activities are funded by contributions from Governments and donor foundations.

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Executive Summary

Diversion of conventional arms poses a significant threat to societies around the globe, limiting the effectiveness of arms control initiatives and frustrating attempts to catalogue flows of conventional arms. This Key Issues Brief (the Brief) explores the role of industry and private sector actors in preventing diversion in conventional arms transfers. The Brief sets out the contribution that industry and private sector actors can make in addressing diversion and the benefits that are generated from participating in this action.

The Brief draws from inputs provided during two separate meetings convened by UNIDIR in Geneva, Switzerland. The first was an initial scoping meeting, held on 7 August 2018. The second was an informal expert meeting, held on 3–4 October 2018. These meetings brought together representatives of States, non-governmental organizations (NGOs), and industry and private sector actors. The participants considered their roles and responsibilities in conventional arms transfers, especially as they relate to addressing risks of diversion and improving end-use/r controls.

The Brief identifies certain key issues raised in the UNIDIR-organized meetings, explaining how industry and private sector actors can contribute to, and benefit from, action under each point. In summary:

- **Cooperation:** Increased cooperation among industry and other actors in conventional arms transfers confers several benefits for actors and reinforces systems to address diversion:
 - increased information-sharing would improve State and industry risk assessments;
 - increased cooperation with national regulators increases industry knowledge and requires fewer enforcement actions;
 - feedback from national authorities to industry actors informs better industry practice;
 - clearer intergovernmental communication lowers the risk of misunderstanding and reduces improper documentation practices by industry; and
 - increased inter-industry communication increases clarity and lessens the chance of diversion-causing mistakes.
- **Risk management:** When evaluating a potential transfer, both States and industry must conduct risk assessments. Industry can contribute to improvements in this area in several ways, including by:
 - providing States with information that States can use in their own risk assessments;
 - incorporating information from States into industry risk assessments to improve their efficacy; and
 - considering, and constructively engaging with, key factors in diversion risk management, such as regional considerations, sources of information, joint venture-related risk and differing risk standards for evaluating, and evaluated, actors.
- **Licensing:** While licensing is a State's prerogative, improvements in licensing efficacy stand to benefit States and industry by increasing clarity and reducing the risk of diversion. Such improvements could include:
 - greater cooperation in re-evaluation of delivery plans;
 - increased clarity on the development and use of end-user forms;
 - improved commitment to prohibitions and restrictions on re-export;
 - development of a deeper shared understanding of differences in States' policy and regulatory requirements, including opportunities for convergence;
 - better linkages between licensing and customs entities;

- a deeper review of commercial ethics policies and their appropriate use; and
 - consideration of open licences and their costs and benefits.
- **Transport and transshipment:** The key vulnerability in the transit stage of a commercial arms transfer is the use of freight forwarders and shippers, with several issues increasing diversion risk, including a lack of experience with licensed cargo, a refusal to take responsibility for such cargo, improper security for items and unauthorized route alterations. Industry can work with States to develop approaches to address these difficulties.
 - **Defining end use and end users:** There is no agreed upon definition of the end user in a conventional arms transaction. This uncertainty undermines end-user documentation, limits the ability of States to monitor the final end user of items and is exacerbated by technological developments. Industry can work with States to develop a consensus on a definition of end use and end users.
 - **Reflections:** In addition to the specific points outlined above, three broader takeaways are highlighted, specifically:
 - that discussions on the prevention of diversion should be expanded to include industry and private sector actors;
 - that cooperation is vital in the prevention of diversion at every stage of a conventional arms transfer and that industry and private sector actors must play a role in this; and
 - that shared understanding of systems can promote greater integration and minimize the risk of diversion.

About the research team

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1 Introduction

1.1 OBJECTIVE

Diversion of conventional arms poses a significant threat to societies around the globe, limiting the effectiveness of arms control initiatives and frustrating attempts to catalogue flows of conventional arms. Since 2015, UNIDIR has sought to address this problem through three phases of a larger project.¹ The previous phases of the project focused on governmental entities and examined how to enhance common understanding and cooperation among governments to strengthen end use/r control systems.

However, governments are not the only stakeholders in conventional arms transfers. **Industry and private sector actors² are heavily involved in the manufacturer, licensing, transfer and receipt of conventional arms.** To address the contributions of such actors to this issue, the third phase of the project **focuses on the roles and responsibilities of industry and private sector actors in conventional arms transfers and their contributions to preventing diversion.**

The objective of this phase is to examine options and avenues for strengthening end use/r controls applicable to industry and private sector actors and to create a space for States to engage in dialogue with industry and private sector actors. This phase explores issues related to documentation, risk management, information-sharing, awareness-raising and supply chain oversight responsibilities and opportunities. The key findings and observations of this phase will contribute to the work UNIDIR has accomplished in the previous two phases and encourage further development of practical solutions to strengthen end use/r controls in tackling diversion in conventional arms transfers.

1.2 PREVIOUS PHASES OF THE PROJECT

The first phase of the project, entitled “Examining Models for Harmonization of End Use/r Control Systems”, sought to enhance the knowledge and capacity of policymakers and practitioners to identify frameworks, procedures and practical measures in harmonizing end-use/r control systems in order to promote meaningful dialogue among States in mitigating risks of arms diversion. This phase produced a meeting summary from an informal expert group meeting in Vienna, Austria, on 22–23 April 2015,³ and a research study entitled “Examining Options to Enhance Common Understanding and Strengthen End Use and End User Control Systems to Address Conventional Arms Diversion”.⁴

The second phase of the project, entitled “Tackling Diversion (Phase II): Promoting Regional Dialogue to Enhance Common Understanding and Cooperation to Strengthen End Use/r Control

¹ All three phases of this project have been made possible by funding from the United Nations Trust Facility Supporting Cooperation on Arms Regulation (UNSCAR).

² The term “industry and private sector actors” refers to all commercial entities involved in the transfer of conventional arms, including manufacturers, shippers, transshippers, freight forwarders, brokers and other related actors.

³ UNIDIR, “Meeting Summary: Examining Options and Model for Harmonization of End Use/r Control Systems”, Informal Expert Group Meeting, Vienna, 22–23 April 2015, <http://www.unidir.org/files/publications/pdfs/eucmeeting-summary-survey-en-632.pdf>.

⁴ UNIDIR “Examining Options to Enhance Common Understanding and Strengthen End Use and End User Control Systems to Address Conventional Arms Diversion”, 2016, <http://www.unidir.org/files/publications/pdfs/final-euc-2015-en-649.pdf>.

Systems”, had a regional focus, engaging with States in Africa and the Middle East, Latin America and the Caribbean, and Asia and the Pacific, that were not participating in export control regimes, the European Union or the Organization for Security and Cooperation in Europe. This phase was aimed at developing knowledge and capacity for addressing diversion among key policymakers and practitioners. It also focused on identifying practical measures to strengthen end-use/r control systems at the regional and global levels. This phase produced three meeting summaries, from informal consultative meetings in Port of Spain, Trinidad and Tobago (21–22 September 2016),⁵ Nairobi, Kenya (6–7 October 2016)⁶ and Bangkok, Thailand (1–2 March 2017),⁷ as well as a research study, entitled “Strengthening End Use/r Control Systems to Prevent Arms Diversion: Examining Common Regional Understandings”.⁸

Together, these phases resulted in several key findings. In particular, both phases identified four major areas that were required for an effective end use/r control system: (i) common definitions of key terms, (ii) common understanding of the exact details of items, end use and end user that must be provided to export control authorities, (iii) widely accepted types of assurances to be provided by the end user or importer, and (iv) a shared understanding of the role and function of end use/r documentation. As a result, these areas are most relevant for, and should be prioritized in, any strengthening initiative. In addition, both phases identified further areas as especially challenging for strengthening, but equally important to any effective end use/r control system: (i) exchange of information and indicators of risk assessment, and (ii) post-delivery cooperation. Reports from both phases supported enhancing international cooperation, working towards agreement on a common understanding of key terms and aligning standards, in particular, key elements to be contained in end use/r control documentation and general principles for effective end use/r control s.

1.3 INITIAL SCOPING MEETING WITH SELECT INDUSTRY AND PRIVATE SECTOR REPRESENTATIVES

On 7 August 2018, UNIDIR convened an initial scoping meeting in Geneva, Switzerland, with a small group of representatives from key defence industry actors and relevant private sector actors, as well as representatives of States and subject-matter experts. The participants met to facilitate initial discussion on the roles and responsibilities of industry and private sector actors and to explore their contribution to preventing diversion in conventional arms transfers.

1.4 INFORMAL EXPERT GROUP MEETING WITH STATES AND INDUSTRY AND THE PRIVATE SECTOR

On 3–4 October 2018, UNIDIR convened an informal expert group meeting in Geneva, Switzerland, for representatives of States, non-governmental organizations (NGOs), industry and private sector actors to consider the roles and responsibilities of industry and private sector actors in conventional

⁵ UNIDIR, “Meeting Summary. Examining Common Subregional Understandings to Strengthen End Use/r Control Systems to Prevent Arms Diversion”, Subregional Consultative Meeting, Port of Spain, Trinidad and Tobago, 21–22 September 2016, <http://www.unidir.org/files/publications/pdfs/eucii-caribbean-meeting-en-669.pdf>.

⁶ UNIDIR, “Meeting Summary: Examining Common Regional Understandings to Strengthen End Use/r Control Systems to Prevent Arms Diversion”, Regional Consultative Meeting, Nairobi, Kenya, 6–7 October 2016, <http://www.unidir.org/files/publications/pdfs/eucii-africa-meeting-en-670.pdf>.

⁷ UNIDIR, “Meeting Summary. Examining Common Regional Understandings to Strengthen End Use/r Control Systems to Prevent Arms Diversion”, Regional Consultative Meeting, Bangkok, Thailand, 1–2 March 2017, <http://www.unidir.org/files/publications/pdfs/eucii-thailand-meeting-en-681.pdf>.

⁸ UNIDIR “Strengthening End Use/r Control Systems to Prevent Arms Diversion: Examining Common Regional Understandings”, 2017, <http://www.unidir.org/files/publications/pdfs/strengthening-end-use-r-control-systemsto-prevent-arms-diversion-en-686.pdf>.

arms transfers; examine how end use/r controls could be strengthened to support these actors in addressing diversion; outline the contributions that States can, and do, make in supporting industry and private sector actors in preventing diversion; and discuss how States, industry and private sector actors as well as other stakeholders can better coordinate to prevent diversion.

The meeting was attended by 18 representatives of States, NGOs, industry and the private sector. It was divided into four sessions: one session for representatives of States, two sessions for representatives of industry and the private sector, and a final joint session.

1.5 KEY ISSUES BRIEF

This Brief draws from the inputs provided during both meetings. It maps out the key issues identified by participants. The majority of the substantive comments generated were provided by industry and private sector actors. Future research in this area will continue to support discussion from a wide variety of stakeholders.

In the Brief, where a comment was provided by an industry actor or a State, it is referred to in these terms. Where a comment was provided more generally in one of UNIDIR-organized meetings, it is described as coming from participants.

2 Cooperation

Cooperation among industry and private sector actors and other stakeholders in conventional arms transfers creates opportunities for information-sharing, coordinated action and improved practice that can benefit all actors and mitigate the risk of diversion.

2.1 KEY FORMS OF COOPERATION

- **Risk assessments:** Information-sharing and information management are critical in risk assessment. Participants argued that, for such sharing and management to be most effective, the timely involvement of industry actors is required. There should be more research into this point to know what can and should be shared (and how this can be done) without breaking confidentiality rules or harming commercial interests. Receiving feedback from shared information was also identified as important in developing the process and in ensuring that all parties know how to behave and why.
- **National regulators:** Cooperation with regulators is important for companies for a variety of reasons, ranging from reputational issues to facilitation of practical operations and avoiding possible enforcement actions caused by lack of knowledge. This could be done through further improving person-to-person communications or, for example, through the introduction of specialized helplines aimed at assisting small- and medium-sized companies involved in the transfer of conventional arms and other defence items, or through industry outreach programmes undertaken by States.
- **Feedback:** Some participants noted that feedback from national authorities to industry actors was important for risk assessment and to ensure the companies' internal compliance and security programmes were being kept up to date.
- **Inter-governmental cooperation:** Inter-governmental communication and intra-governmental communication are vital for addressing diversion. Many governments are unwilling to sign end user documentation provided by other governments (which can be in a number of different forms or standards) for transactions involving industry and private sector actors. This can lead to significant delays and an overall lack of clarity, and can leave industry and private sector actors reliant on contractual guarantees or unable to proceed at all due to the lack of a licence. In certain cases, the undertaking required by one part of a government may contain conditions (for example, a prohibition on the use of an item in a certain type of weapons programme) that would be rejected if presented to another part of the same government.

- **Inter-industry communication:** Inter-industry communication is also important for preventing diversion and supporting commercial activity. Many suppliers routinely ask for end use/r documentation that is not strictly required. This slows transactions and does not necessarily provide any additional value in preventing diversion. It was suggested that if commercial actors had a better understanding of their responsibilities, this practice might decline. Furthermore, as noted regarding transportation and transshipment entities, many industry and private sector actors involved in supply chains or wider distribution of items are not familiar with export control requirements. Participants debated whether smaller actors (particularly those dealing with dual-use items in a retail context) have the capacity to receive training on export control requirements and implement such requirements consistently. This is also an area that would benefit from further consideration.

3 Risk management

3.1 COORDINATION AND INFORMATION-SHARING IN RISK MANAGEMENT

Industry actors have first-hand knowledge of the increasingly complex supply chain of conventional arms transfers and are interested in working with their respective governments to ensure a smooth and responsible transfers of items. **Involvement and active cooperation among industry and private sector actors and governments is critical, both at the pre-transfer phase, and throughout the transfer of items with possible follow-up stages.**

Risks assessments conducted by both States and industry actors can provide useful information.

- **Industry and private sector actors have access to information that could be useful to States,** particularly with respect to transfer and transshipment-related risks.
 - Know Your Customer (KYC) initiatives by industry and private sector actors generate information that industry uses to conduct risk assessments.
 - An improved system of communication, and greater feedback on the uses of such information, might encourage greater information-sharing.
- **Risk assessments conducted by industry can benefit from information provided by States.**
 - Participants confirmed that, when industry actors are looking for sources of information to make risk assessments, there are often recommendations on government websites; but these points are not mandated and are purely intended as 'standard setting'.
 - Similarly, States often provide 'country lists' of other States that they will apply particular scrutiny too. However, these country lists can change rapidly and industry actors may not be made aware of any such changes. In addition, it should be noted that risk assessments, as part of a State's control over transfers, are a form of foreign policy and domestic authority. States often do not share the factors they consider, or the information they are basing risk assessments on, with other States, or with industry actors, and expecting States to begin sharing this information may be unrealistic.

3.2 KEY FACTORS IN DIVERSION RISK MANAGEMENT

A number of key factors in conducting diversion risk management were identified in the meetings, including:

- **Regional considerations:** Participants agreed that, when diversion risk assessments are conducted, neighbouring States and the wider region should be considered. This is vital because conflicts can extend across borders and borders are sometimes very porous. A participant noted that they had, in practice, denied a transfer to a particular State due to its proximity to a State with significant internal conflict.

- **Sources of information:** Other sources of information for diversion risk assessments can include exporting States, importing States, intelligence agencies, licensing authorities, sanctions lists⁹ and external entities that can conduct background checks and provide specialized information.¹⁰
- **Joint ventures:** One participant noted a further complication in the case of joint ventures between industry actors and States. In these situations, the industry actor may have a process of conducting diversion risk assessments, but if the State holds the majority share of the joint venture, it may not support such action.
- **Differing levels of risk standards:**
 - **Evaluated actor:** Different actors may warrant different levels of scrutiny. Participants noted that an evaluation of a State may require a different approach and level of detail than an evaluation of a private actors.
 - **Evaluating actor:** Participants explained that different diversion risk standards will apply in different industries and to different actors. One participant argued that a large actor that conducts mass-produced standardized business transactions with long-standing purchasers should naturally conduct automatic screening. However, this will not apply to other actors, which, due to size or the more bespoke nature of their business, may need a more specialized screening process for each transaction. Further, participants put forward the position that there should be less focus on standards and more focus on the discipline with which standards are adhered to. It was argued that an industry actor, when implementing a diversion risk management system, must identify the compliance risks, assess probability and determine impact. The degree of complexity will change depending on the business but the basic task of conducting a risk assessment will not. This issue warrants further scrutiny, as a question of how different industries, States and regional organizations might conduct risk assessments.

⁹ For example, the Consolidated United Nations Security Council Sanctions List; see <https://www.un.org/sc/suborg/en/sanctions/un-sc-consolidated-list>.

¹⁰ For example, Dow Jones third-party assessments; see <https://www.dowjones.com/products/risk-compliance/>.

4 Licensing

Export control is a State's prerogative. Such control is exercised by a State as an instrument of its sovereignty and foreign policy, and as a tool to limit cases of diversion of arms. Licensing transfers, including licensing them under certain conditions or refusing to license them, gives States control over which States or actors may receive conventional arms and under what circumstances. In addition to acting as a tool for foreign policy, licensing is also one of the strongest, and most flexible, defences against diversion of conventional arms.¹¹

4.1 MEASURES TO IMPROVE EFFICACY IN LICENSING

Participants suggested methods to improve the efficacy and diversion-prevention of key licensing measures:

- **Delivery plans:** It was noted that, where transport options change, the ability for industry and States to cooperatively re-evaluate delivery plans would ensure that new transport options be designated by the State and followed by industry. The alternative is that industry actors are left unable to carry out the delivery plan as designed, which can lead to cancelled transactions or potential breaches of the plan, increasing the risk of diversion.
- **End user forms:** States and industry should work together to ensure that requirements for State sign-off are delivered with greater coordination. Requesting sign-off from a State that is reluctant to provide it, or does not understand the request, can confuse and delay transfers, leading to items sitting in transit, where they are vulnerable to diversion.
- **Prohibitions and restrictions on re-export:** It is well understood that these requirements, whether it is an outright prohibition or one requiring either permission from or notification to the original export authority, are important in tracking the movements of items after the initial transfer and preventing items from being transferred on to actors that should not possess them. However, participants noted that in certain circumstances, due to their role in commercial supply chains, industry actors that import items, modify them and then return them, but do not comply with these requirements when doing so. It was also noted that in certain regions, the freight forwarder can apply for the licence. On occasion, items are simply shipped without licensing at all, which creates a key risk of items ending up in unintended hands.

¹¹ Many States are party to export control regimes (e.g. the Arms Trade Treaty and the European Union Common Position 2008/944/CSFP). These regimes set out criteria to be assessed in each individual transfer.

- **Differences in State policy and regulatory requirements:** It was recognized by all participants that such requirements are manifestations of State sovereignty, instruments of foreign policy and specific to a State’s own regulatory context. Operating within these principles and systems, however, industry actors noted that they believe greater convergence would increase certainty and, potentially, reduce the risk of diversion by improving compliance. Such convergence could be increased among States, especially where transferring items between multiple States requires compliance with a host of different measures, which participants noted can lead to mistakes.¹² Alternatively, convergence could occur within States, as participants noted that States may often request documentation that they, themselves, would be unwilling to complete.
- **Linkages between licensing entities and customs entities:** Participants agreed that there is an ‘information gap’ between such bodies and noted that, where licensing entities are able to access more of the information that is available to customs entities, then they might be able to scrutinize further elements of the transaction, which would support efforts to mitigate diversion. However, it was noted that certain elements that customs agencies may review (for example, the exact order of a supply chain) may not always be in place when a licence is to be granted. Further study of how to better promote and support coordination between these entities is warranted.

4.2 COMMERCIAL ETHICS POLICIES

While not directly related to cooperation among States and industry and private-sector actors, an additional consideration involves ethics policies of industry actors.¹³ In certain instances, ethics policies will require that an industry actor refuse to proceed with a transaction, on the basis of an ethical concern with the buyer, the transfer process, the potential end use of the item or other issues related to the transaction. This can result in industry actors rejecting a transaction that would have been granted a licence by their State. One participant noted that this involves second-guessing a State’s own policy. Other participants argued that their companies may undertake such actions and that implementing commercial ethics policies represents a basic form of industry responsibility and risk management. This issue would benefit from further research, both on the basic question of how appropriate it is for an industry actor to diverge from its State’s policies, and on additional questions, such as whether an industry actor ought to notify a State when it makes such a determination and whether there might be a process for discussing such policies.

¹² A point of disagreement between industry actors and representatives of States concerned the European Union Common Position 2008/944/CSFP. Certain States argued that the EU Code of Conduct moved the EU towards a more harmonized system, as it requires States to explain any decision to grant a licence where another EU member State has refused an essentially identical transaction within the last three years. However, industry participants felt that the EU Code of Conduct is ‘toothless’ and does not lead to harmonization, as it does not require EU member States to necessarily deny an export licence for an essentially identical transaction whose licence has already been denied by another EU member State, but simply requires the member State to consult the member State that issued the denial before it approves the export and provide a detailed explanation for its approval of the export of the items in question.

¹³ Such ethics policies may be informed by international standards, e.g. the United Nations Guiding Principles on Business and Human Rights (the Ruggie Principles), unanimously endorsed by the Human Rights Council in June 2011, which require companies to ensure that they do not cause or contribute to “adverse human rights impacts”, independent of any measures taken by States. This includes impacts that the company may contribute to through business activities like the provision of products or services — such as the sale of munitions and supply of related support services.; see https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

4.3 OPEN LICENCES

Open licences (which allow exporters to export multiple items under a single licence) can pose specific challenges, both from the point of view of record-keeping, and in preventing diversion to unwanted end users.

However, participants argued that such licences are generally only granted in specific circumstances and should not necessarily be viewed as a loophole in a diversion prevention framework. First, open licences are commonly only used to facilitate the transfer of parts and components and not primary equipment or small arms and light weapons (SALW). Second, particular kinds of open licences will generally have further restrictions or forms of monitoring. Open general licences, for example, will usually require periodic audits of the exporter and will only be issued for exports to close allies or States where risks are minimal. Open individual export licences, on the other hand, will generally only be issued to trusted exporters that would otherwise have required an administratively burdensome number of individual licences for a transaction. Whether such licences are offered, and how they are managed, varies substantially among national authorities. In addition, communication between customs entities and licensing entities only becomes more important for preventing diversion in the case of open licences.

5 Transport and transshipment

5.1 FREIGHT FORWARDERS AND SHIPPERS

In the transport and transshipment of items, freight forwarders and shippers can be a potential point of diversion.

The vast majority of trade for freight forwarders and shippers is not subject to export controls and they are therefore less focused on (or even unaware of) their requirements in this area. For major shippers and freight forwarders, items requiring a licence represent a minuscule amount of their total business, which can lead to a poor understanding of the system among such actors. This lack of compliance creates serious risks. For example, participants noted that, in their experience, if a freight forwarder is not informed that an item is subject to a licence, they may not inquire and will fail to follow any of the required procedures in the licence.

In addition, **freight forwarders may not take responsibility for moving items in accordance with regulations and the terms of a licence.** Freight forwarders often require documentation that will state that they are not responsible for incidents or breaches of procedure, regulation or law. Participants related that it can be difficult for supplying companies even to ask shippers and freight forwarders whether they are compliant with any specific authorization, which creates clear opportunities for diversion and imposes significant costs on industry actors that work to comply with relevant rules.

Furthermore, additional challenges in dealing with freight forwarders may include:

- that items may also be mislabelled to identify the country of origin as the most recent port of departure, instead of the place of origin;
- route alterations that violate the authorization: and
- improper security for items.

5.2 DIVERGENCE IN STATE SYSTEMS

When transporting and shipping items, the different control systems encountered in each country can result in significant compliance costs and confusion. This is compounded by the lack of clarity over what counts as 'transit' and the different interpretations States may have of common rules (for example, EU standards).¹⁴ This point, in particular, was identified as an area that would welcome benefit from further examination.

The overall difficulty of managing transit by industry and private sector actors can be exacerbated by the commercial reality that transit arrangements will likely be finalized many months after a request for authorization has been submitted.

¹⁴ , "As described in footnote 12, there is disagreement between industry actors and representatives of States concerning European Union Common Position 2008/944/CSFP."

6 Defining end use and end users

There is a wide variety of documentation pertaining to end use and end users. Governments vary on how they define re-exportation, what they consider to be required information and whether (and when) they will allow the possibility of conducting post-delivery inspections.

6.1 DEFINITION OF END USE AND END USERS

There is no agreed upon definition of end user. This leads to a lack of clarity for all parties involved in transactions, increases the risk of diversion and undermines monitoring of risks. In addition, such uncertainty can lead some industry actors to use documentation 'defensively', requiring statements from States or industry actors even when it is not commercially necessary or required by State licensing procedures.

The lack of an agreed-upon definition is exacerbated by technological developments, which have created additional scenarios in which an item can potentially be transferred. With a clear and widely understood definition of end user, it might be possible for parties to agree on how to treat these new circumstances.

A potential solution would be to rely on the 'ultimate consignee' as a concept that could be used for clarity. This is a definition from the customs sphere. However, while this concept has a largely accepted definition, it would still not solve debates on the responsibility of parties to determine who holds that title.

6.2 KNOWLEDGE OF END USER

On some occasions, the ultimate end user is unknown to the exporter. This can manifest in industry and private sector actors incorrectly treating a customer as an ultimate end user, when that customer will, in fact, transfer the item onwards. This feeds into a wider debate on how much responsibility industry and private sector actors have in tracing an item down a supply chain (and how practical such tracing might be). Enhancing cooperation and breaking down silos, as well as using existing systems (including both customs and export frameworks) may provide a way to verify end users more consistently, but without some convergence of definitions and standards, progress will be difficult.

Information exchange is also very important in this regard. Actors need to know what the risk factors are and how to alert the right authorities in cases where risks of an unintended end use/r are suspected.

7 Reflections

This Brief has set out a number of key issues to be addressed, contributions from industry and potential benefits for States, industry and the prevention of diversion. For reflection, the Brief now presents final points highlighted by participants on diversion, as well as takeaway points and further work.

7.1 KEY STEPS FOR ADDRESSING DIVERSION

SALW, SALW ammunition, parts and components, intangible technology, intellectual property and larger conventional defence items pose different levels of risk when it comes to assessing diversion, something that is not fully recognized or addressed by current international and regional instruments.

Proper marking and record-keeping of goods is vital. This must be considered throughout the supply chain, taking into account any possible time lapse between authorization and actual delivery or follow-up for repair and maintenance.

There are a number of measures that States can take to help to prevent diversion. The Arms Trade Treaty (ATT) provides a well-regarded and general framework for both governments and industry and private sector actors for addressing address diversion. States noted the importance of the ATT in addressing diversion and, in particular, highlighted the importance of the ATT working groups as facilitators of dialogue on this issue.¹⁵ These working groups can be used to facilitate the participation of specialized experts to draw on the experience of the private sector and civil society. Multiple States supported the inclusion of private sector actors into these working groups to provide information to States. Within the context of the ATT, States also noted the benefits of universalization of standards and the availability of assistance programmes, which could also incorporate industry actors more effectively.

7.2 CONTEXT OF DIVERSION

Regulation and enforcement of transfers is not consistent across the globe. Items move across countries constantly, so one cannot rely only on industry and private sector actors where items are moving into areas where there is less regulation. Government involvement to track such items, and then sharing this information with other governments (and industry and private sector actors, when appropriate) would assist in the regulation and enforcement of transfers.

Governments often rely on industry and private sector actors in mitigating diversion. Each case is individual, but more could be done to collaboratively identify red flags and issues that might be of potential risk. In this, industry communications to their governments about suspicious inquiries and unusual requests are of key importance. Information-sharing among governments and industry and private sector actors is crucial, keeping in mind commercial interests and sensitivities. Following up through maintenance and inspections is an opportunity for the private sector to monitor what delivered items are being used for. If items are lost or diverted, industry and private sector actors

¹⁵ See the working paper “Preventing and Fighting Diversion of Legally Transferred Weapons” submitted to the Working Group on Effective Treaty Implementation Meeting, 6–7 March 2018, https://thearmstradetreaty.org/hyper-images/file/ATT_WGETI_CSP4_WP_Diversion_France_et_al/ATT_WGETI_CSP4_WP_Diversion_France_et_al.pdf; and the working paper “Topic of the Prevention of Diversion (Article 11)” submitted to the same Working Group, https://thearmstradetreaty.org/hyper-images/file/ATT_WGETI_CSP4_Food_for_thought_on_the_topic_of_the_prevention_of_diversion_Article_11CHE/ATT_WGETI_CSP4_Food_for_thought_on_the_topic_of_the_prevention_of_diversion_Article_11CHE.pdf.

may have little direct recourse beyond refusing to deal with certain actors in future. Further discussion on this point would be welcomed by participants.

7.3 TAKEAWAY POINTS

This Brief has mapped out the key issues identified by participants and set out further areas for exploration and study. This final section includes a selection of concluding observations that, following the informal expert group meeting, collate the most commonly expressed points, issues and concerns of participants:

- **Discussions on the prevention of diversion should be expanded:** It is clear that industry actors play a vital role in the prevention of diversion and that discussions on the prevention of diversion must be expanded to include industry actors. **Processes related to the Arms Trade Treaty would particularly benefit from greater engagement with industry actors.**
- **Cooperation is vital in the prevention of diversion:** Cooperation among actors was stressed consistently, and with respect to every stage of a conventional arms control transfer, in the informal expert group meeting. Improved cooperation and information-sharing among relevant actors could improve the risk assessment process at the pre-transfer stage and address gaps at the licensing stage. Better cooperation and communication could also assist in resolving concerns related to the approach taken by freight forwarders and shippers and provide greater clarity on the status of items post-delivery, both of which represent key areas in which to mitigate diversion of conventional arms.
- **The value of shared understanding:** Where shared understanding exists, it can lead to more efficient and secure practices. It may, eventually, also lead to harmonized regulations that can provide more cohesive regulatory regimes and greater clarity for States and industry actors, minimizing opportunities for diversion. However, areas such as pre-transfer risk assessments, licensing and rules on post-delivery inspections remain State competencies and reflect a State's national priorities and approaches.

7.4 FURTHER WORK

Further research is required in several areas: The implications of **transfers of parts and components, as well as dual-use items**, is an area that several stakeholders have identified as warranting further research. In addition, the **impact and applicability of commercial ethics policies**, together with the responsibility of companies to maintain such policies, have also been identified as a productive research topic. Another area where further research may be helpful is in relation to **freight forwarders and shippers**, as any further information on how supplying companies and State regulatory entities might act to address concerns that such entities are failing to comply with regulations, creating serious risks of diversion, would be valuable. Finally, the practice and obligations of industry actors in post-delivery situations, including whether any obligations on an industry actor diminish the further an item moves down the supply chain, was identified as a productive topic by participants.

UNIDIR will release a longer research study on this topic in early 2019. Further work on contributions of industry and private sector preventing diversion in conventional arms transfer will be publicized in due course.



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Key Issues Brief

Preventing Diversion in Conventional Arms Transfers: Exploring Contributions of Industry and Private Sector Actors

Diversion poses a significant threat to societies around the globe, limiting the effectiveness of arms control initiatives and frustrating attempts to catalogue flows of conventional armaments.

UNIDIR convened two separate meetings on this topic in Geneva, an initial scoping meeting on 7 August 2018 and an informal expert meeting on 3–4 October 2018. These meetings brought together representatives of States, NGOs and the private sector.

This Brief draws from the inputs provided during these meetings, maps out the key issues identified by participants, and sets out areas for further exploration and study.