

# 12. Controls on security-related international transfers

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## I. Introduction

In recent years, a central issue for the states that cooperate in the development of export control laws on security-related items has been whether a principle of discrimination or a principle of global equity should underpin their efforts. After the end of the cold war, an export control system that had been clearly based on discrimination against explicitly identified adversaries was gradually reformed, introducing more general rules that were to be applied by national licensing authorities on a case-by-case basis. Recently, largely under prompting by the United States, there has been greater support for a hybrid approach in which controls are tightened on a small number of countries of concern, while technology is allowed to flow more freely within trusted communities of countries.

In developing common guidelines, export control regimes have tended to emphasize objective criteria that minimize the risk of divergent national interpretations when making licensing decisions.<sup>1</sup> Whether a country applies comprehensive safeguards to the nuclear activities undertaken on its territory is one such criterion.<sup>2</sup> In 2008 the Nuclear Supplier Group's (NSG) decision to exempt India from this aspect of its guidelines raised the question of whether the identification of sensitive destinations was a political decision or whether objective criteria could be the basis for national export licensing.

Recent developments in a number of export control regimes are examined in section II. This section pays particular attention to the NSG's decisions related to India. It also reports developments regarding United Nations Security Council Resolution 1540 of 2004.<sup>3</sup> Section III discusses changes in the export controls applied by the European Union (EU) to the transfer of items specially designed and developed for military use as well

<sup>1</sup> An 'export control regime' is a multilateral cooperation arrangement that tries to improve the effectiveness of the national export controls of the countries that participate in them.

<sup>2</sup> Comprehensive safeguards are based on a combination of nuclear material accountancy, complemented by containment and surveillance techniques, such as tamper-proof seals and cameras that the International Atomic Energy Agency (IAEA) installs at facilities to monitor activities on a continuous basis.

<sup>3</sup> UN Security Council Resolution 1540, 28 Apr. 2004. UN Security Council resolutions are available at <<http://www.un.org/sc/>>.

as dual-use items.<sup>4</sup> Section IV examines the development of laws that are intended to simplify the international transfer of military equipment and technology within trusted communities of countries to better support the needs of their armed forces. The conclusions are presented in section V. Appendix 12A lists all multilateral arms embargoes in force in 2008.

## II. The control of international transfers of proliferation-sensitive items

UN Security Council Resolution 1540 (2004) declares the proliferation of weapons of mass destruction (WMD) and their means of delivery a threat to international peace and security. Among other things, the resolution obliges all UN member states to exercise effective export controls over such weapons and related materials. To monitor the implementation of the resolution, the Security Council established the 1540 Committee, consisting of all members of the Security Council. In April 2008 the UN Security Council adopted Resolution 1810 to strengthen the mandate of the 1540 Committee and to extend it for three years.<sup>5</sup> The resolution encourages states to map out priorities and plans for the implementation of Resolution 1540 and to communicate requests for assistance in implementation to the committee. It also urges states and international, regional and subregional organizations to inform the committee of areas in which they can provide assistance and to submit points of contact for assistance. The 1540 Committee's tasks include conducting a 'comprehensive review of the state of implementation' as well as continuing to organize and participate in outreach events and strengthening its role in facilitating technical assistance, 'including by engaging actively in matching offers and requests for assistance through such means as assistance templates, action plans or other information submitted to the 1540 Committee'.<sup>6</sup> The resolution also asks the committee to promote the sharing of experiences and lessons learned in the implementation of Resolution 1540 with states and organizations. In 2008 the Security Council added the World Customs Organization (WCO) to the international organizations mentioned in the original resolution.<sup>7</sup> The WCO plays an important role in relation to those parts of the resolution that address border controls and law enforcement, including enforcing national export and trans-shipment controls.

<sup>4</sup> Dual-use goods and technologies have both civilian and military applications.

<sup>5</sup> UN Security Council Resolution 1810, 25 Apr. 2008.

<sup>6</sup> UN Security Council Resolution 1810 (note 5), p. 3.

<sup>7</sup> United Nations, Report of the Committee established pursuant to Resolution 1540 (2004), S/2008/493, 30 July 2008, Annex, paras 124–26. The organizations mentioned in the original resolution are the IAEA and the Organisation for the Prohibition of Chemical Weapons (OPCW).

## Developments in multilateral export control regimes

Four informal multilateral arrangements worked within their specific fields to strengthen export control cooperation in 2008: the Australia Group (AG), the Missile Technology Control Regime (MTCR), the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (WA) and the NSG. The states participating in these arrangements and in the Zangger Committee are listed in table 12.1.<sup>8</sup> The arrangements also engage with non-participating states to emphasize the importance of modern and effective export controls. Outreach and increased transparency can help non-participating states to apply the guidelines, control lists, standards and procedures developed by regime partners to the extent that these are described in public documents.<sup>9</sup>

The Australia Group (AG) was established in the light of international concern about the use of chemical weapons in the 1980–88 Iran–Iraq War. At first, the members cooperated to maintain and develop their national export controls to prevent the export of chemicals that might be used for, or diverted to, chemical weapon programmes. The participating states now seek to prevent the intentional or inadvertent supply of materials or equipment to chemical or biological weapon programmes by sharing information on proliferation cases and strategies to manage them. The AG does not seek to hinder in any way legitimate transfers of chemical or biological items.<sup>10</sup>

In 2008 AG members built on the 2007 agreement to pay particular attention to synthetic biological agents by forming a synthetic biology advisory body to inform the AG's members about technological developments in this area and to facilitate any group response deemed necessary.<sup>11</sup>

The AG also continued cooperation to deal with transfers of technology via oral or electronic transmission—so-called intangible technology transfers (ITT), 'an area of increasing priority in the defence against the proliferation of chemical and biological weapons capabilities'. This included the exchange of information on how each member screens visa

<sup>8</sup> The Zangger Committee participants seek to take account of the effect of 'changing security aspects' on the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT) and to 'adapt export control conditions and criteria' in that light, although it is not formally part of the NPT regime. For basic information on the Zangger Committee see annex B in this volume. For a summary and other details of the NPT see annex A in this volume.

<sup>9</sup> Outreach includes activities to engage directly with a target community for purposes such as awareness raising, information exchange or dialogue.

<sup>10</sup> See the AG website, <<http://www.australiagroup.net/>>.

<sup>11</sup> Australia Group, '2008 Australia Group Plenary', Press release, 19 Apr. 2008, <[http://www.australiagroup.net/en/agm\\_apr2008.html](http://www.australiagroup.net/en/agm_apr2008.html)>; and Hart, J. and Clevestig, P., 'Reducing security threats from chemical and biological materials', *SIPRI Yearbook 2008: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2008), pp. 453–54.

**Table 12.1.** Membership of multilateral weapon and technology transfer control regimes, as of 1 January 2009

| State                   | Zangger<br>Committee<br>1974 | NSG<br>1978 | Australia<br>Group<br>1985 | MTCR<br>1987 | Wassenaar<br>Arrangement<br>1996 |
|-------------------------|------------------------------|-------------|----------------------------|--------------|----------------------------------|
| Argentina               | x                            | x           | x                          | x            | x                                |
| Australia               | x                            | x           | x                          | x            | x                                |
| Austria                 | x                            | x           | x                          | x            | x                                |
| Belarus                 |                              | x           |                            |              |                                  |
| Belgium                 | x                            | x           | x                          | x            | x                                |
| Brazil                  |                              | x           |                            | x            |                                  |
| Bulgaria                | x                            | x           | x                          | x            | x                                |
| Canada                  | x                            | x           | x                          | x            | x                                |
| China                   | x                            | x           |                            |              |                                  |
| Croatia                 | x                            | x           | x                          |              | x                                |
| Cyprus                  |                              | x           | x                          |              |                                  |
| Czech Republic          | x                            | x           | x                          | x            | x                                |
| Denmark                 | x                            | x           | x                          | x            | x                                |
| Estonia                 |                              | x           | x                          |              | x                                |
| Finland                 | x                            | x           | x                          | x            | x                                |
| France                  | x                            | x           | x                          | x            | x                                |
| Germany                 | x                            | x           | x                          | x            | x                                |
| Greece                  | x                            | x           | x                          | x            | x                                |
| Hungary                 | x                            | x           | x                          | x            | x                                |
| Iceland                 |                              |             | x                          | x            |                                  |
| Ireland                 | x                            | x           | x                          | x            | x                                |
| Italy                   | x                            | x           | x                          | x            | x                                |
| Japan                   | x                            | x           | x                          | x            | x                                |
| Kazakhstan              | x*                           | x           |                            |              |                                  |
| Korea, South            | x                            | x           | x                          | x            | x                                |
| Latvia                  |                              | x           | x                          |              | x                                |
| Lithuania               |                              | x           | x                          |              | x                                |
| Luxembourg              | x                            | x           | x                          | x            | x                                |
| Malta                   |                              | x           | x                          |              | x                                |
| Netherlands             | x                            | x           | x                          | x            | x                                |
| New Zealand             |                              | x           | x                          | x            | x                                |
| Norway                  | x                            | x           | x                          | x            | x                                |
| Poland                  | x                            | x           | x                          | x            | x                                |
| Portugal                | x                            | x           | x                          | x            | x                                |
| Romania                 | x                            | x           | x                          |              | x                                |
| Russia                  | x                            | x           |                            | x            | x                                |
| Slovakia                | x                            | x           | x                          |              | x                                |
| Slovenia                | x                            | x           | x                          |              | x                                |
| South Africa            | x                            | x           |                            | x            | x                                |
| Spain                   | x                            | x           | x                          | x            | x                                |
| Sweden                  | x                            | x           | x                          | x            | x                                |
| Switzerland             | x                            | x           | x                          | x            | x                                |
| Turkey                  | x                            | x           | x                          | x            | x                                |
| UK                      | x                            | x           | x                          | x            | x                                |
| Ukraine                 | x                            | x           | x                          | x            | x                                |
| USA                     | x                            | x           | x                          | x            | x                                |
| European Commission     | o                            | o           | x                          |              |                                  |
| <b>Total membership</b> | <b>37</b>                    | <b>45</b>   | <b>41</b>                  | <b>34</b>    | <b>40</b>                        |

NSG = Nuclear Suppliers Group; MTCR = Missile Technology Control Regime; o = observer; x = member or participant; \* = joined in 2008

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

applications as a means of countering ITT of concern.<sup>12</sup> The issue of ITT control is a general problem in dual-use export control, and the issue has also been discussed in other regimes and processes.<sup>13</sup>

The potential risks from ITT were highlighted in a report by British security services stating that specialized academic research facilities were at risk of being unwittingly exploited by individuals seeking knowledge that could later be applied in acts of mass-impact terrorism.<sup>14</sup> This is not a new concern: the United Kingdom used a voluntary vetting scheme for a number of years in partnership with the academic sector. In November 2007 the Academic Technology Approval Scheme (ATAS) was introduced. This required non-EU citizens to obtain a valid ATAS clearance certificate from the Counter-Proliferation Department of the Foreign and Commonwealth Office in order to study certain scientific disciplines at the post-graduate level in the UK.<sup>15</sup>

Visa vetting schemes have been introduced by other governments and additional measures have been proposed within the EU. In December 2008 the General Affairs and External Relations Council (GAERC) encouraged EU member states to establish a consular vigilance procedure or to strengthen such a procedure where it already exists. The GAERC noted that competent national visa-issuing authorities must be made more aware of the problems surrounding non-proliferation measures and pointed out a possible role for the EU in awareness raising.<sup>16</sup>

The Missile Technology Control Regime is an arrangement in which countries that share the goal of non-proliferation of unmanned delivery systems for nuclear, biological or chemical (NBC) weapons cooperate to exchange information and to coordinate their national export licensing processes.<sup>17</sup>

Public statements during 2008 by the MTCR continued to draw attention to the steady and incremental increases in the size and sophistication of missile arsenals in several regions—particularly the Middle East, North

<sup>12</sup> Australia Group (note 11).

<sup>13</sup> E.g. at its 2006 plenary meeting the WA agreed the Wassenaar Arrangement, 'Best practices for implementing intangible technology transfer controls', 2006, <[http://www.wassenaar.org/public\\_documents/index\\_PD06.html](http://www.wassenaar.org/public_documents/index_PD06.html)>. In Sep. 2008 the partners in the Global Initiative to Combat Nuclear Terrorism organized a consultation on ITT within the academic sector.

<sup>14</sup> The contents of the report are reported in Townsend, M., 'Terrorists try to infiltrate UK's top labs', *The Observer*, 2 Nov. 2008. See also chapter 10, section IV, this volume.

<sup>15</sup> British Border Agency, 'Changes to student rules—academic technology approval scheme (ATAS)', Press release, 13 Nov. 2007, <<http://www.bia.homeoffice.gov.uk/sitecontent/newsarticles/2007/atas>>.

<sup>16</sup> Suggestions included mutual notification of visa refusals justified by a risk of proliferation in consular posts in sensitive countries and an examination of how this might be done—including by using the Schengen Information System to identify individuals engaged in proliferation activities. Council of the European Union, Council Conclusions and new lines for action by the European Union in combating the proliferation of weapons of mass destruction and their delivery systems, 17172/08, 17 Dec. 2008, p. 12.

<sup>17</sup> See the MTCR website, <<http://www.mtc.info/>>.

East Asia and South Asia—and the connection between these missile programmes and the proliferation of nuclear weapons.<sup>18</sup> The public information about the work of the MTCR suggests that the regime has not placed any insurmountable barrier in the path of any missile programme of concern in the recent past, and the partners recognize that ‘more must be done to discourage WMD means-of-delivery programmes and activities of proliferation concern’.<sup>19</sup>

Other international efforts to prevent the proliferation of delivery systems for NBC weapons have increasingly focused on the missile development programmes of a small number of states. For example, resolutions adopted by the UN Security Council have introduced restrictions or prohibitions on the transfer of controlled items to Iran and North Korea.<sup>20</sup> In November 2008 Iran continued the testing phase of its ballistic missile programme and was reported to have successfully tested a two-stage solid-fuel missile with a range of 2000 kilometres. The test indicated that Iran has continued to shift the focus of its ballistic missile programme away from liquid-fuelled engines to more versatile and stable solid-fuel rockets. Throughout 2008 Iranian spokesmen emphasized that the missile programme provided a necessary deterrent to the perceived risk of attacks on Iran’s nuclear infrastructure.<sup>21</sup> In early 2009 it was reported that North Korea had deployed a new type of ballistic missile for the first time and was preparing a new phase of ballistic missile testing.<sup>22</sup>

The MTCR partners have underlined the inadequacy of the current arms control system for missiles, and missile development programmes in several countries that are not the focus of current attention in the regime also crossed important technological thresholds recently.

In January 2008 Israel tested a new rocket motor believed to be intended for integration into a three-stage extended-range ballistic missile (often referred to as the Jericho III). This missile is said to have a range of 4000 km.<sup>23</sup>

<sup>18</sup> MTCR, ‘Plenary meeting of the Missile Technology Control Regime, Canberra, Australia, 5–7 November 2008’, Press release, <<http://www.mtcr.info/english/press/canberra.html>>. On missile development programmes in nuclear weapon states see chapter 8 in this volume.

<sup>19</sup> MTCR (note 18).

<sup>20</sup> In Mar. 2008 the UN Security Council clarified some of the restrictions and prohibitions introduced in previous resolutions. UN Security Council Resolution 1803, 3 Mar. 2008. See also Kile, S. N., ‘Nuclear arms control and non-proliferation’, and Anthony, I. and Bauer, S., ‘Controls on security-related international transfers’, *SIPRI Yearbook 2007: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2007); Kile, S. N., ‘Nuclear arms control and non-proliferation’, and Anthony, I., Bauer, S. and Wetter, A., ‘Controls on security-related international transfers’, *SIPRI Yearbook 2008* (note 11); and chapter 9, sections II and III, in this volume.

<sup>21</sup> Hildreth, S. A., *Iran’s Ballistic Missile Programs: An Overview*, Congressional Research Service (CRS) Report for Congress RS22758 (US Congress, CRS: Washington, DC, 4 Feb. 2009), pp. 4, 6–7.

<sup>22</sup> Hildreth, S. A., *North Korean Ballistic Missile Threat to the United States*, Congressional Research Service (CRS) Report for Congress RS21473 (US Congress, CRS: Washington, DC, 24 Feb. 2009), pp. 3–4.

<sup>23</sup> Azoulay, Y., ‘Missile test will “improve deterrence”’, *Haaretz*, 18 Jan. 2008.

As part of its integrated guided missile development programme, India has developed an underwater missile launch capability. In February 2008 India test fired a ballistic missile from an undersea platform for the first time.<sup>24</sup>

The Wassenaar Arrangement promotes transparency and the exchange of information and views on transfers of an agreed range of items. It encourages responsibility in transfers of conventional arms and related dual-use goods and technologies and seeks to prevent 'destabilizing accumulations' of such items.<sup>25</sup>

The WA's 2008 plenary, held on 2–3 December in Vienna, was informed by working-level meetings held during the year within the General Working Group, the Experts Group, and the Licensing and Enforcement Officers Meeting. In 2008 the WA's efforts focused on the implementation of the conclusions of the 2007 assessment of the regime's overall functioning under four categories: best practices of export control regulations, re-export control of conventional weapons, transparency and outreach. In addition to discussing these broader issues, the acquisition of man-portable air defence systems (MANPADS) by unauthorized users was once again highlighted as an important issue to be monitored and discussed further.<sup>26</sup>

As in 2007 a consensus on expanding WA membership could not be reached. However, the plenary agreed to continue promoting best practices related to export controls and raising awareness of the WA by conducting outreach through dialogue with non-participating states and international organizations. In 2008 such bilateral activities were conducted with Belarus, China and Israel.<sup>27</sup>

Based on the recommendations of the Experts Group, the WA updated its two control lists: for dual-use goods and technologies and for munitions. These changes relate to, for example, low-level and infrared sensors.<sup>28</sup>

<sup>24</sup> See chapter 8, section VII, in this volume.

<sup>25</sup> See the WA website, <<http://www.wassenaar.org/>>.

<sup>26</sup> On export control of MANPADS see Schroeder, M., 'Global efforts to control MANPADS', *SIPRI Yearbook 2007* (note 20); and Wassenaar Arrangement, 'Updated elements for export controls of man-portable air defence systems (MANPADS)', Vienna, Dec. 2007, <[http://www.wassenaar.org/publicdocuments/index\\_PD07.html](http://www.wassenaar.org/publicdocuments/index_PD07.html)>. This is a revision of the document adopted in 2000 and amended in 2003.

<sup>27</sup> Wassenaar Arrangement, '2008 plenary meeting of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-use Goods and Technologies', Public statement, Vienna, 3 Dec. 2008, <[http://www.wassenaar.org/publicdocuments/index\\_PS\\_PS.html](http://www.wassenaar.org/publicdocuments/index_PS_PS.html)>.

<sup>28</sup> Wassenaar Arrangement, 'Summary of changes: list of dual-use goods & technologies and munitions list as of 3 December 2008', and 'The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-use Goods and Technologies: list of dual-use goods and technologies and munitions list', WA-LIST (08) 1, 3 Dec. 2008, <<http://www.wassenaar.org/controllists/>>.

## The Nuclear Suppliers Group

The NSG aims to prevent the proliferation of nuclear weapons by controlling exports of nuclear and nuclear-related material, equipment, software and technology.<sup>29</sup> The controls, which are implemented by the participating governments through national legislation and procedures, are not intended to prevent or hinder international cooperation on peaceful uses of nuclear energy. In 2008 the NSG continued to consider proposals to amend guidelines on the transfer of particularly sensitive nuclear technology, specifically the technology to enrich uranium or to recover plutonium from used nuclear fuel, and transfers to India.

### *Negotiating Nuclear Suppliers Group guidelines*

In 2004, following the public disclosure of the activities of an international illicit nuclear trafficking network, US President George W. Bush proposed that the NSG should refuse to sell enrichment and reprocessing technology and equipment to countries that did not already possess full-scale, functioning enrichment and reprocessing plants. This proposal provoked a negative reaction from a number of states, including several NSG partners. Critics argued that a ban would be inconsistent with the right of states parties to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (Non-Proliferation Treaty, NPT) to acquire nuclear technology for peaceful purposes.<sup>30</sup>

France advanced an alternative approach in the NSG by proposing seven additional criteria that a nuclear supplier would apply alongside existing guidelines when considering applications to export sensitive nuclear technology.<sup>31</sup> When it became clear that most NSG participating states preferred this approach, the partners began to elaborate the criteria. However, a proposed criterion that sensitive nuclear technology should not be transferred unless the recipient state had agreed an Additional Protocol to its safeguards agreement with the International Atomic Energy Agency (IAEA) was unacceptable to Brazil, which does not have such a protocol in place and does not intend to seek one.<sup>32</sup> The NSG partners subsequently

<sup>29</sup> On the NSG see Anthony, I., Ahlström, C. and Fedchenko, V., *Reforming Nuclear Export Controls: The Future of the Nuclear Suppliers Group*, SIPRI Research Report no. 22 (Oxford University Press: Oxford, 2007); and the NSG website, <<http://www.nuclearsuppliersgroup.org/>>.

<sup>30</sup> NPT (note 8), Article IV; and Boese, W., 'U.S. joins others seeking nuclear export criteria', *Arms Control Today*, vol. 38, no. 4 (May 2008).

<sup>31</sup> On the background to these proposals see Boese, W., 'Nuclear export criteria lacks consensus', *Arms Control Today*, vol. 38, no. 5 (June 2008).

<sup>32</sup> An Additional Protocol is a legal document granting the IAEA inspection authority that complements that provided in underlying safeguards agreements (see note 2). Since 2006 Brazil has operated a uranium-enrichment facility at Resende to meet its own needs and to supply foreign customers with enrichment services. The French proposal, if adopted as proposed, could complicate the acquisition of technology and equipment for the Resende facility.

agreed to expand this criterion to permit transfers of sensitive nuclear technology to countries that have introduced regional arrangements that include elements that can be considered equivalent to those included in an Additional Protocol.

The USA subsequently proposed three additional criteria: (a) that the transfer should take place under conditions that would prevent technology from being reproduced, including a physical barrier or 'black box' that prevents the users from gaining access to sensitive technology; (b) that suppliers should evaluate whether the transfer to one country would lead other countries in the same region to try to acquire similar technology; and (c) that suppliers would not transfer to countries that have contravened past voluntary agreements to abstain from acquiring such capabilities.<sup>33</sup>

The first of the additional criteria proposed by the USA was difficult for several countries to accept. In particular, Canada objected to forms of protection that would inhibit the future development of its indigenous commercial activities.<sup>34</sup> An additional issue related to whether controls should be applied only to currently listed technologies or whether they should also apply to any future technology, yet to be developed or commercially proven, intended for the same purposes of enrichment or reprocessing. At the end of 2008 the NSG participating states had not reached final agreement on any of these issues.

#### *Facilitating civil nuclear cooperation with India*

Much of the discussion within the NSG during 2008 was a continuation of the debate surrounding civil nuclear cooperation to India.<sup>35</sup> Following an agreement reached at a meeting in Warsaw in 1992, the NSG effectively excluded nuclear cooperation with countries outside the NPT.<sup>36</sup> According to the NSG guidelines, suppliers should only transfer controlled items and technology to a non-nuclear weapon state party to the NPT after the importing state has brought into force an agreement with the IAEA requiring the application of comprehensive safeguards—so that safeguards will apply to all activities in the country in which source and special

<sup>33</sup> Pomper, M., 'Nuclear suppliers make progress on new rules', *Arms Control Today*, vol. 38, no. 10 (Dec. 2008).

<sup>34</sup> Boese (note 31).

<sup>35</sup> On the background to this discussion see Ahlström, C., 'Legal aspects of the Indian-US Civil Nuclear Cooperation Initiative', *SIPRI Yearbook 2006: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2006), pp. 669–85.

<sup>36</sup> Nuclear Suppliers Group, 'Statement on full-scope safeguards adopted by the adherents to the Nuclear Suppliers Guidelines', Meeting of Adherents to the Nuclear Suppliers Guidelines, Warsaw, 31 Mar.–3 Apr. 1992, <<http://www.sipri.org/contents/expcon/nsgfss.html>>. The NSG guidelines were amended in 1993 to take into account the agreement reached in Warsaw. Thorne, C. E., 'Multi-lateral export controls: past, present and future', Keynote speech, International Seminar on the Role of Export Controls in Nuclear Non-Proliferation, Vienna, 7–8 Oct. 1997, <<http://www.nuclearsuppliersgroup.org/public.htm>>.

fissionable material are being used.<sup>37</sup> The agreement in Warsaw was difficult to reach, but it was rightly proclaimed as a significant step forward in developing non-proliferation standards. Moreover, this standard became a global norm when it was incorporated in a decision at the 1995 Review Conference at which the duration of the NPT was extended indefinitely.<sup>38</sup>

After a three-year process, in 2008 the NSG members agreed to exempt India from this crucial part of the NSG guidelines.<sup>39</sup> The exception was made in the context of the July 2005 Indian–US Civil Nuclear Cooperation Initiative (CNCI).<sup>40</sup>

Through the CNCI the Bush Administration announced its intention to make civil nuclear cooperation part of a wider policy of building a closer economic, political and strategic relationship with India. To that end, the USA began working to dismantle the domestic and international barriers preventing Indian–US nuclear cooperation. In 2006 the USA circulated among NSG participants a draft Statement on Civil Nuclear Cooperation with India proposing an approach to modifying existing NSG guidelines. Another draft, modified after consultations with India, was considered by the NSG in the autumn of 2008.<sup>41</sup> India and the USA both pressed the NSG partners for a quick decision on the proposal in order to translate the decision into domestic law in 2008.<sup>42</sup> The option of amending the proposal was opposed by Indian officials. They stressed that domestic political con-

<sup>37</sup> The basic purpose of safeguards is to block military access to the fissile materials that are an essential element of a nuclear weapon, but in countries—such as India—where the nuclear programme has a military as well as a civilian element, the role of safeguards is necessarily different. A nuclear weapon state is defined by the NPT as a country that manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 Jan. 1967. Thus, from a legal perspective, the NSG partners consider countries known to have exploded nuclear devices after 1967 to be non-nuclear weapon states. In practice, applying the NSG guidelines excludes civilian nuclear cooperation with India, Israel, North Korea and Pakistan—countries considered to be non-nuclear weapon states but that have (or are strongly believed to have) nuclear weapons and are not parties to the NPT.

<sup>38</sup> Regehr, E., ‘Getting a nonproliferation payoff from India’, *Embassy*, 13 Aug. 2008. On the 1995 NPT Review Conference and its decisions see Simpson, J., ‘The nuclear non-proliferation regime after the NPT review and extension conference’, *SIPRI Yearbook 1996: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 1996), pp. 563–73, 590–93.

<sup>39</sup> Goff, P., ‘Nuclear Suppliers Group approves Indian exemption’, New Zealand Government, News release, 7 Sep. 2008, <<http://beehive.govt.nz/release/nuclear+suppliers+group+approves+indian+exemption>>. On the background to the decision and its potential implications see Anthony, I., ‘Civilian nuclear cooperation: an Indian exemption?’, *European Security Review*, no. 40 (Sep. 2008).

<sup>40</sup> On the CNCI see Ahlström (note 35).

<sup>41</sup> Vishwanathan, A., ‘The Nuclear Suppliers Group and the Indo-US nuclear deal’, IDSA Strategic Comments, Institute for Defence Studies & Analyses, New Delhi, 26 Sep. 2007. The drafts are reproduced in Kimball, D. G., ‘U.S. proposal for changes to Nuclear Suppliers Group Guidelines circulated March 2006’, Arms Control Association, 27 Mar. 2006, <[http://www.armscontrol.org/projects/India/20060327\\_DraftNSGProposal](http://www.armscontrol.org/projects/India/20060327_DraftNSGProposal)>; and Kimball, D. G., ‘U.S. proposal for India-specific exemption from Nuclear Suppliers Group Guidelines circulated August 2008’, Arms Control Association, 13 Aug. 2008, <<http://www.armscontrol.org/node/3274>>.

<sup>42</sup> Varadarajan, S., ‘Eleventh hour for the Nuclear Suppliers Group’, *The Hindu*, 9 Aug. 2008.

ditions in India made it likely that amending the draft would be tantamount to continuing to block civil nuclear cooperation.<sup>43</sup>

Parallel to these discussions in the NSG, India and the IAEA reached an agreement for the application of safeguards to civil nuclear facilities.<sup>44</sup> However, as it is not a comprehensive safeguards agreement, NSG participating states were still restricted from supplying controlled items to India. The agreement only provides for the application of safeguards to 14 nuclear reactors in India (6 of which are already under facility-specific safeguards) by 2014, while 8 other nuclear reactors designated by India for military use will remain unsafeguarded. India made it clear that applying safeguards to these facilities is unacceptable and non-negotiable.

Despite the limits of the IAEA–India agreement, the USA proposed that a number of voluntary steps that India had taken in recent years were sufficient grounds to agree that NSG participating states may transfer controlled items and related technology to India—provided that the government of the exporting country is satisfied that the items are intended for peaceful purposes at safeguarded civil nuclear facilities. The transfer in question would also have to be consistent with all other elements of the NSG guidelines. The 2008 version of the US proposal to exempt India from aspects of the guidelines was accepted on 6 September 2008 by the NSG partners without additional conditions.<sup>45</sup>

In 2008, following the NSG’s decision to amend the guidelines, India signed civil nuclear cooperation agreements with France, the USA and Russia in September, October and December, respectively.<sup>46</sup>

The NSG works by consensus, and if any of the 45 participating states had refused to modify existing guidelines to facilitate civil nuclear cooperation with India, the US-led effort would have failed. According to diplomats close to the discussions, it was clear early in the discussions that

<sup>43</sup> Subramanian, T. S., ‘India firm on “unconditional” exemption’, *The Hindu*, 12 Aug. 2008.

<sup>44</sup> India and the IAEA agreed the text of the agreement in July 2008, and it was subsequently endorsed by the IAEA Board of Governors in August. IAEA, ‘IAEA Board approves India-specific safeguards’, IAEA Staff Report, 1 Aug. 2008, <<http://www.iaea.org/NewsCenter/News/2008/board010808.html>>. The agreement between the Government of India and the IAEA for the application of safeguards to civilian nuclear facilities was signed on 2 Feb. 2009 and will enter into force when India has fulfilled certain requirements. The text of the agreement is available at <<http://www.armscontrol.org/node/3181>>.

<sup>45</sup> Kimball, D. G., ‘Text, analysis, and response to NSG “Statement on civil nuclear cooperation with India”’, *Arms Control Today*, 6 Sep. 2008, <<http://www.armscontrol.org/node/3345>>.

<sup>46</sup> ‘France–India nuclear cooperation deal’, *World Nuclear News*, 30 Sep. 2008; The White House, ‘President Bush signs H.R. 7081, the United States–India Nuclear Cooperation Approval and Nonproliferation Enhancement Act’, 8 Oct. 2008, <<http://georgewbush-whitehouse.archives.gov/news/releases/2008/10/20081008-4.html>>; Mohammed, A., ‘U.S., India sign civil nuclear cooperation agreement’, Reuters, 10 Oct. 2008, <<http://www.reuters.com/article/topNews/idUSTRE49990220081010>>; and Islamic Republic News Agency (IRNA), ‘India, Russia sign nuclear cooperation agreement’, 5 Dec. 2008, <<http://www.globalsecurity.org/wmd/library/news/india/2008/india-081205-irna02.htm>>.

no country planned to oppose the proposal outright.<sup>47</sup> While the terms of the agreed exemption were unconditional, it is believed that the NSG partners came to an informal agreement on certain points.

During the process of lobbying NSG participating states, the Indian Government made a public commitment to maintain an existing voluntary, unilateral moratorium on nuclear testing.<sup>48</sup> However, the commitment does not bind the current government or any successor, and India has not signed the 1996 Comprehensive Nuclear Test-Ban Treaty (CTBT).<sup>49</sup> It is believed that NSG partners agreed informally to terminate civil nuclear commerce with India if it renews nuclear weapon testing. This informal decision would avoid any direct link to the CTBT, as two NSG participating states (China and the USA) also have not ratified the treaty.

A decision of this kind would certainly suit the USA since it is already a provision of US law and as the political reaction to an Indian test could anyway compel a future US Government to terminate agreements with India.<sup>50</sup> While other NSG partners might follow a similar line in the wake of an Indian nuclear test, it is not certain. Informal agreement within the NSG that other countries would act along similar lines could help the USA avoid a situation where domestic legislation and domestic political opinion compels the US Government to adopt a policy that other nuclear suppliers are not obliged to share.

A second proposal still under informal discussion would restrict civil cooperation with India to certain parts of the NSG list of controlled items. An informal agreement among NSG partners might include a decision not to approve the transfer of technologies that are particularly sensitive from a nuclear weapon proliferation perspective to India. This would include uranium enrichment and used fuel reprocessing technologies. Similarly, when questioned by US legislators regarding the changes to US domestic law necessary to facilitate cooperation with India, the Bush Administration promised to press for an NSG decision prohibiting the export of enrichment and reprocessing equipment and technology to any state outside of the NPT and the NSG.<sup>51</sup>

<sup>47</sup> Press Trust of India, 'Switzerland "unlikely" to block waiver for India at NSG', *South Asia Times*, 9 Aug. 2008; and Hibbs, M., 'Some in NSG predict prolonged debate over conditions for Indian exemption', *Nuclear Fuel*, vol. 33, no. 16 (11 Aug. 2008).

<sup>48</sup> Indian Ministry of External Affairs, 'Statement by External Affairs Minister of India Shri Pranab Mukherjee on the Civil Nuclear Initiative', New Delhi, 5 Sep. 2008, <[http://www.indianembassy.org/newsite/press\\_release/2008/Sep/3.asp](http://www.indianembassy.org/newsite/press_release/2008/Sep/3.asp)>.

<sup>49</sup> For a summary and other details of the CTBT see annex A in this volume. The treaty will come into force for all parties once the 44 states named in the annex have ratified it.

<sup>50</sup> Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act of 2006, US Public Law 109-401, 18 Dec. 2006, <[http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109\\_cong\\_bills&docid=f:h5682enr.txt.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h5682enr.txt.pdf)>.

<sup>51</sup> Boese, W., 'NSG, Congress approve nuclear trade with India', *Arms Control Today*, vol. 38, no. 8 (Oct. 2008).

While India is not expected to join the NSG, the group must consider how it will manage future relations with that country. NSG partners will also need to determine how to monitor the voluntary undertakings given by India in the September statement by the External Affairs Minister, including support for negotiations towards a fissile material cut-off treaty (FMCT) and the effective enforcement of national export controls.<sup>52</sup> A significant expansion in India's civil nuclear sector will lead to an increase in suppliers of dual-use technologies, and NSG partners will expect India to ensure that the national export control system is updated to take into account this change.

While the decision taken by the NSG was specific to India, other countries that are effectively excluded from international civil nuclear cooperation have also sought to modify the existing rules. As an alternative to the country-based approach to cooperation, China has proposed a set of criteria that any country could, in theory, meet. Israel and Pakistan, which urged the NSG to consider adopting 'a generic, multi-tiered, criteria-based approach towards nuclear technology transfers', have made similar proposals.<sup>53</sup> Proponents argue that a criteria-based approach would give all of the countries that are currently locked out of international civil nuclear cooperation an incentive to bring their domestic laws, procedures and policies in line with NSG norms. The approach could also help restore the perception of the NSG as a rule-based body rather than one driven by the political and economic self-interest of its most powerful members. However, the degree of trust among NSG partners is currently too low for them to be confident that other national authorities will apply agreed criteria in an acceptable way when assessing specific export licences.

### III. Supply-side measures in the European Union

The year 2008 saw many important changes regarding the EU's approach to arms exports. Efforts focused on strengthening the EU Code of Conduct through adoption of a revised agreement, which is both more comprehensive and legally binding and on facilitating intra-EU transfers (see section IV below). The EU also introduced new lines of action against the proliferation of WMD, and strengthened and expanded cooperation with third countries on export control.<sup>54</sup> Negotiations over a substantial revision ('recast') of EU Council Regulation 1334/2000 (the EU Dual-use Regu-

<sup>52</sup> On the FMCT see Kile, *SIPRI Yearbook 2008* (note 20), pp. 361–62.

<sup>53</sup> Israeli spokesman David Siegel, quoted in Kessler, G., 'Israel submits nuclear trade plan', *Washington Post*, 30 Sep. 2007; and Ezdi, A., 'A carrot and a stick', *International News* (Karachi), 7 Jan. 2009.

<sup>54</sup> Council of the European Union (note 16). In an EU context, 'third countries' are all countries outside the EU, with the exception of the countries of the European Economic Area (EEA), i.e. Norway, Liechtenstein and Iceland.

lation), which began in December 2006, are still ongoing.<sup>55</sup> The EU seeks to bring the regulation in line with UN Security Council Resolution 1540 by introducing—in addition to existing export controls—brokering and transit/trans-shipment controls for dual-use items.

### **Strengthening the European Union Code of Conduct on Arms Exports**

In December 2008 the Council of the European Union (the EU Council) finally adopted an updated and strengthened version of the politically binding 1998 EU Code of Conduct on Arms Exports as a legally binding common position.<sup>56</sup> The common position's legal status obliges member states to implement it nationally. The title of the document was officially changed to 'Common Rules Governing Control of Exports of Military Technology and Equipment' (Common Rules).

The preamble of the Common Rules expands the Code of Conduct considerably to include references to relevant documents adopted since 1998. This text, for the first time, defines the type of arms transfer subject to common criteria and operative provisions and broadens the scope of transactions covered by the agreement. The Common Rules apply to export licence applications for: (a) 'licences for physical exports, including those for the purpose of licensed production of military equipment in third countries', (b) 'brokering licences', (c) "'transit" or "transshipment" licences', and (d) 'any intangible transfers of software and technology by means such as electronic media, fax or telephone'.<sup>57</sup> National legislation determines in which of these cases an export licence is required.

The Code of Conduct's eight assessment criteria have also been amended. Criterion 3, regarding the respect for human rights in the country of destination, has been expanded to consider international humanitarian law. According to the new wording,

having assessed the recipient country's attitude towards relevant principles established by instruments of international humanitarian law, Member States shall . . . deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.<sup>58</sup>

<sup>55</sup> Council Regulation (EC) no. 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology, *Official Journal of the European Community*, L159, 30 June 2000.

<sup>56</sup> Council Common Position 2008/944/CFSP of 8 Dec. 2008 defining common rules governing control of exports of military technology and equipment, *Official Journal of the European Union*, L335, 13 Dec. 2008, pp. 99–103; and Council of the European Union, EU Code of Conduct on Arms Exports, 8675/2/98 Rev. 2, Brussels, 5 June 1998.

<sup>57</sup> Council Common Position 2008/944/CFSP (note 56), Article 1.

<sup>58</sup> Council Common Position 2008/944/CFSP (note 56), Article 2.

Criterion 7, regarding the risk that exported goods might be diverted to an undesirable end-user, has been amended to refer to the risk of diversion to suspected individual terrorists (not only suspected terrorist organizations) and the risk of re-export to undesirable destinations. The latter explicitly refers to the ‘record of the recipient country in respecting any re-export provision or consent prior to re-export’. EU member states also agreed to ‘regularly exchange experiences with those third states applying the criteria on their military technology and equipment export control policies and on the application of the criteria’.<sup>59</sup>

Importantly, the Common Rules require each EU member state to not only submit a contribution to the EU’s annual report on arms exports for publication in the *Official Journal of the European Union*, but also to publish a national report on exports of military technology and equipment. While these substantial changes were by and large already included in the User’s Guide that accompanies the EU Code of Conduct, they were not codified in a formal agreement until December 2008.<sup>60</sup>

The Code of Conduct had already included criteria for assessing export licence applications as well as reporting, information exchange and consultation obligations. The Common Rules include substantial changes that had already been agreed in 2005, but consensus on the adoption of the document could not be reached until 2008.<sup>61</sup> The impasse was partly due to the linking of the changes with the lifting of the EU’s arms embargo on China.<sup>62</sup> The adoption of Common Rules also reflected the need to strengthen the credibility of EU policy regarding the proposed arms trade treaty and in outreach to other countries on the need for modern and effective export controls—both of which were undermined while the EU was unable to strengthen its own rules. The toolbox of measures to enhance the transparency of transfers to countries on which arms embargoes have been lifted, discussed in 2005, is not reflected in the Common Rules, however.<sup>63</sup>

#### *Joint action on conventional arms export control in various regions*

Prior to the adoption of the Common Rules, in March 2008 the EU adopted a joint action on support for EU activities that promote the control of arms exports and the principles and criteria of the then-EU Code of Conduct on

<sup>59</sup> Council Common Position 2008/944/CFSP (note 56), Article 11.

<sup>60</sup> Council of the European Union, ‘User’s guide to the EU Code of Conduct on Arms Exports’, 7486/08, Brussels, 29 Feb. 2008.

<sup>61</sup> Tenth annual report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, *Official Journal of the European Union*, C300, 22 Nov. 2008, p. 1.

<sup>62</sup> Anthony, I. and Bauer, S., ‘Transfer controls’, *SIPRI Yearbook 2005: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2005), p. 718. On this and all other multilateral arms embargoes in force in 2008 see appendix 12A.

<sup>63</sup> Anthony and Bauer (note 62), p. 718.

Arms Exports among third countries.<sup>64</sup> The joint action funds regional seminars on conventional arms export control in accession, candidate and European Neighbourhood Policy (ENP) partner countries during 2008 and 2009.<sup>65</sup>

A seminar for South Eastern Europe took place in Slovenia in May 2008, and a follow-up activity is planned for 2009. The first seminar in the ENP partner countries in North Africa was held in Morocco in December 2008.<sup>66</sup> A seminar in Georgia for Armenia, Azerbaijan, Belarus, Georgia and Moldova is planned for 2009. The events in South Eastern Europe build on a series of biannual events on the EU Code of Conduct that have been hosted by different countries in the Western Balkans twice a year since 2005. Organized by the EU Presidency in cooperation with SIPRI, the events have facilitated exchange of information on the implementation and practical application of the EU Code of Conduct.<sup>67</sup>

The joint action is the EU's first attempt to provide systematic funding to activities aimed at strengthening export controls for conventional arms. It was an initiative of the Portuguese Presidency during the second half of 2007 and was agreed during the Slovenian Presidency in early 2008. The initiative complements the EU assistance and cooperation programmes in the dual-use area funded through the Community budget and implemented by the German Office of Economics and Export Controls (Bundesamt für Wirtschaft und Ausfuhrkontrolle, BAFA) in close cooperation with other EU member states.

### **European Union support for an arms trade treaty**

On 6 December 2006 the UN General Assembly voted to establish a Group of Governmental Experts (GGE) to assist the Secretary-General in writing a draft international arms trade treaty. To regulate the international arms trade, the EU has advocated establishing 'binding standards, consistent with the existing responsibilities of states under relevant international law'.<sup>68</sup> To that end, the EU has actively supported the UN process to develop an arms trade treaty.

<sup>64</sup> Council Joint Action 2008/230/CFSP of 17 March 2008 on support for EU activities in order to promote the control of arms exports and the principles and criteria of the EU Code of Conduct on arms exports among third countries, *Official Journal of the European Union*, L75, 18 Mar. 2008, pp. 81–85.

<sup>65</sup> Events in Turkey and Ukraine are also eligible for funding under this budget line.

<sup>66</sup> Council of the European Union, 'Report on the regional seminar on the control of arms exports, Rabat, Morocco, 18 and 19 December 2008', 5195/09, 20 Jan. 2009.

<sup>67</sup> The respective EU Presidency-in-office is responsible for organizing the events.

<sup>68</sup> EU Presidency Statement by H. E. Ambassador Sanja Štiglic, Permanent Representative of Slovenia to the United Nations, on behalf of the European Union at the United Nations Security Council open debate on Small Arms and Light Weapons (SALW), New York, 30 Apr. 2008, <[http://www.europa-eu-un.org/articles/en/article\\_7844\\_en.htm](http://www.europa-eu-un.org/articles/en/article_7844_en.htm)>.

In a final report, issued in August 2008, the GGE proposed further discussion ‘on a step-by-step basis, in an open and transparent manner, within the framework of the United Nations’.<sup>69</sup> In October 2008 the General Assembly established a process to take these discussions forward through a series of meetings scheduled for 2009.<sup>70</sup> The meetings will be financed in part by the EU.<sup>71</sup> The process has been described by the British Government as ‘a reasonable, step by step, approach towards this important treaty, balancing the desire by a wide group of States and Civil Society to progress quickly, with the pace and format that gives time for those States who wish to proceed more cautiously to express their views within the wider UN membership’.<sup>72</sup>

### **Combating the proliferation of weapons of mass destruction**

In December 2008 the EU Council endorsed ‘New lines for action by the European Union in combating the proliferation of weapons of mass destruction and their delivery systems’.<sup>73</sup> The document combines outward-looking and inward-reaching elements. One of the deliverables of the action plan is ‘intensifying cooperation with third countries to help them to improve their non-proliferation policies and export controls’.<sup>74</sup> The EU, among other things, aims to ‘raise the profile of non-proliferation measures within the EU by turning this fundamental security issue into a cross cutting priority of EU and Member States’ policies in respect of all aspects of action to tackle this phenomenon’ and to ‘identify existing best practice with a view to encouraging the spread of such practice at the level

<sup>69</sup> United Nations, General Assembly, Report of the Group of Governmental Experts to examine the feasibility, scope and draft parameters for a comprehensive, legally binding instrument establishing common international standards for the import, export and transfer of conventional arms, A/63/334, 26 Aug. 2008, p. 16.

<sup>70</sup> United Nations, General Assembly, ‘Towards an arms trade treaty: establishing common international standards for the import, export and transfer of conventional arms’, A/C.1/63/L.39, 17 Oct. 2008.

<sup>71</sup> Council of the European Union, Council Decision 2009/42/CFSP of 19 January 2009 on support for EU activities in order to promote among third countries the process leading towards an Arms Trade Treaty, in the framework of the European Security Strategy, *Official Journal of the European Union*, L17, 22 Jan. 2009, pp. 39–44.

<sup>72</sup> Rammell, B., British Minister of State for Foreign and Commonwealth Affairs, Speech on Arms Trade Treaty, House of Commons, London, 9 Oct. 2008, <<http://www.fco.gov.uk/en/newsroom/latest-news/?view=Speech&id=7626984>>.

<sup>73</sup> Council of the European Union (note 16).

<sup>74</sup> The Council also adopted a joint action in support of UN Security Council Resolution 1540. The joint action would fund subregional workshops aimed at strengthening capacities and facilitating the identification of implementation gaps. Joint Action 2008/368/CFSP of 14 May 2008 in support of the implementation of United Nations Security Council Resolution 1540 (2004) and in the framework of the implementation of the EU strategy against the proliferation of weapons of mass destruction, *Official Journal of the European Union*, L127, 15 May 2008, pp. 78–83. See also section II above.

of Member States' national policies'.<sup>75</sup> In line with this focus on enhanced training and enforcement measures, the Council also called for agreement at European level on making illegal export, brokerage and smuggling of weapons and materials of WMD subject to criminal sanctions. It also adopted a small arms clause to be inserted into agreements with third countries, to complement the non-proliferation clause.<sup>76</sup>

#### IV. Trade cooperation agreements for military items

In recent years there have been efforts to ensure that arms export controls do not create unnecessary barriers to legitimate international cooperation in the defence industry or handicap national armed forces by raising the cost or the delivery time for necessary military equipment. More tailored controls have been sought that can achieve the main objective of reducing the risk that items specially designed, developed, adapted or produced for military use would be transferred to unauthorized recipients while also facilitating economically and technologically competitive arms production.

##### **Regulating intra-European Union transfers of defence products**

In contrast to the single piece of EU legislation that governs the export and transfer of dual-use items, each EU member state uses its national legislation to control the export and transfer of items that were specially designed, developed or adapted for military use.<sup>77</sup>

In December 2007 the European Commission proposed a package of measures to support the development of a stronger and more competitive European defence industry, including proposals to reduce obstacles to inter-state trade in defence related products within the EU.<sup>78</sup> At the end of November 2008 the Council, the European Parliament and the Commission agreed on the text of a directive simplifying terms and conditions of transfers of military items within the EU.<sup>79</sup> On 16 December 2008 the European Parliament approved a legislative resolution on the proposed direct-

<sup>75</sup> Council of the European Union (note 16), p. 4.

<sup>76</sup> Council of the European Union, 'Council conclusions on the inclusion of a SALW article in agreements between the EU and third countries', 17186/08, 17 Dec. 2008.

<sup>77</sup> European Commission, Proposal for a directive of the European Parliament and of the Council on simplifying terms and conditions of transfers of defence-related products within the Community, COM(2007) 765 final, Brussels, 5 Dec. 2007. On the background to the decision and the content of the proposal from the Commission see Anthony, Bauer and Wetter (note 20).

<sup>78</sup> European Commission (note 77).

<sup>79</sup> European Parliament, Committee on the Internal Market and Consumer Protection, Report on the proposal for a directive of the European Parliament and of the Council on simplifying terms and conditions of transfers of defence-related products within the Community (COM(2007)0765—C6-0468/2007—2007/0279(COD)), European Parliament Session Document no. A6-0410/2008, 15 Oct. 2008.

ive, moving the EU closer to a common market for defence items.<sup>80</sup> The directive is expected to be published in the *Official Journal*, and thus enter into force, in mid-2009.

Up until now military equipment has often been transferred within the EU using individual licences. Once the directive is adopted into EU law, member states 'shall grant global transfer licences to an individual supplier on its request authorizing one or several transfers of one or several defence related products to one or several recipients in another Member State'.<sup>81</sup> Each member state should also design and publish a general licence to authorize transfers of defence products to the armed forces of other member states.

Under the directive the transfer of military items between member states would remain subject to prior national authorization (although there are a number of exceptions to this rule) and licences would continue to be granted by national authorities. However, once a licence has been granted, additional authorization for export control purposes would not be required for the passage of items through member states or for the entrance on the territory of the member state where the recipient is located. Regulations related to safe and secure transport would still apply to any transfers. The directive includes provisions to guarantee the security of transfers, notably with respect to the final recipients of products or components.

The responsible authorities in member states could revoke, withdraw, suspend or limit the use of transfer licences that they have issued at any time for specific reasons. These include protection of their essential security interests or non-compliance with the terms of the licence. The national authorities would also determine the penalties that would be imposed on

<sup>80</sup> European Parliament, Committee on the Internal Market and Consumer Protection, Report on the proposal for a directive of the European Parliament and of the Council on simplifying terms and conditions of transfers of defence-related products within the Community (COM(2007)0765—C6-0468/2007—2007/0279(COD)), A6-0410/2008, 15 Oct. 2008, <<http://www.europarl.europa.eu/sides/getDoc.do?reference=A6-2008-0410&language=EN>>; 'EU armaments: last lap for public procurement directive', *European Defence and Diplomacy*, no. 184 (9 Dec. 2008), p. 4; and European Parliament, 'Building a genuine and transparent EU arms market', Press Release 20081216IPR44603, 16 Dec. 2008, <[http://www.europarl.europa.eu/news/expert/infopress\\_page/054-44605-350-12-51-909-20081216IPR44603-15-12-2008-2008-false/default\\_en.htm](http://www.europarl.europa.eu/news/expert/infopress_page/054-44605-350-12-51-909-20081216IPR44603-15-12-2008-2008-false/default_en.htm)>.

According to a Council document containing this resolution, 'The adopted amendment corresponds to what was agreed between the three institutions and ought therefore to be acceptable to the Council. Consequently, once the legal linguists have scrutinised the text, the Council should be in a position to adopt the legislative act.' Council of the European Union, 'Proposal for a Directive of the European Parliament and of the Council on simplifying terms and conditions of transfers of defence-related products within the Community—Outcome of the European Parliament's first reading (Strasbourg, 15 to 18 December 2008)', 17254/08, 14 Jan. 2009.

<sup>81</sup> An individual licence grants permission to an exporter to export a specific item to a specific end-user. A global licence grants permission to an exporter to export more than one type of item to one or more identified end-users (both the items and end-users are stipulated in the licence). A general licence authorizes the export of one or more types of item to any end-user in a given country or countries. A general licence may be used by any exporter, whereas a global licence is granted to a specific licence holder.

the licence holder in cases of non-compliance. The directive would allow the licensing member state to temporarily exclude certain entities from general licences in case of 'serious concerns' as to their 'willingness or ability' to comply with applicable terms and conditions.<sup>82</sup>

The directive would oblige the licensing member state to inform the recipient of military items and the member state where the recipient is located of limitations on a re-transfer. Importantly, member states 'shall have the necessary resources and be able to verify compliance with export limitations'. Finally, similar to the language of EU arms embargoes and the EU Dual-Use Regulation, member states 'shall take appropriate measures to ensure the proper enforcement of the provisions of this Directive' and 'lay down rules on penalties applicable to infringements of the provisions adopted in implementation of this Directive'. These penalties shall be 'effective, proportionate and dissuasive'.<sup>83</sup>

The directive would apply to military items listed in an annex. This means that for the first time the EU will have a binding control list of military equipment, as opposed to a reference list. The directive would require a number of legal adjustments of the national export control laws governing the export of military equipment. It would also create new enforcement demands for national authorities, as they would be required to enforce the licensing decisions and accompanying re-transfer conditions of another EU member state; that is they would have to prevent, detect, investigate and prosecute any violations. There remain unresolved questions, in particular how member states' licensing practices will be harmonized, and how the certification of recipients of transfers will be handled in a consistent manner across the EU.

### **Bilateral treaties to simplify export licensing procedures**

Some governments have sought bilateral agreements that can facilitate legitimate trade in military articles and services. In January 2008 the USA issued an Export Control Directive to enable US export licensing authorities 'to respond more expeditiously to the military equipment needs of our friends, allies, and particularly our coalition partners'.<sup>84</sup> However, the Bush Administration did not convince the US Congress to amend national legislation to allow a special procedure for exports of spare and replacement parts for items previously exported to allies.

<sup>82</sup> European Parliament, Committee on the Internal Market and Consumer Protection (note 80), amendment 8.

<sup>83</sup> European Parliament, Committee on the Internal Market and Consumer Protection (note 80), amendments 50 and 56.

<sup>84</sup> US Department of State, 'President issues export controls directive to reform U.S. defense trade policies and practices', Fact Sheet 2008/44, 22 Jan. 2008, <<http://2001-2009.state.gov/r/pa/prs/ps/2008/jan/99562.htm>>.

The Bush Administration's work to establish bilateral agreements with Australia and the UK—two countries with a history of close military and industrial links to the USA—resulted in the USA signing a Defense Trade Cooperation Treaty with the UK in June 2007 and one with Australia in September 2007.<sup>85</sup> If ratified, the treaties will create licensing exemptions for pre-approved projects and firms and permit the export of specified listed items from the USA to both countries for: combined military and counterterrorism operations; joint research, development and production projects; mutually agreed special military projects; and use by the US military. Under the terms of the treaties, Australia and the UK agree to prevent the re-export and re-transfer of such items outside the pre-approved projects and firms without prior approval from the US Government.

However, it is uncertain whether the treaties will ever enter into force. Although the treaties have been ratified by Australia and the UK, they await ratification by the US Senate. In September 2008 the Chairman of the US Senate Foreign Relations Committee, Joseph Biden, informed the Secretary of State, Condoleezza Rice, that the committee would not be able to complete its scrutiny of either treaty before the end of 2008.<sup>86</sup> Therefore a decision on ratification of the treaties was deferred until 2009.

At different times the US Congress has raised a number of concerns regarding the treaties. One concern relates to the degree of oversight that can be exercised by licensing authorities once the treaties take effect. Enforcement of the treaty provisions would depend heavily on the effectiveness of the internal administrative systems of the companies making use of licence exemptions. While companies would be required to report on the use of licence exemptions, the possibility for inspection by officials would probably be limited. However, a number of congressmen have expressed the view that there should be more stringent, rather than more relaxed, enforcement systems to control international transfers of military technology.

A second concern is whether the national laws of the treaty partners are adequate to prevent unauthorized re-transfer of technologies provided

<sup>85</sup> In the period 2006–2007 the US authorities denied only 15 of the c. 23 500 Australian and British licence applications. Crawley, V. and McKeeby, D., 'US–UK defense treaty signed', *America.gov*, 27 June 2007, <<http://www.america.gov/st/washfile-english/2007/June/20070627162529MVyelwarCO.9842493.html>>; and Embassy of the United States, Canberra, Australia, 'Questions and answers: Australia–US treaty on defence trade cooperation', 5 Sep. 2007, <<http://canberra.usembassy.gov/irc/us-oz/2007/09/05/pm3.html>>. More detailed implementing arrangements for the treaty were published in a regulation issued in Feb. 2008. US Department of State, 'Implementing arrangement pursuant to the treaty between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland concerning defense trade cooperation', Media release, 14 Feb. 2008, <<http://www.state.gov/t/pm/rls/othr/misc/101101.htm>>. On the relationships between the US, British and Australian arms industries see chapter 6, section IV, in this volume.

<sup>86</sup> Abramson, J., 'Defense trade treaties stall in Congress', *Arms Control Today*, vol. 38, no. 9 (Nov. 2008).

under licence exemptions. A focus of particular attention has been whether current laws could prevent technology transfers within industrial entities created through foreign direct investment and within international military technology research and development projects. The issue has been particularly difficult in the UK, where doubts have arisen over whether British law can protect US technology as European defence industries increasingly integrate.

A third reason that the Congress is cautious about creating licence exemptions for US technology is the potential for diversion to end-users in China. Discussions in Europe over whether to maintain the 1989 political commitment not to transfer arms to China have fed a wider concern in the USA that transfers of European technology to China will contribute to China's military modernization.<sup>87</sup>

## V. Conclusions

The decision of the Nuclear Suppliers Group to step back from their previous agreement that the application of comprehensive IAEA safeguards would be an objective condition of supply is one piece of evidence that export controls are gradually evolving away from a system based on clear rules for general application and towards a system in which the controls are tailored for different categories of countries. The most powerful participating states in the NSG believe that there is a political imperative to strengthen ties with India and most countries with leading nuclear industries are convinced that there are compelling economic and environmental arguments for engagement and cooperation with India. The danger that other countries may now conclude that nuclear proliferation carries less costly consequences than they had supposed is considered to be a risk that can be managed.

By changing the nature of their relationship with India, NSG participating states may develop a mechanism to support the introduction of export controls that are in line with the highest international standards, for example by helping India to regularly update national export control lists. The implications of civil nuclear cooperation with India may stimulate a broader and more inclusive dialogue about the role that nuclear export control will play in nuclear non-proliferation. However, the impact of this change on countries like Pakistan or North Korea that remain excluded from civil cooperation is unclear.

<sup>87</sup> Stumbaum, M.-B., 'Opportunities and limits of EU-China security cooperation', *International Spectator*, vol. 42, no. 3 (Sep. 2007), pp. 351-70.

Changes to export control rules and procedures inside the EU in 2008 highlighted the general importance of dedicating sufficient resources to implement and enforce export controls across the EU.

Discussion in the EU, the USA and the USA's military allies has focused on how to modify export control laws to facilitate, rather than restrict, the exchange of technology—particularly among allies—that is specially designed and developed for military use as one part of a broader effort to increase the capabilities of armed forces at the lowest possible cost. This effort has also fuelled the wider debate about whether export controls should be tailored to specific circumstances or whether universally applicable rules should be developed.