

# 10. Multilateral military-related export control measures

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## I. Introduction

In 1996 changes occurred in the membership or status of three of the multilateral military-related export control regimes discussed in this chapter: the Australia Group, the Nuclear Suppliers Group (NSG), and the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies.<sup>1</sup>

The Republic of Korea (South Korea) became a new member of the Australia Group, bringing its membership to 30 states. Brazil, South Korea and Ukraine joined the NSG, bringing its membership to 34. At the meeting in 1996 where the Wassenaar Arrangement was formally established, Argentina, Bulgaria, South Korea, Romania and Ukraine participated for the first time in the discussions which have been held by the group, putting its founder membership at 33 states. Brazil—which had been accepted as a member of the Missile Technology Control Regime (MTCR) in 1995—participated in the 1996 MTCR plenary meeting, bringing its membership to 28 states. These regimes are discussed in sections II–V.

The other regime discussed in this chapter is the European Union (EU) regulation for exports of dual-use technologies (section VI). Table 10.1 lists the members of six regimes—those mentioned above and the Zangger Committee—and shows that participation is still a highly concentrated activity, confined to 36 states.

## II. The Wassenaar Arrangement

The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies was formally established in Vienna in July 1996. It seeks to prevent destabilizing accumulations of conventional arms and specific dual-use technologies and thereby contribute to regional and international security and stability. In the framework of the Arrangement, members exchange information and discuss policy approaches. However, the Arrange-

<sup>1</sup> For background information about the structure and terms of reference of 6 multilateral regimes and for developments up to the end of 1994, see Anthony, I. *et al.*, 'Multilateral weapon-related export control measures', *SIPRI Yearbook 1995: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 1995), pp. 597–633; and for developments in 1995, see Anthony, I. and Stock, T., 'Multilateral military-related export control measures', *SIPRI Yearbook 1996: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 1996), pp. 537–51.

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**Table 10.1.** Membership of multilateral military-related export control regimes, as of 1 January 1997

State	Zangger Committee 1974	NSG <sup>a</sup> 1978	Australia Group <sup>b</sup> 1985	MTCR <sup>c</sup> 1987	EU dual-use regulation 1995	Wassenaar Arrangement 1996
Argentina		x	x	x	n.a.	x
Australia	x	x	x	x	n.a.	x
Austria	x	x	x	x	x	x
Belgium	x	x	x <sup>d</sup>	x	x	x
Brazil	x	x <sup>f</sup>		x <sup>f</sup>	n.a.	
Bulgaria	x	x			n.a.	x
Canada	x	x	x	x	n.a.	x
Czech Republic	x	x	x		n.a.	x
Denmark	x	x	x	x	x	x
Finland	x	x	x	x	x	x
France	x	x	x	x	x	x
Germany	x	x	x	x	x	x
Greece	x	x	x	x	x	x
Hungary	x	x	x	x	n.a.	x
Iceland			x <sup>d</sup>	x	n.a.	
Ireland	x	x	x	x	x	x
Italy	x	x	x	x	x	x
Japan	x	x	x	x	n.a.	x
Korea, South <sup>e</sup>		x <sup>f</sup>	x <sup>d,f</sup>		n.a.	x
Luxembourg	x	x	x <sup>d</sup>	x	x	x
Netherlands	x	x	x	x	x	x
New Zealand		x	x	x	n.a.	x
Norway	x	x	x	x	n.a.	x
Poland	x	x	x		n.a.	x
Portugal	x	x	x	x	x	x
Romania	x	x	x		n.a.	x
Russia	x	x		x	n.a.	x
Slovakia	x	x	x		n.a.	x
South Africa	x	x		x	n.a.	
Spain	x	x	x	x	x	x
Sweden	x	x	x	x	x	x
Switzerland	x	x	x	x	n.a.	x
Turkey					n.a.	x
Ukraine		x <sup>f</sup>			n.a.	x
UK	x	x	x	x	x	x
USA	x	x	x <sup>d</sup>	x	n.a.	x

*Note:* The years in the column headings indicate when the export control regime was formally established, although the groups may have met on an informal basis before then.

<sup>a</sup> The Nuclear Suppliers Group.

<sup>b</sup> The European Commission is represented in the Australia Group as an observer.

<sup>c</sup> The Missile Technology Control Regime.

<sup>d</sup> A member of the Australia Group which had not ratified the Chemical Weapons Convention as of 1 Jan. 1997.

<sup>e</sup> South Korea is an observer to the Zangger Committee.

<sup>f</sup> This state became a member of the regime in 1996.

ment does not have collective decision authority. All decisions are taken by member states independently and are implemented through national procedures.<sup>2</sup>

States participating in the Wassenaar Arrangement are obliged to maintain national controls on transfers of items in the List of Dual-Use Goods and Technologies and the Munitions List developed by experts from the participating states. The participating states agreed to implement the elements of the Arrangement in their national export control systems by 1 November 1996.<sup>3</sup> In the framework of the Arrangement, members have agreed to notify one another both of aggregate transfers to non-participating states and of individual cases where licences to transfer an item have been denied. At least in the first stage, members have not agreed to refuse a licence for a transfer of the same product to the same destination where a partner in the Arrangement has denied a licence application. However, for the dual-use goods subject to control, they have agreed to notify partners in the Arrangement within 60 days if they do grant a licence for such a transfer.<sup>4</sup> In April 1996 Russia initially refused to accept this procedure but modified its position before the establishment of the Arrangement after certain transitional arrangements were agreed, giving Russia time to modify its national regulations.<sup>5</sup>

Neither the Munitions List nor the List of Dual-Use Goods and Technologies was released as part of the so-called Initial Elements of the Wassenaar Arrangement, although individual governments may release the lists unilaterally. However, it is stated that the dual-use list includes a sub-set of items considered to be 'very sensitive' for the purposes of decisions to export.<sup>6</sup>

The participating states have agreed to information exchanges of three types. For conventional arms, information is to be exchanged on a six-monthly basis regarding deliveries of equipment conforming to the categories used in the context of the United Nations Register of Conventional Arms to countries that do not participate in the Wassenaar Arrangement. However, the information is to be provided together with details of the model and type of equipment transferred—which is not required for the UN Register.<sup>7</sup> For dual-use goods there are specific reporting obligations associated with different schedules within the agreed list of goods and technologies. Finally, countries may present any information they consider relevant or raise any issue of concern in the Wassenaar forum. For example, at the December 1996 plenary meeting the

<sup>2</sup> The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies: Initial Elements, Press statement, 12 July 1996 (available at the SIPRI Arms Transfers Project Internet address URL <[http://www.sipri.se/projects/arms\\_trade/wass\\_initialelements.html](http://www.sipri.se/projects/arms_trade/wass_initialelements.html)>).

<sup>3</sup> The Wassenaar Arrangement . . . (note 2).

<sup>4</sup> The Wassenaar Arrangement . . . (note 2), Section II, Scope.

<sup>5</sup> 'As export control group starts, US watches Russian actions', *Wireless File (European Edition)*, United States Information Agency, 17 July 1996, URL <<gopher://198.80.36.82:70/0R27426453-27432300-range/archives/1996/pdq.96>>.

<sup>6</sup> The Wassenaar Arrangement . . . (note 2), Section III, Control Lists.

<sup>7</sup> The Wassenaar Arrangement . . . (note 2), Section VI, Procedures for the Exchange of Information on Arms.

issue of implementation of the 1996 UN embargo on arms transfers to Afghanistan was raised.<sup>8</sup>

Aside from the plenary and other meetings in the framework of the Wassenaar Arrangement, six countries—France, Germany, Italy, Russia, the United Kingdom and the United States—have agreed to meet for ‘more intensive consultations and more intrusive information sharing’.<sup>9</sup>

The participating states agreed that the Arrangement would be open in principle to all countries on the condition that they meet certain criteria. The criteria are: (a) whether the country is a producer or exporter of arms or industrial equipment subject to control; and (b) the non-proliferation policies of the country, including adherence to existing multilateral export control regimes, the 1968 Non-Proliferation Treaty (NPT), the 1972 Biological and Toxin Weapons Convention (BTWC) and the 1993 Chemical Weapons Convention (CWC); and (c) the country’s maintenance and application of effective national export controls.<sup>10</sup>

The Wassenaar Arrangement is not directed at any state or group of states. However, in the framework of the discussions among the participating states transfers of conventional arms and dual-use items to certain destinations are currently considered to be cause for serious concern. Among these destinations is Iran. The Czech Republic, Hungary, Poland and Russia have given the United States bilateral assurances outside the framework of the Wassenaar Arrangement that they will not conclude further agreements for arms transfers to Iran. However, none of these states is willing to break existing contracts or to deny Iran supplies of spare parts that are essential for the operation of equipment already delivered.<sup>11</sup>

### III. The Nuclear Suppliers Group

The NSG is a forum for discussing and coordinating export control policies with a view to preventing the acquisition of nuclear weapons by non-nuclear weapon states.

The main recent additional feature of the NSG Guidelines for Transfers of Nuclear-related Dual-use Equipment, Material and Related Technology is the requirement for an agreement between the International Atomic Energy Agency (IAEA) and the recipient state requiring the application of full-scope safeguards (that is, safeguards on all fissionable materials in its current and

<sup>8</sup> The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Press statement, 13 Dec. 1996 (available at the SIPRI Arms Transfers Project Internet address URL <[http://www.sipri.se/projects/armstrade/wass\\_press9612.html](http://www.sipri.se/projects/armstrade/wass_press9612.html)>).

<sup>9</sup> ‘The Wassenaar Arrangement’, Address by Under-secretary of State for Arms Control and International Security Affairs Lynn E. Davis, Carnegie Endowment for International Peace, 23 Jan. 1996. For the list of parties to the NPT, the BTWC and the CWC as of 1 Jan. 1997, see annexe A in this volume.

<sup>10</sup> The Wassenaar Arrangement . . . (note 2), Appendix 4, Participation.

<sup>11</sup> Sullivan, P., ‘Export controls: conventional arms and dual-use technologies’, *National Defense University Strategic Forum*, no. 100 (Dec. 1996), URL <<http://198.80.36.91/ndu/inss/strforum/forum100.html>>. Sullivan is Deputy Director of the US Defense Technology Security Administration.

peaceful activities) before controlled items will be transferred.<sup>12</sup> The NSG Guidelines also require the recipient to establish physical protection against unauthorized use of transferred materials and facilities. The members of the NSG exchange information on nuclear programmes of potential concern from a proliferation perspective. In addition, the Guidelines call for consultations among members before controlled items are transferred to these programmes to reduce the risk that any given transfer will contribute to an increased risk of nuclear-weapon proliferation.

The members of the NSG also require recipients to provide an end-use statement before any transfer of controlled items takes place. This is to reduce the risk that controlled items will be diverted to unsafeguarded facilities or activities. The members are not obliged to use any standard form of end-use document but their national document should require a statement from the recipient country specifying how controlled items will be used, stating that they will not be used for proscribed activities and that the consent of the supplier will be obtained before any item is retransferred.

After the decision on 'Principles and Objectives for Nuclear Non-Proliferation and Disarmament' had been adopted at the NPT Review and Extension Conference in May 1995,<sup>13</sup> the NSG agreed at its 1996 Plenary Meeting to 'promote openness and transparency through further dialogue and cooperation with non-member countries'. A special working group was established to further this objective.<sup>14</sup>

In 1996 two new members joined the NSG, Brazil and South Korea. Brazil joined the Group at the April 1996 Buenos Aires Plenary Meeting after the Brazilian Congress approved national nuclear-related export regulations. Historically, the commitment of Brazil to the international norm against nuclear weapon proliferation has been questioned, and accession to the NSG raised the issue of the criteria for membership—Brazil is still not a party to the NPT.

Brazil began to discuss the issue of modifying its export control laws and regulations in the early 1990s. By 1992 a draft law was submitted by the President to the Brazilian Congress on export controls for sensitive goods and services. This included the measures needed to regulate exports of goods with military applications including conventional arms and items associated with the development of weapons of mass destruction. The Brazilian Congress passed this draft into law in October 1995 as Law 9112. Under the law, exports of sensitive goods require prior permission from several federal agencies under the overall coordination of the Strategic Affairs Secretariat in the administration of the Brazilian President. An inter-ministerial working group was established under the overall coordination of the Strategic Affairs Secretariat to prepare and review more specific regulations.

<sup>12</sup> The most recent version of the NSG Guidelines was transmitted to the IAEA as INFCIRC/254/Rev.2/Part2/Mod.1 (Guidelines for Transfers of Nuclear-related Dual-use Equipment, Material and Related Technology), 19 Mar. 1996.

<sup>13</sup> For a discussion of the conference, see Simpson, J., 'The nuclear non-proliferation regime after the NPT Review and Extension Conference', *SIPRI Yearbook 1996* (note 1), pp. 561–89.

<sup>14</sup> Press statement: Nuclear Suppliers Group plenary meeting, Buenos Aires, 25–26 Apr. 1996.

In making these changes to its national procedures the Brazilian Government stated two objectives: (a) to create the means by which Brazil can implement and enforce its commitments in the field of disarmament and non-proliferation of weapons of mass destruction; and (b) export control regulations were seen as a basic precondition if Brazil was to gain unrestricted access to advanced technology from the major suppliers. The lack of export regulations was seen by Brazil as an obstacle to its strengthening of trade links with countries which have advanced technology and which participate in export control regimes.

In recent years Brazil has taken a series of steps intended to reassure the international community that it has no intention to develop nuclear weapons. The 1991 quadripartite Agreement on the Exclusively Peaceful Utilization of Nuclear Energy between Argentina, Brazil, the IAEA and the Brazilian–Argentine Agency for Accounting and Control of Nuclear Materials (ABACC), which entered into force in 1994, and the entry into force for Brazil of the Tlatelolco Treaty in 1994 were the most important of these. Through these steps Brazil has accepted legal commitments which can be compared with those accepted by parties to the NPT. Under these conditions the members of the NSG decided to admit Brazil to the group in spite of the fact that Brazil has not signed the NPT.<sup>15</sup>

For Ukraine, the basis for nuclear-related export controls is a Presidential Decree of January 1993.<sup>16</sup> Based on this decree a decision by the Ukrainian Cabinet of Ministers of March 1993 introduced a list of nuclear dual-use equipment subject to export control.<sup>17</sup> In March 1995, as a prelude to joining the NSG, the Ukrainian delegation sent a letter to the IAEA stating that Ukraine would conduct its nuclear exports in accordance with the NSG Guidelines specified in IAEA document INFCIRC/254.<sup>18</sup>

In South Korea, the 1993 Public Notice on Export and Import of Strategic Commodities, a regulation under the Foreign Trade Act, was revised in October 1995 to include all the items on the Zangger Committee trigger list and the nuclear dual-use items specified in the NSG Guidelines.<sup>19</sup>

The members of the NSG have also made efforts to secure voluntary adherence to the NSG Guidelines from countries which are not members. Particular attention has been paid to nuclear dual-use exports by Belarus, China, Kazakhstan and Lithuania.

<sup>15</sup> Brazil has, however, unilaterally accepted NPT-equivalent undertakings. See Goodby, J. E. *et al.*, 'Nuclear arms control', *SIPRI Yearbook 1995* (note 1), p. 663.

<sup>16</sup> Presidential Decree on Improvement of State Export Control, no. 3, 3 Jan. 1993.

<sup>17</sup> *Nuclear Successor States of the Soviet Union*, Nuclear Weapon and Sensitive Export Status Report, no. 4 (Monterey Institute for International Studies: Monterey, Calif., May 1996).

<sup>18</sup> IAEA Document INFCIRC/254/Rev.2/Part 1 (Guidelines for Nuclear Transfers) and INFCIRC/254/Rev.2/Part 2 (Guidelines for Nuclear-related Dual-Use Transfers), Oct. 1995.

<sup>19</sup> The Public Notice on Export and Import of Strategic Commodities of 1 July 1993 established an export control system that was compatible with the activities of the Coordinating Committee for Multilateral Export Controls (COCOM), which was dissolved in Mar. 1994. *Korea's New Export Control System*, attachment to INFCIRC/490, IAEA Vienna, 19 Oct. 1995; and Yang Woo Park, 'South Korea', *Worldwide Guide to Export Controls* (Export Control Publications: Chertsey, Surrey, Nov. 1995). For a discussion of the Nuclear Exporters Committee, known as the Zangger Committee, see Anthony *et al.*, *SIPRI Yearbook 1995* (note 1), p. 546; and Anthony and Stock, *SIPRI Yearbook 1996* (note 1), p. 546.

China is the most important supplier of dual-use nuclear equipment outside the NSG because of its status as a nuclear weapon state. On 11 May 1996 China announced that it would not provide further assistance to nuclear facilities which were not subject to full IAEA safeguards. This announcement followed discussions between the USA and China. At the same time, the USA and China also agreed to hold further bilateral consultations on export control policies. US Secretary of State Warren Christopher stated that one of the main issues of concern to the USA was Chinese nuclear and military cooperation with Iran.<sup>20</sup> In November 1996 the US State Department issued a statement that, after discussions with Chinese officials and with the information available, it had concluded that China was 'operating within the assurances they have given' regarding non-proliferation.<sup>21</sup>

#### IV. The Australia Group

The Australia Group is an informal group whose objective is to limit the transfer of chemical precursors, equipment used in the production of chemical and biological weapons (CBW), and biological warfare agents and organisms. The participating states have agreed to apply decisions taken collectively through their national export control systems. Created in 1985, the original objective of the Australia Group was to prevent CW proliferation while the negotiations to complete the CWC were being undertaken. Subsequently, it has also acted to prevent BW proliferation during the process of developing improved measures to ensure compliance with the BTWC.

Two events in 1995 modified the focus of the group. The first was the discovery of the extent of Iraq's CBW programmes through the work of the UN Special Commission on Iraq (UNSCOM) after the 1991 Persian Gulf War. The second event—the use of Sarin by a group of religious extremists in an attack on passengers on the Tokyo subway<sup>22</sup>—raised serious challenges to the previous approaches to CBW non-proliferation, which focused on state actors rather than also taking into consideration the activities of sub-state groups.

The CWC will introduce a comprehensive verification system and, progressively, a discriminatory regime for the trade with non-states parties in the chemicals listed in Schedules 1–3 of the CWC. The CWC also requires parties to enact legislation penalizing acts prohibited under the convention committed by nationals or by individuals operating on their territory—providing a mechanism for action against terrorism involving chemicals. The BTWC does not contain similar provisions, and the modest proposals for transparency made at the Fourth Review Conference of the BTWC<sup>23</sup> cannot be an effective substitute. Already criticized from various quarters, the chances of introducing veri-

<sup>20</sup> Secretary of State Warren Christopher, 'American interests and the US-China relationship', Address before the Council on Foreign Relations, 17 May 1996, in *US Department of State Dispatch*, 27 May 1996.

<sup>21</sup> Voice of America, 21 Nov. 1996, URL <gopher://gopher.voa.gov:70/00/newswire/thu/U-S-CHINA-IRAN>.

<sup>22</sup> See also chapter 13 in this volume.

<sup>23</sup> For a discussion of the Fourth BTWC Review Conference, see chapter 13 in this volume.

fication mechanisms into the BTWC will depend largely on the success of the CWC regime.

The most recent annual meeting of the Australia Group was held in Paris on 14–17 October 1996. Thirty states attended, including, for the first time, South Korea. The European Commission attended as an observer. No changes were made to the Australia Group's so-called warning lists.<sup>24</sup> At the meeting Hungary announced its intention to ratify the CWC and so become the 65th party—triggering the process towards entry into force of the convention on 29 April 1997.<sup>25</sup>

In this way, the relationship between the work of the Australia Group and the purposes and objectives of the CWC has become a more immediate issue.<sup>26</sup> All the Australia Group members had signed the CWC by the end of 1996. Although all the members had pledged to be among the first 65 states to ratify the Convention,<sup>27</sup> five—Belgium, Iceland, South Korea, Luxembourg and the United States—were not. All the Australia Group participants are parties to the BTWC.<sup>28</sup> The participating states have endorsed measures for strengthening confidence in both treaty regimes but noted that 'the maintenance of effective export controls will remain an essential practical means of fulfilling obligations under the CWC and the BTWC'.<sup>29</sup>

In October 1996 the Australia Group issued a press release on the anticipated entry into force of the CWC, stating that:

Representatives at the Australia Group meeting recalled that all of the participating countries are taking steps at the national level to ensure that relevant national regulations promote the object and purpose of the CWC and are fully consistent with the Convention's provisions when the CWC enters into force for each of these countries. They noted that the practical experience each country had obtained in operating export licensing systems intended to prevent assistance to chemical weapons programmes have been especially valuable in each country's preparations for implementation of key obligations under the CWC. They noted in this context that these national systems are aimed solely at avoiding assistance for activities which are prohibited under the Convention, while ensuring they do not restrict or impede trade and other exchanges facilitated by the CWC.<sup>30</sup>

In essence, this position was unchanged from that of the previous year.<sup>31</sup> The press release reiterated that national export licensing systems are aimed 'at

<sup>24</sup> The Australia Group export control lists include: chemical weapon precursors; dual-use chemical manufacturing facilities and equipment, and related technology; biological agents; animal pathogens; dual-use biological equipment; and plant pathogens.

<sup>25</sup> See chapter 13 in this volume.

<sup>26</sup> See Anthony *et al.*, *SIPRI Yearbook 1995* (note 1), p. 611, and Anthony and Stock, *SIPRI Yearbook 1996* (note 1), pp. 548–49, for discussions of the Australia Group and its relationship to the CWC after entry into force.

<sup>27</sup> Anthony and Stock (note 1), p. 547.

<sup>28</sup> For the full list of states which have signed or ratified the CWC and the BTWC as of 1 Jan. 1997, see annex A in this volume.

<sup>29</sup> Australia Group meeting, 14–17 October 1996, Press release, Paris, 17 Oct. 1996.

<sup>30</sup> Australia Group Countries welcome prospective entry into force of the Chemical Weapons Convention, Press release, Australian Embassy, Paris, 17 Oct. 1996.

<sup>31</sup> Anthony and Stock (note 1), p. 547.

preventing inadvertent assistance to the production of CBW and [are] administered in a streamlined and effective manner which allows trade and the exchange of technology for peaceful purposes to flourish'.<sup>32</sup>

Taking the United States as an example, US trade statistics indicated that, in 1991, 38 000 export licences were issued for dual-use technologies, with a few hundred applications denied or returned without action. In 1992 less than 3 per cent of the value (\$640.5 billion) of all goods exported from the USA was goods subject to specific licensing requirements, of which the value of goods that were denied export licences amounted to less than \$2 billion. In 1983–93, the share of US chemical and allied industry investment in the developing world remained steady at around 21 per cent, the major impediments to further investment being national barriers in the developing countries rather than unilateral restrictions imposed by the exporting states.<sup>33</sup>

The Australia Group also announced that a number of the participants will host regional seminars prior to the entry into force of the CWC to inform other states of the relevance of national policies.<sup>34</sup>

These statements and regional initiatives are part of an attempt to depolarize the divergent positions on Article XI of the CWC (Economic and Technological Development), which have cast a shadow over the discussions in the Preparatory Commission (PrepCom) of the Organisation for the Prohibition of Chemical Weapons (OPCW).

After the CWC enters into force the Australia Group will have to balance the implications of Article I (General Obligations) and Article XI of the CWC—which has already placed the Australia Group in diametrical opposition to many developing countries.<sup>35</sup> Their frustration was expressed most forcefully in a statement to the PrepCom by India:

. . . as we enter the final phase of this Commission, I would like to reiterate my Government's expectation that the [Chemical Weapons] Convention, if implemented in the letter and spirit of its provisions will result in enhanced trade in chemicals, equipment and technology for peaceful purposes amongst States Parties. We regret that discussions on Article XI of the Convention have come to a cul-de-sac. Unless countries which are party to export control regimes operating outside the scope of the Convention agree that the provisions of the Convention supersede all existing

<sup>32</sup> Australia Group Meeting (note 29).

<sup>33</sup> Roberts, B., 'Article III: Non-Transfer', eds G. S. Pearson and M. R. Dando, *Strengthening the Biological Weapons Convention: Key Points for the Fourth Review Conference* (Quaker United Nations Office: Geneva, 1996), p. 35.

<sup>34</sup> Seminars on CWC implementation were sponsored by the Provisional Technical Secretariat and hosted by Austria (6–8 Mar. 1996); Iran (23–26 Apr. 1996); and Japan (16–17 Oct. 1996). Another seminar was sponsored and hosted by Romania (21–22 Oct. 1996) for the Central and East European countries and the Commonwealth of Independent States.

<sup>35</sup> Article I of the CWC commits states parties never to assist, encourage or induce, in any way, anyone to engage in any activity prohibited under the convention. Article XI commits states parties not to maintain any barriers restricting or impeding trade for legitimate purposes with other states parties and to review their national regulations in the field of trade in chemicals in order to render them consistent with the object and purpose of the CWC. For the text of the CWC, see *SIPRI Yearbook 1993: World Armaments and Disarmament* (Oxford University Press: Oxford, 1993), appendix 14A, pp. 735–56 (also available at the SIPRI CBW Project Internet address URL <<http://www.sipri.se/projects/group-cw/CWCrtf.html>>).

arrangements upon entry into force, the provisions of this Article cannot be implemented as intended. Without this benevolent interaction among countries—which can enhance trust and cooperation, especially in today’s age of liberalised trade—the Convention may end up with only a selectively regulatory role. Parties to a multilateral Convention of this nature, who have submitted themselves to the verification and fact-finding provisions of the Convention should not be subject to demands by some other States Parties to furnish end-user certificates or be refused the import of chemicals and equipment, as this would only create two classes of States Parties and make the implementation of the Convention contentious.<sup>36</sup>

Several other developing countries have also expressed concern about the possible non-implementation of Article XI.

A key aspect of this debate is whether trade restrictions contained in the CWC apply only to the scheduled chemicals or whether the obligation in Article I not to assist any CW programme also extends to other potentially relevant compounds. The Australia Group warning list for chemicals differs from the set of scheduled chemicals subject to control in the framework of the CWC.<sup>37</sup> Absent the national controls harmonized in the Australia Group, the unlicensed transfer of chemicals which are unscheduled for CWC purposes but which may none the less pose a threat to the CWC regime would be permitted—a logic rejected by states participating in the Australia Group.<sup>38</sup>

## V. The Missile Technology Control Regime

The aim of the MTCR is to restrict the proliferation of missiles, unmanned air vehicles and related technology for those systems capable of carrying a 500-kg payload a distance of at least 300 km.<sup>39</sup> The MTCR is a voluntary arrangement in which countries interested in restricting the proliferation of specific goods and technologies exchange information and coordinate their national activities. The MTCR does not act as a decision-making authority; each member is responsible for implementing group decisions through national laws and regulations. However, within the regime the members have developed common approaches to the issue of transfers of a specified list of controlled items.

The MTCR is not intended to interfere with civilian activities—such as meteorology or the peaceful uses of space—that depend on equipment and technologies which have characteristics similar to some missiles.

<sup>36</sup> Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons document PC-XV/10, 16 Dec. 1996, p. 2.

<sup>37</sup> Mathews, R. J., ‘A comparison of the Australia Group List of Chemical Weapon Precursors and the CWC Scheduled Chemicals’, *Chemical Weapons Convention Bulletin*, no. 21 (Sep. 1993), pp. 1–3.

<sup>38</sup> See, e.g., Australia: National Export Licensing Measures, PrepCom Document PC-XIII/B/WP.9, 26 Mar. 1996.

<sup>39</sup> A fact sheet released by the United States Arms Control and Disarmament Agency uses a slightly wider formulation than that used in the MTCR Guidelines, including the phrase ‘missiles, unmanned air vehicles, and related technology for those systems capable of carrying a 500 kilogram payload at least 300 kilometers, as well as systems intended for the delivery of weapons of mass destruction (WMD)’. In addition to missiles, this formulation would cover all systems designed and developed specifically for delivering nuclear, chemical or biological weapons. *The Missile Technology Control Regime* (US Arms Control and Disarmament Agency: Washington, DC, 28 May 1996), URL <<http://www.acda.gov/factshee/exptcon/mtr96.htm>>.

Apart from its annual plenary meeting, MTCR members also hold inter-sessional discussions at which government experts can address specific issues. In 1996 inter-sessional meetings addressed regional aspects of missile proliferation and the issue of how to regulate the transshipment of missiles and associated technologies, including shipment through countries which are not regime members. Transshipment of equipment and technologies has the potential to undermine the effectiveness of end-user statements. The July 1996 seminar on transshipment issues was held in Washington and included representatives from 12 MTCR member states and 7 non-member states.<sup>40</sup>

In 1996 one of the main issues for discussion among members of the regime was that of new members. One country, Ukraine, has taken steps to join the MTCR but has not been accepted as a member by the regime, which operates by consensus. Another country, Brazil, completed the national measures required before participation in the regime is possible and in 1996 attended an MTCR plenary meeting for the first time. The relationship between the MTCR and Brazil and Ukraine is examined in the section below.

South Korea has also expressed a wish to join the MTCR. In 1979 the South Korean Government gave the United States an undertaking that it would not develop missiles with a range longer than 180 km. However, in the light of the further development of longer-range missiles by North Korea (including the development of missiles with ranges over 1000 km) South Korea examined the development of missiles for its own use with ranges at least up to the 300-km range contained in the MTCR Equipment and Technology Annex.<sup>41</sup> The United States, which supports South Korean membership in the MTCR in principle, would prefer the existing commitment to remain in place, arguing that it is not necessary for South Korea to match North Korea on a system-by-system basis in order to safeguard its security. According to some reports, an agreement was reached in December 1996 which would make it possible for South Korea to join the regime.<sup>42</sup>

A second issue under discussion was the relationship between the MTCR member states and countries which are outside the regime. There is no multi-lateral arms control treaty or agreement addressing the issue of the use, possession, production or trade in missiles. Efforts to develop such an agreement or treaty, proposed by Canada several years ago, have not led to any progress. The issue of the relationship between MTCR members and non-members has several elements. First is the relationship with countries which have significant ballistic missile-production capacities but are not members of the MTCR (China and North Korea are prominent in this group). It has been

<sup>40</sup> 'Letter from the President to the Speaker of the House of Representatives and the President of the Senate, 12 Nov. 1996', *Wireless File (Europe)*, 13 Nov. 1996, URL <<http://www.usis.usemb.se/wireless/300/eur307.htm>>.

<sup>41</sup> 'Restrictions on domestic-produced ROK missiles should be lifted', *Hanguk Ilbo* (Seoul), 26 Sep. 1995, p. 3 (in Korean), in 'Editorial urges US to abolish restriction on ROK missiles', Foreign Broadcast Information Service, *Daily Report—Arms Control and Proliferation Issues (FBIS-TAC)*, FBIS-TAC-95-006, 6 Dec. 1995, p. 22; and *Tong-a-ilbo* (Seoul), 9 Oct. 1995 (in Korean), in 'Government to abrogate missile pact with US to join MTCR', FBIS-TAC-95-006, 6 Dec. 1995, p. 21.

<sup>42</sup> See, e.g., *The Australian*, 4 Dec. 1996, p. 8.

acknowledged by members that in the absence of a multilateral agreement or treaty the regime is strengthened through cooperation with other countries, and China, Israel, Romania and Ukraine (although non-members) have made unilateral statements of their intention to adhere to the MTCR Guidelines.<sup>43</sup> The second element is relations with countries which are developing or buying ballistic missiles with a particular focus on the Persian Gulf and South Asia.<sup>44</sup>

In June 1996 the members of the MTCR held a meeting on regional missile-proliferation issues which focused on South Asia and the Persian Gulf. Information was exchanged between MTCR members about the current status of four missile programmes of concern—in all likelihood these were programmes in India, Iran, Iraq and Pakistan. As noted above, there is no multilateral agreement which focuses on the use, possession, production or trade of missiles. These systems are not limited in the framework of European conventional arms control. Even countries which are among the leading advocates of greater transparency in armaments have serious reservations about revealing their own missile stocks. In most countries outside Europe not only are the size and characteristics of missile arsenals considered secret but also the interest in arms control as a form of conflict management is low. However, assuming that governments could be persuaded to engage in such discussions, the nature of missile technology has usually been considered to make regional approaches to arms control inappropriate.<sup>45</sup> Consequently, MTCR members consider that the regime encourages restraint in missile programmes in these regions while reinforcing the national security of all states.<sup>46</sup>

### **Criteria for MTCR membership: a comparison of Brazil and Ukraine**

In January 1994 the Ukrainian Government took a decision to seek membership of the MTCR.<sup>47</sup> The decision followed two years of internal discussion about the advantages and disadvantages of such a step. While Brazil joined the MTCR in 1995, the membership of Ukraine has not been approved. However, as noted above, Ukraine currently adheres to the MTCR Guidelines without being a member of the regime.

While both Brazil and Ukraine have significant capacities to design, develop and produce ballistic missiles, Ukrainian capabilities are more significant and more highly developed than those of Brazil.<sup>48</sup>

<sup>43</sup> Frieman, W., 'New members of the club: Chinese participation in arms control regimes, 1980–95', *Nonproliferation Review*, vol. 3, no. 3 (spring–summer 1996), p. 20.

<sup>44</sup> 'Control of missile technology', Opening speech of David Davis, Minister of State, Foreign and Commonwealth Office, at the MTCR Plenary Meeting, Edinburgh, 8 Oct. 1996.

<sup>45</sup> The missile attacks by Libya against the Italian island of Lampedusa in 1986 and by Iraq against Israel in 1991 underline the difficulty of defining who should be included in a 'region' for the purposes of discussing missile-related arms control.

<sup>46</sup> Missile Technology Control Regime holds plenary meeting in Edinburgh, UK Foreign and Commonwealth Office Press release, Edinburgh, 10 Oct. 1996.

<sup>47</sup> US–Ukrainian missile export controls agreement, Press release, Office of the Vice-President, Washington, DC, 13 May 1994; and Sharov, Y., 'Ukraine and the MTCR', *The Monitor*, vol. 1, no. 2 (spring 1995). Sharov was then First Secretary in the Ukrainian Ministry of Foreign Affairs.

<sup>48</sup> The largest missile-production facility in the world is the Pivdenmash complex located at Dnepropetrovsk in Ukraine while a Ukrainian design bureau led the development of several Soviet

Both Brazil and Ukraine intend to participate in the development of civilian space activities—a market which is expected to grow significantly in the future. The Brazilian Space Agency (AEB) has prepared a National Policy on the Development of Space Activities (PNDAE) to promote the development of space activities in the national interest.<sup>49</sup> Brazil intends to develop space systems, infrastructure and activities in order to participate in future civilian telecommunications, weather and climate forecasting, inventory and monitoring of natural resources, and navigation and scientific research.

As with dual-use nuclear technologies, Brazil saw integration into the international export control system as removing an obstacle to access to advanced technology from the major suppliers.<sup>50</sup> This became even more important as Russia—a potential source of technology—has progressively joined the international export control system.

Ukraine has based a major element of its programme for converting military production facilities on the development of a civilian space programme. During the Soviet period, space launch vehicles as well as missiles were developed in Ukraine, including the Zenith and Cyclone rockets. However, the programmes for civilian space activity are integrated with those of cooperation partners in Russia and Kazakhstan. Many of the payloads which these rockets are expected to place in space are from Canada, the United States and Western Europe.<sup>51</sup> As Russia has become more fully integrated into the MTCR it has given bilateral assurances to the USA as well as to its new MTCR partners that it will not contribute to civilian programmes which may have the side-effect of stimulating the development of equipment and technology listed in Category 1 of the MTCR Equipment and Technology Annex. As a result, the issues of missile proliferation and civilian space programmes have inevitably become interlinked.<sup>52</sup>

ballistic missiles, including the SS-24 intercontinental ballistic missile (ICBM). Ukraine was a major production centre for SS-18 and SS-24 ICBMs. Moreover, the missile industry has significant political influence given that President Leonid Kuchma is a former director of the missile design bureau Yuzhmash. Hoydysh, D., *Ukrainian Export Control: Trip Report*, Unpublished paper for the Lawyers Alliance for World Security, 21 Apr. 1995; Zamyatin, V., 'Kiev promises not to pry too much into other countries' secrets', *Kommersant-Daily*, 20 Sep. 1995 (in Russian), in 'Prospects for Ukraine's military space program viewed', FBIS-TAC-95-006, 6 Dec. 1995, pp. 170–71; and Biletsky, V., Kotova, O. and Potekhin, O., *Conversion in Ukraine: Problems and Prospects*, Analytical Report no. 4 (Friedrich-Ebert-Stiftung: Kiev, Dec. 1994), p. 90.

<sup>49</sup> Brazilian National Policy on the Development of Space Activities (PNDAE), URL <<http://www.brasil.emb.nw.dc.us/es-pndae.htm>>, 15 Nov. 1995.

<sup>50</sup> The Brazilian Center for Aerospace Technology has been holding discussions with British Aerospace and the French company SAGEM about joint development of satellite launch vehicles. *Defense News*, 11–17 Mar. 1996, p. 26. In addition, Brazil and Russia have discussed the prospect of cooperation between their civilian space programmes. *World Aerospace and Defense Intelligence*, 9 June 1995, p. 15; and Casado, J., *O Estado de Sao Paulo*, 30 Apr. 1995, p. A4 (in Portuguese), in 'Rocket program, technology gains outlined', FBIS-TAC-95-003, 29 June 1995, pp. 12–14.

<sup>51</sup> The US company Rockwell International Space Systems has agreed to market Ukrainian launch services to potential Western customers. *World Aerospace and Defense Intelligence*, 10 May 1996, p. 5. With Rockwell as a partner, Yuzhmash hopes to be able to compete with such companies as Lockheed Martin, McDonnell Douglas and Arianespace in what is expected to be a growing market for satellite launches.

<sup>52</sup> Zaborsky, V., 'Ukraine's missile industry and national space program: MTCR compliance or proliferation threat?', *The Monitor*, vol. 1, no. 3 (summer 1995).

During the initial phases of the discussions between Ukraine and members of the MTCR, the fact that Ukraine was not a party to the NPT and the lack of a national export control system were cited as obstacles to regime membership.<sup>53</sup> Ukraine has since 1994 been a party to the NPT and has also taken steps to introduce national export controls.

In March 1992 the Ukrainian Cabinet of Ministers established the State Expert and Technical Commission to develop a national export control system. On 3 January 1993 the Ukrainian President issued a Decree on Improving State Export Control and, based on this authority, the Cabinet of Ministers established the State Commission on Export Control as a policy-making body and an Expert–Technical Committee to execute agreed policies.<sup>54</sup>

In March 1993 the Cabinet of Ministers approved a control list which included a section on missile technology and equipment but which was not harmonized with the MTCR Equipment and Technology Annex. However, in July 1995 the Cabinet of Ministers issued a new decision on the export, import and transshipment of missiles which was in line with the annex.<sup>55</sup>

Given that Brazil and Ukraine have similarities in their national policies and capabilities with regard to missile technologies, what is the explanation for their differential treatment as far as MTCR membership is concerned?

The primary difference between the two countries is their attitude towards their domestic missile programmes rather than international missile transfers. Brazil has made it clear that it will not incorporate long-range ballistic missiles into the force structure of the Brazilian armed forces. President Fernando Henrique Cardoso made a statement to this effect on 18 August 1995, declaring that Brazil does not intend to produce, import or export long-range ballistic missiles.<sup>56</sup>

Ukraine, by contrast, continues to see ballistic missiles as an important capability which can enhance its national security. According to Victor Zaborsky, a Ukrainian researcher working in the United States, the position of the Ukrainian Government can be summarized as ‘everything which is not prohibited by arms control treaties is allowed’.<sup>57</sup> Under its commitments in the 1987 Treaty on the Elimination of Intermediate-Range and Shorter-Range Nuclear Missiles (INF Treaty) and the 1992 Lisbon Protocol to the 1991 START I Treaty, Ukraine is not allowed to produce or possess missiles with ranges between 500 and 5500 km. However, there are no treaties or agreements which prevent Ukraine from developing, producing and deploying

<sup>53</sup> Interview with the then Minister of Defence and chairman of the Commission on Export Controls in *Narodna Armiya (Kiev)*, 19 Jan. 1995 (in Ukrainian), in Joint Publication Research Studies, *Military Affairs (JPRS-UMA)*, JPRS-UMA-95-003, 11 Jan. 1995.

<sup>54</sup> Tsimbalyuk, V., ‘Export controls in Ukraine’, *The Monitor*, vol. 1, no. 4 (fall 1995), pp. 1, 3–4. Tsimbalyuk was at that time Chairman of the Expert–Technical Committee.

<sup>55</sup> Statute on the Procedure for Controls on the Export, Import and Transit of Missile Technology as well as Equipment, Materials and Technology that are Used in the Creation of Missile Weaponry, Decree no. 563 of the Cabinet of Ministers, 27 July 1995, *Zibrannya Ostanov Uryadu Ukrayiny*, no. 11 (Nov. 1995), (in Ukrainian), in FBIS-SOV-96-029, 12 Feb. 1996, pp. 52–82.

<sup>56</sup> ‘Missile Technology Control Regime’, Position Paper on Brazilian Foreign Policy, Brazilian Embassy, Washington, DC, URL <<http://www.brasil.emb.nw.dc.us/fppp09mi.htm>>, 15 Nov. 1995.

<sup>57</sup> Zaborsky, V., ‘US–Ukrainian talks on MTCR: is compromise possible?’, *The Monitor*, vol. 2, no. 3 (summer 1996), pp. 1, 5.

ballistic and cruise missiles with ranges of up to 500 km or air- and sea-based cruise missiles with no range limitations.<sup>58</sup>

Ukraine also retains a number of shorter-range Scud-B missiles in its inventory and the United States has suggested that this is inconsistent with MTCR membership. An unnamed US State Department official is quoted as saying, 'one of our national criteria for supporting a country's membership [of MTCR] is that they forgo offensive missiles'.<sup>59</sup>

It is possible that the refusal of MTCR members to admit Ukraine to the regime also reflected some residual concerns about Ukrainian export licensing procedures and technology transfers.<sup>60</sup> Ukrainian export licensing includes the use of general licences which permit multiple shipments of specified items to certain countries without the need for a new authorization from the licensing authority as well as individual licences which require a new authorization for each shipment. General licences were to be used by Ukraine for transactions involving other members of the Commonwealth of Independent States (CIS). As noted above, the Ukrainian civilian space programme is closely integrated with those of Russia and Kazakhstan. To some extent, therefore, the effectiveness of Ukrainian export controls is tied to the development of an overall CIS export control system designed to prevent unauthorized retransfers of controlled items.<sup>61</sup>

## VI. The European Union dual-use export controls

The European Union export control system for dual-use goods entered into force on 1 July 1995.<sup>62</sup> In effect, the members of the EU have agreed to recognize one another's national export control systems for specific goods and technologies. This represents the first step towards the establishment of a common

<sup>58</sup> Statement of Yevgeny Sharov, Ukrainian Ministry of Foreign Affairs, to a seminar on export control organized by the Committee on Critical Technologies (Russia) and the Monterey Institute of International Studies (USA), in FBIS-TAC-95-006, 6 Dec. 1995, pp. 148–50.

<sup>59</sup> *Defense News*, 30 Sep.–6 Oct. 1996, p. 46. The Scud-B has a range of c. 280 km.

<sup>60</sup> In early 1996 press reports suggested that China may have acquired details of SS-18 intercontinental ballistic missiles from Ukraine. Three Chinese citizens were expelled from Ukraine in Jan. 1996. According to the statement of the Ukrainian Security Service department in Dnepropetrovsk, 'in disregard of the established rules of control over missile technologies, the Chinese acquired a number of blueprints on the development of inter-continental ballistic missile engines'. Interfax (Moscow), 2 Feb. 1996, in 'Ukraine: Chinese Embassy protests expulsion of 3 nationals', Foreign Broadcast Information Service, *Daily Report—Central Eurasia (FBIS-SOV)*, FBIS-SOV-96-024, 5 Feb. 1996. In Dec. 1996 US newspapers quoted intelligence reports that Ukrainian technicians would assist Libya with the maintenance of its inventory of ballistic missiles acquired from the Soviet Union. This was denied by the Ukrainian Foreign Ministry. Markus, U., 'Ukraine denies selling arms to Libya', Open Media Research Institute (OMRI) *OMRI Daily Digest*, no. 237, part II (10 Dec. 1996), URL <<http://www.omri.cz>> (hereafter, references to the *OMRI Daily Digest* refer to the Internet edition at this URL address); and Markus, U., 'Ukraine concerned over arms sales allegations', *OMRI Daily Digest*, no. 239, part II (12 Dec. 1996); and *Warsaw Voice*, 15 Dec. 1996, p. 8.

<sup>61</sup> In 1996 the members of the CIS took some steps to implement the 1992 Agreement on Joint Measures in the Sphere of Export Controls. On 16 May the Interstate Council of the CIS approved the creation of a single customs space for CIS members including closer cooperation between national authorities in export control. Latypov, U., 'Integration in the CIS and problems of export controls', *The Monitor*, vol. 2, no. 3 (summer 1996).

<sup>62</sup> Council Regulation (EC) 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods. *Official Journal L367/37*, 31 Dec. 1994.

system for the control of exports of dual-use goods in the member states of the EU.<sup>63</sup> While the aim of the EU regulation is to ensure the uniform application of export controls by all the member states towards third countries, the specific decisions and control arrangements—such as the issuing of licences—are left to the members. The objective is to be effective as a non-proliferation instrument while imposing the minimum restrictions on intra-community sales of dual-use items.

The legal basis of the export controls is twofold—a consequence of the division of competence between the EU and its member states. Whereas the export controls on dual-use goods fall within the competence of the EU, the lists defining the goods to be controlled were found to be a matter affecting the national security of member states and therefore subject to the common foreign and security policy (CFSP). Therefore, the provisions of the EU Regulation itself are based on Article 113 of the 1957 Treaty of Rome (Treaty Establishing the European Economic Community), while a separate Council Decision includes five annexes which specify the items to be subject to control and specific destinations.<sup>64</sup> The annexes contain the lists of products subject to export control (Annex I), the countries to which exports of these products are generally authorized (Annex II), guidelines on export policies agreed upon by the member states (Annex III) and highly sensitive goods which are subject to controls even between member states (Annexes IV and V). Changes or amendments to these lists can be made only by the member states and require a consensus.<sup>65</sup> The export control system, as constructed, has been described as a compromise between the EU competence in general trade matters and the national prerogative that member states retain in the areas of foreign, security and defence policy.<sup>66</sup>

The EU regulation provides for different types of export authorization. An individual licence may be required for the export to third countries (that is, countries not specified in Annex II of the regulation) of dual-use goods listed in Annex I.<sup>67</sup> A simplified procedure, in the form of a general licence, is available if the goods are intended for one of the destinations listed in Annex II.<sup>68</sup> The list of ‘friendly countries’ in Annex II is illustrative, with no requirement to use general licences for trade with these countries. No list of sensitive or

<sup>63</sup> The need for such a system arose in the early 1990s with the implementation of the 1986 Single European Act, the aim of which was to remove intra-community trade barriers and ensure the free movement of goods between member states. Anthony *et al.* (note 1), pp. 616–19.

<sup>64</sup> Council Decision of 19 December 1994 on the joint action adopted by the Council on the basis of Article J.3 of the Treaty on European Union concerning the control of exports of dual-use goods, Decision 94/942/CFSP. *Official Journal L367/37*, 31 Dec. 1994.

<sup>65</sup> To make the decision-making process more efficient, limitations to the consensus rule have been suggested.

<sup>66</sup> Taylor, T. and Cornish, P., ‘The Single European Market and Strategic Export Control’, Paper presented at the Economic and Scientific Research Council (ESRC) Conference on the Single European Market, Exeter University, 8–11 Sep. 1994, p. 11.

<sup>67</sup> The licensing requirement is described in Article 3 of the Council Regulation (note 62). Annex I corresponds to the dual-use items appearing on the lists of 4 non-proliferation regimes: the Australia Group, the MTCR, the NSG and the Wassenaar Arrangement.

<sup>68</sup> Described in Article 6 of the Council Regulation (note 62) and Article 3 of the Council Decision (note 64).

proscribed destinations exists and it is left to the discretion of each member state to decide whether or not goods listed in Annex I should be exported to a certain destination. There are also cases in which EU member states (notably Germany and the United Kingdom) issue general licences for exports of some dual-use goods to non-EU destinations such as India.

When deciding whether to grant an export authorization, authorities have to take into consideration the guidelines contained in Annex III.<sup>69</sup> An export authorization may be made subject to certain requirements and conditions—such as end-use statements—but this is not a requirement.<sup>70</sup>

The EU regulation also contains a ‘catch-all’ clause under which unlisted goods may also require an export authorization if the exporter has been informed by the authorities that the goods are, or may be intended, for use in connection with weapons of mass destruction.<sup>71</sup> Conversely, the exporter is obliged to inform the national authorities if he is aware that goods are intended for such purposes.<sup>72</sup>

Once a licence has been issued in one member state, it is automatically valid for exports from any other member state.<sup>73</sup> This is one of the main features of the EU regulation, and to simplify matters even further the European Commission has designed a single form whose use is gaining widespread acceptance throughout the EU. However, EU member states are not obliged to use these forms and some countries continue to use national documents.

During the discussion of the EU regulation, the prospect of exporters established in one state being able to apply for licences from a state operating less stringent controls was raised. To avoid this, exporters must apply for licences in the countries where they are legally established.<sup>74</sup> If the goods to be exported are located in another member state, a consultation between the licensing authorities of the states has to take place before a licence is granted. In extreme cases, where vital national security interests are concerned, a member state can take action to prevent the export of these goods from taking place.

Several members were concerned about intra-EU transfers of what were considered to be the most sensitive dual-use goods—mostly items on the NSG and MTCR equipment lists but also items related to information security. For the latter items, contained in Annex IV, a three-year transitional period was agreed during which they will still be subject to intra-Union controls.<sup>75</sup> It was agreed that after three years a review would consider whether intra-EU con-

<sup>69</sup> Article 8 of the Council Regulation (note 62).

<sup>70</sup> Eavis, P., ‘EC regulations’, ed. J. Thurlow, *Worldwide Guide to Export Controls* (Export Control Publications: Chertsey, Surrey, 1996). There are differences in national procedures of EU member states regarding both the end-user and end-use documents required for licensing purposes.

<sup>71</sup> Article 4 of the Council Regulation (note 62). This provision was controversial during the negotiation of the regulation and several countries, including Sweden, argued that it was inconsistent with their constitutions. Sweden, however, has made use of this provision on a number of occasions.

<sup>72</sup> Member states may even require notification if the exporter suspects that the goods are intended for such purposes.

<sup>73</sup> Article 6 of the Council Regulation (note 62).

<sup>74</sup> Article 7 of the Council Regulation (note 62). See also Explanatory Note published by the Services of the European Commission.

<sup>75</sup> Article 19 of the Council Regulation (note 62) and Article 5 of the Council Decision (note 64).

trols on these items could also be lifted. Products listed in Annex V are treated as military rather than dual-use products in the national regulations of more than one member state. In these countries, intra-Union transfers of such items are also subject to controls under national arms export regulations.<sup>76</sup>

To ensure an effective export control system at the EU level, direct cooperation and exchange of information between the competent authorities of the member states is encouraged. A coordinating group—consisting of one representative from each member state and chaired by a representative of the European Commission—has been established.<sup>77</sup> The task of this group is to examine questions concerning the application of the regulation and measures which should be taken by member states to inform exporters of their obligations under the regulation. As of June 1996, the group had met five times.<sup>78</sup>

The EU regulation is directly applicable in all the EU member states (according to Article 189 of the Treaty of Rome) and each member is obliged to take appropriate measures to ensure its proper enforcement.<sup>79</sup> Member states must inform the European Commission of the laws, regulations and administrative provisions adopted in order to implement the regulation, and the Commission is responsible for forwarding this information to other member states. Every two years the Commission has to present a report to the European Parliament and the Council on the application of the regulation.<sup>80</sup>

The Commission monitors the implementation of the regulation and may propose amendments to it at any time. Amendments to the annexes are discussed within the Council ad hoc working group on dual-use goods and are focused on updating the lists of dual-use goods so that they correspond to the lists of the four main supplier regimes. In 1996, following the establishment of the Wassenaar Arrangement (which, as noted above, also includes a list of dual-use goods and technologies), Annex I was amended.<sup>81</sup>

Since it entered into force, the EU regulation has encountered a number of problems. The main problem was the mutual recognition of licences by customs officials at the perimeter of the EU. Uncertain about the validity of documents presented, customs officers invoked a consultation procedure which involved two national authorities and the European Commission. The delay (perhaps up to two weeks) while this cross-checking and consultation took place reduced the credibility of the EU export control system in the eyes of industry. Additional guidelines regarding when and how such consultation should take place have been published by the Commission.<sup>82</sup>

<sup>76</sup> Article 20 of the Council Regulation (note 62) and Article 6 of the Council Decision (note 64). At the end of the transitional period, a decision will be taken on whether some of the goods are to be included permanently within the scope of the rules on dual-use goods.

<sup>77</sup> Article 16 of the Council Regulation (note 62).

<sup>78</sup> Eavis (note 70).

<sup>79</sup> Article 17 of the Council Regulation (note 62).

<sup>80</sup> Article 18 of the Council Regulation (note 62).

<sup>81</sup> Council Decision 96/613/CFSP of 22 October 1996 amending Decision 94/942/CFSP on the joint action adopted by the Council on the basis of Article J.3 of the Treaty on European Union concerning the control of exports of dual-use goods. *Official Journal* L278/39, 30 Oct. 1996.

<sup>82</sup> Eavis (note 70).

Member states can go further than the existing consultation procedures if they wish, informing each other about potential programmes of concern either through EU mechanisms or in the framework of the Wassenaar Arrangement.

The EU regulation has been criticized as ‘the lowest common denominator among export control systems of the EU member states’.<sup>83</sup> In the view of the Commission, the twin-pillar system of a regulation and a decision operating together is cumbersome and should ideally be changed. The dual-use regulation is probably a step towards a more integrated export control system rather than the end-point. However, since the national export control regimes of the member states are not uniform and the implementation and enforcement practices of the licensing and customs authorities differ, it was probably inevitable that the first stage of an export control system would be modest.

If the EU regulation is to meet its underlying objective—to establish a single European market in dual-use goods without the risk of diversion of these goods and technologies to undesirable weapon programmes—it will be necessary to satisfy the member states that it is being applied in a uniform and effective manner.

<sup>83</sup> Rudney, R. and Anthony, T. J., ‘Beyond COCOM: a comparative study of five national export control systems and their implications for a multilateral nonproliferation regime’, *Comparative Strategy*, vol. 15, no. 1 (Jan.–Mar. 1996), p. 52.