

# 11. Controls on security-related international transfers

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## I. Introduction

Export controls are preventive measures intended to help ensure that exported goods do not contribute to activities in other countries that are either illegal or undesirable from the perspective of the authorities in the exporting state. Historically, defence items—those items that were specifically designed, developed or modified for military use—have usually been held under careful control. However, in recent years export controls have been extended to many dual-use items—those items that were neither specifically designed nor developed for military application but can be used in weapon programmes. Many countries updated their export control laws in the 1990s following the discovery that Iraq and other countries had supported clandestine weapon programmes by purchasing dual-use equipment, materials and technology. The effective enforcement of these laws requires the active, competent and cooperative involvement of a range of national actors—including customs, police, intelligence and prosecution services—and an appropriate legal framework, including penalties for export control violations.

This chapter highlights the efforts of multilateral cooperation regimes, the European Union (EU) and the United Nations to control international transfers of proliferation-sensitive items by developing, implementing and enforcing export control laws. Section II examines recent developments in multilateral cooperation arrangements that attempt to improve the effectiveness of the participating states' national export controls. Section III discusses developments in EU export control policies for defence articles and dual-use items. Section IV examines the investigation and prosecution of suspected violations of export control laws. The conclusions are presented in section V.

## II. Developments in multilateral export control regimes

Four informal multilateral cooperation regimes worked in their specific fields to strengthen export control cooperation in 2007: the Australia Group (AG), the Nuclear Suppliers Group (NSG), the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies (WA) and the Missile Technology Control Regime (MTCR). The states participating in these cooperation regimes and in the Zangger Committee are listed in

**Table 11.1.** Membership of multilateral weapon and technology transfer control regimes, as of 1 January 2008

State	Zangger Committee 1974	NSG 1978	Australia Group 1985	MTCR 1987	Wassenaar Arrangement 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			
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>36</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 2007.

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

table 11.1.<sup>1</sup> In addition to information exchange, all four multilateral arrangements conduct outreach efforts to non-participating states that emphasize increased transparency and the importance of modern and effective export controls. These efforts can help non-participating states to apply the guidelines, control lists, standards and procedures developed by regime partners.

### The Australia Group

The AG was established in 1985 in the light of international concern about the use of chemical weapons in the 1980–88 Iran–Iraq War. Initially, 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. 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.<sup>2</sup>

Insights from previous proliferation cases along with relevant developments in science and technology can lead to revisions of the lists of items subject to national export control by AG members. For example, in 2007 Australia Group members agreed to pay particular attention to synthetic biological agents.<sup>3</sup> Following this decision, the AG agreed to amend its animal pathogens list to clarify the coverage of controls on *Mycoplasma mycoides*—a bacterium that causes a severe and contagious respiratory disease in cattle.<sup>4</sup> As the bacterium's genome had been sequenced, the AG believed that *M. mycoides* could be synthetically reproduced and pose a potential proliferation threat.<sup>5</sup>

### The Nuclear Suppliers Group

Created in 1975, the aim of the NSG is to prevent the proliferation of nuclear weapons through export controls on nuclear and nuclear-related material, equipment, software and technology.<sup>6</sup> The export controls, which are implemented by the participating states through national legislation and procedures, are not intended to prevent or hinder international cooperation on peaceful

<sup>1</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. See also annex B in this volume.

<sup>2</sup> See the AG website at <<http://www.australiagroup.net/>>.

<sup>3</sup> On synthetic biology see chapter 9 this volume, section V.

<sup>4</sup> Australia Group, 'Media release: 2007 Australia Group plenary', Press release, Paris, 12–15 June 2007, <[http://www.australiagroup.net/en/agm\\_2007.htm/](http://www.australiagroup.net/en/agm_2007.htm/)>.

<sup>5</sup> The disease, which is endemic in most of Africa and a problem for agriculture in parts of Asia, has occurred in cattle in the past decade in Italy, Portugal and Spain. Additional information can be found in the online database of the European Bioinformatics Institute of the European Molecular Biology Laboratory, <<http://www.ebi.ac.uk/>>.

<sup>6</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); see also the NSG website at <<http://www.nuclearsuppliersgroup.org/>>.

uses of nuclear energy. NSG-participating states exchange information related to cases where their authorities deny licences to export nuclear or nuclear-related dual-use items for reasons related to the NSG guidelines, which in turn helps countries to assess export applications.<sup>7</sup>

In 2007 the exchange of information on current proliferation challenges in the framework of the NSG included the implementation of two UN Security Council resolutions on Iran. In Resolution 1737 the Security Council decided that all states should block Iranian access to equipment and technology if the items could contribute to activities related to uranium enrichment, nuclear waste reprocessing or heavy water.<sup>8</sup> The resolution also instructs states to freeze the funds and financial assets of a designated list of Iranian entities and people associated with proliferation-sensitive activities. In March 2007 the latter list was revised in Resolution 1747.<sup>9</sup>

Iran depends on international trade to supply its nuclear and nuclear-related industries with equipment, technology and materials. Iran has also sought to buy dual-use items to support its engineering and petrochemical industries as well as for use in mineral research and specialized technical universities and research centres. These items can be legally supplied to Iran (which is a party to the 1968 Non-Proliferation Treaty, NPT<sup>10</sup>) for legitimate, peaceful purposes—including for use in the nuclear industry. However, such transfers must be authorized, and licence assessments depend on access to information that allows national export authorities to determine (a) the end-use of a requested item and (b) the risk that an item will be diverted to an illegitimate end-use. Based on the interventions of the NSG, it has been reported that applications to export dual-use items to Iran were denied on 75 occasions between 2002 and 2007.<sup>11</sup>

It is a fundamental principle of the NSG that suppliers should only authorize transfers of control-listed items when they are satisfied that the transfers would not contribute to the proliferation of nuclear weapons or other nuclear explosive devices. According to NSG guidelines, suppliers should only transfer control-listed items and technology to a non-nuclear weapon state after the importing state has brought into force an agreement with the International Atomic Energy Agency (IAEA) requiring the application of safeguards on all source and special fissionable material in its current and future peaceful activities. Moreover, the NSG requires that the importing state must apply com-

<sup>7</sup> For the NSG guidelines on nuclear transfers and transfers of nuclear-related dual-use equipment, materials, software and related technology see <<http://www.nuclearsuppliersgroup.org/guide.htm>>.

<sup>8</sup> UN Security Council Resolution 1737, 23 Dec. 2006. The resolution also required states to block access to items that would assist the development of nuclear weapon delivery systems (see below).

<sup>9</sup> UN Security Council Resolution 1747, 24 Mar. 2007.

<sup>10</sup> For a brief summary of and list of the parties to the Treaty on the Non-Proliferation of Nuclear Weapons see annex A in this volume.

<sup>11</sup> Hoge, W., 'Iran was blocked from buying nuclear materials at least 75 times, group says', *New York Times*, 16 Nov. 2007.

prehensive IAEA safeguards before any new nuclear supply agreements are concluded.<sup>12</sup>

India has posed a specific challenge to the application of NSG guidelines. As India is a country with nuclear weapons but is not a nuclear weapon state from a legal perspective within the scope of the NPT, the transfer of controlled items to India is not addressed in the NSG guidelines. As cooperation with India's military nuclear programme is prevented under the provisions of the NPT, the NSG guidelines on exports of nuclear and nuclear-related dual-use items would either need to be modified to permit civil cooperation with India or some kind of exemption from several provisions would need to be granted.

In the light of the commitment to expand bilateral activities in the field of civil nuclear energy contained in the July 2005 Indian–US Civil Nuclear Cooperation Initiative (CNCI), the United States circulated a 'pre-decision' draft of how civil nuclear cooperation could be facilitated prior to the 2006 NSG plenary meeting.<sup>13</sup> However, the issue was not formally presented at the meeting and no decision on how to proceed was sought at that time. Indian Government officials are reported to have given informal briefings to NSG participating states on the sidelines of the 2007 plenary meeting. A special envoy of the Indian Prime Minister, Shyam Saran, visited some NSG participating states during 2007 to seek their support.<sup>14</sup> The USA convened a special meeting of NSG participating states in September 2007 to give a briefing on the current status of various elements of the CNCI.<sup>15</sup> A number of NSG participating states were reported to have opposed any decision by the NSG until a bilateral safeguards agreement has been concluded between India and the IAEA.<sup>16</sup> As of January 2008 the NSG had not taken a position on either the need for, or the form of, its relationship with India but was reported to be discussing the conditions that could attend a modification of the guidelines.<sup>17</sup>

Several countries have explored civil nuclear cooperation with India since the CNCI was announced in 2005, including Australia, France and Russia. In August 2007 the Australian Prime Minister, John Howard, informed the Indian Prime Minister, Manmohan Singh, that Australia was willing to open dis-

<sup>12</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 IAEA installs at facilities to monitor activities on a continuous basis.

<sup>13</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).

<sup>14</sup> 'EU says "closely watching" India's talk with UN nuclear body', PTI News Agency, 26 Nov. 2007.

<sup>15</sup> On the CNCI see US Department of State, 'Joint statement by President George W. Bush and Prime Minister Manmohan Singh', Washington, DC, 18 July 2005, <<http://www.state.gov/p/sca/rls/pr/2005/49763.htm/>>; 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; and chapter 8 this volume, section IV.

<sup>16</sup> Hibbs, M., 'Approval in 2007 of US–India deal may hinge on Infcirc-66 safeguards', *Nuclear Fuel*, vol. 32, no. 21 (8 Oct. 2007), pp. 4–5. Discussions on a bilateral safeguards agreement opened in Nov. 2007. International Atomic Energy Agency, 'IAEA–India to launch consultations for India-specific safeguards agreement', Press release, 21 Nov. 2007. See also chapter 8 this volume, section IV.

<sup>17</sup> Hibbs, M., 'NSG prepares to set specific conditions for lifting sanctions against India', *Nuclear Fuel*, vol. 33, no. 2 (14 Jan. 2008), pp. 1, 10.

cussions about the supply of natural uranium to India.<sup>18</sup> Following the December 2007 election of Kevin Rudd as Australian Prime Minister, the new Australian Foreign Minister, Stephen Smith, reversed this decision, referring to the ‘long standing commitment of the Australian Labor Party that we don’t authorize the export of uranium to countries who are not parties to the Nuclear Nonproliferation Treaty’.<sup>19</sup>

### **The Wassenaar Arrangement**

Agreement to establish the WA was made in 1995 at a meeting in Wassenaar, the Netherlands. Its objective is to promote transparency and the exchange of information and views on transfers of an agreed range of items. The WA encourages responsibility in transfers of conventional arms and related dual-use goods and technologies and seeks to prevent ‘destabilizing accumulations’ of such items.<sup>20</sup>

Every four years the WA undertakes a review and evaluation of its overall performance. For the WA’s third assessment in 2007, working groups on the following areas were established: Best Practices of Export Control Regulations, Re-export Control of Conventional Weapons Systems, Transparency and Outreach. The WA’s subsidiary bodies (the General Working Group, the Experts Group, and the Licensing and Enforcement Officers Meeting) met during the year to exchange information and to prepare decisions prior to the plenary meeting in December 2007.<sup>21</sup> The meeting agreed to continue to conduct outreach through dialogue with non-participating states and international organizations to promote best practices related to export controls, among others for man-portable air defence systems (MANPADS); however, no consensus could be reached on expanding membership.

WA participating states made modifications to the export control lists, with a particular focus on devices used to initiate explosions and equipment for the disposal of improvised explosive devices (IEDs). For the first time, the WA also undertook a major editorial review of the control list. Roughly 2500 editorial changes were made to improve consistency and to increase the list’s usability for licensing authorities and industry; the changes do not materially affect the scope of the controls.<sup>22</sup> The Experts Group and the MTCR began a dialogue in 2007 to develop a common understanding of terminology and technical parameters on certain navigation equipment given the overlap between the regime lists.

<sup>18</sup> High Commission of India in Australia, ‘In response to a question regarding Australian Prime Minister’s telephone call to PM’, 16 Aug. 2007, <[http://www.hcindia-au.org/pr\\_132.html](http://www.hcindia-au.org/pr_132.html)>.

<sup>19</sup> Bowden, R., ‘Australia rules out Uranium sales to India’, Worldpress.org, 20 Jan. 2008, <<http://www.worldpress.org/Asia/3047.cfm>>.

<sup>20</sup> See the WA website at <<http://www.wassenaar.org/index.html>>.

<sup>21</sup> Wassenaar Arrangement, ‘Public statement 2007 plenary meeting of the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies’, Vienna, 6 Dec. 2007. All public WA documents are available at <<http://www.wassenaar.org/>>.

<sup>22</sup> For updated control lists and a summary of changes adopted at the December 2007 plenary see <<http://www.wassenaar.org/controllists/index.html>>.

The WA plenary meeting approved amendments to the 2003 elements for export controls of MANPADS.<sup>23</sup> The amendments strengthened language about production equipment and training. They also added requirements for end-use assurances and the possibility of post-shipment checks in recipient countries. A provision was added that non-participating states could be provided with technical and expert support in developing and implementing their legislation to control MANPADS transfers. The 2002 ‘Best practices for exports of small arms and light weapons’ were also amended ‘to bring them in line with language adopted by the UN in 2005 on marking and tracing of small arms and light weapons’.<sup>24</sup>

The plenary also approved two new documents: ‘Statement of understanding on implementation of end-use controls for dual use items’ and ‘Best practices to prevent destabilising transfers of small arms and light weapons (SALW) through air transport’.<sup>25</sup> The end-use statement recommends that both the respective competent authorities and the exporter apply risk-management principles to the three phases of end-use controls.<sup>26</sup> For the competent authorities, this translates into a risk-based approach during the pre-licence phase (e.g. through awareness raising with industry), the application procedure (e.g. plausibility checks, inter-agency consultations) and after the licence is granted (e.g. information exchange between governments, ‘proportionate and dissuasive penalties’ to deter violations, monitoring end-use obligations, post-shipment controls and reporting). On the exporter side, responsibilities during the three phases include internal compliance programmes; physical and technical security arrangements and a two-way information exchange with authorities on sensitive end-users and business contacts; presentation of appropriate documents and further explanations during the application procedure; and record-keeping and post-shipment controls once a transfer is completed. The best practices document contains a series of measures to be taken at the national level to prevent the undesirable and illegal transport of SALW by non-state actors and to support the work of enforcement officers. These measures include the provision of specific transport details in advance of granting an export licence, which can in turn be used in a prosecution should those terms be violated, and exchange of information that could be fed into a national risk assessment in the licensing and enforcement process.

<sup>23</sup> Wassenaar Arrangement, ‘Elements for export controls of man-portable air defence systems (MANPADS)’, Vienna, Dec. 2007, <<http://www.wassenaar.org/publicdocuments/index.html/>>.

<sup>24</sup> Wassenaar Arrangement, ‘Updated best practice guidelines for exports of small arms and light weapons (SALW)’, Vienna, Dec. 2007, <<http://www.wassenaar.org/publicdocuments/index.html/>>.

<sup>25</sup> Wassenaar Arrangement, ‘Statement of understanding on implementation of end-use controls for dual use items’, Vienna, Dec. 2007, <<http://www.wassenaar.org/publicdocuments/index.html/>>; and Wassenaar Arrangement, ‘Best practices to prevent destabilising transfers of small arms and light weapons (SALW) through air transport’, Vienna, Dec. 2007, <<http://www.wassenaar.org/publicdocuments/index.html/>>.

<sup>26</sup> The term ‘exporter’ refers to the legal or physical person who has the authority to determine and control the sending of items outside the physical jurisdiction or customs boundary of a state. For a glossary of terms used in this chapter see SIRPI Non-proliferation and Export Control Project, ‘Glossary of terms used in arms and dual-use export control’, <<http://www.sipri.org/contents/expcon/eglossa.html>>.



## The Missile Technology Control Regime

Established in 1987, the MTCR is an informal arrangement in which countries that share the goal of non-proliferation of unmanned delivery systems for nuclear, biological or chemical weapons cooperate to exchange information and coordinate their national export licensing processes.<sup>27</sup>

The MTCR undertakes outreach activities to inform non-participating states about the regime's activities and to provide practical assistance regarding efforts to prevent the proliferation of missile delivery systems. At the plenary meeting in early November 2007, MTCR partners proposed outreach to Belarus, China, Croatia, Egypt, Jordan, India, Israel, Kazakhstan, Libya, Panama, Singapore, Syria, the United Arab Emirates and Yemen and agreed that explanations of the rationale behind changes to the list of controlled goods could be taken up in outreach meetings. The MTCR considered new membership applications from a number of countries, but no consensus was reached on any of the applications, which are evaluated on a case-by-case basis and on both political and technical grounds.<sup>28</sup> The MTCR has yet to consider Russia's proposal for a comprehensive review of the regime's work pending details of what such a review might encompass.

The electronic point of contact (ePOC) database that MTCR partners use to facilitate the secure exchange of documents and to notify each other when they deny an export licence was under further development in 2007. Revisions will allow partners to renew notifications online with the date of the most recent renewal appearing in the database with the relevant notification. The ePOC database will also be able to trace revoked denials for up to five years following the revocation.

### *The MTCR and regional missile developments*

MTCR partners have drawn attention to the significant number of ballistic missile tests that have been carried out by India, Iran, North Korea and Pakistan recently.<sup>29</sup> During their information exchange at the plenary meeting, MTCR partners considered and expressed concern over regional missile developments, in particular in Iran and North Korea.<sup>30</sup> Iran continued to test ballistic missiles during 2007, and in November the Iranian Minister of Defence, Mostafa Mohammad Najjar, made reference to the test-firing of a missile with a range of 2000 kilometres which he called the Ashura, said to

<sup>27</sup> See the MTCR website at <<http://www.mtc.info/>>.

<sup>28</sup> China, Croatia, Cyprus, Estonia, Kazakhstan, Latvia, Libya, Lithuania, Malta, Romania, Slovakia and Slovenia all sought to participate in the MTCR.

<sup>29</sup> See Anthony, I. and Bauer, S., 'Controls on security-related international transfers', *SIPRI Yearbook 2007: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2007), p. 645.

<sup>30</sup> 'Opening Statement by the Secretary General for European Affairs, Mr. Dimitrios K. Katsoudas', 22nd MTCR Plenary, Athens, 7 Nov. 2007, <[http://www.mfa.gr/www.mfa.gr/Articles/en-US/141107\\_F1551.htm/](http://www.mfa.gr/www.mfa.gr/Articles/en-US/141107_F1551.htm/)>.



have been developed and produced by the Iranian Ministry of Defence.<sup>31</sup> US officials subsequently informed General Yury Baluyevsky, the Chief of General Staff of the Russian armed forces, that an Iranian missile test had taken place on 20 November.<sup>32</sup> MTCR partners emphasized the need to support the implementation of decisions by the UN Security Council. The plenary reiterated its support for UN Security Council Resolution 1540, which declares proliferation of weapons of mass destruction (WMD) and their means of delivery a threat to international peace and security and obliges all UN member states to exercise effective export controls over such weapons and related materials.<sup>33</sup> The partners also noted the direct relevance of a number of UN Security Council resolutions (specifically resolutions 1718, 1737 and 1747, see below) to MTCR export controls and expressed their determination to implement these resolutions.

UN Security Council Resolution 1718 was agreed after the test of a nuclear explosive device by North Korea in October 2006.<sup>34</sup> The resolution requires UN member states to ‘prevent the direct or indirect supply, sale or transfer to North Korea, through their territories or by their nationals, or using their flag vessels or aircraft, and whether or not originating in their territories’ of certain specific items. The items subject to the embargo include missiles and missile systems ‘as defined for the purpose of the United Nations Register of Conventional Arms’ as well as ‘additional items, materials, equipment, goods and technology’ as determined by a Security Council committee set up for the purpose of overseeing implementation of the resolution.<sup>35</sup>

While the UN has not imposed an arms embargo on Iran, both resolutions 1737 and 1747 include certain provisions with direct relevance to missile-related export controls. UN Security Council Resolution 1737 adopted in December 2006 includes a provision that member states should supply items listed in UN Security Council document S/2006/815 to Iran only under specific circumstances.<sup>36</sup> This document contains a list of items, materials, equipment, goods and technology related to ballistic missile programmes derived directly from the MTCR control list. Transfer of the listed items to Iran is prohibited if the authorities of the exporting state find that they would contribute to the development of nuclear weapon delivery systems.

In all other cases the export of listed items should only take place on three conditions. First, the authorities in the exporting state must apply the guidelines set out in another Security Council document, S/2006/985, which con-

<sup>31</sup> ‘Iran’s new ballistic missile “Ashura”’, Agence France-Presse, 27 Nov. 2007.

<sup>32</sup> ‘Russian general says no evidence that Iran tested new missile’, ITAR-TASS, 7 Dec. 2007.

<sup>33</sup> UN Security Council Resolution 1540, 28 Apr. 2004; Anthony, I., ‘Reducing security risks by controlling possession and use of civil materials’, *SIPRI Yearbook 2007* (note 29); and Ahlström, C., ‘United Nations Security Council Resolution 1540: non-proliferation by means of international legislation’, *SIPRI Yearbook 2007* (note 29).

<sup>34</sup> UN Security Council Resolution 1718, 14 Oct. 2006.

<sup>35</sup> The list of items can be found on the website of the committee at <<http://www.un.org/sc/committees/1718/>>.

<sup>36</sup> United Nations, List of items, materials, equipment, goods and technology related to ballistic missile programmes, attached to S/2006/815, 13 Oct 2006.

tains the MTCR guidelines.<sup>37</sup> Second, the authorities in the exporting state must obtain and be in a position to effectively exercise a right to verify the end-use and end-use location of any supplied item. Third, the authorities must notify the relevant UN Security Council committee within 10 days of the supply, sale or transfer.

Resolution 1747 amplifies Resolution 1737 and calls on all states to ‘exercise vigilance and restraint in the supply, sale or transfer directly or indirectly from their territories or by their nationals or using their flag vessels or aircraft’ to Iran of a range of items, missiles or missile systems as defined for the purpose of the UN Register of Conventional Arms (UNROCA). Similar vigilance and restraint should also be shown in regard to any ‘technical assistance or training, financial assistance, investment, brokering or other services, and the transfer of financial resources or services, related to the supply, sale, transfer, manufacture or use of such items’.<sup>38</sup>

### *The MTCR and other missile-control mechanisms*

The UN High Representative for Disarmament Affairs, Serge Duarte, has concluded that the manufacture and proliferation of delivery systems ‘remain difficult problems, and there is no multilateral missiles treaty or even signs of one arising anytime soon’.<sup>39</sup> In October 2007 Russia and the USA circulated a joint statement on the 1987 Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles (INF Treaty) at the UN General Assembly First Committee on disarmament and international security. The statement calls on all interested countries to ‘discuss the possibility of imparting a global character to this important regime through the renunciation of ground-launched ballistic and cruise missiles with ranges between 500 and 5500 kilometres, leading to destruction of any such missiles and the cessation of associated programmes’.<sup>40</sup> Russia introduced a similar proposal at a meeting of the foreign ministers of the Organization for Security and Co-operation in Europe (OSCE) in November 2007. Russia had hoped for this to be a joint proposal with the USA, but the USA did not support the discussion of a missile treaty in a Euro-

<sup>37</sup> United Nations, Guidelines for sensitive missile-relevant transfers, annex to S/2006/985, 15 Dec. 2006.

<sup>38</sup> The UNROCA defines missiles as ‘(a) Guided or unguided rockets, ballistic or cruise missiles capable of delivering a warhead or weapon of destruction to a range of at least 25 kilometers, and means designed or modified specifically for launching such missiles or rockets . . . this subcategory includes remotely piloted vehicles with the characteristics for missiles as defined above but does not include ground-to-air missiles (b) Man-Portable Air-Defence Systems (MANPADS):’ United Nations Register of Conventional Arms, *Information Booklet 2007* (UN Department for Disarmament Affairs: New York, 2007), <<http://disarmament.un.org/cab/register.html>>, p. 6.

<sup>39</sup> Duarte, S., ‘Current state of affairs in the field of arms control and disarmament and the role of the respective organizations’, Statement before the First Committee of the UN General Assembly, 8 Oct. 2007. Since Nov. 2000 the UN General Assembly has engaged a Panel of Government Experts to consider ‘the issue of missiles in all its aspects’. In 2002 the panel produced its first report which contained no actionable proposals other than a recommendation to continue discussions. It has not subsequently been possible to achieve the necessary consensus within the group to produce any further reports.

<sup>40</sup> United Nations, Joint United States–Russian statement on the treaty on the elimination of intermediate-range and shorter-range missiles, A/C.1/62/3, 1 Nov. 2007.

pean regional forum. The proposal, when introduced, did not attract the support of all OSCE foreign ministers.<sup>41</sup>

The Hague Code of Conduct against the Proliferation of Ballistic Missiles (HCOC), which was opened for signature at the Hague in November 2002, was developed by MTCR participating states.<sup>42</sup> The HCOC contains transparency and confidence-building measures that are intended to reduce mistrust by explaining how missile technology is being applied by states with legitimate missile programmes. These measures include pre-launch notifications, which contain advance information on rocket, ballistic missile and space launch vehicles, and annual declarations on relevant national policies. When the HCOC was launched 93 countries signed on as subscribing states. By December 2007 the number of subscribing states had grown to 127.<sup>43</sup>

The extent to which the HCOC has achieved its objectives is difficult to establish and paradoxically, given its focus on transparency, public information about the activities of the HCOC is scarce. The expansion in participation has largely reflected decisions by countries that have no ballistic missile programmes.<sup>44</sup> Most countries with emerging ballistic missile programmes have refused to participate, as have China, India and Pakistan—although China is willing to maintain engagement and exchange information with HCOC members without subscribing to the code.<sup>45</sup> Public reports suggest that a significant number of the states that subscribe to the HCOC do not file annual declarations of their ballistic missile and space launch vehicle-related policies.<sup>46</sup> In many cases the states concerned would have nothing to report and may be reluctant to carry the cost of filing blank or ‘nil’ reports.

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

During 2007 the complex system that the European Union has developed to control exports of military and dual-use items continued to evolve. In December 2006 the European Commission proposed revisions to the EU dual-use

<sup>41</sup> ‘US stance on making INF Treaty universal looks strange—Lavrov’, ITAR-TASS, 5 Dec. 2007.

<sup>42</sup> At the 1999 plenary meeting of the MTCR at Noordwijk, the Netherlands, the participating states agreed that additional steps would be needed to control missile proliferation beyond export control coordination. During discussions in 2000 it became clear that participating states preferred to seek a relatively quick process resulting in a political code of conduct rather than a legal agreement. By 2001 participating states had agreed on the text of a draft code of conduct and had begun to discuss its content with non-MTCR states.

<sup>43</sup> For a list of subscribing states see annex B in this volume.

<sup>44</sup> Philippine Department of Foreign Affairs, ‘Philippines concludes productive chairmanship of Hague Code of Conduct (HCOC) against ballistic missile proliferation’, Press release SFA-AGR-540-06, 27 June 2006.

<sup>45</sup> Chinese Ministry for Foreign Affairs, ‘The Hague Code of Conduct against the Proliferation of Ballistic Missiles (HCOC)’, Press release, 21 May 2007, <<http://www.fmprc.gov.cn/eng/wjw/zjjg/jks/kjlc/wkdd/t410752.htm>>.

<sup>46</sup> Keohane, D., ‘Challenges in missile non-proliferation—multilateral approaches: the Hague Code of Conduct against Ballistic Missile Proliferation’, Report on the International Conference organized by the European Union Institute for Security Studies, Vienna, 30 May 2007.

export control regime, including amendments to the legal framework.<sup>47</sup> Although member states considered the proposals, no agreement on how to modify the current system was reached during 2007.

In their national export licence assessments, EU member states take into account the eight criteria of the EU Code of Conduct on Arms Exports, which also includes reporting, information exchange and consultation obligations.<sup>48</sup> The Council of the EU's Working Party on Conventional Arms Exports (COARM) plays a central role in facilitating discussion of arms transfer issues within the EU. COARM publishes a user's guide that is intended to help EU member states apply the Code of Conduct and that includes best practice guidelines for the interpretation of the code's criteria. In 2007 COARM published best practice guidelines for the remaining three of the eight criteria.<sup>49</sup> COARM also added a chapter to the user's guide on post-shipment controls, which encourages information exchange on the national measures that member states use in order to ensure that end-use agreements are respected. The user's guide also recommends that member states inform each other when brokering registration requests are denied.

### **Implementing UN Security Council sanctions in EU law**

As reported in section II, the UN Security Council adopted several resolutions restricting or prohibiting transfers of a range of items to Iran, including UN Security Council Resolution 1737. Article 8 of EU Council Regulation 1334/2000—the primary legislation which governs the export of dual-use items from the EU—underlines that in making licensing decisions member states must take into account their obligations under sanctions imposed by a binding resolution of the UN Security Council.<sup>50</sup> However, Article 3 makes clear that the law does not apply to items that only pass through the EU and does not create any licensing requirement for items in transit or trans-shipment on the way to Iran. Article 3 also makes clear that the regulation does not apply to transfers of technology which take place through contact between people—either inside the EU during visits by foreign nationals or outside the EU during visits by EU nationals to other countries.<sup>51</sup> Therefore, Regulation

<sup>47</sup> European Commission, Proposal for a Council Regulation setting up a Community regime for the control of exports of dual-use items and technology, COM(2006) 829 Final, Brussels, 18 Dec. 2006.

<sup>48</sup> Council of the European Union, EU Code of Conduct on Arms Exports, 8675/2/98 Rev. 2, Brussels, 5 June 1998. On the impact of the code over its first 10 years see Bromley, M., *The Impact on Domestic Policy of the EU Code of Conduct on Arms Exports: the Czech Republic, the Netherlands and Spain*, SIPRI Policy Paper no. 21 (SIPRI: Stockholm, Apr. 2008).

<sup>49</sup> Council of the European Union, 'User's guide to the European Union Code of Conduct on Arms Exports', 10684/1/07 Rev. 1, Brussels, 3 July 2007. The new additions were for criterion 1, related to international obligations of member states, criterion 5, related to the security of friends and allies of EU member states, and criterion 6, on the attitude of the buyer country to terrorism.

<sup>50</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 Communities*, L159 (30 June 2000), p. 5.

<sup>51</sup> While there is no primary legislation at European level, EU member states have agreed that they will control such transfers through national legislation. To that end, the Council adopted Council Joint

1334/2000 by itself cannot be an adequate basis to implement the UN decisions.<sup>52</sup> In general member states have adopted the practice of first stating the measures that are needed to meet the objectives of any UN resolution as part of the EU's Common Foreign and Security Policy, usually in the form of a common position. A Council regulation will then provide the basis for action to interrupt or reduce economic or financial relations with the country in question.

In February 2007 the EU Council adopted a common position identifying the particular restrictive measures to be applied to Iran in order to achieve the objectives of UN Security Council Resolution 1737.<sup>53</sup> In April 2007 Regulation 423/2007 concerning restrictive measures against Iran put these restrictive measures into a law that is binding on all EU member states.<sup>54</sup> Regulation 423/2007 prohibits the supply to Iran of all goods and technology listed in an annex to the regulation; this annex is identical to the NSG and MTCR lists. The regulation also provides legal authority to stop these same items in transit through the EU and to control technical assistance and services not covered by Regulation 1334/2000. In addition, the regulation defines a list of goods and technologies that are not usually controlled but that could contribute to enrichment-related, reprocessing or heavy water-related activities, to the development of nuclear weapon delivery systems, or to the pursuit of activities related to other topics about which the IAEA has expressed concerns or identified as outstanding.<sup>55</sup> The regulation requires exporters to seek authorization before exporting these items, which are listed in a separate annex to the EU law.<sup>56</sup> By this means the EU extended the scope of restrictions beyond those required to implement UN decisions.

In contrast to exports of dual-use items, exports of military items are controlled by the national legislation of member states and not by European law. While many missile-related dual-use items are controlled by Regulation 1334/2000, missiles themselves are not. Missiles and rockets as well as components specifically designed for them are on the national munitions list that forms part of the arms export control law in each member state. In February 2007 the EU prohibited the export of missiles and rockets to Iran.<sup>57</sup> Subsequent measures agreed by the EU go beyond the decisions taken in the UN

Action of 22 June 2000 concerning the control of technical assistance related to certain military end-uses (2000/401/CFSP), *Official Journal of the European Communities*, L159 (30 June 2000), pp. 216–17.

<sup>52</sup> One of the proposals put forward by the European Commission would create a legal basis to control items in transit through the EU, a modification that is also necessary to bring EU law into line with the requirements of UN Security Council Resolution 1540.

<sup>53</sup> Council Common Position 2007/140/CFSP of 27 February 2007 concerning restrictive measures against Iran, *Official Journal of the European Union*, L61 (28 Feb. 2007), pp. 49–55.

<sup>54</sup> Council Regulation (EC) No. 423/2007 of 19 April 2007 concerning restrictive measures against Iran, *Official Journal of the European Union*, L103 (20 Apr. 2007), pp. 1–23. This regulation was subsequently amended and updated by Council Regulation (EC) No. 618/2007 of 5 June 2007 amending Regulation (EC) No. 423/2007 concerning restrictive measures against Iran, *Official Journal of the European Union*, L143 (6 June 2007), pp. 1–2.

<sup>55</sup> As called for by the preamble, paragraph 5, of Council Common 2007/140/CFSP (note 53).

<sup>56</sup> Council Regulation No. 423/2007 (note 54), Article 3.

<sup>57</sup> Council Common Position 2007/140/CFSP (note 53).

Security Council in relation to conventional arms. Whereas the UN Security Council has called on states to exercise vigilance and restraint in the supply of conventional weapons to Iran, in April 2007 the EU prohibited the transfer, sale or supply to Iran of 'arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment and spare parts for the aforementioned'.<sup>58</sup>

### Regulating intra-EU transfers of arms

As noted above, while the export of dual-use items is controlled by a single piece of EU legislation, exports of military articles and services are controlled by separate legislation in each of the 27 EU member states. Moreover, military items are not part of the single European market and member states apply their national laws and regulations when selling arms to one another. While member states apply the common criteria laid down in the Code of Conduct on arms exports when considering applications to export military articles, the scope for their interpretation still permits national policy differences. Through cooperation and reporting (including denial notification and regular consultations) the EU has promoted increasing convergence among national authorities in the application of export policies of military-related products to third countries.<sup>59</sup>

In December 2007 the European Commission proposed a piece of legislation intended to simplify national licensing procedures for transfers of certain items within the EU.<sup>60</sup> The proposal contained two main elements. First, member states would be required to grant general and global licences for intra-EU transfers of specified items. Individual licensing would not be prohibited, but would become exceptional. Second, member states would be obliged to create general licences for transfers of military-related products to governments in any other member state and for transfers to recipients in other member states certified in accordance with common criteria to be laid down in legislation.

Another significant aspect of the proposed legislation relates to the creation of an agreed list of export-controlled munitions. All EU member states have made a political commitment to control a list of items based on the Munitions List compiled by the Wassenaar Arrangement.<sup>61</sup> This list has been adopted by

<sup>58</sup> Council Common Position 2007/246/CFSP of 23 April 2007 amending Common Position 2007/140/CFSP concerning restrictive measures against Iran, *Official Journal of the European Union*, L106 (24 Apr. 2007), pp. 67–75.

<sup>59</sup> In EU terminology, a 'third-country' is any non-member of the EU.

<sup>60</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.

<sup>61</sup> Only 1 EU member state (Cyprus) does not participate in the WA. However, as the EU has adopted it as a reference list, Cyprus is politically bound to control WA Munitions List items through national legislation. The EU list, which is revised to reflect changes agreed in the Wassenaar Arrangement, was updated in Mar. 2007. Common Military List of the European Union, *Official Journal of the European Union*, L88 (29 Mar. 2007), pp. 58–89.



the EU as a reference list—called the Common Military List of the European Union—to which member states apply the Code of Conduct. There is no harmonized approach among member states regarding how the items on the Common Military List are incorporated into national laws and regulations. In some cases the list is adopted as a national control list without modification. In other cases the listed items are reworked into an existing national control list that is tailored to national guidelines and licensing systems. Working with the Common Military List for certain transactions and a national control list for others could undermine the objective of simplifying regulations and reducing transaction costs for exporting companies. If passed, the legislation would make the Common Military List a single, legally binding list of defence products, replacing the current national lists in cases of intra-EU transfers. Additionally, the European Commission has proposed applying the legislation to all military-related products that correspond to those listed in the Common Military List—including subsystems, components, spare parts, technology transfer, and maintenance and repair.

The Commission's proposal recognizes that reducing scrutiny of intra-EU transfers would require confidence between member states that there will be no retransfer that would not have been approved by the originating member state. To address this problem the proposal recommends a certification system. Member states would be required to certify companies wishing to make use of general licences according to common requirements. When applying for an export licence, certified companies would have to confirm to their national authorities that they understand and respect the export limitations issued by the originating member states. The incorporation of company certification and greater exchange of information between licensing officials and industry would add a new dimension to the process of converging of national export controls.

These proposed measures are intended to reduce what has been described by the Commission and the European Defence Agency as a fragmented European defence industry.<sup>62</sup> Simplification measures were also discussed in the 1990s but failed, not least because of EU member states' concerns that the measures would infringe on their sovereign powers regarding arms production and trade—concerns that are being voiced again in the current debate.<sup>63</sup> If adopted, the legislation would represent a significant change in EU export control.

### **The revised EU Customs Code**

Since October 1992 the import and export of goods within the EU has been governed by the Community Customs Code.<sup>64</sup> Following the March 2004 bomb attacks on the train network in Madrid the European Council issued the

<sup>62</sup> See chapter 6 this volume, section III.

<sup>63</sup> See e.g. Ninth Annual Report according to Operative Provision 8 of the European Union Code of Conduct on Arms Exports, *Official Journal of the European Union*, C253 (26 Oct. 2007), p. 3.

<sup>64</sup> Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code, *Official Journal of the European Communities*, L302 (19 Oct. 1992), p. 1.



Declaration on Combating Terrorism.<sup>65</sup> One customs-related aspect of the declaration was a commitment to protect the security of international transport and ensure effective systems of border control. This commitment added a higher public security element to EU customs work and required the revision of the primary legislation governing customs procedures.

In April 2005 the European Parliament and the Council made security-related amendments to the customs code.<sup>66</sup> The amendments had three main elements. First, the status of Authorized Economic Operator (AEO) was created. Second, a common approach was laid down in relation to risk assessment of items of potential concern from a security perspective. Third, a requirement for advance notification of the arrival and departure of goods at the border of the EU customs boundary was introduced. The amendments also established a timetable for the strengthened security component in the customs code, with some of the key elements scheduled for introduction by the end of 2008 and the remaining elements to follow by July 2009. In December 2006 the Commission published detailed implementing regulations.<sup>67</sup>

Businesses involved in the international supply chain can apply to national customs services for the status of Authorized Economic Operator, which would be awarded to them if the national authorities certify that agreed standards have been met.<sup>68</sup> Businesses decide whether or not to apply for AEO status; they also decide whether or not to limit their trade activities to partners that have received AEO status. Customs authorities in EU member states assess the AEO applications using standards and criteria laid down at European level.<sup>69</sup> Once awarded, AEO status is recognized by national customs authorities across the EU. Businesses that receive the AEO certificate are considered by authorities to be reliable in implementing customs-related operations and, therefore, are entitled to enjoy certain benefits. The benefits include simplified procedures for clearing goods for import and export, fewer document and physical checks on goods, and a preferential status in regard to security- and safety-related inspections at premises. The certification scheme started to come into force in January 2008.

Combining trade facilitation with law enforcement is a problem faced by customs authorities around the world. The increased volume of international

<sup>65</sup> European Council, 'Declaration on Combating Terrorism', Brussels, 25 Mar. 2004, <[http://www.ue.eu.int/ueDocs/cms\\_Data/docs/pressData/en/ec/79637.pdf](http://www.ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/79637.pdf)>.

<sup>66</sup> Regulation (EC) No. 648/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code, *Official Journal of the European Union*, L117 (4 May 2005), pp. 13–19.

<sup>67</sup> Commission Regulation (EC) No. 1875/2006 of 18 December 2006 amending Regulation (EEC) No. 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code, *Official Journal of the European Union*, L360 (19 Dec. 2006), pp 64–125.

<sup>68</sup> An economic operator is a business or individual involved in activities covered by customs legislation. Manufacturers, exporters, freight forwarders, warehouse managers, customs agents and carriers are all examples of economic operators.

<sup>69</sup> The criteria include the record of compliance, the existence of a document management system, the financial solvency of the operator, and physical safety and security criteria (including access control, physical containment) used by the operator.

trade coupled with the need to remain competitive in the global marketplace has put pressure on operators managing seaports, airports and land crossings to move goods more quickly along the supply chain. These factors partly explain the low percentage of shipments that are physically inspected by customs authorities. Customs authorities have responded by trying to target particular shipments for inspection based on the result of an assessment of the risk posed by any given cargo. Targeted inspections have been under development for a considerable time to enforce laws related to, for example, the protection of endangered species of plants and animals. However, using this approach to combat terrorism and non-proliferation is a more recent development.

In 2003 the EU carried out a pilot action to create a common approach to risk assessment. A comprehensive catalogue of risk indicators and a detailed list of questions organized in distinct risk areas were developed to help to measure the threat that a particular shipment would not comply with EU legislation.<sup>70</sup> Information related to the goods being shipped into and out of the EU are compared with risk profiles for places, goods and operators. These profiles are compiled nationally using uniform criteria. This work has underpinned the legal requirement for all goods moving into and out of the EU to be subject to a common risk assessment by July 2009.<sup>71</sup> The risk assessment system being developed is a valuable tool, but it does not replace the need for well-trained and motivated customs officers. Although the system will flag shipments for selection, the decision about what to inspect will be made by a customs officer and is not automatic. To avoid any potential distortions arising from different levels of national enforcement, the customs code requires that, where the assessment returns a positive risk analysis, an equivalent level of preventive control must be applied by EU national authorities.<sup>72</sup>

The risk assessment system is possible because of the 2005 decision that the arrival and departure of goods must be notified in advance.<sup>73</sup> This decision will be fully implemented by 2009. At that time the advance notification of entry and exit of goods will become mandatory and, if operators do not submit the necessary information, they will find that their goods either cannot be loaded or will be stopped at the border.

As a practical matter, the security system must be supported by information technology, and the customs authorities of EU member states have been working on an electronic customs project. Currently all EU customs services can exchange information electronically. The project's final objective is that authorities will be able to exchange information in real time among the offices involved in a specific procedure, rather than between headquarters.<sup>74</sup>

<sup>70</sup> European Commission, 'Standardised framework for risk management in the customs administration of the EU', 17 Nov. 2004, <[http://ec.europa.eu/taxation\\_customs/customs/customs\\_controls/risk\\_management/customs\\_eu/index\\_en.htm](http://ec.europa.eu/taxation_customs/customs/customs_controls/risk_management/customs_eu/index_en.htm)>.

<sup>71</sup> Regulation (EC) No. 648/2005 (note 66).

<sup>72</sup> Commission Regulation (EC) No. 1875/2006 (note 67).

<sup>73</sup> Regulation (EC) No. 648/2005 (note 66).

<sup>74</sup> European Commission, 'Electronic customs', 7 Dec. 2005, <[http://ec.europa.eu/taxation\\_customs/customs/policy\\_issues/e-customs\\_initiative/index\\_en.htm](http://ec.europa.eu/taxation_customs/customs/policy_issues/e-customs_initiative/index_en.htm)>.

While these changes are needed to implement the revisions to the Community Customs Code, the revised system will also help the EU to meet its international obligations. For example, the new customs code will make the EU compliant with the World Customs Organization (WCO) SAFE Framework of Standards—which all EU member states have made a political commitment to support.<sup>75</sup> As a centre of global trade, the EU has a strong interest in ensuring that border controls do not introduce unnecessary complications in transactions with key trade partners. The EU has begun to discuss how the customs code can be harmonized with the systems being used in the USA that share certain features and objectives, in particular the US Customs–Trade Partnership Against Terrorism (US-CTPAT) and has also opened a dialogue on customs issues with China.<sup>76</sup>

#### IV. The role of investigation and prosecution in enforcing export controls of dual-use goods

Each year thousands of dual-use items are traded internationally. Generally, most exporters share the objectives that export controls try to achieve, such as preventing the proliferation of nuclear, biological or chemical weapons and their missile delivery systems. The main emphasis in enforcing export controls is usually placed on techniques that help exporters avoid the unauthorized export of controlled items. Ideally, export control enforcement agencies work together with exporters to reduce the risk that violations will occur because of negligence or a lack of understanding. For example, authorities can help exporters by offering advice on how to properly classify products, how to screen prospective customers and by pointing out indicators that suggest risks associated with a particular end-use, end-user or destination.

Nevertheless, dual-use items are sometimes transferred without the proper authorization. Typically, however, proliferators try to acquire weapons by using established trading routes and concealing the item's true end-use and final end-user. For example, Japan has modern and comprehensive laws to control exports of dual-use items. Nevertheless, in June 2007 four executives of the Mitutoyo Corporation were sentenced for their role in illegally exporting precision instruments that measure objects in three dimensions. Inspectors from the IAEA had found one of the Mitutoyo machines at a nuclear-related facility in Libya in 2003, causing Japanese investigators to launch an inquiry into exports by the company. This led to the charge that Mitutoyo had exported five machines to Malaysia and Singapore without the proper authorization—a charge that the company admitted.<sup>77</sup>

<sup>75</sup> World Customs Organization, 'WCO SAFE Framework of Standards', June 2007, <<http://www.wcoomd.org/home.htm>>.

<sup>76</sup> In Jan. 2007 the EU and the USA set up a working group of customs specialists to examine how to achieve mutual recognition of their respective trade partnership programmes. European Commission, 'Customs and security', 5 Mar. 2008, <[http://ec.europa.eu/taxation\\_customs/customs/policy\\_issues/customs\\_security/index\\_en.htm](http://ec.europa.eu/taxation_customs/customs/policy_issues/customs_security/index_en.htm)>.

<sup>77</sup> Hongo, J., 'Mitutoyo execs receive suspended terms', *Japan Times*, 26 June 2007.

Several recent international initiatives have emphasized the role of criminal law in enforcing export controls. For example, the US-led Proliferation Security Initiative (PSI) encourages the active use of law enforcement and criminal justice procedures to tackle illicit trafficking in proliferation-sensitive items. In addition, many of the multilateral export control regimes have also begun to pay closer attention to enforcement issues in general, including criminal sanctions.<sup>78</sup> UN Security Council Resolution 1540 of April 2004 requires states to establish and enforce 'appropriate criminal or civil penalties' for violations of export control laws and regulations.<sup>79</sup> EU Council Regulation 1334/2000 requires member states to lay down the penalties applicable to infringements of dual-use export control laws and regulations and stipulates that penalties must be 'effective, proportionate and dissuasive'.<sup>80</sup>

Criminal law could support effective enforcement of export controls either by general prevention (i.e. deterring violation of the laws by adopting an exemplary punishment system) or through special prevention (i.e. stopping an individual offender from committing further crimes, e.g. through imprisonment). However, the emphasis placed on these legal theories within the overall spectrum of enforcement options is not agreed. Discussions in Europe have underlined that whether or not penalties in general have a deterring function remains a controversial question, and one that is governed by domestic (rather than European) legislation that is guided by traditions relating to national penal laws.

While Regulation 1334/2000 leaves the specific penalties entirely to the discretion of member states, the European Commission has proposed a revision requiring the member states to have the option of criminal sanctions where serious export control offences are proved and to agree on a minimum tariff for sentencing.<sup>81</sup> In 2005 and 2006 the EU collected information on (a) the export control provisions that are in force in the member states, (b) the states' views on whether or not sanctions (administrative and criminal) should be harmonized within the EU, and (c) the type of sanctions that are currently applicable in the states for violation of export control laws and which could be made subject to EU harmonization. The results revealed variations in how offences are dealt with at the national level. A majority of the member states expressed a reluctance to harmonize sanctions in their replies.<sup>82</sup>

<sup>78</sup> On the potential expanded role for the PSI and the enforcement discussion in multilateral regimes see Anthony and Bauer (note 29), pp. 647–51. On the PSI see also Ahlström, C., 'The Proliferation Security Initiative: international law aspects of the Statement of Interdiction Principles', *SIPRI Yearbook 2005: Armaments, Disarmament and International Security* (Oxford University Press: Oxford, 2005).

<sup>79</sup> Examples of administrative penalties are financial penalties, the loss of export licences, the loss of right to privileges (e.g. to simplified procedures) and the loss of property rights through confiscation. Examples of criminal penalties are fines, imprisonment and suspended sentences.

<sup>80</sup> On the implication of effective, proportionate and dissuasive penalties see e.g. Court of Justice of the European Communities, *Commission of the European Communities v Hellenic Republic*, 'Failure of a member state to fulfil its obligations—failure to establish and make available the Community's own resources', Case 68/88, 21 Sep. 1989.

<sup>81</sup> European Commission (note 47).

<sup>82</sup> E.g. the maximum penalty for a serious breach of an export control law can result in 15 years in prison in Germany and Hungary whereas Ireland applies a maximum penalty of 12 months in prison.

There is an apparent gap between the number of suspected illegal activities and the number of prosecutions in the EU member states. Discussions have revealed that some member states maintain a policy of refraining from bringing suspected offences in front of a court, possibly to protect their dual-use industries. Most member states have either very limited or no experience of prosecuting export control-related cases.<sup>83</sup> National laws also diverge on the question of which actors should be held liable under the EU's export control legislation. The national legislation of member states is only obliged to hold the actual exporter liable. However, acknowledging that actors other than exporters could be responsible for the spread of WMD, Germany has gone a step further to include liability for brokers and shippers of dual-use goods in its national legislation.<sup>84</sup> In contrast, the United Kingdom remains reluctant to make other actors in the export chain liable under its export control legislation. In addition to their export control legislation, most states have laws that could deal with such actors. However, investigators and prosecutors must be familiar with export control issues in order to make use of that legislation to address suspected illegal exports of dual-use items in an effective way.

In addition to the variety of prosecution policies and applicable sanctions in the member states, there are also prosecution discrepancies. Some member states use a system in which prosecutors have a duty to prosecute whereas other systems require that the prosecutors assess the public interest before proceeding to trial. In practice, there is a risk that trial decisions are governed by aspects related primarily to time and resources. The complex and technical nature of the export control legislation may also deter a prosecutor who has some latitude as to whether or not to press charges.

In most EU member states, if a suspect is to be convicted of a serious export control-related offence, the prosecutor usually has to prove that the suspect, at least passively, has confirmed that the exported goods were destined for WMD proliferation uses. If intent cannot be proved, the prosecutor can use the option of subsidiary legislation, such as the submission of false documents to the licensing authority. However, acts of this kind are likely to be seen by a court as technical offences and carry low penalties. Proving intent requires law enforcement actors to collect adequate and sufficient evidence. Intelligence services often play a central role in detecting export-related offences, but the information that they hold may not be available to investigators and public prosecutors as evidence for trial purposes.<sup>85</sup> In contrast to the usually limited

<sup>83</sup> Realizing the need for coordination and exchange of experience in most of the member states, the European Commission's Directorate-General for Justice, Freedom and Security sponsored a seminar on investigating and prosecuting offences related to the illegal export of dual-use goods in EU member states in Stockholm on 10–12 Sep. 2007. The seminar was co-hosted by SIPRI and the Swedish Prosecution office for national security. Wetter, A., *Enforcing European Union Law on Exports of Dual-use Goods*, SIPRI Research Report no. 24 (Oxford University Press: Oxford, forthcoming 2008).

<sup>84</sup> Foreign Trade and Payments Act (Außenwirtschaftsgesetz, AWG) of 28 Apr. 1961, Article 34, as amended by the law of 28 Mar. 2006.

<sup>85</sup> The interests of intelligence services and the law enforcement community may not be aligned. E.g. an intelligence service may prefer to use information to better understand the proliferation activities of a particular country, rather than to prosecute a dealer or broker in dual-use items.

attention devoted to unauthorized exports of dual-use goods in many states, the illicit trafficking in nuclear and other radioactive material is given high priority by both law enforcement communities and the media.<sup>86</sup>

## V. Conclusions

The role of export controls in supporting the implementation of the main multilateral non-proliferation treaties is now supplemented by the important role that they play in implementing decisions of the UN. One key challenge for export control authorities is how to implement and enforce the comprehensive export control and non-proliferation sanctions in place (including financial sanctions), which requires adapting legal bases and rethinking institutional set-ups and procedures. UN Security Council Resolution 1540 requires all UN member states to enforce effective penalties for export control violations of dual-use goods, but the debate about what constitutes such sanctions has yet to take place. The EU has initiated a debate about what constitutes dissuasive, effective and proportionate sanctions in export control.

The great majority of exporters understand and want to comply with the underlying objectives of export control. However, proven cases in which controlled items were exported without authorization underline that voluntary compliance with export controls cannot be assumed from all exporters. It is necessary to have mechanisms to enforce the controls. The need for enforcement agencies, in particular customs, to play an increased role in delivering security is gradually being acknowledged and reflected in recent initiatives in the context of EU, UN, WCO and national initiatives. However, this role is yet to be fully recognized and supported through the required personnel and financial allocations and underpinned through the appropriate strategies, laws and procedures.

Prevention is the overarching goal, meaning that enforcement tasks such as detection, disruption and interdiction are key components of law enforcement in preventing unauthorized exports. While the organizational distribution of legal powers to perform these tasks and their implementation vary, enforcement usually involves customs, border and other police forces, and intelligence services. Civil society has also played a role in collecting and distributing information about possible violations of export control laws. In addition to law enforcement tasks, prosecutors play an important role in giving effect to export control laws by bringing perpetrators to court. Cooperation between all of the listed actors is essential for the accomplishment of successful prevention. However, both prevention and effective enforcement first require establishing an export controls system based on a political-strategic mandate, clear procedures and allocation of responsibilities, a solid legal basis, and an institutional memory—each tailored to a country's specific situation.

<sup>86</sup> On the illicit trafficking in nuclear and other radioactive material see also International Atomic Energy Agency (IAEA), *Combating Illicit Trafficking in Nuclear and Other Radioactive Material*, IAEA Nuclear Security Series no. 6 (IAEA: Vienna, 2007); and appendix 8D in this volume.