The Export Control Process:
Sources, Goals, and Principles

Dr Jean Pascal Zanders
The Trench

Workshop for Customs Officers of the Kyrgyz Republic in the Field of Export Control
Center on Export Controls
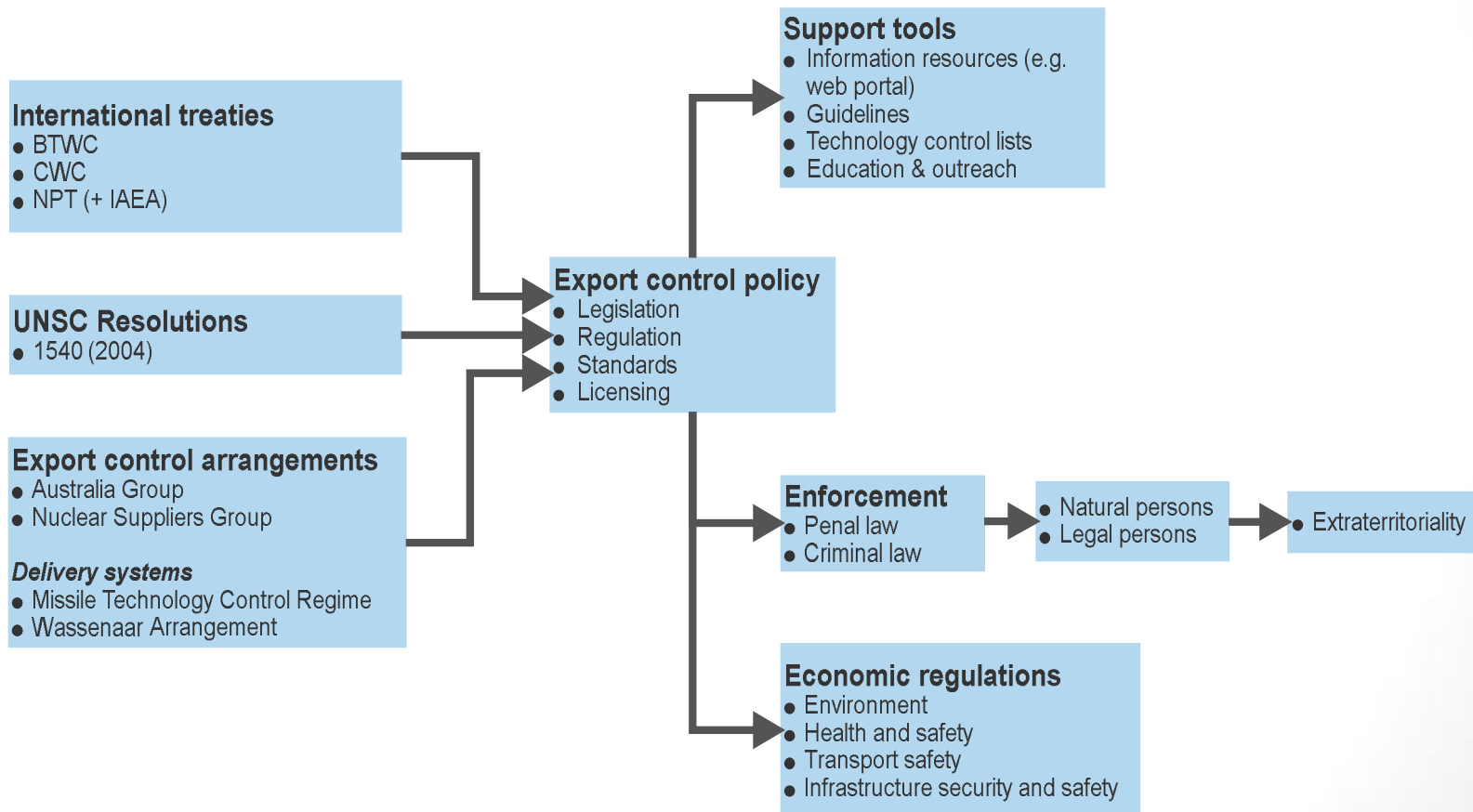*Bishkek, Kyrgyz Republic, 28 April 2021*

Part 1

REGULATORY FRAMEWORKS IN A DYNAMIC ENVIRONMENT

Legal foundations of an export control system

International instruments

State-level implementation

Support tools
- Information resources (e.g. web portal)
- Guidelines
- Technology control lists
- Education & outreach

International treaties
- BTWC
- CWC
- NPT (+ IAEA)

UNSC Resolutions
- 1540 (2004)

Export control arrangements
- Australia Group
- Nuclear Suppliers Group

Delivery systems
- Missile Technology Control Regime
- Wassenaar Arrangement

Export control policy
- Legislation
- Regulation
- Standards
- Licensing

Enforcement
- Penal law
- Criminal law

- Natural persons
- Legal persons

- Extraterritoriality

Economic regulations
- Environment
- Health and safety
- Transport safety
- Infrastructure security and safety

A dynamic environment

- Treaties govern inter-state behaviour; new dynamics are less state-centric
  - Impact on verification requirements in international treaties
  - New forms of technology transfers
    - Difficult to capture under current transfer control regimes
  - Emphasis on national implementation

- Individualisation of threats and threat perceptions
  - A major consequence of terrorism
  - Increasingly, governments frame responsibilities for individual economic actors and professionals

New security actors

- Intent on harm
  - Criminals & terrorists
  - Have potential interest in CBRN materials

- Economic imperatives have replaced security imperatives
  - Sub-state economic units.
    - Industry, shipping agencies, etc.
    - Research institutes
    - Researchers, students, etc.
  - Transnational economic units
    - Multi-national corporations
  - State (agencies)
  - International organisations

Multi-layered **&** multi-sectorial governance – 1

- Weapon control
  - Multilateral agreements (Geneva Protocol, BTWC, CWC)
  - Proliferation prevention arrangements (Australia Group, PSI, Global Partnership, etc.)
  - UN agencies: UNSC, UNODA, 1540 Committee, UNEP, UNDA, etc.
  - National laws and regulations (criminal, penal, trade, safety, etc.)
- Disease prevention
  - WHO, FAO, OIE + their regional organisations/initiatives
- Crime and terrorism
  - UNSC Resolutions (1540, terrorism resolutions, etc.)
  - Interpol, Europol, etc.

Multi-layered **&** multi-sectorial governance – 2

- International transfers
  - WTO, WCO, etc.
- Economic actors
  - Companies (national, multinational, transnational)
  - Research institutions
  - Individuals
- Instruments of collective & individual governance
  - Codes of conduct; Professional codes; Ethics
  - Awareness-raising & education
  - Whistle-blower protection schemes

Part 2

NATIONAL ORGANISATION OF TRANSFER CONTROLS:
POLICY INSTRUMENTS

Export controls **&** transfer controls

- Export controls
  - Commercial transactions between two or more countries
  - Five broad types of action
    - Export
    - Import
    - Temporary storage
    - Transit across the territory before re-exportation at a different location
    - Processing: value-adding activity before re-exportation
- Transfer controls
  - Include export controls
  - Also cover:
    - Commercial transactions within a country
    - Business decisions
    - Undesired technology transfers

Nature of technology transfers

- Commercial transactions
  - Trade
  - Assistance
    - Technology may be free for recipient
    - Nevertheless, transfer involves many commercial trade-related activities
- Business decisions
  - Mergers and acquisitions
  - Divestiture of business activities
  - Friendly/hostile company takeovers
  - Corporate breakups
- Undesired technology transfers
  - Theft
    - Propriety information
    - Research, production, process or product data
    - Tangible technologies
    - Hacking
  - Espionage
    - Industrial espionage
    - Government-initiated espionage

National regulatory framework

- Sources of the national regulatory framework
  - Treaties and binding resolutions (e.g. UNSC) regulating weapon-relevant technologies
  - International and national standards on health, safety and the environment
  - Temporary binding security-related constraints on technology transfers
    - International sanctions and embargoes (global and regional)
    - National sanctions and embargoes
- Requirements following from the implementation of the national regulatory framework
  - Governmental decisions, ordnances, directives
  - Procedures and administrative requirements
    - Technology transfer application
    - Regulatory oversight and auditing requirements
    - Transparency and reporting (including for international treaty obligations)

Enforcement of the regulatory framework

- Criminalisation
  - Legislative process of making specific acts violating the regulatory framework a criminal offence
  - Requires laws and other regulatory measures
  - Must cover
    - The various dimensions of the technology transfer process
    - The various actors and partners in the technology transfer process
- Penalisation
  - Laws and other legislative measures that identify the punishment for the criminal offences
- Enforcement
  - Empowering certain (administrative, law enforcement, etc.) agencies to
    - Monitor technology transfers,
    - Oversee the implementation of the regulatory framework,
    - Act when infringements are noted (corrective, penal)
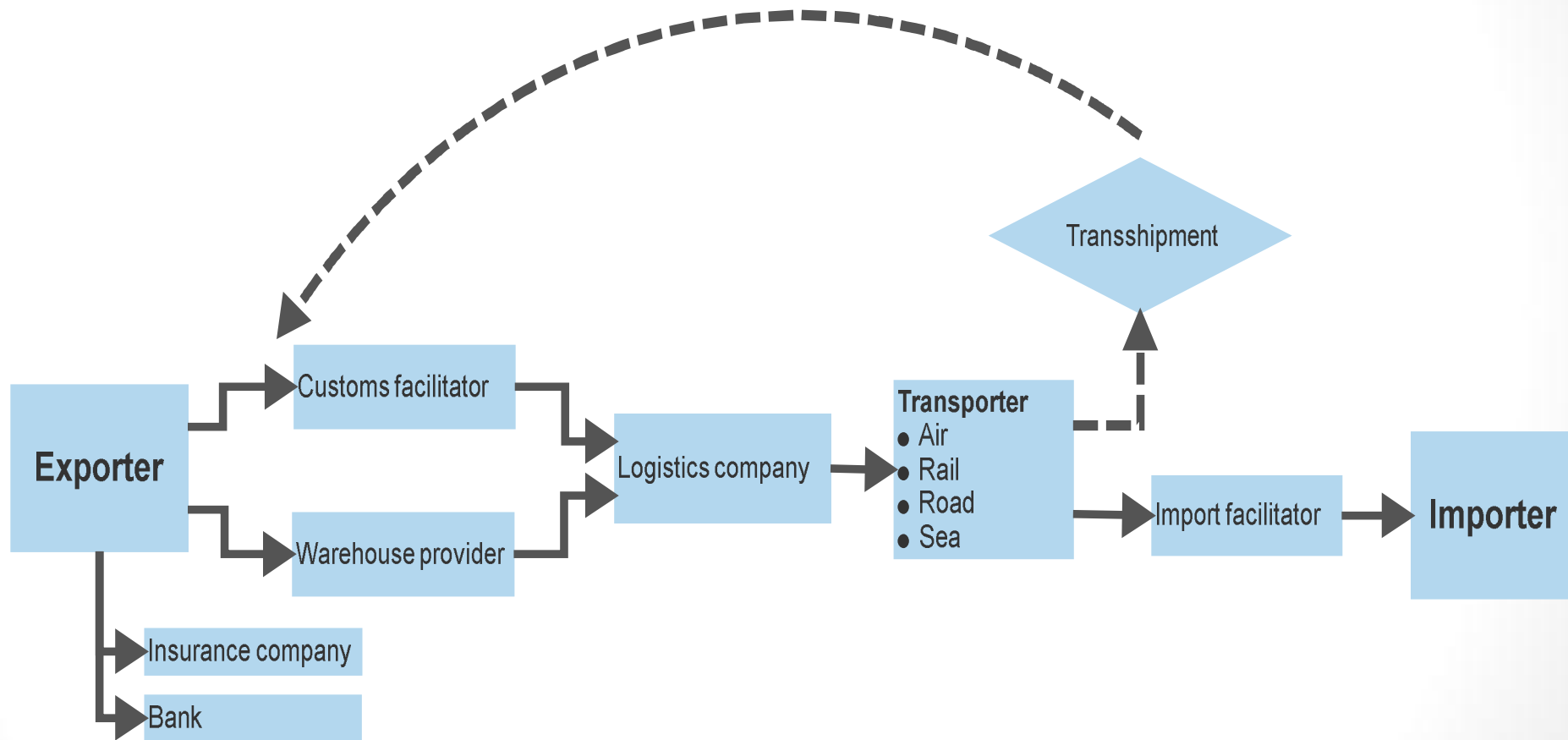   - Investigate and act upon discovery of malfeasance

Outreach and education

- Assistance with the technology transfer process
  - Passive assistance tools (e.g. national internet portals with legislative and regulatory information)
  - Assistance desks in relevant ministries and agencies
    - Contact points for general ´questions
    - Contact points for specific issues (e.g. export authorisation application)
- Education and training
  - Specific types of businesses
  - Staff specialisation
  - General education as part of regular courses or other educational programmes
- Outreach
  - Proactive engagement of relevant industries and businesses with a view of increasing their overall awareness of obligations and implementation

NATIONAL ORGANISATION OF TRANSFER CONTROLS:
ACTOR CATEGORIES

Technology transfer partners

Suppliers

- Industry (manufacturing)
  - Products
    - Raw materials
    - Semi-finished products
    - Finished products
  - Processes
    - Importation
    - Processing / Value enhancement
    - Exportation
    - Internal transfers

- Services
  - Intangible technology transfers
  - Includes:
    - Consulting
    - Information technology and knowledge economy
    - Training and education
    - Maintenance and repairs

Facilitators

- Underwriters
  - Investors (in the industrial activity)
  - Financers
  - Insurers
- Facilitators
  - Traders
  - Brokers
    - Goods
    - Customs facilitation
      - Physical persons
      - Automated systems
  - Shippers:
    - Consignor
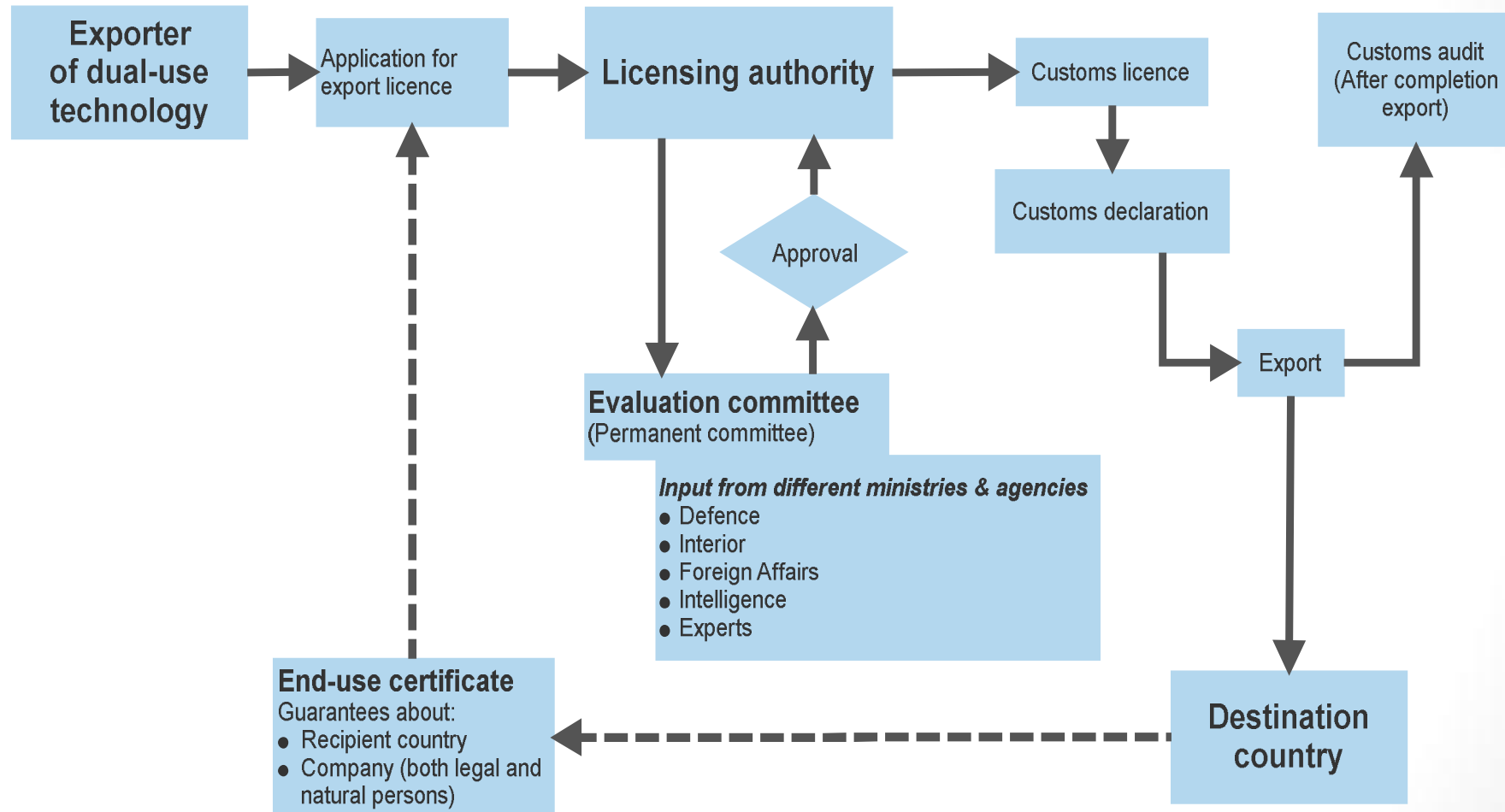   - Consignee
    - Transshipment companies

Knowledge and expertise

- Academics
  - Universities
  - Research institutes and think tanks
- Scientists and engineers
  - Research institutes
  - Laboratories and testing facilities
- Professionals
  - Technology experts
  - Technicians
- Civil society
  - Expertise in various areas, including assistance in treaty implementation, etc.

Part 4

NATIONAL ORGANISATION OF TRANSFER CONTROLS: *POLICY IMPLEMENTERS*

Applying for an export licence

Exporter of dual-use technology → Application for export licence → **Licensing authority** → Customs licence → Customs audit (After completion export)

Licensing authority → **Evaluation committee** (Permanent committee)

Approval

Input from different ministries & agencies
- Defence
- Interior
- Foreign Affairs
- Intelligence
- Experts

Customs licence → Customs declaration → Export → **Destination country**

End-use certificate
Guarantees about:
- Recipient country
- Company (both legal and natural persons)

- - - → Prior requirement

Ministries

- Different ministries play roles in the technology transfer process
  - Administrative accompaniment of the transfer process
  - Monitoring of regulatory conformity of the transfer process
  - Fiscal administration
  - Security assessment
  - Health, safety and environmental monitoring
  - Law enforcement
  - Etc.
- Policy development
  - Legislation
  - Policy and administrative decisions
- Interactions with
  - Parliament regarding the further development of regulatory frameworks
  - Stakeholder communities for regulatory input and outreach
    - Businesses
    - Special interest groups: professional associations, civil society, etc.
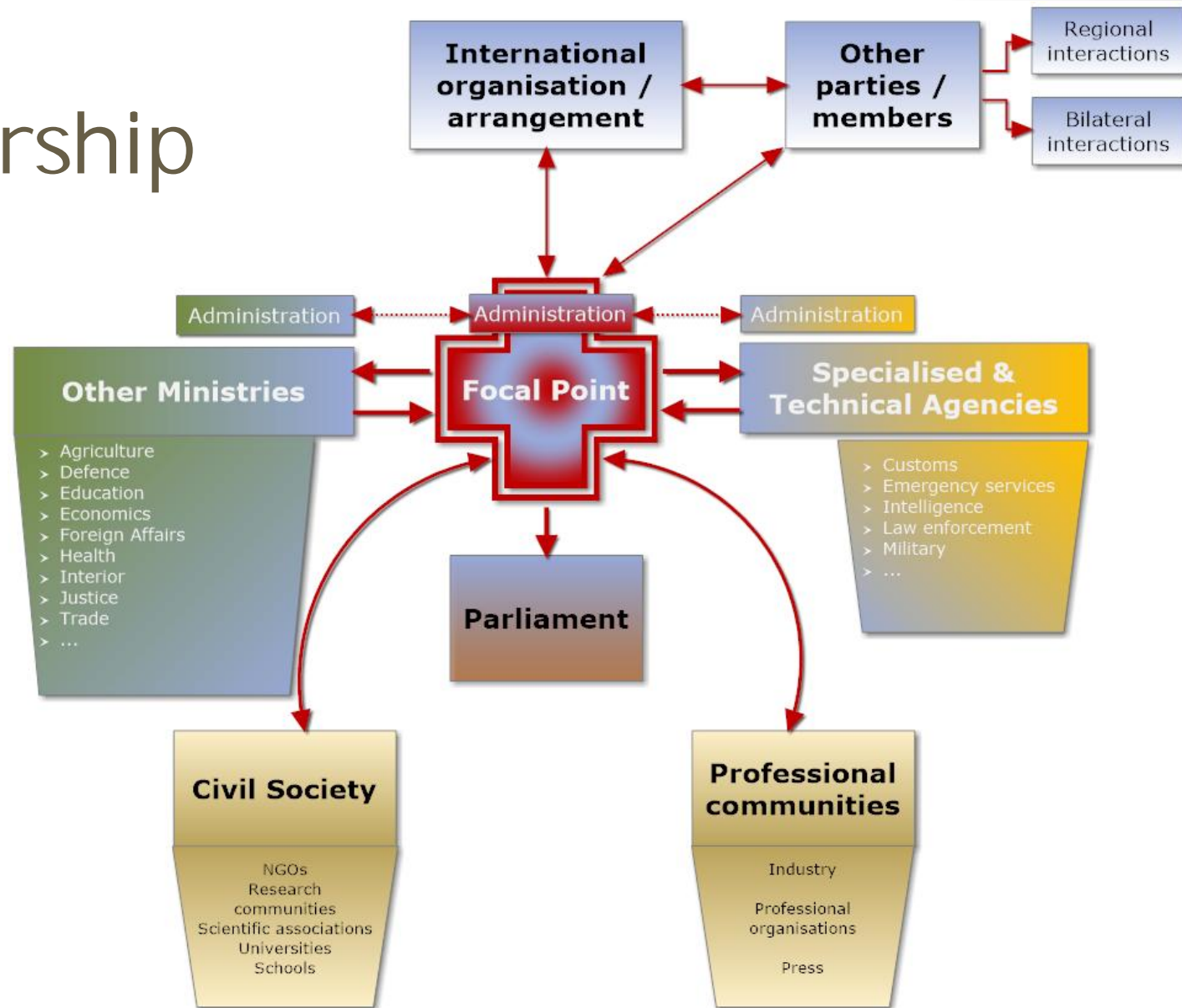
Managing technology transfers

- Licensing authority
  - Issuing export licences
  - Denial of sensitive exports
  - Technical knowledge
    - Important source of information for the exporter

- Customs
  - Border controls
  - Company audits

Preventing illicit transfers

- Intelligence agencies
  - Information gathering
  - Data analysis and threat/risk assessment
  - Notification of threats and risks

- Law enforcement
  - Investigation
  - Prosecution
  - Penalisation

Multi-stakeholdership

E-mail: jpzanders@the-trench.org
Twitter: @JPZanders
Blog: http://www.the-trench.org/blog/