

Militarily relevant EU–China trade and technology transfers: Issues and problems

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1. Introduction

The issue of whether or not the European Union (EU) should modify its current arms transfers policy with regard to China has rapidly elevated into a political question taken up by decision-makers at very high levels not only in Europe and China, but also in North America and across East Asia. The discussion around this rather narrow question should be made into the catalyst for a wider discussion of the strategic impact of the trade in high technology items between the EU and China. It would be a very positive development if this wider discussion was to take place in Europe as the existing basis for thinking about EU–China relations seems to lack any coherent strategic dimension.

At present political and economic issues dominate European thinking about China. Collectively the EU has decided to engage China further and to seek an upgraded political dialogue (something that has been called ‘one of our top foreign policy goals in the years to come’ by the EU External Relations Commissioner).¹ The primary objectives of this dialogue would be to support China’s transition to an open society based upon the rule of law and respect for human rights as well as encouraging the integration of China in the world economy through bringing it fully into the world trading system, and supporting the process of economic and social reform that is continuing in China.

For the European Union economic issues inevitably loom large in thinking about China given that since 1978, EU-China trade in goods has increased more than 30-fold, reaching a level of roughly €146 billion in 2003.² Moreover, the large trade surplus that the EU enjoyed with China throughout the 1980s has now transformed into a large trade deficit (around €64 billion in 2003, the biggest bilateral trade deficit between the EU and any country). In the financial area foreign direct investment by EU companies in China represents approximately seven percent of the total foreign direct investment in China.

¹ Speech by The Rt Hon Chris Patten, ‘Lifting of the arms embargo on China: The Rueda Report on Arms Exports’ European Parliament, Strasbourg 16 Nov. 2004.

² China is the second biggest trading partner for the EU (after the US) and the EU occupies the same rank for China. China has only a slightly smaller volume of trade with the EU than does the US, while the volume of EU–China trade is slightly larger than trade between China and Japan.

Although the United States, Japan, Hong Kong and Taiwan all have significantly higher levels of investment in China than the EU, the stock of EU direct investment was nevertheless valued at \$34 billion at the end of 2002.

By contrast European countries have not seen any urgent need to develop their collective strategic thinking related to China. This partly reflects the fact that collective strategic thinking about any issue geographically removed from the European context is a very new activity for the EU. Although, given the history of violent conflict between European countries, the entire European integration effort undoubtedly had a strategic objective, this was an internal and inward looking project. While internal aspects of European integration progressed very far, by contrast external aspects of developing a common foreign and security policy, including a European defence policy, have been ‘a late development and something of a problem child’.³ Furthermore, European thinking on military security issues remains local, rather than global and is still firmly focused on conflict prevention and crisis management.⁴ However, the EU security strategy endorsed in December 2003, the first collective threat assessment and a clear statement of security priorities, represents an important new departure. The threats identified are not presented in geographical terms—the EU has no collective enemies—but rather in functional terms, with the proliferation of weapons of mass destruction and the threat of mass impact terrorism the most prominent.

At the end of 2003 China released its first Policy Paper on the European Union, which included a short section outlining Chinese objectives in the military field.⁵ In that document China expressed an interest in developing high-level military-to-military exchanges with the EU leading in time to a strategic security consultation mechanism. As part of this development the exchange of missions of military experts and an expanded programme of exchange in the area of training and defence studies were envisaged. However, the document also underlined that the EU should ‘lift its ban on arms sales to China at an early date so as to remove barriers to greater bilateral cooperation on defence industry and technologies’.

By extension it can be deduced that for the EU, Asian countries represent a military security threat only in so far as they sponsor or contribute to the proliferation of weapons of mass destruction or facilitate mass impact terrorism. On the other hand, Asian countries that support non-proliferation and counter-terrorism are seen as partners. Judging by the contents of the joint declaration agreed in December 2004, the EU clearly sees China as a partner rather than a problem in this context.⁶

³ Alyson J. K. Bailes, *The European Security Strategy: An Evolutionary History*, SIPRI Policy Paper no. 10, Feb. 2005.

⁴ The first collective military activities that the EU has undertaken have been in Africa and in Southeast Europe.

⁵ *China's EU Policy Paper*, 13 Oct. 2003 available on the website of the PRC Ministry for Foreign Affairs at URL <http://www.fmprc.gov.cn/eng/wjzjg/xos/dqzzywt/t27708.htm>.

⁶ *Joint declaration of the People's Republic of China and the European Union on Non-proliferation and Arms Control*, Council Document 15854/04 (Presse 348), 8 Dec. 2004.

Over time an increase in defence cooperation, including through increased trade and technology transfer, is envisaged by the Chinese side. Moreover, such a development would not be incompatible with EU objectives as expressed in public documents. However, this is not a position that appears to have been arrived at through systematic analysis of Chinese behaviour and was not subject to broad discussion across Europe.⁷

The remaining sections of this paper will review the trade in high technology goods, items and technologies with China and evaluate this trade against security and defence considerations that would appear to be relevant from a European perspective.

2. High-tech trade with China

As noted above, the volume and value of trade between the EU and China has reached very high levels. Moreover, there is a sharp rate of growth in the value of transactions and the balance of trade increasingly favours China. This development in overall trade relations has been heavily flagged in Europe as a potential problem in bilateral relations between the EU and China. The European Commission has warned that China will inevitably emerge in the relatively near future as a low-cost competitor in high-skill industries. China is already a major exporter of consumer electronics, computers and telecommunications equipment to the EU and, according to the Commission, in future Chinese producers will put pressure on European companies that are currently well positioned in global markets, such as automobile manufacturers in France and Germany. This is said to be further exacerbated by recent changes in currency values that further boost the competitive position of Chinese goods relative to European goods.

This overall situation may increasingly lead European companies to partner with Chinese companies and enterprises rather than trying to match them in what may turn out to be an increasingly uneven competition. At the same time European companies are trying to put pressure on political leaders to accelerate the process of political, legal and social change in China. Not coincidentally, the EU has paid great attention to the way in which China is implementing the commitments that flow from membership in the World Trade Organisation (WTO) and has established projects to help China meet its obligations.

The role of foreign direct investment has grown progressively as a factor in China's economic development since the early 1980s. For China, providing market access and establishing conditions favourable to foreign investment have been seen as instruments to ensure the transfer of advanced technologies, rather than products, to China. Conversely the primary interest of European exporters is to expand the market share for their products in China while protecting their position by avoiding transfers of technology to the extent

⁷ Nor within the various institutions of the European Union. For example, it is a very open question whether the European Parliament shares the view that China has become an effective non-proliferation partner rather than a residual proliferation problem.

possible. European companies with products in advanced technology sectors have designed their strategies in regard to the Chinese market with this objective in mind. One recent analysis based on information gathered from 20 leading EU companies with investments in China and operating in high-technology sectors (including interviews with senior company managers based in both China and Europe suggested 'a measure of reluctance on the part of EU companies to transfer their core technologies to China and to base R&D capability there'.⁸ The same analysis found that the company officers surveyed were doubtful whether this approach would be sustainable in the longer-term given the determination of the Chinese side to acquire know-how and technology. Over time technology leakage would inevitably occur and therefore long-term strategies had to be based on continuous innovation through investment in research and product development. For the European Union a strategy of engaging Chinese partners in cooperative research to establish leading technologies that can be competitive in global markets, not only in China, seems to be a prominent element in strategy in certain fields.

The European Commission has taken an active role in stimulating EU-China scientific and technological (S&T) co-operation by allocating dedicated funds as part of its framework programme for research. The level of co-operation under this programme has increased since a bilateral S&T agreement entered into force in 1999 and programmes have been established to link research organisations, industry, universities and individual researchers in specific projects supported by community financing. A joint EU-China office for the promotion of research co-operation was established in June 2001 in Beijing, to help Chinese scientists access the European S&T Framework Programme. At the same time agreement was reached on the specific S&T co-operation priorities for the coming years, namely biotechnology, environment, information technology and nano-technologies.

While European Union exporters sell a very wide range of items to China, a number of sectors can be considered particularly relevant from a military standpoint.

Commercial aerospace

The European GALILEO programme aims to provide high precision global satellite navigation services. Galileo, scheduled to be operational by 2008, is designed to encircle the globe with 30 satellites in medium Earth orbit, comprising 27 operational satellites and three reserves, plus two control centres on the ground. It should provide users, ranging from aircraft and shipping to cars and trekkers, with a navigational fix accurate to within just one metre—which is more accurate than the fix that can be obtained using the public signal made available by the US GPS system. The programme is implemented through

⁸ David Bennett, Xiaming Liu, David Parker, Fred Steward, Kirit Vaidya, 'Technology transfer to China: a study of strategy in 20 EU industrial companies', *International Journal of Technology Management*, Vol. 21, No. 1–2 2001.

the Galileo Joint Undertaking, which is a joint venture financed by the common EU budget (provided through the Commission) and by the European Space Agency (which is an inter-governmental body created by the EU Member States). China has shown an active interest in this technology and a cooperation agreement was signed with the EU in October 2003. A joint EU-China Galileo Training and Cooperation Centre has been set up in Beijing to foster Galileo awareness raising, training and industrial partnerships between Europe and China.

China is to contribute €200 million to the Galileo project. The main focus of Chinese participation will be on developing applications that the satellite navigation system can support rather than on the technologies of the system itself. However, China is also expected to cooperate with the EU in some joint work on research and development, manufacturing and technical aspects of the Galileo project.

Some countries that have shown an interest in cooperating with Galileo, such as India, will not be allowed to pull down encrypted signals from the satellites that form the central element of the programme. These countries will only be allowed to access unencrypted signals that would be satisfactory for civilian applications. China, on the other hand, will be able to access encrypted signals as part of the process of cooperating on the development of applications, though this is not an unconditional right of access. The receivers able to decrypt Galileo signals are subject to export licensing in the supplier countries and in the EU–China agreements there is specific language establishing the legitimate end-use China may make of encrypted signals received from the Galileo system.

European aerospace companies have been engaged with Chinese partners for a significant number of years. However, after China's accession to the WTO and the subsequent lowering of tariff barriers European suppliers anticipate significant increases in civil aircraft sales in China.⁹ European manufacturers also hope to benefit in time from other changes that are expected to flow from Chinese participation in the WTO—including greater transparency in government procurement regulations and sufficient control in the retail sector to suppress the production of spare parts not conforming to internationally applicable quality standards.¹⁰

Airbus (the consortium of companies that together form the most important European aircraft manufacturer) has increasingly offered China projects that will, over time, make Chinese producers critical suppliers of components and sub-assemblies for some of the most important Airbus products. These arrangements have also allowed European consortia such as Eurocopter, which is itself a first-tier supplier of Airbus, to work more closely with Chinese

⁹ As of December 2004, according to China's WTO commitments, there should not be any geographic or quantitative restrictions on civil aircraft sales, nor any restrictions on equity or form of establishment. However, China had not at that point joined the WTO Agreement on Trade in Civil Aircraft.

¹⁰ Eight European aerospace companies and entities (Airbus China Limited, Alenia Aeronautica, European Association of Aerospace Industry, BAE Systems, EADS, Rolls-Royce, SNECMA group, Thalès) cooperate in an Aerospace Working Group to try and achieve these objectives in China.

partners such as the Shenyang Aircraft Corporation (which is one partner for Airbus). Eurocopter has been unable to sell helicopters directly to the Chinese military and has been concerned that Russian competitors that are able to sell military products will gain an advantage in the civilian helicopter market, including sales to non-military departments within the Chinese government.¹¹

Telecommunications and information technology

The development of the telecommunication system in China has been identified by a number of European analysts, officials and exporters as the area with perhaps the biggest potential for future cooperation between China and the EU. According to Jose Cotta, Head of Unit on International Aspects, Innovation and SMEs within the European Commission, the fields of micro-electronics, integrated circuits (IC), software and mobile telecommunications have been identified as particular target areas by Europeans. The Chinese Ministry of Science and Technology (MOST) has pointed to the same sectors as holding the greatest potential for future cooperation.

According to the Chinese Ministry of Information Industry more than 350 European information technology and telecommunications companies are active in China. Moreover, for some of the biggest European IT and telecommunications companies (such as Ericsson and Siemens) success in the Chinese market is critical to their business plans. European research and development cooperation programmes have focused on trying to engage European research institutes, including universities, into programmes and projects in China.

Material science (photo-electric materials, plastics and special metals)

China's Ministry of Science and Technology has targeted research into the development of new materials and then promoting the industrialization of the new materials and related technologies through product development as one of its main priorities. The development of materials to support a new generation of advanced weapons has been identified as one purpose for which new materials are required as well as for the automobile industry.

In October 2001 the EU Research Commissioner, Philippe Busquin, and the Chinese Minister for Science and Technology, Xu Guanhua signed a cooperation agreement in the field of material sciences. At the time that the agreement was signed the EU and China identified material sciences as being critical to the evolution towards the next generation of products and production processes. The objective of the agreement was to promote Chinese participation in European projects on material sciences, promote European participation in Chinese projects in the same area, support training and information activities

¹¹ In 2003, when the Chinese government placed a significant order for helicopters, European models were not considered in the tender.

(conferences, workshops, etc) and finance the exchange of scientific and technological information in this field.

The European Union and China appear to emphasize a model in which university-industry research collaboration in the field of material sciences will spin-off products for subsequent development by small enterprises. This model appears to be becoming widespread and the nature of the financing instruments available for such activities favours locating the enterprises in China. If a European university laboratory identifies a target material that it finds to be of potential commercial interest it may be difficult to find a local pilot plant and therefore difficult to finance and conduct the field tests needed to bring a product to the market. By teaming with Chinese partners a European research project can apply to European programmes for S&T cooperation for financing sufficient to cover all of the costs of establishing a small company.¹²

For China this model may also help address a weakness that some authors assert has existed in Chinese S&T policy, namely the absence of any effective mechanism for transferring ideas, methods and technologies developed at research institutes into the manufacturing sector because of a lack of interest from state enterprises, which are said to have very little incentive to innovate.¹³

Advanced machine tools

In 2001 China became the largest importer of machine tools and has been so ever since. Imports of machine tools are worth roughly \$10 billion each year. Moreover, domestic demand for machine tools is expected to continue to grow as the country steps up its efforts to become the leading global centre for manufacturing industry.¹⁴ The main source of growth in machine tool imports has been the growth in the aerospace and aviation, automobile, power equipment manufacturing, ship-building, metallurgic and petrochemical equipment manufacturing sectors. The machine tools that China imports have increasingly tended to be advanced computer numerically-controlled (CNC) machine tools.

Chinese machine tool companies have apparently embarked on a strategy of buying machine tool firms in other countries. The policy of mergers and acquisitions is intended to help domestic machine tool companies introduce more advanced technology and equipment from the companies being acquired. According to one recent market survey by KPMG, Chinese companies have already become competitive global suppliers of certain types of machine tools at the low end of the technology spectrum. The demand for more sophisticated machine tools has primarily been driven by the rapid expansion in automotive-

¹² Where research cooperation involving Chinese researchers in international project groups take place at European companies or universities. The Chinese project team members may find it easiest to return to their Chinese institution and apply for Community financing in collaboration with the European project partners under EU programmes set up to support EU-China scientific cooperation.

¹³ 'Country analysis brief on China', *Energy Information Administration*, US Department of Energy, July 2004.

¹⁴ 'Machine tool imports to reach record', *China Daily*, 24 March 2005.

related manufacturing has accounted for half of machine tool consumption in recent years. The sale of aircraft-related manufacturing (though primarily in the first instance the repair and maintenance of aircraft rather than their production) is identified as a significant near-term future market in China.¹⁵

The leading manufacturer of machine tools in Europe is Germany and the KPMG survey paid particular attention to the views of German companies on the development of the market in China. They found that almost all German machine tools companies are currently doing business with China either through export (52 percent), established production facilities (36 percent), or licensed production (15 percent). Moreover, most of the companies expected their business in China to expand in future.

3. Domestic drivers and constraints on high-tech trade with China

The wider political and economic benefits of increasing high-tech trade with China were noted in the first section above. As regards specific decisions about what kinds of technology to transfer the main influences on the behaviour of European exporters appear to be of two kinds. Firstly, the decisions are heavily influenced by decisions taken within companies about the role of technology transfer within their overall business strategy for China. Secondly, for a number of high technology items there is a legal requirement for an exporter to submit prospective transactions for assessment by the responsible national authorities as part of the export control system. For European exporters the export control system has elements that stem from European legislation and elements that reflect national laws. Moreover, for certain items European exporters may be subject to the jurisdiction of US export control laws.

As a general statement it is true that judicious transfers of technology can help companies cut their cost base, build international cooperation networks of different kinds and increase their market share. At the same time a failure to protect the security of core technology could aid competitors or lead to the emergence of new competitors, in either case to the long-term detriment of the company. Therefore, the way in which companies manage technology transfer has a critical impact on their success or failure. In China (which is a large and growing market but one that has a reputation for inadequate protection of intellectual property) the decisions about technology transfer may be particularly difficult.

One recent study of the way in which European companies approach investment in and technology transfer to China found that in the short to medium term, companies see many complementarities between their own objectives and those of their Chinese counterparts. However, in the longer term,

¹⁵ KPMG, *China Machine Tools Market Survey*, Feb. 2004.

the survey found that there are real concerns about the loss of competitive advantages of foreign industries and enterprises to China.¹⁶

4. Security and defense response

Following the use of the People's Liberation Army by the Chinese government to suppress demonstrations in Beijing on 4 June 1989 several European Union (EU) Member States took national decisions not to export arms to China. On 26 June 1989, in Madrid, the European Council of Ministers agreed that an arms embargo would become part of a wider set of diplomatic and economic measures intended to signal disapproval of Chinese actions.

At the European Council meeting in Brussels in December 2003, the Heads of State and Government of EU Member States invited their foreign ministers to re-examine the need for the arms embargo and the arguments for and against its removal.¹⁷ Based on what is known about this review, a decision in principle to lift the embargo appears to have been taken, with the main remaining discussion relating to when this decision will take effect and under what conditions.¹⁸ A number of EU leaders have made statements to the effect that China is different in many respects from the group of countries on whom the EU has imposed arms embargoes. Moreover, EU leaders have recognized that China's leadership has changed since 1989 and that there have also been dramatic changes in Chinese society.

From the EU perspective there are undoubtedly strong political and legal reasons to lift the arms embargo, which has become counter-productive in bilateral relations. However, the premature public discussion of the issue has generated a negative reaction from certain quarters inside and outside the EU and member states need to inform their own domestic public opinion as well as partners around the world about the issues at stake. A wider discussion of the current status of the embargo appears to be needed before the decision to remove it is announced. EU Member States have also needed to brief close friends and allies, notably members of the United States Congress, about the background to the embargo and the arguments being put forward in the European debate to reduce the risk that the reasons underlying any decision will lead to misunderstanding.

¹⁶ Peter Bruun and David Bennett, *Perspectives On The Transfer Of Technology To China: Scandinavian Companies And The European Context*, paper presented at the 6th International Research Symposium organized by the International Manufacturing Network, Centre for International Manufacturing, Cambridge University (UK) 10–11 Sept. 2001, URL <http://www.ifm.eng.cam.ac.uk/cim/imnet/symposium2001/papers/bruun.pdf>.

¹⁷ In the document containing the Presidency conclusions from the European Council it is noted that the Council 'invites the General Affairs and External Relations Council to re-examine the question of the embargo on the sale of arms to China'. Presidency Conclusions, European Council DOC/03/5, 12 Dec. 2003.

¹⁸ 'Belgium's Michel Endorses Lifting of China Arms Embargo', *Groot Bijgaarden De Standaard* (in Dutch) 27 Apr. 2004.

Based on published comments and articles there does appear to be considerable scope for misunderstanding, though it also appears that some individuals in positions of authority will not be convinced by any amount of explanation. Officials in the United States have not had a positive view of the changing attitudes of European Union countries. A State Department spokesman summarized the United States attitude when pointing out that the Bush administration ‘has repeatedly expressed its concerns to EU member states regarding possible lifting of the arms embargo against China. In our view, lifting the ban would not contribute to regional stability and would send the wrong signal to China regarding its continued poor human rights record.’¹⁹

In other articles and statements published in the US it has been argued that lifting the embargo would enable China to accelerate defence modernization by filling critical technology gaps. It has also been asserted that the arms embargo is a legally binding prohibition on arms sales to China by EU Member States.²⁰ Other articles have suggested that a decision to lift the embargo might even trigger a re-evaluation of trans-Atlantic defence cooperation in Washington, with an unnamed State Department official quoted to have said ‘you have to ask whether we should be doing things to make defence cooperation easier, when Europe is removing its own limitations on defence cooperation with China’.²¹

In fact, given the particular form that the embargo takes, it is highly questionable whether any of the statements by American officials and commentators are true. After briefly surveying what appears to be the present political mood within European governments on the issue of the embargo, this article will try to explain the background to the arms embargo and examine some of the political and legal issues that have come to the forefront.

Background to the arms embargo

Over the years since 1989 Chinese government representatives have regularly raised the issue of the arms embargo with European counterparts. Chinese representatives have asserted that the embargo indicated the ‘incorrect attitude’ of European leaders towards the reform process that was taking place in China as well as a possible lack of understanding of that process, its requirements and its realities.

Chinese representatives have stressed that relations between China and Europe would be more productive if based on a positive agenda of cooperation to achieve shared objectives. Moreover, China has maintained that one important element in this overall positive cooperation agenda should be expansion of military-to-military contacts.

¹⁹ ‘China Arms Embargo’, Office of the Spokesman, Department of State, Washington DC 1 June 2004.

²⁰ Roger Cliff and Evan Medeiros, ‘Keep the ban on arms for China’, *International Herald Tribune*, 23 March 2004.

²¹ Amy Klamper, ‘Europeans May Lift China Arms Embargo’, *The National Journal*, 24 April 2004.

Member States have periodically made statements that the arms embargo would have to be reconsidered in the context of the EU to normalise relations with China and in March 1997 the Portuguese Defence Minister was quoted as saying that the EU arms embargo may be lifted.²² However, European representatives have rejected the Chinese perspective by and large.

In January 2004 Chinese President Hu Jintao visited France and once again raised the issue of the arms embargo. However, on this occasion the response to Chinese arguments from European leaders has been different. Following talks with his Chinese counterpart French President Jacques Chirac said that the arms embargo ‘makes no more sense today’ and expressed the French hope that the embargo could be lifted ‘in the coming months’.²³ When the then French Foreign Minister Dominique de Villepin briefed his counterparts on the discussions held with China and proposed lifting the embargo as of April 2004 the ensuing discussion among EU Foreign Ministers was reported to be positively inclined towards re-evaluating the arms embargo but did not set any timetable.²⁴

The legal form of the arms embargo

The arms embargo that the Member States have maintained in regard to China does not have a solid basis in EU law. The embargo is based on a political Declaration on China made by the European Council meeting in Madrid on 26–27 June 1989. In other words, the embargo was declared before the creation of the European Union and before its Common Foreign and Security Policy (CFSP) was established. The CFSP has been established as part of the process of revising the basic founding documents for the EU, and a number of legal instruments were created to give expression to CFSP decisions. There has not been any decision to revise the form of the arms embargo on China after 1989. The arms embargo on China is unique in this regard. All other sanctions measures that pre-date the creation of new EU legal instruments have either been discontinued or they have been renewed and given a different legal form under one or other type of instrument available under CFSP.

From this it can be argued that from a legal perspective there is not one arms embargo against China but a series of national arms embargoes established under national laws and regulations.²⁵ This argument is discussed further below, but it follows logically that the decision to maintain or lift the embargo as well as the decision about how to interpret its scope is a national decision for each of the EU Member States.

²² Quoted in the *Financial Times*, 15 Dec. 1997 and *The Independent*, 25 March 1997, p. 15.

²³ ‘Hu Jintao proposes steps to boost strategic partnership with France’, *China People’s Daily*, 29 Jan. 2004.

²⁴ ‘Solana: EU ready to lift China arms embargo’, *China Daily*, 5 Feb. 2004.

²⁵ Joakim Kreutz, ‘Reviewing the EU Arms Embargo on China: The Clash Between Value and Rationale in the European Security Strategy’, Institute of International Relations, Prague, *Perspectives*, vol. 22, Summer 2004, pp. 43–58.

The absence of a clear basis in EU law has created implementation and enforcement difficulties for a number of the countries that joined the European Union in its latest round of enlargement. Several faced the possibility that exporters could question the basis for national decisions to deny export licences to China. If faced with such questions national authorities would not be able to make reference to any EU legislation or decision in explaining the reason for licence denial. Instead, they would have to explain decisions with reference to national laws and regulations, and in a number of cases it was not clear to national licensing authorities what the basis for a denial would be.

The arms embargo was agreed after China used heavy equipment, including main battle tanks, in response to pro-democracy protests in Tiananmen Square in central Beijing, killing hundreds of protestors. Subsequently EU declarations deplored in particular deplored the execution of those ‘who legitimately claim their democratic rights’. According to the Declaration, the European Council considered it necessary to adopt a number of measures, namely:

- raising the issue of human rights in China in the appropriate international fora: asking for the admittance of independent observers to attend the trials and to visit the prisons,
- interruption by the member states of the community of military cooperation and an embargo on trade in arms with China,
- suspension of bilateral Ministerial and High Level contacts,
- postponement by the community and its member states of new cooperation projects,
- reduction of programmes of cultural, scientific and technical cooperation to only those activities that might maintain a meaning in the present circumstances,
- prolongation by the member states of visas to Chinese students who wish it.

Apart from the arms embargo, all of the measures contained in the 1989 Declaration were discontinued in the early 1990s.

The Declaration on China was made in the framework of European Political Cooperation, the procedure by which states that were part of the European Community consulted one another on major international policy issues and problems. Although the Single European Act signed by those governments in 1986 had created some formal elements for this inter-governmental dialogue, the legal basis for common actions in the field of foreign and security policy did not appear until the Maastricht Treaty (which created the European Union) that incorporated the idea of a common foreign policy into EU law. The Maastricht Treaty (the Treaty on European Union) did not enter into force until 1 November 1993.

In general, common foreign and security policy is a separate “pillar” within the European Union in that it remains purely inter-governmental—meaning that Member States are responsible for national decisions about how to interpret the agreements they reach among themselves. The agreements are in effect a

framework narrowing the discretion of national authorities when taking decisions, formulating policies and passing laws. This is unlike the situation for issues such as the single EU market for goods and services or trade policy for non-military goods, where there is an obligation for uniformity under laws that are directly applied across the whole territory of the EU.

In 1989, when the Declaration on China was agreed, the European Union had no specific and agreed guidelines about how to implement an arms embargo, which further reinforces the fact that the declaration provides an umbrella for what are in effect a series of national decisions, each applied in a national system governed by unique export control legislation and regulations.

As a general rule it has been accepted by EU Member States that a wide degree of national discretion in the implementation of arms embargoes would create inherent risks for Member States that apply the embargo to a broad spectrum of items. For example, a country that decided that all of the items on its national munitions control list fall within the terms of the embargo would in effect find many of its suppliers excluded from an embargoed market. Meanwhile in a Member State that took a narrow view—for example, limiting the scope of an embargo only to lethal items and perhaps crowd control equipment—a much larger number of exporters would be able to sell their products into that same market.

If this was to occur then both the weight of the political signal sent to the target of the embargo and the degree of trust and cooperation among EU Member States would be reduced. To increase the degree of policy coherence EU Member States took certain basic steps to harmonize their approach to the implementation of arms embargoes.

One such measure was the adoption of a European Union Common Embargo List divided into four different categories. The first agreed category includes weapons designed to kill and their ammunition. This includes weapons of any size or calibre as well as ammunition for them and specialized components. The second category includes weapon platforms, such as armed or armoured vehicles, warships and specialized naval ships, aircraft and helicopters specially designed for military purposes. The third category consists of non-weapon platforms—vehicles specially designed or modified for military use, such as transport and recovery vehicles, amphibious fording vehicles and bridges. The fourth category consists of specially designed ancillary equipment.²⁶

When an arms embargo is applied to a particular country, EU Member States also discuss whether it should be interpreted as a “full-scope” embargo, or whether it should be interpreted as less than full-scope. If the Member States agree on a full-scope embargo then the language of the instrument (a Council Common Position) that defines the measures to be taken will refer to arms, munitions and military equipment. In case of a full-scope embargo it is understood by Member States that the scope covers all the goods on the common embargo list.

²⁶ The full list is available at URL <http://web.sipri.org/contents/expcon/eu_commonlist.html>.

In the case of an embargo that is less than full-scope—an embargo on arms and munitions—Member States specify the categories within the common embargo list that the embargo will cover.

The EU Member States have used an instrument known as a Common Position to give a legal form to the arms embargoes that have been established since the creation of the Common Foreign and Security Policy. A Common Position defines the approach of the EU to a particular matter of a geographical or thematic nature. Once it is adopted, the Member States must ensure that their national policies conform to the approach that has been established. The Common Positions related to particular arms embargoes have given more precise guidelines to the Member States on how the embargo should be implemented. The language used in recent Common Positions has made clear that restrictions not only apply to physical items but also services of different kinds (such as technical training or assistance related to the provision, manufacture, maintenance or use of the items on the list). Moreover, recent documents establishing embargoes have stressed that the embargo applies to any supply of embargoed items by the nationals of EU Member States, regardless of the origin of the items concerned, and that the embargo covers any supply after the adoption of the embargo, regardless of when items were purchased. In such cases export licences granted before the embargo entered into force will be revoked.

In respect of China, none of these steps (that are now undertaken as a matter of routine by the EU Member States when establishing an arms embargo) have been taken.

The practical impact of the arms embargo on China

Examining some of the statements made by Member States and taking into account the pattern of identified exports of defence articles to China after 1989, the evidence suggests that the manner in which the embargo has been interpreted at the national level has always been less than full scope.

To illustrate, a 1995 statement by the United Kingdom government made clear that the embargo did not apply to the full range of goods controlled for strategic purposes. In response to a Parliamentary Question the UK government gave the following clarification of its interpretation of the arms embargo against China: ‘Since 7 June 1995 the United Kingdom has enforced an embargo on the sale to China of “weapons, and equipment which could be used for internal repression”. The EU introduced a ban on arms sales to China on 26 June 1989 but the scope of that ban has, in the absence of agreement on a common interpretation, been left for national interpretation’. In making this statement the UK identified the kinds of items for which licences would be denied, including the following categories:

- lethal weapons such as machine guns, large calibre weapons, bombs, torpedoes, rockets and missiles;

- specially designed components of the above, and ammunition;
- military aircraft and helicopters, vessels of war, armoured fighting vehicles and other such weapons platforms;
- any equipment which is likely to be used for internal repression.

While the UK has blocked the transfer of lethal items and major weapon platforms, licence applications to export other defence articles and services as well as dual-use goods and technologies intended for military applications have been considered on a case-by-case basis in the light of the criteria that govern all defence exports. Under this policy the UK export control authorities have approved exports of equipment with military applications—such as the Searchwater radar—to China.

The response of the French Defence Minister Charles Millon prior to his visit to China in April 1997 can be taken as representative. Millon, stated that ‘there is no question of going back on the decision about the arms trade’ but also observed that the embargo on equipment sales did not mean that no forms of military cooperation with China were possible.²⁷ Under the policy adopted by France it has been possible to export, for example, the AS-365N Dauphin-2 helicopter after the 1989 Declaration. Millon went on to say that France and China had discussed reinforced cooperation in three areas, namely the establishment of a high level strategic dialogue, increased exchanges of information and training and cooperation in technology, industrial and infrastructure projects. According to Millon, this technological and industrial cooperation was to be conducted ‘within the framework of our European and international commitments’.²⁸

The European Union Code of Conduct on Arms Exports²⁹

The EU Code of Conduct on Arms Exports was adopted in June 1998. The countries which acceded to the EU in May 2004, the European Free Trade Association (EFTA) countries which are members of the European Economic Area (EEA)—Iceland, Liechtenstein and Norway—and Bulgaria, Canada, Croatia, Romania and Turkey have aligned themselves with its principles. Although it is not legally binding, the Code of Conduct document contains political commitments: eight criteria for export licensing and operative provisions, which outline reporting procedures and mechanisms for intergovernmental denial notification and consultation. In 2000 the EU member states agreed a list

²⁷ *Agence France Presse* (in English), 8 April 1997.

²⁸ *Agence France Presse* (in French) 8 April 1997.

²⁹ The two following sections build on the information contained in Anthony, I., and Bauer, S., ‘Transfer Controls’, in *Armaments, Disarmament and International Security: SIPRI Yearbook 2005* (Oxford University Press: Oxford 2005).

of military equipment to which the Code is applied, and that list was revised in 2003.³⁰

In 2004 the EU Code of Conduct was formally reviewed and the membership of the EU was enlarged. The review process coincided with the full integration of 10 new EU states into the information and consultation procedures of the Code of Conduct. At the time of writing the review was very close to reaching its conclusion.

In addition to the review process, in 2004 the Conventional Arms Exports Working Group (COARM) took a number of other decisions, which were announced in its Sixth Annual Report. The EU member states agreed that they will 'fully apply the Code of Conduct to licence applications where it is understood that the goods are to be incorporated into products for re-exports'. In assessing such applications, they will also take into account five other criteria, which are identical to the additional criteria for incorporation purposes announced by the British Government³¹ in 2002: (a) 'the export control policies and effectiveness of the export control system of the incorporating country'; (b) 'the importance of their defence and security relationship with that country'; (c) 'the materiality and significance of the goods in relation to the goods into which they are to be incorporated, and in relation to any end-use of the finished products which might give rise to concern'; (d) 'the ease with which the goods, or significant parts of them, could be removed from the goods into which they are to be incorporated'; and (e) 'the standing entity to which the goods are to be exported'.³²

In 2003 COARM agreed 'in principle to share information on denials on an aggregate basis, without indicating which Member States issued the denials, with selected non-member countries whose export control legislation and policy meet the high standards set by Member States for themselves'. Each decision is taken on a case-by-case basis. The first such agreement was reached with Norway, and the exchange of denials between the EU and Norway began in November 2004.

Developing a dialogue with the European Parliament was one of the priorities for future action outlined in 2003, and in 2004, for the first time, the dialogue was more comprehensive than a presidency briefing to the European Parliament Foreign Affairs Committee. In addition to addressing the Foreign Affairs Committee's Sub-committee on Security and Disarmament on the issue of the review of the Code of Conduct, the Netherlands Presidency invited the

³⁰ 'Common Military List of the European Union (equipment covered by the European Union code of Conduct on Arms Exports) adopted by the Council on 17 November 2003 (updating and replacing the Common List of military equipment covered by the European Union Code of Conduct on Arms Exports adopted by the Council on 13 June 2000)', *Official Journal of the European Union*, no. C 314 (23 Dec. 2003), pp. 1–26.

³¹ British Foreign and Commonwealth Office, 'Foreign Secretary's statement on incorporation issues', 8 July 2002, URL <<http://www.fco.gov.uk/Files/kfile/Incorporation.pdf>>.

³² 'Sixth annual report according to operative provision 8 of the European Union Code of Conduct on arms exports', *Official Journal of the European Communities*, C 316 (21 Dec. 2004), pp. 1–215.

European Parliament's rapporteur on the EU Code of Conduct³³ to brief a COARM meeting and to speak at an informal meeting on the EU Code review that was held in The Hague.

Among COARM's priorities for 2004 was the harmonization of reporting. To this end, the Netherlands Presidency and SIPRI organized a meeting of national experts from EU member states to discuss data collection and reporting methods in the EU and ways to improve the comparability and comprehensiveness of the annual reports on implementation of the EU Code of Conduct.³⁴

The EU Code of Conduct review

Much of the Code review focused on the codification of decisions which have been taken since 1998. Since 2002 the annual report on the implementation of the Code of Conduct has included a compendium of decisions taken each year. In addition, a User's Guide to the EU Code was published in November 2003. It further defines and interprets the terms and procedures outlined in the 1998 Code of Conduct.³⁵ An updated version of the User's Guide was published in December 2004.³⁶ As a result, the Code of Conduct has developed into an export control instrument considerably beyond its original scope, although the text of the agreement had not been modified during the first seven years of its existence.

Most amendments to the Code are likely to affect the operative provisions (i.e., the implementation of the information and consultation procedures). The proposed changes include: the circulation of denials for brokering, transit and trans-shipment licences; the explicit coverage of agreements on licensed production by the Code of Conduct; the application of the Code to the transfer of intangible software and technology; harmonization of end-user certification; and a requirement that member states produce national reports on arms exports. A central database has been created to store denial notifications for both export licence denials and of brokering licence denials when these exist. The database is maintained by the Council secretariat but open to all member states.

The EU governments also considered changing the status of the Code of Conduct from a Council Declaration to a Common Position, but they are

³³ The European Parliament's reports on the EU Code of Conduct are available at URL <<http://www.sipri.org/contents/expcon/euparl.html>>.

³⁴ Subsequent to the meeting, SIPRI published a study which analyses the data collection and reporting methods in EU member states, evaluates the utility of existing data for drawing meaningful conclusions about the implementation of the EU Code of Conduct, and makes recommendations for improving the comprehensiveness, usefulness and comparability of the annual reports. Bauer, S. and Bromley, M., *The European Union Code of Conduct on Arms Exports: Improving the Annual Report*, SIPRI Policy Paper no. 8 (SIPRI: Stockholm, Nov. 2004, URL <http://www.sipri.org/contents/publications/policy_papers.html>.

³⁵ 'User's Guide to the European Union Code of Conduct on Arms Exports', Council of the European Union document 1428/03, Brussels, 6 Nov. 2003.

³⁶ 'User's Guide to the European Union Code of Conduct on Arms Exports', Council of the European Union document 16133/1/04, rev.1, Brussels, 23 Dec. 2004.

unlikely to reach consensus on this issue. Unlike a Council Declaration, the Common Position is an instrument of the CFSP referred to in the Treaty on European Union, which politically obliges member states to bring their legislation and policies in line with the agreed Common Position. A Common Position would not make the implementation of the Code of Conduct subject to scrutiny by the European Commission or make identified breaches subject to enforcement actions by the European Court of Justice. However, by turning the political declaration into a Common Position member states would be obliged to apply the code until a new collective decision was taken.

Linking the Code review to the EU arms embargo

The review negotiations took place in parallel with the discussion of lifting the EU embargo on China and, even if not formally connected, the two issues became linked in the minds of many political decision makers. At the December 2004 China–EU Summit, the Netherlands Presidency made clear that the embargo would not be lifted until a strengthened Code of Conduct was agreed.³⁷ In addition, a post-embargo ‘toolbox’ would be used to address the concerns of some EU members, as well as the USA, that the lifting of the embargo may lead to an increase of arms exports to China (though the idea to create the toolbox had already been announced when the embargo on Libya was lifted). The toolbox will include the sharing of information on equipment sold in the past three years, which should allow EU governments to monitor that the commitment made at the December 2004 summit not to increase arms exports to China in qualitative or quantitative terms is being respected. The toolbox will also provide for: a quarterly exchange of detailed information on licences granted for exports of EU Common Military List items to post-embargo destinations; consultations about the destination of such exports; discussions at Council level in the event of major national policy changes with regard to destination; and a review of denial notifications issued during the embargo to see if they remain valid.

Tying the lifting of the embargo to the review of the Code of Conduct reportedly was intended to put pressure on France in its role as both a key proponent of the lifting of the embargo and as the state obstructing certain changes proposed in the context of the review of the Code. The debate also became entangled with transatlantic technology transfer issues owing to the US threat to limit EU access to sensitive technology if the embargo were lifted. Opposition to lifting the embargo (at this time) therefore can be attributed to different motivations, the weight of which differed from country to country: concern about commercial, defence, technological and political repercussions in the relationship with the USA; concern about continued Chinese human rights violations and about sending the wrong political signal; and an interest in a strengthened EU Code of Conduct.

³⁷ ‘EU/China: relations between EU and China move forward—lifting of arms embargo may be envisaged’, *Atlantic News*, no. 3635 (11 Dec. 2004), p. 4.

Exports of dual-use goods, equipment and technology

In Europe the development of supply-side measures during the 1990s both at the national and at the EU level has not been confined to items specially designed or adapted for military use. There have also been important changes in the approach to controlling exports of dual-use items and these changes have implications for trade with China.

As noted above, military items are regulated by the national laws of EU member states but there is ever closer cooperation between them to harmonize their policy making and to exchange information about how national decisions are taken and implemented. By contrast, exports of dual-use goods have been controlled by community law (a Council regulation) since 1995. The common legal base (including a common list of controlled items) was fundamentally revised in 2000 and is currently being reviewed.³⁸ This review is expected to lead to further changes.

While all EU member states are subject to the same law governing dual-use exports, the process of assessing individual exports and issuing (or denying) licences for them is still carried out by national authorities. The European Commission is responsible for monitoring the implementation of community law, including in this field, and has the power to take measures in cases where identified differences in national practices advantage the exporters from one member state.

The dual-use export control system was originally introduced as part of the process of creating a single European market in which all companies would be subject to the same rules and within which goods would move freely. The Commission argued, successfully, in front of the European Court of Justice that dual-use goods (which are not inherently military) could not legally be excluded from the jurisdiction of the single market. The dual-use export control system was built around need to implement non-proliferation obligations stemming from the participation of European Union member states in nuclear, chemical and biological arms control treaties. The member states stated clearly that the implementation of the single market must not undermine their international obligations in the field of arms control.

The common control list that forms part of the EU dual-use export control system is built on the technical work carried out within multilateral export control regimes. The EU list is a compilation of lists agreed by the Australia Group, Nuclear Suppliers Group, Missile Technology Control Regime and the dual-use list developed by experts in the framework of the Wassenaar Arrangement on Export Control. Whereas the treaties that exist in the nuclear, biological and chemical weapon arms control field establish a relatively clear normative framework to govern decisions about exports of many items on the EU list, this framework is lacking for items that have military applications but

³⁸ Council Regulation (EC) No 1334/2000 of 20 June 2000, setting up a Community regime for the control of exports of dual use items and technology as last amended by Council Regulation (EC) No 1504/2004 of 19 July 2004 Official Journal of the European Union, L. 281 31 Aug. 2004, p. 1.

that are neither WMD related nor specially designed and developed for military use.

Under article 8 of regulation 1334/2000, the member states are obliged to take a number of factors into account when making national licensing assessments. These include European Union arms embargoes but only in circumstances where there is a common position or a joint action adopted by the Council (which, as noted above, is not the case for China) or by a decision of the OSCE or by a binding resolution of the United Nations Security Council. However, when making national assessments of export applications for dual-use items member states are obliged to take into account considerations of national foreign and security policy, including those covered by the European Union Code of Conduct on arms exports. This applies to all exports of dual-use items, including to China.

As noted above, in practice non-proliferation of nuclear, biological and chemical weapons is by far the dominant factor in thinking about how to implement dual-use export controls. European countries have no recent history of using export controls as instruments of foreign policy in the manner that is accepted practice in the United States. Moreover, as noted earlier, European countries do not appear to have any clearly identified strategic interests in or politico-military assessments of the regional security environment in East Asia. As a result, it would appear that exports of dual-use products and technologies that are not relevant in a non-proliferation context (and this would include items in the information technology, machine tool or civilian aerospace sectors) would be extremely unlikely to face any close scrutiny during licensing assessment.

5. Conclusions

Based on the survey above the following points appear to emerge:

There is a strong interest and a common commitment to build closer political and economic relations between the EU and China. Neither sees the other as a strategic competitor or a military threat, each has a strong interest in the emergence of a stronger rule-based multilateral system and each is determined to work for an international order based on multiple poles of decision making. At the same time it appears that European countries have not, either individually or collectively, made a systematic assessment of the strategic implications of changes in Chinese military power. Thinking about China has been driven by political and commercial considerations rather than an evaluation of the security environment in East Asia and China's place within it.

Nevertheless, European countries have compelling arguments to lift their arms embargo on China. The legal basis for the embargo is inadequate in ways that make it increasingly difficult to implement after the enlargement of the EU. The political impact of the embargo is increasingly limited in that it is an inadequate instrument for exerting pressure or conducting dialogue with China on the underlying issue of concern—human rights.

On a related point, the practical impact of the embargo is highly questionable given the pattern of technology transfer between Europe and China. While EU supply-side measures are applied globally, including in Asia, the member states currently lack a well developed, common normative basis for licensing exports of items in technology fields that form the basis for much of the European high technology trade with China.

There is a clear and compelling need for a deeper and more thorough assessment of the regional and global implications of the evolving EU–China trade and technology transfer relationship.