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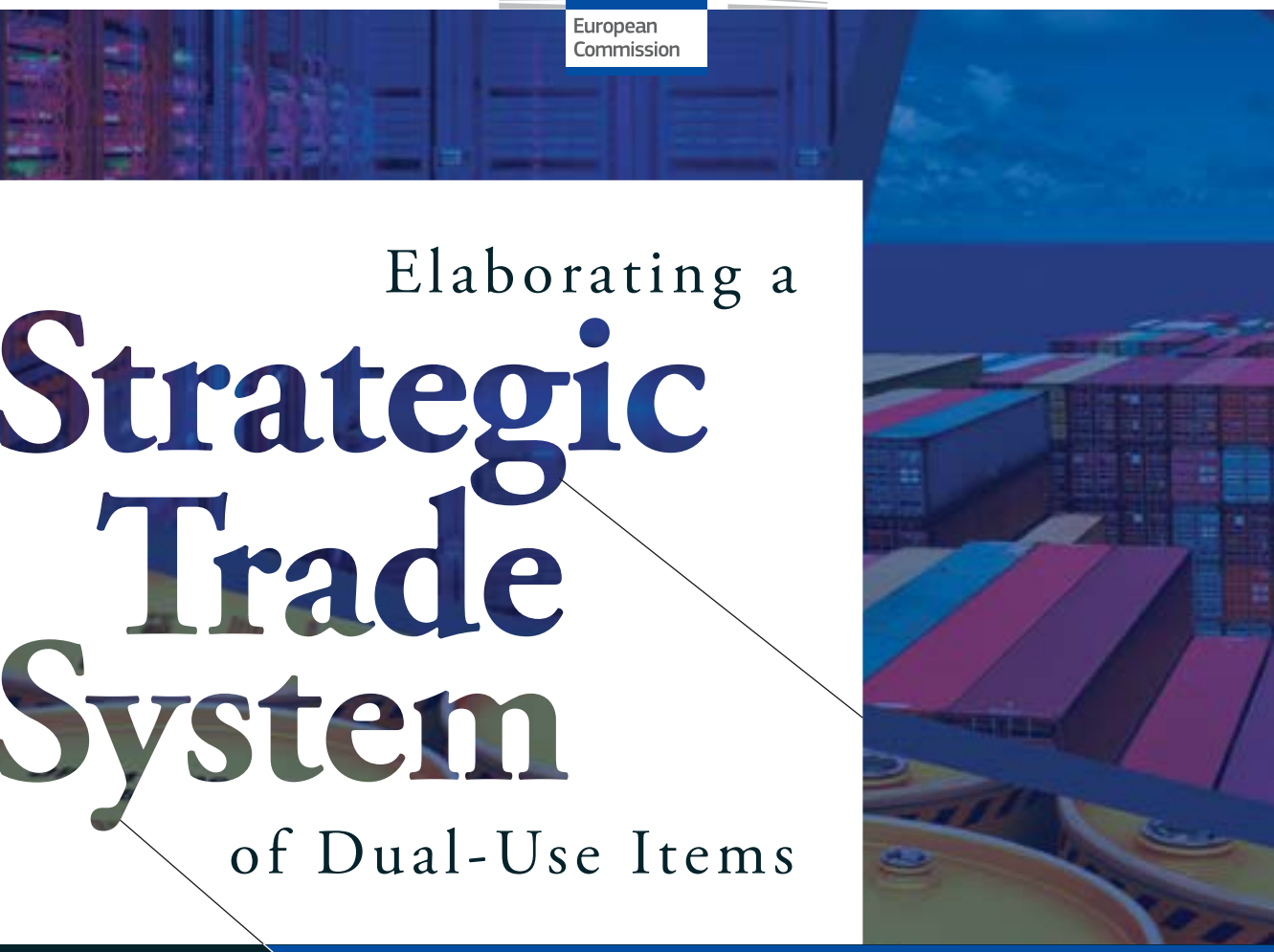

Elaborating a Strategic Trade System of Dual-Use Items

Experiences from the European Union, Morocco, the Philippines, Serbia, Singapore and Ukraine

Quentin Michel (dir.),
Sylvain Paile-Calvo (dir.),
Veronica Vella (ed.)

EU P2P
export control programme
for dual use goods

This publication has been prepared within the framework of the European Union's EU P2P (Partner-to-Partner) Export Control Programme for Dual-use Goods financed by Global Europe: Neighbourhood, Development and International Cooperation Instrument (NDICI – Global Europe).

The EU P2P Programme actively contributes to chemical, biological, radiological and nuclear (CBRN) risk mitigation and it is, thus, closely associated with the European Union's largest civilian external security programme, the EU CBRN Risk Mitigation Centres of Excellence Initiative (EU CBRN CoE).

EU P2P cooperation projects are currently implemented by Expertise France, the French Dual-use Export Control Office (SBDU), the German Federal Office for Economic Affairs (BAFA), the University of Liège (ULiège), the University of Barcelona (UB) and King's College London (KCL).

Funded by the European Union.

This document should not be considered as representative of the European Commission's official position.

Luxembourg: Publications Office of the European Union, 2024

Print ISBN 978-92-68-07480-0 doi:10.2770/31429 NF-09-23-407-EN-C
PDF ISBN 978-92-68-07479-4 doi:10.2770/273918 NF-09-23-407-EN-N

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List of abbreviations and acronyms

AG	Australia Group
ASEAN	Association of Southeast Asian Nations
BTWC	Biological and Toxin Weapons Convention
CWC	Chemical Weapons Convention
EU	European Union
EU P2P	European Union Partner-to-Partner Export Control Programme for Dual-use Goods
IAEA	International Atomic Energy Agency
ICP	Internal Compliance Programme
MECR	Multilateral Export Control Regime
MTCR	Missile Technology Control Regime
NPT	Nuclear Non-Proliferation Treaty
NSG	Nuclear Suppliers Group
NSGL	National Strategic Goods List
OSCE	Organization for Security and Cooperation in Europe
SSECU	State Service for Export Control of Ukraine
SGCA	Strategic Goods (Control) Act 2002
STC	Strategic Trade Control
UN	United Nations
UNSCR 1540	United Nations Security Council Resolution 1540 (2004)
US EXBS	United States Export Control and Related Border Security Assistance program
WA	Wassenaar Arrangement
WMD	Weapon of Mass Destruction

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Foreword

Since 2004, the European Union has been supporting the design and implementation of strategic trade controls in partner countries through outreach and cooperation under specific programmes, such as the 'EU P2P (Partner-to-Partner) Export Control Programme for Dual-use Goods' (EU P2P Programme) and the 'Export Control Targeted Initiatives'. These initiatives have led to the establishment of long-term partnerships with over 50 countries worldwide.

International obligations and multilateral commitments set out common objectives and basic principles, but individual states are responsible for the elaboration and management of the regulatory tools related to strategic trade controls. For its part, the European Union – with its 27 Member States - has built a unique strategic trade control system for dual-use items. It consists of a single set of guiding principles and common rules, contained in the Regulation of the European Parliament and of the Council "setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items" Regulation (EU) 2021/821 of 20 May 2021. These principles and common rules are implemented and enforced by the competent authorities of the 27 Member States of the Union.

The Regulation also establishes that *"the Commission and the Member States shall, where appropriate, maintain dialogues with third countries, with a view to promoting the global convergence of controls. The dialogues may support regular and reciprocal cooperation with third countries, including exchange of information and best practices, as well as capacity-building and outreach to third countries (...)"* (Article 29).

The methodology for dialogues and cooperation designed by the EU P2P Programme supports joint efforts with partner countries to define shared objectives to enhance national strategic trade control systems and reinforce national capabilities to reduce the risks of proliferation of weapons of mass destruction. This encourages national authorities and stakeholders to explore the various facets of "why" the continuous enhancement of strategic trade management is essential, "what" is and should be the scope of controls, "who" might be called upon to contribute to the elaboration, implementation and enforcement of controls and "how" controls should be best organized to balance international security and trade facilitation.

The present publication intends to illustrate and analyse examples of dual-use trade control systems that address these questions in a balanced and efficient manner. It reflects the experiences shared by experts from the European Union and five of its partner countries under the EU P2P Programme, i.e. Morocco, the Philippines, Serbia, Singapore and Ukraine, and builds on their regular and enduring exchanges on export control best practices. This document is (i) the result of dialogues with partners, (ii) an important contribution to the mutual understanding of various responses to common challenges and (iii) a tool for strengthening collective action against the proliferation of weapons of mass destruction.

We are profoundly grateful to our partners for their insightful contributions as we are certain that these will inspire more countries in their endeavors of preventing the proliferation of weapons of mass destruction, while preserving the legitimate trade and peaceful uses of goods and technologies that contribute to our universal welfare.

Dr. Peter M. WAGNER
Director and Head of Service
Service for Foreign Policy Instruments
European Commission

Contextual Note: **The European Union as an international partner to support strategic trade control systems for dual-use items**[1]

Following the adoption of the European Security Strategy and the EU strategy against the proliferation of weapons of mass destruction by the European Council in 2003, the European Union has been continuously committed to strengthening export control policies and practices beyond its borders. The EU has thrived to establish partnerships globally towards improving export control mechanisms and advocating adherence to effective export control criteria in order to combat the proliferation of weapons of mass destruction and related materials, equipment and technologies. These long-term structural efforts have yielded impactful results and continue to be strengthened as required and guided by the recast of the Dual-use Export Control Regulation (EU) 2021/821[2], the 2022 Strategic Compass for Security and Defence[3] and the 2023 European Economic Security Strategy[4].

The EU P2P Export Control Programme for Dual-use Goods[5] is the flagship initiative of the EU to develop dialogue and cooperation with third countries, with a view to promoting the global convergence of controls, in order to support a global level-playing field and enhance international security[6].

1 Contribution by Balazs Maar and Baskar Rosaz, Programme Managers at the Service for Foreign Policy Instruments of the European Commission.
2 Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), (OJ L 206, 11.6.2021, pp. 1-461).
3 A Strategic Compass for Security and Defence – For a European Union that protects its citizens, values and interests and contributes to international peace and security, Council of the EU (https://www.eeas.europa.eu/eeas/strategic-compass-security-and-defence-0_en).
4 Joint Communication to the European Parliament, the European Council and the Council on "European Economic Security Strategy",JOIN/2023/20 final, (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023JC0020&qid=1687525961309).
5 European Union Partner-to-Partner Export Control Programme for Dual-use Goods (https://cbrn-risk-mitigation.network.europa.eu/eu-p2p-export-control-programme_en).
6 See: Article 29 (Cooperation with Third Countries) of Regulation (EU) 2021/821.

Since 2004, the Programme (then named 'Long-Term Programme') has consolidated strong partnerships with over 50 countries from across several regions in the world. Its overall objective is to contribute to the establishment, consolidation or update of effective strategic trade controls (STC) systems for dual-use goods by offering a long-term perspective for cooperation and mutual economic benefits of trade controls convergence. It offers dialogues, shares European and international best practices with the national governments and communities of practice in all areas of dual-use export controls (*e.g.* legal frameworks, licensing best practices, customs enforcement, investigation and prosecution, outreach to industry/research institutes/academia).

An important priority for the Programme is to support partners' compliance with international legal obligations under, inter alia, the Chemical Weapons Convention (CWC), the Biological and Toxin Weapons Convention (BTWC), the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and most notably under UN Security Council Resolution 1540, to secure and facilitate trade of sensitive goods and technologies. These legal instruments require States to implement strategic trade controls for dual-use goods. Multilateral export control regimes such as the Nuclear Suppliers Group (NSG), the Australia Group (AG), the Missile Technology Control Regime (MTCR) and the Wassenaar Arrangement (WA) respectively define dual-use items to be controlled by their members. The EU's own control list of dual-use items integrate the decisions agreed upon within the framework of the regimes and integrate them into a comprehensive document, which is regularly updated by the EU. This list is directly applicable to all EU Member States as defined by the Dual-use Export Control Regulation. Over the years, as many countries outside of the EU decided to adopt legislation based on the European legal framework for their strategic trade management systems, the EU control list has become the *de facto* international standard for the trade of dual-use items.

The EU P2P Programme benefits from EU Members States' expertise in implementing the EU Regulation, which is entirely leveraged when roadmaps of activities are defined with partner countries to jointly tackle challenges through the delivery of technical assistance, hands-on trainings and exchanges of best practices. The Programme offers awareness modules and themed events covering a broad range of issues regarding proliferation and trade control

mechanisms and able to respond to the specific individual needs of partner countries. These are formulated under the European Union Common Training Toolkit (EUCOTT), which includes various types of activities tailored to national priorities and levels of awareness such as e-learning curricula, introductory and in-depth workshops, specialised trainings (including 'train-the-trainers'), case studies, table-top exercises, etc. The Programme also offers tailor-made activities for countries facing specific challenges, notably when crises occur at borders. Together with partner governments, it also regularly designs, develops and proposes new activities to address international developments in the field of non-proliferation of WMD and strategic trade controls of dual-use goods.

Promoting a dialogue with the private sector (e.g. industry, academia) and strengthening coordination with other international initiatives and cooperation programmes in the field of strategic trade controls are other critical activities for the EU P2P Programme's success. The search for synergies ensures an optimal use of resources and coordinated activities with partner countries, e.g. the EU P2P Programme supports national implementation of UNSC Resolution 1540 and uses World Customs Organisation guidance whenever appropriate. Considering their added value for the Programme, coordination and joint actions with other initiatives are often proposed to partner countries. The EU P2P Programme also benefits from the structures (CBRN National Teams) and networks (technical experts) established through the EU CBRN Centres of Excellence Initiative in 64 partner countries around the world. Additionally, the Programme acts in full complementarity and close coordination with the EU P2P Export Control Programme for Conventional Arms, funded under Common Foreign and Security Policy (CFSP) Council Decisions.

In accordance with the provisions of the Dual-use Export Control Regulation (EU) 2021/821, the EU P2P Export Control Programme for Dual-use Goods will continue to "maintain dialogues with third countries, with a view to promoting the global convergence of controls. The dialogues may support regular and reciprocal cooperation with third countries, including exchange of information and best practices, as well as capacity-building and outreach to third countries. The dialogues may also encourage the adherence of third countries to robust export controls developed by multilateral export control regimes as a model for international best practice."

Introduction

The objective of this manual is to offer, through the experiences of the EU and several selected countries, a comprehensive understanding of the elaboration process that a state must initiate to establish or strengthen its strategic trade control (STC) system. The manual is structured into three main parts.

The first one, applying the '3WH'([7]) methodology developed by the European Studies Unit of the University of Liège and the Joint Research Centre of the European Commission, is dedicated to the general concept of the STC system. It focuses on some of the main motivations that might be put forward by authorities (why), the scope of controls in terms of items and operations (what), the actors that could draft and implement the rules (who) and finally the process followed to grant or deny an authorisation (how).

The second and third parts illustrate the concepts presented in Part 1 by explaining how the EU and a selected number of states have elaborated and implemented STC systems. The selection of countries has been made on the basis of the exemplarity they might constitute for third states. Therefore, Morocco has been designated for its geopolitical dimension, the Philippines for its geographical dimension as an archipelago, Serbia for its role as a potential EU Member State, Singapore as one of the world's busiest transhipment hubs and Ukraine as a country facing aggression and being partially occupied.

The analysis for each state consists of (a) an introduction emphasising why the state may be a useful example for third states, (b) the context in which the state has elaborated its STC system, (c) the process and evolution and (d) the scope of the system.

7 This methodology is based on structuring research and analysis of a particular topic by following the 'who','what', 'when and 'how' interrogative approach.

To avoid any confusion, it is necessary to highlight that in this context, we have defined 'STC system' as the process of risk assessment and regulatory constraints required by authorities to operators to allow international transactions of dual-use items and technology.

The items subject to an STC system may vary from one national system to another, depending on the interpretation and definition of 'strategic items' and the political will to control certain sectors or areas of trade. It potentially includes the control of trade of very diverse goods and technologies (that could potentially be used by a subject/end-user for illicit purposes): indeed, it could include control measures for the trade of arms, dual-use goods, conflict minerals, diamonds, goods related to torture and the death penalty and cultural goods.

However, in this manual, 'STC system' refers only to control for the trade of dual-use items that are tangible and intangible goods and technologies, and considered as strategic by their very nature. These products, as they can be used for both civilian and military purposes relating to the proliferation of weapons of mass destruction (WMDs) or conventional weapons, play a fundamental role in the trade and development of states, as well as in their national and international security concerns.

The international legal and political commitments framing an STC system are rather limited. Accordingly, they consist of three universally applicable international treaties on WMDs control and disarmament, namely the Nuclear Non-Proliferation Treaty (NPT) ([8]), the Biological and Toxin Weapons Convention (BTWC) ([9]) and the Chemical Weapons Convention (CWC) ([10]). Along with these multilateral treaties, there are also obligations stemming from UN Security Council resolutions, specifically UN Security Council 1540 Resolution (UNSCR 1540), that obliges all states around the globe to, among other things, control exports of dual-use items.

8 Treaty on the Non-Proliferation of Nuclear Weapons, UNTS, Vol. 729, 1968.
9 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, UNTS, Vol. 1015, 1972.
10 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, UNTS, Paris/New York, 1993.

These conventional rules have also been supplemented by soft-law norms, which are non-legally binding guidelines agreed by groups of dual-use good supplier states organised in what are known as multilateral export control regimes (MECRs). The most relevant are the Nuclear Suppliers Group (NSG) ([11]), the Australia Group (AG) ([12]), the Missile Technology Control Regime (MTCR) ([13]) and the Wassenaar Arrangement (WA) ([14]). The soft-law guidelines of these groups have come to complement the conventional norms, and today have a universal impact that is further addressed in the pages of this manual.

There are no standards or internationally agreed guidelines for the design and/or precise implementation of an STC system. MECRs and international treaties do not provide a precise list of components, parameters or measures that a system should include or consider in order to exist and/or be effective. However, years of practice, standards from different regions of the world and lessons learned through time and experience provide insights and ideas that can serve as inspiration or benchmarks for the establishment and improvement of strategic export control systems.

11 International Atomic Energy Agency, INFCIRC/254 – Communication Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment or Technology, Vienna, 1978.
12 Australia Group, 'Guidelines for Transfers of Sensitive Chemical or Biological Items', 2015.
13 Missile Technology Control Regime, 'Guidelines for Sensitive Missile-Relevant Transfers', 1987.
14 The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use goods and technologies, WA-DOC (17) PUB 001 – Public Documents: Volume I. Final Declaration and Guidelines, and Procedures, Including the Initial Elements, 1996.

PART 1

A strategic trade control system:

why, what, who and how

CHAPTER **1**

Ana Sánchez-Cobaleda ([15]), **Sylvain Paile-Calvo** ([16]) and **Quentin Michel** ([17])

1.1. An STC system: **why?**

So-called dual-use items are tangible and intangible materials and technologies, considered strategic by their very nature. These products can be used for both civilian and military purposes relating to the proliferation of WMDs or conventional weapons, so they play a fundamental role in the trade and development of states and in their national and international security concerns.

15 **Ana Sanchez-Cobaleda** is an Assistant Professor and Researcher at the Law Faculty of the University of Barcelona (UB) and legal advisor of the EU P2P. She holds a PhD in Law (cum laude) on the international legal regime of dual-use items and has worked as a lawyer in a Spanish-German law firm and as a legal assistant at the United Nations Development Programme. She studied law at the Albert-Ludwigs-Universität Freiburg (Germany) and at the Pompeu Fabra (Spain), from which she graduated, and holds an LLM and an MA in International Cooperation and Development (UB). An alumna of the OECD's International Programme of Nuclear Law and the author of several journal articles and book chapters, Dr. Sánchez-Cobaleda has conducted her research on non-proliferation, export controls and European security at the University of Leiden, King's College London, the University of Geneva and KU Leuven, among others.

16 **Sylvain Paile-Calvo** (PhD) is a Senior Researcher at the European Studies Unit of the University of Liège (Belgium) since 2006. In this capacity, he has worked with international organisations, EU structures and European ministries of defence in the fields of the Common Security and Defence Policy and strategic trade control. Since 2013, he has been contributing to the implementation of the EU P2P, the EU P2P Export Control Programme for arms and other European cooperation projects on chemical, biological, radiological and nuclear risk management as a legal advisor or coordinator. Since 2021, he is the Technical Director and Team Leader of projects of the EU P2P for dual-use goods.

17 **Quentin Michel** is Full Professor of European Studies at the Department of Political Science at the University of Liège. In addition to his academic role, he regularly provides expertise in the field of strategic trade control to national, European and international organisations and fora. His current research covers several key areas, including: sanctions and export controls; EU economic governance; decision-making process of EU institutions, with a particular focus on the role of informal governance; EU sustainable development policies, exploring their connections with other policies through in-depth impact assessment studies; and nuclear regulation policies. He has been an active contributor to the EU P2P Programme since 2007 and is a founding member of the European Export Control Association for Research Organisations (EECARO) and other European Union initiatives in dual-use item trade control (e.g. EU P2P Summer University, 'Chaundfontaine Group').

Due to the dual nature of these strategic items, which harbours potential benefits and dangers, a solid national STC system has become a key element of many states' legal framework. The reasons that lead each state to establish such a system vary according to national priorities and idiosyncrasies. However, the main motives usually adduced can be classified into four categories, which are explored in this chapter. Thus, first, it analyses the interest in complying with legal obligations and commitments, followed by motives stemming from national, regional and international security interests. Then, the reasons relating to safeguarding trade priorities are discussed, before concluding with a presentation of the main geopolitical incentives that help explain why a state may decide to establish an STC system.

1.1.1. Legal and political commitments

Today, the international legislation of dual-use items is framed within the legal regime of non-proliferation of WMDs and, although deployed in multiple instruments of different legal nature, the provisions on these items constitute a unique and complex network that has been favoured by the interaction between conventional law, soft-law norms and normative acts adopted by the United Nations (UN) Security Council, like the UNSCR 1540.

An STC system relies primarily on laws and related enforcement measures to control the movement of strategically important goods out of or through the territory of a state. The entire set of activities designed to control such trade is built on the basis of that legal framework: control lists, licensing requirements, customs procedures, information exchange provisions, enforcement activities and raising awareness. Consequently, a key reason for adopting an STC system is to have a sound legal framework to ensure access to global trade and preserve international security.

In a society where multilateralism is still very much on the agenda, nearly all states have opted for non-proliferation, as shown by the almost universal nature of the main treaties on the subject. Therefore, a primary motive for the establishment of an STC system is to achieve proper compliance with internationally acquired obligations and commitments regarding dual-use goods and technologies.

1.1.1.1. Treaties and regimes

The international regulation of dual-use items has not been autonomously developed but rather has evolved in conjunction and in parallel with the regulation against WMDs proliferation. Historically, non-proliferation regulation has developed mainly through conventional legal sources, i.e. international treaties that, bilaterally or multilaterally, required obligations from their state parties ([18]). Indeed, the non-proliferation policies that have been adopted throughout history, mainly in the second half of the 20th century, have often taken the form of international treaties and these remain the main instruments to control proliferation, although, as we will see, they are not the only sources. Accordingly, the conventional basis for the regulation of dual-use items is to be found in three universally applicable international treaties on WMDs control and disarmament, namely the NPT, the BTWC and the CWC. However, treaties are not the only legally binding sources in the field of STC, since there are also obligations stemming from UN Security Council resolutions, to which we will revert later.

The aforementioned international treaties, due to their unifying and universalist aspirations, sometimes suffer from certain shortcomings in terms of the delimitation of key concepts. Thus, some of their provisions are diluted by a lack of specificity or clarity in their definition, leading to difficulties in their application, such as possible divergent interpretations or varying levels of rigour depending on the state. In this context, conventional norms have been complemented by non-legally binding guidelines and political commitments agreed upon by groups of dual-use supplier states organised in MECRs.

In these multilateral fora of voluntary participation, supplier states of dual-use items – which generally tend to be politically aligned – harmonise their export conditions through the adoption of politically binding guidelines and lists of controlled goods. These soft-law norms came to complement the conventional norms, sometimes due to the shortcomings of the treaties in terms of the delimitation of concepts that determine their scope of application, and sometimes due to the lack of instruments that regulate specific aspects of certain dual-use goods.

18 Joyner, D. H. (2009), *International Law and the Proliferation of Weapons of Mass Destruction*, Oxford University Press, New York, pp. xiv–xviii.

Currently, the most relevant export control regimes that agree on the goods to be controlled and the conditions to be followed when making such transfers so as not to harm the commercial interests of the participants ([19]) are: the NSG, a cohort of suppliers initially set up to avoid unfair competition among them, which deals with strategic nuclear materials; the AG, which controls chemical and biological dual-use items; the MTCR, which deals with the transfers of delivery systems; and the WA, which focuses on exports of conventional arms and dual-use goods and technologies. The soft-law guidelines of all of them are self-established behavioural standards set by supplier states which, although not a source of law *stricto sensu* due to their exclusively political nature, today have a universal impact that cannot go unmentioned.

One of the main contributions of these regimes, if not the main one, to the international normative framework of dual-use goods, are their control lists, also known in some cases as trigger lists. Focusing on the corresponding category of goods, experts from the states participating in each regime periodically update the lists of materials and technologies whose transfer is subject to control. Thus, taking into account the most recent scientific and technological developments, these fora try to keep up to date with science and technology in order to better address and hinder the interests of potential proliferators.

However, these regimes have not been free from criticism. Since the establishment of the NSG in 1974 and until recently, multilateral export control regimes were traditionally seen as exclusionary clubs that discriminate against non-participants ([20]). Indeed, for years, these groups were viewed with suspicion by those who do not participate in them, and have been especially criticised by developing states that considered them discriminatory for impeding their technological progress. They have also faced criticism for their attempt to hamper competition in foreign markets by preventing competitors from offering lower prices, and lastly, they have been blamed for having articulated a political intentionality that resulted in restricting the access of certain destinations to certain goods and technologies, to the point of even being considered as 'cartels' ([21]).

19 Anthony, I. (2014), 'The Evolution of Dual-Use Technology Controls: A Historical Perspective', in *Technology Transfers and Non-Proliferation – Between Control and Cooperation*, Routledge, New York, pp. 25–44 (p. 28).

20 Chayes, A. and Chayes, A. H. (1994), 'Regime Architecture: Elements and Principles', in Nolan, J. E. (ed), *Global Engagement: Cooperation and Security in the 21st Century, Brookings Institution*, Washington, D.C., pp. 65–130 (p. 72).

21 Michel, Q. and Caponetti, L. (2017), *Introduction to International Strategic Trade Control Regimes*, European Studies Unit – University of Liège, Liège, p. 70; Coppen, T. (2017), 'The Role of Trade Controls in the Non-Proliferation Regime', in *The Law of Arms Control and the International Non-Proliferation Regime: Preventing the Spread of Nuclear Weapons*, Brill Nijhoff, Leiden/Boston, pp. 191–254.

For their part, participants and supporters of export control regimes contend that the guidelines are intended to regulate trade in dual-use goods, not to prohibit it, and that transfer limits are ultimately aimed at preventing the proliferation of WMDs and potential attacks which, if they were to occur, would undoubtedly impede strategic trade. As explained in the following section, beyond the arguments of the proponents of multilateral export control regimes, the UN Security Council has done the most for their perceived image and progressive acceptance. Since the adoption of the UNSCR 1540 in 2004, the Security Council has given a definitive boost to dual-use trade controls, making the case for their universalisation and contributing to a change in the perception of these voluntary fora.

1.1.1.2. Impact of UN Security Council resolutions

So far, we have discussed conventional treaties and soft-law guidelines. Despite their applying to different regimes – nuclear, chemical, biological, missile technology and so on – these texts of universal scope and/or impact share the non-proliferation of WMDs and the achievement of international peace and stability as ultimate objectives, and all of them use arms control measures as a means to achieve this. However, as previously mentioned, there is another source, also legally binding, of great relevance in this field: the legal acts of international organisations, specifically certain UN Security Council resolutions which have seen growing importance since the beginning of the millennium. In fact, it was the Security Council which, in 2004, in an extraordinary exercise of its powers under Chapter VII of the UN Charter, adopted the UNSCR 1540 ([22]) and its subsequent amendments ([23]), with specific decisions among which it established prohibitions and obligations for all states of the world regarding dual-use items. Since this Security Council resolution burst onto the scene, it has been a fundamental source of binding regulation for dual-use items.

While all analysed sources are addressed at the state level, they are not the only ones that may be involved in the proliferation of WMDs, since non-state actors could also have proliferation intentions. Thus, pursuant to the UNSCR 1540, states are also obliged to adopt and enforce laws at the national level that prevent companies or individuals from contributing to proliferation activities.

22 UN Security Council, S/RES/1540 – Adopted by the Security Council at Its 4956th Meeting on 28 April, New York, 2004.

23 UN Security Council, S/RES/1673, 2006; S/RES/1810, 2008; S/RES/1977, 2011; S/RES/2055, S/RES/2325, 2016; etc.

The UNSCR 1540 has often been described as complementary to the main WMDs non-proliferation treaties and is also considered an instrument in the fight against terrorism ([24]). As regards the issue of dual-use items controls, it has often been said that it fills some gaps not covered by the existing regime (the reference to non-state groups being its main contribution), and that it promotes compliance with the obligations contained in the international conventional texts, with which it converges ([25]).

Likewise, the Security Council's endorsement of export control regimes is evident from its definition of 'related materials', considering as such the materials, equipment and technology included in relevant international control lists ([26]) which are likely to be used at any point in the chain of production or use of WMDs and their means of delivery.

Although intergovernmental voluntary export control agreements aimed at coordinating the provision of certain controlled materials were already in place in 2004, it was with the adoption of the UNSCR 1540 that controls on the transfer of dual-use goods and technology became a mandatory and absolutely essential part of the international non-proliferation legal regime, always with a special focus on proliferation to non-state actors.

1.1.1.3. Legitimacy of regimes for non-members

Since the UNSCR 1540 obliges all states around the globe to, among other things, control exports of dual-use items, multilateral export control regimes have come to serve as role models and their guidelines as examples of how to comply with this Security Council normative act, which is otherwise vague in the way its obligations are to be implemented. Moreover, many of the obligations

24 Veel, H. (2016), '1540 and the 2016 Comprehensive Review: A Brief History of United Nations Security Council Resolution 1540 in Light of the 2016 Comprehensive Review', *Background Paper – International Law and Policy Institute*, Vol. 18 , p. 4.

25 Rath, J., Ischi, M. and Perkins, D. (2014), 'Evolution of Different Dual-Use Concepts in International and National Law and Its Implications on Research Ethics and Governance', *Science and Engineering Ethics*, Vol. 20, No 3, pp. 769–90 (p. 776).

26 The UNSCR 1540 defines 'related materials' in a footnote as: 'materials, equipment and technology covered by relevant multilateral treaties and arrangements, or included on national control lists, which could be used for the design, development, production or use of nuclear, chemical and biological weapons and their means of delivery'. Thus, the Security Council specifically refers to items considered by multilateral arrangements, or included on national control lists, and not exclusively those covered by international treaties.

required by the UNSCR 1540 are also found in other sources. Hence, from a practical point of view, for some states the obligations imposed by the Security Council enhance compliance with other instruments of the regime and may even provide a good incentive to comply with non-legally binding requirements that favour international monitoring.

Indeed, the UNSCR 1540 came to destigmatise the work of multilateral export control regimes that had been until then considered 'gentlemen's agreements' that discriminated against non-participants who were nonetheless willing to acquire dual-use items for peaceful purposes.

There are two other important reasons for this positive change in the perception of informal export control fora. First, the emergence of new states in a supplier role after years of being recipients of dual-use goods and technologies – the so-called emerging economies of countries such as Brazil, China and India ([27]) – and second, the perception that the threat of WMDs terrorism would have global consequences, an idea that has stirred the consciences of politicians and experts in many states who are increasingly advocating for a system that effectively prevents proliferation to non-state actors – albeit without restricting transfers for peaceful uses ([28]).

Finally, a last reason on why criticism of the fora has diminished in recent years is the national aspirations of these states to be able to participate in trade exchanges at the highest level ([29]). No state wants to be left behind and excluded from building trade ties, nor to be singled out for non-compliance with international commitments. However, the level of expertise required to comply with the rules that allow states, in turn, to participate in strategic global trade is very high. Indeed, the development of checklists requires a great deal of

27 In recent years, China has taken some important steps towards strengthening its transfer controls, including the creation of a new national licensing agency, which is in the interest of those suppliers wishing to be able to trade with China. However, there are still proliferation risks. India has become a major supplier of dual-use items, joining the MTCR, the WA and the AG in recent years. In addition, several eastern European states that are EU Member States or candidates for EU membership have also joined the ranks of some of these fora. Bauer, S. and Stewart, I. J. (2015), 'Dual Use Export Controls', *EU Workshop 2015 Publication*.

28 Hunger, I. (2014), 'Regulating Transfers of Biological Dual-Use Technology: The Importance of a Serious Debate', in Meier, O. (ed), *Technology Transfers and Non-Proliferation – Between Control and Cooperation*, Routledge, New York, pp. 134–154 (p. 141).

29 Gahlaut, S. (2014), 'Increasing the Effectiveness and Acceptance of Dual-Use Export Controls: Asian Perspectives', in Meier, O. (ed), *Technology Transfers and Non-Proliferation – Between Control and Cooperation*, Routledge, New York, pp. 207–229 (p. 221).

technical knowledge, time and resources. Therefore, the fact that there are standards supported by many states with such know-how and that such guidelines and lists have been agreed on the basis of years of lessons learned means that many of those who, as a result of the obligations of the UNSCR 1540, have begun to control their transfers of dual-use items, have chosen to follow such standards and checklists.

At this point, it could be concluded that due to the flexibility and lack of precision of the UNSCR 1540 on its implementation, the influence of export control regimes has been felt far beyond the behaviour of their participants.

1.1.1.4. National compliance with international obligations

At this point, it is essential to mention the importance of non-state actors in the domestic implementation of international obligations. The current context of numerous transnational companies with complex industrial structures, complex academic collaboration schemes among research institutions and increasingly numerous international transfers poses such a challenge in preventing the proliferation of WMDs that the traditional approach to export controls has become meagre. In view of the growing difficulties in controlling strategic transfers, it became urgent to establish a solid basis for cooperation between national authorities and industry, academia, private-sector firms and companies that could negligently – wittingly or unwittingly – supply dual-use items to end users of dubious legitimacy.

To this end, a partnership with the private sector becomes almost a necessity, as good communication, raising awareness and transparency are key elements for an effective dual-use trade control regime. To a lesser extent, cooperation with universities and research organisations is also a growing necessity, as research can be considered as dual-use in its own right ([30]). In both industry and academia, a stronger awareness has been developing for some time now, reflected in so-called internal compliance programmes, also known as ICPs, which aim to ensure that dual-use goods control requirements are respected within these organisations.

30 Michel, Q. (2022), 'Trade Control and Dual Use Research: A Difficult Compromise', European Studies Unit – University of Liège, Liège (https://www.esu.ulg.ac.be/wp-content/uploads/2022/02/TC_difficult-compromise.pdf).

1.1.2. Security incentives

1.1.2.1. An essential tool for international security

The efforts to define the term 'international security' – or, indifferently, 'global security' – are numerous but have not led to a universal definition. Common sense may describe it as the actions taken to prevent and respond to conflicts and threats to people anywhere in the word, which may involve military and other measures from states and international organisations.

While this notion may be conceptually vague, its link with the controls on the strategic trade of dual-use goods and technology is real and effective. As stated in the first paragraph of the recital of the UNSCR 1540, the 'proliferation of nuclear, chemical and biological weapons, as well as their means of delivery, constitutes a threat to international peace and security' and the 'threat of illicit trafficking in nuclear, chemical, or biological weapons and their means of delivery, and related materials, (...) adds a new dimension to the issue of proliferation of such weapons and also poses a threat to international peace and security' ([31]). The non-proliferation treaties in the nuclear, chemical and biological areas establish a clear link between the non-proliferation of these weapons and the preservation of international security.

These risks of proliferation and illicit trafficking are precisely those addressed by the controls and other management measures on the international trade in dual-use items. As such, the elaboration, implementation and enforcement of controls act as a confidence-building measure set by a state vis-à-vis the other states with which it exchanges goods and technology – in securing these from proliferative procurement efforts – and vis-à-vis the international community as a whole – in strengthening non-proliferation as a universal norm. For instance, the EU recognises and highlights in its security strategies the instrumental role of such controls for its vision of what constitutes 'international security' ([32]).

31 UN Security Council, S/RES/1540.

32 See, for instance:
- 'We have a wide range of instruments available: (...) national and internationally-coordinated export controls; (...) political and economic levers (including trade and development policies); interdiction of illegal procurement activities and, as a last resort, coercive measures in accordance with the UN Charter', Council of the European Union, 'EU strategy against proliferation of Weapons of Mass Destruction', Brussels, adopted on 10 December 2003.
- 'We need to increase our capacities to control intangible transfers, including scientific knowledge where necessary. This entails protecting and reinforcing existing export control regimes', Council of the European Union, 'A Strategic Compass for Security and Defence – For a European Union that protects its citizens, values and interests and contributes to international peace and security', adopted on 21 March 2022.

1.1.2.2. An effective tool for regional security

Similarly to 'international security', no single universal definition of 'regional security' exists. The coverage of the concept depends on the vision each region has for itself in relation to its security. The notion of 'region' itself shall be approached very cautiously, as it may comprise institutional settings such as economic cooperation associations, or geographic settings such as a sub-region or a geopolitical ensemble. In this respect, the strategic posture of the EU relating to the threat of proliferation of WMDs ([33]) and the recent European economic security strategy ([34]) can both be conceived as tools for regional security of its 27 Member States.

Regional security may also consist of the vision of an international actor of the security in a region, which it thinks may impact it. For instance, the EU has adopted a strategy for cooperation in the Indo-Pacific ([35]) which describes its own vision of the actions to be undertaken with the region for ensuring security for both the EU and the Indo-Pacific region. In this document, the EU notably states in the section 'New security challenges' that it seeks 'to develop multilateral initiatives on (…) dual use export control with likeminded partners' ([36]).

Another example, of a shared vision this time, is found in the Plan of Action to Implement the EU–ASEAN Strategic Partnership (2023–2027) ([37]), which in the section on the promotion of disarmament and non-proliferation requires the partners to 'Explore regional cooperation on dual use export control (…)'. Again, this example establishes a functional relationship between the mitigation of the proliferation risk and dual-use item trade controls.

33 See: Council of the European Union, 'A Strategic Compass for Security and Defence – For a European Union that protects its citizens, values and interests and contributes to international peace and security', op. cit.

34 Joint Communication to the European Parliament, the European Council and the Council on 'European Economic Security Strategy', Brussels, 20 June 2023.

35 High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, 'The EU Strategy for cooperation in the Indo-Pacific', Brussels, 16 September 2021.

36 High Representative of the Union for Foreign Affairs and Security Policy, 'The EU Strategy for cooperation in the Indo-Pacific', p.14.

37 'Plan of Action to Implement the ASEAN-EU Strategic Partnership (2023–2027)', adopted at the ASEAN Post-Ministerial Conference and by the EU, adopted 2022.

Finally, regional security is naturally both the rationale and objective of the regional conventions establishing nuclear weapons-free zones: the Treaty of Tlatelolco ([38]) in Latin America and the Caribbean, the Treaty of Rarotonga ([39]) in the South Pacific, the Treaty of Bangkok ([40]) in South-East Asia, the Treaty of Pelindaba ([41]) on the African continent and the Semipalatinsk Treaty ([42]) in Central Asia.

1.1.2.3. A pertinent tool for national security

Although there is no formal and universal definition of the notion of 'national security', it can commonly be understood as the ability of a country's government to protect and defend its territory, citizens, economy and institutions. The World Trade Organization, in relation to the security exception contained in Article XXI of the General Agreement on Tariffs and Trade, has generally considered that the 'essential security interests' of a State Party refer to 'to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally' ([43]).

Having this in mind and considering the intrinsically trans-border characteristic of the types of the international flows of dual-use goods and technology that are at stake, it can be thought that national security is only a subjective incentive for a country to elaborate and implement controls over them. Since, for instance, the UNSCR 1540 does not prescribe in its trade control-related provisions – i.e. operative paragraphs 3.c and 3.d – to implement import or in-country commerce controls, the choice to add such controls in addition to those of the international trade is purely sovereign. Dual-use item trade controls, therefore, are not originally motivated by national security considerations.

38 Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean, adopted in 1967.
39 South Pacific Nuclear Free Zone Treaty, adopted in 1985.
40 Treaty on the South-East Asia Nuclear-Weapon-Free Zone, adopted in 1995.
41 African Nuclear-Weapon-Free Zone Treaty, adopted in 1996.
42 Treaty on a Nuclear-Weapon-Free Zone in Central Asia, adopted in 2006.
43 World Trade Organization, *Russia – measures concerning traffic in transit*, Report of the panel, WT/DS512/R, 5 April 2019, para. 7.1.c, p. 23.

The individual decision to design control mechanisms over the in-country movement of goods or technology, however, may well be driven by national security considerations. Some countries, such as Morocco and the Philippines, maintain import controls on these items. The former adopted controls only on the international import flows of dual-use goods. The latter, because of the geographic situation of the country being an archipelago with challenges for effective physical controls of the in-country flows of goods, even adopted controls on the re-assignment of dual-use goods, i.e. the in-country re-export of previously imported goods.

1.1.3. Trade and geopolitical incentives

The arguments put forth to initiate the establishment of an STC system in a country must make sense in the national context and cannot be simply 'copy/paste' from a template, even if the model comes from a state that may have more robust experience and mechanisms in place in this area. A trade control system must duly reflect the realities and challenges of the state.

Answering the question on why to elaborate or review STC can only be done taking into account the context in which the process will take place and the outcomes that will be effectively implemented and enforced. While the protection of security and legal commitments certainly push a state to elaborate and implement a trade control system, other elements could also be identified in the motivation for a state to be proactive.

Trade and geopolitical incentives could constitute an important motivation for a state to establish and strengthen its STC system. It should be remembered that trade controls have first and foremost an economical dimension and deal with the conditionality of the trade. In other words, the existence and the implementation of a comprehensive trade control of such a system might delineate the national industry's access to the international goods and technology market. Moreover, being within a region and taking the initiative to be the first to draft an STC can give the advantage to frame the parameters of the model that shall be copied by other states.

1.1.3.1. Trade incentives

The initial export of a strategic dual-use item is most often conditioned to the assurance that any re-export of this item or exports of strategic items produced thanks to the initial export will be subject to the same level of security guarantees as in the primary exporting state. This notably requires that, prior to the initial export, the end user is identified by an official act of the importing state. It implies that the importing state exercises a form of monitoring of its national economic operators. It also means that the initial exporting state's authorities will allow the transfer of the item leaving its territory only if the recipient country has established effective trade control systems to avoid that the item will be re-exported without adequate authorisation, in case the item would be re-exported. Commercial access to a particular item, therefore, is conditional to the existence and implementation of such rules and practices.

At a more global level, the request for such assurances enables complete access by the country to the most advanced technology markets. The main supplying countries of nuclear, chemical, biological and weapon products, meeting in fora and organisations like MTCR, NSG, WA or AG, have agreed informally to apply this common rule. Outside of these instances, the remaining suppliers are few. Therefore, the obligation of establishing and implementing an STC system constrains access to foreign strategic technologies – for example in electricity generation, telecommunications, satellite development or more common medical applications – which the recipient countries may wish to purchase for the development of their peaceful industries, their economies and the highest level of welfare of their populations.

This economic argument is significant, as it touches on a potential direct gain for the country. It shall thus be presented to the highest political level, which is accountable to the citizens for its economic policy, and to the administrations which implement its decisions, but also to the economic operators, for the definition of their industrial and commercial strategies, and to the population, as it concerns the politics of the country.

This argument shall be duly highlighted in every form of communication of the arguments in favour of the creation or reinforcement of the national framework: indeed, the economic ones, when implying a benefit, are key for convincing all levels of stakeholders and facilitating the mission of the actors. Elaborating and implementing trade controls must be emphasised as a potential gain with minimal costs, primarily administrative, but this shall be developed differently, according to the priorities of the target audience.

The implementation of this framework may imply a limited cost for the government, primarily limited to the time invested by the actors in its elaboration. As regards its implementation, a parallel can be established with the existing weapons trade controls already implemented by the country. In addition, an analysis of the potential market size of the strategic items is recommended.

The economic argument is valid for the economic operators for the definition of their industrial and commercial strategies. In most countries, the application of STCs is free of charge, but the cost of drafting and implementing an ICP might not be negligible. The only possible cost for economic operators is the delay of the authority in awarding the licence. Solutions exist for reducing or simply cancelling these delays. In order to secure the commitment of economic operators for a smooth implementation and enforcement of the controls, it is essential that they see the benefits – in terms of liability and procedure facilitations – they could obtain by proactively complying, and that they are fully and transparently informed of the possible consequences of these controls on their regular activities.

It is also important to inform the public on the diversity of areas in which the technological benefits can be expected at the country level, and on the national industries which are active in the strategic items market.

1.1.3.2. Geopolitical incentives

The contribution to geopolitical developments is the last set of arguments that can be developed together with local actors. Geopolitical incentives are transversal by nature, as they can be a modality of the previous sets of arguments. However, as they affect the substance of the framework that is sought, it may be interesting to develop them as a separate set of arguments.

The elaboration and implementation of STCs on dual-use items may bring its contribution to the geopolitical posture adopted by a country, in a first place, if the ambition is not limited to national controls but to multilateral – i.e. bilateral, sub-regional or regional – controls. Based on models of regional integration, such as the EU trade controls system, partner countries may wish to reduce the differences between their respective rules and set a ground level for sound competition, both for themselves and their economic operators. This project would then be expected to fit the geopolitical strategies and ambitions of states, and the corresponding arguments have to fully integrate this, along with the expected product, especially if the product is to take the form of a binding convention.

The process may also contribute to the geopolitical posture of the country, if it is in a position to assume leadership in the topic for its geographical area. If the partner country is the first in its sub-region or region to engage in the elaboration and development of controls, it will reinforce its strategic position as a commercial actor and model for its neighbours, with a view to potentially accompanying them in their own elaboration and implementation of controls.

The process itself may be a geopolitical incentive for the partner country, if the provider of outreach activities is itself an important partner of the country. The outreach programme or activities are a form of collaboration, which implies the existence of mutual trust between the partners and a will for achieving concrete results for the good of the partner country and the reinforcement of the link. The outreach activities, especially if they dedicate time for exchanges of best practices with and between the economic operators, can bring visibility to the achievements of the partner country to the relevant public and private commercial partners of this country and, subsequently, the expected economic benefits. Thus, the choice of the outreach partner for the country can be a key argument to be highlighted.

The geopolitical arguments are primarily aimed at the highest political institutions of the country, notably the foreign affairs ministry, as they shall reflect the political agenda and priorities. They must also be relayed between the administrations that implement the possible actions decided at a multilateral level. As for the economic operators, they shall also be informed of the geographical scope of application of these controls and the possible partners they may advertise to for potential new commercial exchanges. As for the public, it shall be informed as the process is a matter of general policy, which can contribute to the international stature of the country.

As regards the formulation of these arguments, and notably those related to the possibility that the outcome is generalised to an area or that the country exercises leadership in this area, it is important to emphasise that the same levels of controls are normally expected from countries in the entire area. The commitments of the political instances and the economic operators, notably, can only be secured with the perspective of sound competition in their geopolitical area of priority. With a view to presenting arguments relating to the choice of the partner in the outreach activities, it is important to present facts and figures describing the relationship and interests shared by the provider and the recipient as regards security and trade in general and strategic items in particular.

CHAPTER 2

Veronica Vella ([44])

1.2. An STC system: what, who and how?

1.2.1. Introduction

There are no established or globally accepted standards regarding the precise design and implementation of an STC system. Neither MECRs nor international treaties offer an exact checklist of parameters, components or measures that such a system should comprise or consider effective.

These responsibilities fall to states that are parties to international treaties and instruments mandating the establishment of export controls, the implementation of enforcement measures and the regulation of select activities. Consequently, the configuration and operationalisation of STC systems, in addition to their constituent elements, vary significantly from one nation to another.

States implement export controls according to their own national and regional trade flow realities and, of course, since STCs are strategic in nature, also according to their national foreign and security policies.

44 **Veronica Vella** is a researcher and PhD candidate at the European Studies Unit of the University of Liège, Belgium. Her research focuses on the political and legal framework of strategic trade control systems and regimes, which is the subject of her doctoral studies. She provides external expertise for projects relating to non-proliferation and strategic trade, including dual-use trade, foreign direct investments rules, CBRN risk mitigation and more, intended for various institutions. Additionally, she actively contributes to EU outreach programmes. Furthermore, Veronica advises the Dual-Use Unit at the University of Liège, responsible for implementing an ICP. Her contributions also extend to numerous publications in the field of strategic trade controls, featured in specialised peer-reviewed scientific journals and handbooks. Notably, Veronica co-edits the quarterly Chaudfontaine Newsletter, dedicated to dual-use item transfers, and holds the position of Editor-in-Chief of the Journal of Strategic Trade Control.

Nevertheless, some common elements or a general structure of an STC system can be identified, regardless of national needs and specificities and the different objectives of international conventions. To strike a balance between expressing national specificities and adhering to international standards while ensuring effectiveness, an STC system should encompass and incorporate several core elements. After delving into the primary reasons that could justify the 'why' of an STC system in the preceding chapter, this one will delve into the 'what,' 'who' and 'how'. It will consequently cover the encompassed scope, including items and operations ('what'), the involved stakeholders ('who') and the inner workings of the STC system, including its procedures, processes and authorisation mechanisms ('how').

1.2.2. What: the scope

An initial and critical element to include and define in an STC system is the scope of application. The items and operations, or transactions, to be controlled must be identified.

The items subject to STCs may vary from one national system to another, depending mainly on the interpretation and definition of 'strategic items' and the political will to control certain sectors or areas of trade. For instance, the categorisation of dual-use items as WMDs-related items and conventional weapons-related items may be expanded to include items related, for example, to human rights violations or terrorism (e.g. as in the EU or the United States). In this sense, dual-use items may also include cybersurveillance items and emerging technologies, other than nuclear, chemical, military and other items. In the specific case of cybersurveillance, it is not always a given that the related items are controlled on human rights grounds. In fact, some cybersurveillance technologies were included in the WA list for the first time following the amendments agreed at the 2012 and 2013 WA meetings. Indeed, the fundamental difference between the earlier changes to the WA list, on the one hand, and the EU approach, on the other, lies in a normative justification for imposing export controls. While the traditional justification for adding items to an export control list was to mitigate military risks, for some countries human rights risks serve as a separate 'non-military' basis for imposing export licensing requirements (e.g. for EU Member States) ([45]).

45 Kanetake, M. (2019), 'The EU's dual-use export control and human rights risks: the case of cyber surveillance technology', *Europe and the World: A law review*, Vol. 3, No 1, p. 6.

Furthermore, it should be emphasised that although controls are generally referred to as applying to dual-use 'goods', they should rather refer to dual-use 'items' to the extent that such controls also apply to technologies (considered as intangible goods).

Irrespective of any internationally agreed definition of what constitutes a strategic item, such items can be identified as strategic mainly by appearing on national control lists. Hence the importance of providing for this in the national legal framework.

In addition to defining the scope of national controls, national control lists make it possible to achieve certain unilateral foreign policy objectives, comply with international obligations and meet the conditions for possible membership in MECRs: a notable condition for membership is the application of STCs, and in this regard, national control lists play a pivotal role ([46]).

These lists may be based in whole or in part on the lists of the MECRs and thus include certain chemical and biological agents ([47]), sensitive nuclear-related materials ([48]), dual-use goods and technologies ([49]) and unmanned delivery systems capable of delivering WMDs ([50]).

National control lists can be copied from internationally agreed lists, or they can be adapted by adding or removing items from the list. It should also be mentioned that countries can implement the above list regardless of their membership in regimes. For example, the EU list, implementing internationally agreed controls on dual-use items and incorporating all the MECRs lists, was widely adopted by non-EU and/or non-member countries ([51]). Some countries have even expanded the list to include more items and technologies that they consider to be dual-use. A country may decide to control other items that are not listed in other systems or regimes in light of specific national concerns.

46 O'Sullivan, T. (2017), 'New Approaches to Tailoring Control Lists for National Implementation', *Strategic Trade Review*, Vol. 3, No 5, p. 72.
47 Australia Group, Guidelines for Transfers of Sensitive Chemical or Biological Items, 2015.
48 International Atomic Energy Agency, INFCIRC/254 – Communication Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment or Technology, Vienna, 1978.
49 The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use goods and technologies, WA-DOC (17) PUB 001 – Public Documents: Volume I. Final Declaration and Guidelines, and Procedures, Including the Initial Elements, 1996.
50 Missile Technology Control Regime, Guidelines for Sensitive Missile-Relevant Transfers, 1987.
51 Paile, S. and Michel, Q. (2021), 'EU list of dual-use items: international good practice or standard?', *WorldECR*, No 99.

Therefore, careful analysis and evaluation of foreign policy strategy and national interests is essential to the development of such lists. An example of specific and unique controls may be those applied to emerging technologies. Not only can countries control items differently from those internationally agreed and from those established by other countries, but they can also control more items than those included in the national list by invoking the 'catch-all' clause. This clause triggers a mechanism by which items that are not on the list can be controlled if certain conditions and criteria are met. Finally, it should be underscored that lists are living mechanisms that should be regularly monitored and updated.

Having defined the scope of controls as regards the items to be controlled, an STC system needs to determine the operations subject to controls. The operations or activities that might be subject to control include export, import, transit, brokering, technical assistance and services (e.g. financing, transportation). Most of these activities can be carried out in both tangible and intangible ways. Therefore, when defining the activities to be controlled, it is also necessary to define whether controls are to be applied in the case of intangible transfers. Such controls aim to capture activities relating to the transfer of sensitive technology, verbal communications, digital transfers and others. For instance, research organisations are more involved in intangible transfers of dual-use items than in the export of goods; seemingly, brokers perform mostly intangible transfers or services. Country specifics, such as being a transit country for strategic items, may also influence the definition of activities to be controlled. As mentioned above, there are international instruments which call for controls on a specific set of activities. In particular, the UNSCR 1540 calls on states to establish and maintain national controls over specific strategic items and activities ([52]).

52 'Export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting'. UN Security Council Resolution 1540, April 2004.

1.2.3. Who: the actors involved

The main actors involved in an STC system can be grouped into three main categories: international and regional organisations, national authorities and operators.

International and regional organisations play a crucial role in issuing models and principles. These are the international commitments that states can choose to follow.
The importance of such organisations also lies in their role in implementing safeguards and verification to prevent illicit trafficking. In addition, they provide technical assistance and support, which play a key role in the effective implementation of STCs.

With regard to national and subnational/regional actors, they are key because they have important roles to play, such as drafting legislation, defining foreign policy, raising awareness and ensuring the proper implementation and enforcement of STCs.

At the national and regional levels, the key actors are licensing or permitting authorities and enforcement agencies. The former may refer to agencies or ministries involved in export licensing/permitting, which often include ministries of foreign affairs, trade, commerce, industry, development and defence, along with relevant technical agencies such as those dealing with energy or science ([53]). Both border control and investigative agencies are typically part of the latter.

53 World Customs Organization, *Strategic Trade Control Enforcement (STCE): Implementation Guide*, p. 14.

Customs administrations, along with enforcement and prosecution authorities, play a crucial role in an STC system, ensuring that trade in dual-use items complies with national laws and regulations. Customs administrations may or may not have law enforcement responsibilities under their own legislation, yet they are central to STC enforcement because of their basic legal authority to detect, inspect and interdict shipments ([54]). In fact, while most customs administrations do not have the authority to conduct investigations, STC enforcement investigations (and prosecutions) are highly dependent on the functions, processes and authorities of the customs administrations ([55]).

Operators, on the other hand, contribute to the proper functioning of a STC system by adhering to national foreign policy statements, complying with regulations, ensuring proper documentation, conducting due diligence and being aware of proliferation and illicit trade threats.

It is not an easy task to identify the entities and stakeholders involved in and affected by export controls. There is certainly no single or agreed way to map the range of actors or even sectors affected and involved in such a process ([56]). 'Operators' and affected stakeholders can be (multi)national companies, small and medium-sized enterprises, academia, research organisations, freight forwarders, brokers and others. Each of them has specific responsibilities and challenges to address with respect to export control compliance. That is why outreach efforts, both at the national and international levels, play a critical role. For instance, technical reachback services are an important element to include in an STC system, especially considering the highly technical nature of strategic goods. One of the major challenges faced by al operators, including customs, is the classification of goods, which require urgent assistance.

54 World Customs Organization, *Strategic Trade Control Enforcement (STCE): Implementation Guide*, p. 15.

55 World Customs Organization, *Strategic Trade Control Enforcement (STCE): Implementation Guide*, p. 29.

56 Bauer, S., Brockmann, K., Bromley, M. and Maletta, G., 'Challenges and good practices in the implementation of the EU's arms and dual-use export controls. A cross-sector analysis', *SIPRI*, July 2017, p. 5.

1.2.4. How: procedures and authorisations

Authorisations and the related processing are at the core of STC systems. In fact, it can be said that controls on items and operations are directly linked to licences and authorisations, without which controls and enforcement can hardly be properly applied. Therefore, after defining which items and activities are controlled (and therefore require authorisation), it is imperative to define the scope, conditions and criteria, and the possibility of suspension, revocation and recall with respect to authorisations and licences.

With regard to the scope of the authorisation, the regulatory framework must define the activities for which an authorisation is required. For example, transit operations may fall within the scope of STCs (it is possible to prohibit them if they are detected) but may not require a preventive authorisation. National systems need to determine what type of authorisations should be in place, such as individual or global export authorisations. The period of validity for each of them must also be defined.

In order to require (and obtain) an authorisation for trade in dual-use items, certain conditions and criteria must be met. Generally, while conditions are objective requirements that must be met, with clear and verifiable standards, criteria are subjective standards or guidelines used for evaluation, which can involve interpretation and judgment.

Conditions may relate to the following: the specific activity in question (e.g. is the activity carried out covered by the legal regime?); the destination (e.g. is the authorisation required for exports – or other operations – to all or certain destinations?); the items transferred (can only listed items be controlled or can non-listed items also be subject to controls, thus requiring the implementation of a catch-all clause?); if the system provides for a catch-all clause, in which case is it possible to apply it (e.g. does the operator need to be informed, aware or have reason to suspect that the transferred item may be used for illicit purposes?); the final use (or end use) of the transferred item (e.g. for use in connection with the development and proliferation of WMDs, for military end-use, etc., or for human rights considerations). In addition, conditions may include membership in export control regimes (e.g. membership in the NSG for the transfer of certain items) or reporting to the UN Security Council on the effective export controls in place, as defined by the UNSCR 1540 ([57]).

57 Michel, Q., Caponetti, L., Kolakowska-Falkowska, I. et al. (2020), 'A decade of evolution of dual-use trade control concepts: strengthening or weakening non-proliferation of WMD', European Studies Unit – University of Liège, Liège, p. 7.

Authorisation can be granted or denied based on criteria that must be defined. These may vary from one system to another, hence the importance of defining them. Countries may consider criteria such as: national foreign and security policy; maintenance of regional peace, security and stability; the recipient state's commitment to international obligations related to export control, non-proliferation of WMDs, and others (such as respect for human rights, depending on national interests); compliance with international (and national) sanctions; illicit intended end use; other obligations, such as the International Atomic Energy Agency (IAEA) safeguards agreement; and re-transfer assurances.

All conditions and criteria defined in the national regulatory framework should be met, and the relevant information should be included in the relevant documentation provided by operators and authorities. By way of illustration, relevant information to be provided may be the end-user assurance (e.g. certificate, declaration), item-related information (description, quantity, etc.), commercial documents and others. Another example could be an ICP: if the national system requires operators to implement an ICP in order to apply for an authorisation, the relevant document demonstrating such implementation must be provided by the operators to the authorities. ICPs can also be seen as a mechanism to facilitate strategic trade. In fact, an effective ICP allows an organisation to communicate with regulatory agencies, expedite applications and inquiries and maintain ongoing contact with regulators ([58]). Another facilitating mechanisms can be the Authorised Economic Operator status ([59]), where documentation may also be required and submitted. It is also important to establish a timeframe in which transactions are recorded.

58 Bauer, S., Brockmann, K., Bromley, M. and Maletta, G., 'Challenges and good practices in the implementation of the EU's arms and dual-use export controls: A cross-sector analysis', *SIPRI*, July 2017, p. 42.

59 European Commission, 'What is AEO?', Taxation and Customs Union, accessed 8 June 2023 (https://taxation-customs.ec.europa.eu/customs-4/aeo-authorised-economic-operator/what-aeo_en).

In order to process the authorisation as described above, it is crucial to establish a precise organisation and decision-making process by defining the actors involved in such a process and their specific roles, in addition to the specific administrative provisions discussed above. Countries need to decide which competent authorities will be empowered to grant authorisations. In addition to granting and refusing authorisations, it is important to specify whether the competent authorities can also modify, suspend, revoke or cancel authorisations.

Licensing authorities should work in close cooperation with customs and other relevant national actors. Administrative and inter-agency cooperation is essential for the efficient implementation of an STC system. The exchange of information appears to be essential to achieve such an objective and may include the sharing of data on sensitive end users and authorisations issued (e.g. value and type of licence), the number of operators with an ICP and others. As seen above, customs authorities play a critical role in the enforcement of export controls. It is therefore essential that a state that imposes new licences (requirements) informs its customs authorities and other relevant national authorities without delay.

Inter-agency coordination is also particularly important for the enforcement of controls through detection, investigation and prosecution. Therefore, cooperation between licensing authorities, customs and intelligence and security agencies is critical for a complete and efficient STC system. International cooperation is equally important and can take several forms. It can take the form of cooperation through authorities such as the World Customs Organization, in particular with regard to the exchange of information. In addition, given the multinational nature of illicit strategic trade, a national STC system may provide for mutual administrative assistance, which provides a legal basis for the exchange of information and allows a customs administration to act on behalf of or in cooperation with another to enforce the law ([60]).

60 World Customs Organization, *Strategic Trade Control Enforcement (STCE): Implementation Guide*, p. 20.

In order to ensure the establishment and proper implementation of controls, operators must comply with the rules and procedures issued by the national authorities. Consequently, guidance and outreach (seminars, workshops, consultations, etc.) to operators are useful, if not necessary, to facilitate the process. The operators need to be made aware of the importance of compliance and proper documentation, including record keeping, and supported in proper implementation. Hence, states should focus on providing tools that operators can use to assist them with challenges specific to export controls, such as product classification and risk assessment, to ensure better compliance with the system.

PART 2

The EU strategic trade control system:

a gradual approach

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CHAPTER 1

Ilaria Anna Colussi ([61])

2.1. The evolution of the EU STC system

2.1.1. Introduction

In order to understand the current EU STC system, it is important to consider its evolution through the years, observing the process and steps taken in the light of the context, along with the purpose/scope that it has pursued.
This chapter will focus on the history of the EU approach towards the control of dual-use items, showing that EU intervention constitutes an important complement to international agreements (such as the UNSCR 1540 and conventions on nuclear, chemical and biological weapons) and to MECRs.

Four phases of this evolution can be identified:

a) from the 1980s until the adoption of Council Regulation No 3381(1994) and Council Decision 94/942/CFSP;
b) the adoption of Council Regulation (EC) No 1334/2000;
c) the adoption of Council Regulation (EC) No 428/2009;
d) the adoption of the recast Regulation (EU) 2021/821.

61 **Ilaria Colussi** is an Italian qualified lawyer ('avvocato'), holding a PhD in Public Law/Biolaw from the University of Trento, Italy. She was a Marie Curie Post-Doctoral Fellow at the University of Liège, Belgium, in the European Studies Unit where she focused on strategic trade and European restrictive measures. She has been a Visiting Researcher at the University of Oxford (United Kingdom), Interuniversity Chair of Law and the Human Genome-Bilbao (Spain), the University of Concepciòn (Chile) and the University of Paranà (Argentina). She has worked at the law firm Padovan in Milan, Italy, and has been a legal consultant within various EU CBRN projects. Currently, she serves as a Data Protection Specialist at BBMRI-ERIC, the European research infrastructure for biobanking. In this role she is responsible for implementing data protection rules in the area of biomedical research. Additionally, Ilaria is a legal advisor within the EU P2P, focusing on North African countries, the Balkans and the Caucasus region.

2.1.2. The first phase of the EU STC system: the 1980s and 1990s

In the EU, the perception that the trade of dual-use goods and technologies needed to be controlled started only in the 1980s ([62]). In particular, the discovery of illicit transfers of dual-use goods from the European Community clearly led to the realisation that Member States could be the place of destination/exchange of proliferation-sensitive items, as it occurred for the Netherlands being the market of goods in support of the A. Q. Khan ([63]) network. Then, in the 1990s, it appeared that Iraqi dictator Saddam Hussein was able to import many dual-use goods from the United Kingdom ([64]), and that some German companies were also involved in the export of sensitive items to Iraq to support its clandestine nuclear weapon programme ([65]). Moreover, recognition of the lack of coordination between the Member States regarding the regulation of export controls was also achieved when certain goods headed from France to Moscow were seized at Luxembourg airport due to inaccurate documentation ([66]).

62 See: Michel, Q. (2023), 'EU strategic trade controls and sanctions: are we talking about the same thing', *Journal of Strategic Trade Control*, no 1, DOI:10.25518/2952-7597.68. See also: Jones, S. (2003), 'EU enlargement: Implications for EU and multilateral export controls', *The Nonproliferation Review*, Vol. 10, no 2, pp. 80–89.

63 Spector, L. S., Goren, N. and Salama, S. (2006), 'Special report: the A. Q. Khan network: crime... and punishment?', Monterey Institute Center for Nonproliferation Studies, *WMD Insights*, No 3, p. 2.

64 See: the Scott Report (*Report of the Inquiry into the Export of Defence Equipment and Dual-Use Goods to Iraq and Related Prosecutions*), which was a government inquiry about the connection between the United Kingdom and Saddam Hussein. See: Thompson, B. and Ridley, F. F. (eds), *Under the Scott-light: British government seen through the Scott Report*, Hansard Society Series in Politics and Government, Oxford University Press, Oxford, 1997.

65 In 1988, German engineers were discovered to have helped provide centrifuge data that helped Iraq expand its nuclear weapons programme. Moreover, 52 % of Iraqi international chemical weapon equipment was of German origin. See: Paterson, T., 'Leaked Report Says German and US Firms Supplied Arms to Saddam', *The Independent (United Kingdom)*, 18 December 2002, accessed 31 May 2023 (https://web.archive.org/web/20130527104506/http://www.commondreams.org/headlines02/1218-06.htm).

66 Judgment of the Court of Justice of 4 October 1991, *Aimé Richardt and Les Accessoires Scientifiques SNC*, Case C-367/89.

In addition, Member States participated in multilateral regimes such as the Coordinating Committee for Multilateral Export Controls ([67]) on their own behalf with the exclusion of EU institutions, and this created divergent export controls systems, compromising the free movement of goods in the internal market ([68]). All of these situations pushed the EU to strengthen national export control and enforcement systems, in order to avoid the trade of sensitive goods and technologies to risky places and addressees ([69]), since national laws were not de facto capable of blocking these movements.

Therefore, after considerable negotiations with Member States ([70]), the Commission proposed to adopt a regulation which resulted in Council Regulation No 3381(1994) ([71]). In parallel, the Council adopted Council Decision 94/942/CFSP ([72]) on the joint action.

The regulation defined the principles governing the export of dual-use items (such as the principle of mutual recognition of export licenses) and the joint action adopted a common list of items and destinations, along with the criteria for deciding whether to grant the authorisation ([73]).

67 The Coordinating Committee for Multilateral Export Controls (CoCom) was an informal multilateral organisation through which the United States and its allies attempt to coordinate the national controls they apply over the export of strategic materials and technology to the Communist world.

68 Micara, A. G. (2012), 'Current Features of the European union regime for Export Control of Dual-Use Goods', *Journal of Common Market Studies*, Vol. 50, No 4, pp. 578–593. Despite the states being part of the regime of the NSG and former CoCom members, they had adopted different control lists (France lacked 14 items and Belgium lacked 20). See: Paul Eavis (1994), *Arms and dual-use export controls: priorities for the European Union*, Saferworld, London.

69 Wenzel, J. (1993), 'The European Community's approach to export controls', in Bailey, K. and Rudney, R. (eds), *Proliferation and export controls*, University Press of America, Lanham, MD, pp. 95–99.

70 Hofhansel, C. (1999), 'The Harmonization of EU Export Control Policies', *Comparative Political Studies*, Vol. 32, No 2, pp. 229–256.

71 Council Regulation (EC) No 3381/94 of 19 December 1994 setting up a Community regime for the control of exports of dual-use goods (OJ L 367, 31.12.1994, pp. 1–7).

72 Council Decision 94/942/CFSP of 19 December 1994 on the Joint Action adopted by the Council on the basis of Article J.3 of the Treaty on European Union concerning the control of exports of dual-use goods (OJ L 367, 31.12.1994, pp. 8–167).

73 The Joint Action provided the following: Annex I: list of items subject to controls, as taken from international regimes (MTCR, NSG and AG); Annex II: list of countries for which simplified formalities (general authorisations) might be applied by Member States; Annex III: criteria for granting or refusing an authorisation; Annex IV: list of very sensitive items for which intra-Community authorisations shall be required by all Member States; and Annex V: list of items for which consignments dispatched from one Member State might be subject to individual authorisation.

A 'double path' was chosen (on the one hand drafting a regulation, directly applicable, under the first pillar of the EU, and on the other hand, a joint action under the third pillar ([74]), which needed to be transposed by states to enter into force). Regulation (EC) No 3381/94 was based on both Article 113 of the Treaty establishing the European Community about the common commercial policy (for which the EU had an exclusive competence under Article 3 of the treaty) – and thus the regulation had the purpose of completing the harmonisation of the internal market – and on Article 36 of the treaty, establishing the possibility to control trade for non-economic reasons (such as public security). The joint action was based on Article J.3 of the Treaty on European Union, with the idea that trade control measures adopted for political reasons are a matter of foreign policy (which is mostly a Member State competence). The result was 'an integrated system' ([75]) with two acts cross-referencing each other but not overlapping, having two different legal bases.

Briefly, Regulation (EC) No 3381/94:

- only focused on export control (no other activities were covered);
- defined dual-use goods simply as 'goods which can be used for both civil and military purposes' (Article 2, point (a));
- introduced the catch-all clause (Articles 4 and 5), stating that an authorisation was required for the export of dual-use goods not listed in Annex I to Council Decision 94/942/CFSP in three cases: (a) if the exporter had been informed by their authorities that the goods were or could be intended for use in connection with WMDs; (b) if the exporter was aware of such a purpose; and (c) if the exporter had grounds for suspecting that the goods concerned were intended for such purposes (cases (a) and (b) providing for the obligation to require an authorisation and case (c) providing for the option of Member States to ask for an authorisation);

74 Starting from the Maastricht Treaty (1993) until 2009 (upon the entry into force of the Treaty of Lisbon, when the EU obtained a consolidated legal personality), the EU legally comprised three pillars: (a) European Communities pillar handling economic, social and environmental policies; (b) the Common Foreign and Security Policy (CFSP) pillar, which took care of foreign policy and military matters; and (c) the Police and Judicial Co-operation in Criminal Matters, which brought together cooperation in the fight against crime. This pillar was originally named Justice and Home Affairs (JHA).

75 Leslie, B. J. (1994), 'Dual Use Goods and the European Community: Problems and Prospects in Eliminating Internal Border Controls on Sensitive Products,' *Boston College International and Comparative Law Review*, Vol. 17, No 1, pp. 193–211.

- mentioned individual authorisations and the principle of mutual confidence among Member States' authorities (so that all Member States are bound by the authorisation granted by another Member State), and the possibility of: (a) general authorisation in respect of a type or category of dual-use goods; (b) global authorisation to a specific exporter in respect of a type or category of dual-use goods which may be valid for exports to one or more specified countries; and (c) simplified authorisations as introduced by Member States for exports of dual-use goods not listed in Annex I of Council Decision 94/942/CFSP;
- referenced Annex I of Council Decision 94/942/CFSP for the list of controlled dual-use goods subject to authorisation and destined outside the EU, and Annex IV for goods subject to intra-community transfers.

The EU did not mean to create a single trade control system implemented by a central EU authority, but to reinforce and harmonise the Member States' systems: indeed, Member States were given the possibility to introduce prohibition to export non-listed goods with a view to pursuing the objectives of the regulation (Article 5), were required to take all appropriate measures to establish direct cooperation and exchange of information between competent authorities (Article 13) and to permit the competent authorities to gather information on transactions involving dual-use goods (Article 15), and to take enforcement measures, including establishing penalties (Article 17).

2.1.3. The second phase: Council Regulation (EC) No 1334/2000

The adoption of the inter-pillar approach to export control of dual-use items (with the regulation based on the Common Commercial Policy and the joint action grounded on the Common Foreign and Security Policy) were criticised immediately after the adoption of the abovementioned acts, including by the Court of Justice of the European Union ([76]): indeed, 'the interdependence between trade and foreign policy makes it increasingly difficult to ascertain the exact degree to which a commercial measure serves a foreign policy objective or has foreign policy implications' ([77]). For this reason, the Commission proposed to abandon this inter-pillar approach ([78]) and include all the matter into a Council regulation to be adopted pursuant to Article 133 (ex 113) of the Treaty establishing the European Community, which directly integrated the provisions of the joint action ([79]). Thus, Regulation (EC) No 1334/2000 ([80]) was approved.

Its most important novelties were:

- the criteria for deciding whether to grant the authorisation were moved from the joint action to the regulation;
- the list of controlled items was moved to Annex I of the regulation and it was established to update it according to the evolution of international and multilateral regimes.

76 Judgment of the Court of Justice of 17 October 1995, *Leifer and others*, Case C-83/94, European Court Reports, p. I-3231, 1995; and Judgment of the Court of Justice of 17 October 1995, *Werner v Germany*, Case C-70/94, European Court Reports, p. I-03189, 1995. See: Wetter, A. (2009), *Enforcing European Union Law on Exports of Dual-use Goods, SIPRI Research Report No 24*, Oxford University Press, Oxford, p. 43.

77 Koutrakos, P. (2000), 'The Reform of Common Rules on Exports of Dual-Use Goods under the Law of the European Union', European Journal of Law Reform 2, No 2, pp. 167–189.

78 Proposal for a Council Regulation (EC) setting up a Community regime for the control of dual-use goods and technology, COM(1998) 257, 15 May 1998. Report to the European Parliament and the Council on the application of Regulation (EC) No 3381/94 setting up a Community system of export controls regarding dual-use goods, COM(1998) 258, 15 May 1998. The Commission aimed to abolish controls over the intra-Community trade of dual-use good, reduce discrepancies among States as regards catch all, allow the free trade of dual-use within the EU, increase cooperation and mutual recognition between national authorities.

79 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 (OJ L 159, 30.6.2000, pp. 1–215).

80 More precisely, Council Decision 94/942/CFSP was repealed by Council Decision of 22 June 2000 repealing Decision 94/942/CFSP on the joint action concerning the control of exports of dual-use goods (OJ L 159, 30.6.2000, p. 218).

Other relevant aspects are shown below.

- The 'dual-use goods' definition was broadened to include 'software and technology, which can be used for both civil and military purposes, and including all goods which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices' (Article 2, paragraph a).
- The notion of 'export' was broadened (Article 2, paragraph b), including re-export and transmission of software or technology by electronic media, fax or telephone to a destination outside the Community.
- The notion of 'exporter' was enlarged, including 'natural or legal person on whose behalf an export declaration is made, that is to say the person who, at the time when the declaration is accepted, holds the contract with the consignee in the third country and has the power for determining the sending of the item out of the customs territory of the Community' and 'natural or legal person who decides to transmit software or technology by electronic media, fax or telephone to a destination outside the Community' (Article 2, paragraph c).
- A Community general export authorisation (CGEA) for certain exports to certain countries (81) was established (Article 6).
- The catch-all clause was extended, providing authorisation for export of non-listed items in case of: (a) a purchasing country or country of destination being subject to an arms embargo and an exporter being informed by authorities that items are or may be intended for a military end-use; (b) the exporter being informed that items are or are intended for use as parts or components of military items listed in the national military list that have been exported from the territory of that Member State without authorisation or in violation of an authorisation; and (c) the exporter being aware of all the mentioned purposes (Article 4). States may also prohibit or impose an authorisation requirement on the export of dual-use items not listed in Annex I for reasons of public security or human rights considerations (Article 5).
- Introduction of a consultation mechanism, according to which a state intending to issue an authorisation will consult other states that denied the license for the same transaction within the previous 3 years (Article 9, paragraph 3).

81 Australia, Canada, Japan, New Zealand, Norway, Switzerland, the United States and countries of eastern Europe applying for EU membership.

2.1.4. The third phase: Council Regulation (EC) No 428/2009

The entry into force of the Lisbon Treaty in 2009 ([82]) brought about the abolition of the EU three-pillar architecture and significant amendments to the two core EU treaties, i.e. the Treaty on European Union and the Treaty of the European Communities, renamed Treaty on the Functioning of the European Union. The Lisbon Treaty included dual-use goods and technologies within the framework of EU trade policy.

Moreover, while at the time of Regulation (EC) No 1334/2000 all the Member States were part of MECRs, this was no longer the case with the enlargement waves in 2004 and 2007 ([83]). Therefore, around 2006 the Commission felt the need to further strengthen the EU system of export controls of dual-use items ([84]).

The legislative process ended with the adoption of a substantial reform, embedded in Council Regulation (EC) No 428/2009 (85).
The main changes of this regulation ([86]) in its last version (with the latest amendments) ([87]) are shown below.

82 The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, which entered into force on 1 December 2009 (OJ C 306, 17.12.2007).

83 Cyprus, Estonia, Latvia, Lithuania, Malta, Slovakia, Slovenia and Romania were not members of the MTCR, and Cyprus was not a member of the Wassenaar Arrangement.

84 See: Proposal for a Council Regulation COM(2006) 829 and Communication from the Commission COM(2006) 828.

85 Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (OJ L 134, 29.5.2009, pp. 1–269). For information about the historical development before the regulation, see Alavi, H. and Khamichonak, T. (2016), 'A European Dilemma: The EU Export Control Regime on Dual-use Goods and Technologies', *DANUBE: Law and Economics Review*, Vol. 7, No 3, pp. 161-172.

86 For the analysis of the regulation, see Michel, Q. (2017), *The European Union Dual-Use Items Control Regime, Comment of the Legislation article-by-article*, ESU Non-Proliferation, June 2017, accessed 31 May 2023 (https://dpc.droit.uliege.be/jcms/service/file/20170704105027_Vademecum-DUV5Rev7.pdf).

87 See all the amendments from Regulation (EU) No 1232/2011 until Commission Delegated Regulation (EU) 2021/1528 at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX %3A02009R0428-20211007, accessed 31 May 2023.

The scope of the regulation was not only export, but also brokering and transit of dual-use items, which were indeed subject to authorisation (Articles 5, 10, 12 and 6). Moreover, a definition of 'technology' was provided (Annex I): 'specific information necessary for the 'development', 'production' or 'use' of goods. This information takes the form of 'technical data' or 'technical assistance'. Technical assistance may take forms such as instructions, skills, training, working knowledge and consulting services and may involve the transfer of technical data.

- The notion of 'export' was broadened to include 'making available in an electronic form such software and technology to legal and natural persons and partnerships outside the Community. Export also applies to oral transmission of technology when the technology is described over the telephone' (Article 2, paragraph 2, point (iii)).
- The CGEA was enlarged to include non-EU transfers of certain items (the list of which was set out in Annex II).
- Four types of licenses under the EU export control regime were provided:
  1) the CGEA allowing exporting certain dual-use items to certain destinations under certain conditions. Six CGEAs were introduced ([88]): exports of some types of dual-use items to identified destinations, exports after repair or replacement, temporary exports for exhibitions or fairs, telecommunications and chemicals;
  2) national general export authorisations issued by Member States to exporters established or resident in the authorising state if they do not overlap with items listed in part 2 of Annex II, and/or meet the requirements set out in the regulation and national legislation;
  3) global export authorisations covering several items in several countries of destination or several end-users;
  4) individual licenses granted by national authorities to an exporter to cover exports of one or more dual-use items to an end-user in a non-EU country.

88 Exports to Australia, Canada, Japan, Liechtenstein, New Zealand, Norway, Switzerland and the United States.

- The catch-all clause for exports as previously formulated was confirmed (now Articles 4 and 8), but it was extended to brokering and transit, leaving the possibility to Member States to require authorisations for brokering and transit of non-listed dual-use items when the broker had been informed or had grounds for suspecting that items were intended for WMDs or if the purchasing country or country of destination was subject to an arms embargo and the broker had been informed of military end-use of those items (Article 5, paragraphs 2 and 3), and if transit occurred for items intended for WMDs, for military end use and to destinations subject to arms embargo (Article 6, paragraph 3).

The EU regime of export control of dual-use items was completed by Council Joint Action 2000/401/CFSR ([89]) concerning the control of technical assistance relating to certain military end-uses: this act established that technical assistance was subject to controls (prohibition or an authorisation requirement) when provided outside the European Community and intended for the production and development of WMDs, and when related to military end uses and provided in countries of destination subject to an arms embargo.

89 Council Joint Action 2000/401/CFSP (OJ L 159, 30.6.2000, p. 216).

2.1.5. The fourth phase: the recast Regulation (EU) 2021/821

Since the Green Paper was published in 2011 (90), the European Commission insisted on an update of Regulation (EC) No 428/2009 and for the need for modernisation. It took more than 10 years to arrive at an accepted version, after the Commission's proposal in 2016 (91) and the Parliament and Council positions in 2018 and 2019.

The new regulation is a 'recast' and thus aims to amend Regulation (EC) No 428/2009, replace all previous versions and introduce new substantial provisions.

In summary, the recast regulation:

- broadens the scope of application, because it covers the control of exports, brokering, technical assistance, transit and transfer of dual-use items (Article 1);
- contains new and updated definitions (e.g. exporter, re-export, technical assistance, supplier of technical assistance, transit, arms embargo, ICP, cybersurveillance items, essentially identical transaction); in particular, as regards the notion of 'exporter', the recast regulation includes 'any natural person carrying the dual-use items to be exported where these dual-use items are contained in the person's personal baggage' (Article 2, paragraph 3);
- insists for the digitalisation of licensing (Article 12, paragraph 2);
- enhances information sharing and transparency (Articles 16 and 26);
- reiterates the catch-all clause with regards to 'exporter has been informed' and 'exporter is aware' cases, expands the hypothesis of 'exporter has grounds for suspecting' referring it not only to the fact of items intended for use in connection with WMDs but also to cases of items to be intended for a military end-use if the purchasing country or country of destination is subject to an arms embargo, and for use as parts or components of military items listed in the national military list (Article 4, paragraphs 1 and 3);

90 European Commission, 'The dual-use export control system of the European Union: ensuring security and competitiveness in a changing world,' Green Paper, COM(2011) 393, 30.6.2011, accessed 31 May 2023 (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex %3A52011DC0393).

91 European Commission, 'Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast)', COM(2016) 616, 28.9.2016 (https://eur-lex.europa.eu/resource.html?uri=cellar:1b8f930e-8648-11e6-b076-01aa75ed71a1.0013.02/DOC_1&format=PDF).

- introduces a catch-all authorisation requirement for the export of non-listed cybersurveillance items in case the exporter has been informed by the relevant authority, are aware or have grounds for suspecting that the items in question are or may be intended for use in connection with internal repression and/or the commission of serious violations of human rights and international humanitarian law (Article 5, paragraphs 1, 2 and 3);
- expands catch-all provisions for reasons of 'public security, including the prevention of acts of terrorism, or for human rights considerations' (Article 9);
- gives Member States the possibility to introduce catch-all clauses for the brokering, transit and technical assistance of non-listed items (Article 6, paragraphs 3 and 4; Article 7, paragraph 3; Article , paragraph 3);
- introduces two new EU general export authorisations, for the intragroup export of software and technology (EU007 – see Annex IIG), and on encryption (EU008 – see Annex IIH);
- adds a 'large project authorisation', which may consist of an individual or a global authorisation and is valid for a duration determined by the relevant authority, but no longer than 4 years, except in duly justified circumstances based on the duration of the project (Article 12, paragraph 3);
- underlines the relevance of ICPs and due diligence obligations: exporters must implement ICPs to obtain global export authorisations (Article 12, paragraph 4);
- introduces specific control measures and compliance by exporters, such as record-keeping and registers (Article 27).

CHAPTER 2

Veronica Vella [92]

2.2. The EU Regulation and the lessons that can be drawn

2.2.1. Introduction

After having examined the historical progression of the EU's dual-use control system, this chapter will provide an analysis of its present state. This will be accomplished by scrutinising the most recently amended legal instrument governing dual-use trade, Regulation (EU) 2021/821 [93]. Specifically, this chapter will address the following key aspects of the EU STC system: (a) scope, including items and operations; (b) procedures; (c) raising awareness and ICP; and (d) enforcement and penalties. This organisational structure will remain consistent throughout the text and will also be applied to sections pertaining to other STC systems.

While many aspects and provisions of the regulation are tailored to the EU's unique structure, others offer valuable insights and potential inspiration for non-EU countries. This aligns with a publication's suggestions that categorise regulation provisions as either 'transposable (reproducible through adaptation

92 See footnote 37.

93 Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), (OJ L 206, 11.6.2021, pp. 1-461).

according to national specificities); inspiring (defining principles: reproducible through adaptation to national control systems); inadequate (but may be relevant)' ([94]). Being aware of the complementarity of the cited study, which primarily focuses on and dissects the provisions introduced or amended by the recast regulation, this chapter will consider the regulation as a whole and will conclude with a final section outlining the lessons that can be learnt from the EU dual-use items trade control system and that can benefit other countries in establishing or fortifying their STC systems.

2.2.2. Regulatory framework and implementation

2.2.2.1. Scope

The regulation establishes the framework and procedures for the control of exports, brokering, technical assistance and transit, along with the transfer of dual-use items within the EU.

The primary rule established by the regulation controls the export of listed dual-use items. Nevertheless, harmonious with this responsibility, there are exceptions that permit the export of non-listed dual-use items, along with other activities extending beyond mere export that involve non-listed dual-use items, under the provision that particular conditions are met. A more comprehensive exploration of these aspects will follow in the subsequent paragraphs.

Regarding the rationale behind these controls, authorisations for specific activities involving either listed or non-listed dual-use items are needed when the operator in question has been informed by the competent authority, is aware of, or has reasonable grounds to suspect that these items could be employed for illicit purposes as follows:

- use related to WMDs;
- military end use, particularly in countries subject to an arms embargo;
- incorporation as components of military items already exported from an EU Member State without the necessary authorisation.

94 Aleksic, B., Caponetti E., Cenolli, K. et al. (2022), *How the new EU Dual-Use Regulation could benefit third countries*, European Studies Unit – University of Liège, Liège, p. 7.

Furthermore, for the export of cybersurveillance items, an authorisation should be required for reasons of public security, encompassing the prevention of acts of terrorism and consideration of human rights.

These measures aim to ensure that the dual-use items do not contribute to activities that pose significant risks to global security, human rights or public safety.

2.2.2.2. Items

The controls stipulated in the regulation are applicable to dual-use items, whose definition is provided in Article 2, paragraph 1 ([95]). This initial definition in the text is very specific, encompassing the various potential applications of these items (e.g. civil and military, explosive and non-explosive) and their diverse possible forms (e.g. goods versus technology).

In addition to the guiding definition, the regulation provides annexes that include lists of dual-use items to be controlled in specific contexts. Each dual-use item in the list is associated with a unique five-digit code (e.g. 3D004). The first digit (ranging from 0 to 9) designates one of the 10 categories in which dual-use items are categorised within the regulation. The second digit (from A to E) specifies the type of item, corresponding to a subcategory. The third digit (from 0 to 4) indicates the international regime governing the respective item.

It is imperative to emphasise that, as mentioned in the previous chapter, the scope of EU control over dual-use items extends beyond those explicitly listed or used in WMDs or military contexts. These can also be non-listed items having a potential end use in connection with internal repression and/or violations of human rights and/or that can also be controlled in the interest of public security, including the prevention of acts of terrorism. This substantiates the application of the catch-all clause, allowing the control of items that are not included in the lists. To trigger the clause, the exporter must have either well-founded suspicions, notifications from competent authorities or knowledge that the items in questions are or may be intended for specific illicit end uses, as delineated by the regulation.

95 The definitions reads: 'dual-use items' means items, including software and technology, which can be used for both civil and military purposes, and includes items which can be used for the design, development, production or use of nuclear, chemical or biological weapons or their means of delivery, including all items which can be used for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices;'

Finally, on the subject of items, an important element in EU legislation is the provision for modifying the list of controlled items, which establishes the procedure for the adoption of legal acts amending the list. In the EU, this competence has been given to the Commission as part of its executive powers.

2.2.2.3. Operations

The operations encompassed by the regulation align with those indicated in its title, as mentioned above. As shown in the previous chapter, these undertakings have not undergone simultaneous control implementation, and the inclusion of activities such as technical assistance within the purview of controls is a recent development. Additionally, the regulation provides comprehensive delineations of the operations and activities falling within its scope.

The first definition of operations provided is the one of export and exporter, which is particularly important given the fact that export is one of the main activities in the trade of dual-use items. First of all, it should be emphasised that the terminology has consistently been aligned with the one contained in the customs code, for example exit summary declaration (in the meaning of export) ([96]). Second, the definition provides specifications such as whether it includes 're-export' (and whether it applies when it occurs during transit). Third, and most importantly, the EU definition emphasises that exports also include 'intangible' transfers of items (including 'making available'). Fourth, it stresses that the exporter can also be a natural person carrying the dual-use items in their personal baggage, so controls cover the transfer of technology when that transfer involves the cross-border movement of persons.

As for brokering, it plays an increasingly important role in strategic trading. The regulation indicates what such a definition includes and excludes. In fact, it includes activities such as negotiating or arranging transactions for the purchase, the sale or supply of dual-use items from one third country to another (or the sale or purchase of dual-use items located in third countries for transfer to another third country), but excludes ancillary services (such as transportation, financial services, insurance or reinsurance, or general advertising or promotion).

96 Many of the changes to definitions brought by the recast regulation were necessary to align the new regulation with the Union Customs Code of 2013 (whereas previously, Council Regulation (EC) No 428/2009 referred to the Community Customs Code of 1992).

Finally, it defines the precise profile or status that operators must have in order to be considered brokers, i.e. a person resident or established in the national territory. The inclusion of such specifications may broaden or narrow the profile of the broker and thus potentially expand or limit the scope of controls.

As mentioned above, the recast regulation has expanded the scope of controls by including technical assistance ([97]). It refers to any technical support or services provided to repair, develop, assemble and otherwise deal with dual-use items, taking a variety of forms – including intangible ones – such as training, advice, instruction and others, also when transmitted by electronic means, for example by telephone. In light of this definition (and the related definition of technical assistance provider), controls also cover the transfer of information to a resident of a third country temporarily present in the customs territory.

A third and important activity in the dual-use trade, as defined in the regulation, is transit. The EU defines it as the 'transport of non-Union dual-use items entering and passing through the customs territory of the Union with a destination outside the customs territory of the Union …'. To be more precise, the definition also specifies the precise circumstances under which transit takes place (when items are placed under a specific external transit procedure, transhipped within a free zone or directly re-exported from a free zone, in temporary storage, etc.). The lack of some specifications may give rise to controversy as to the operations covered by this provision. Finally, it should be noted that transit, unlike export and other activities, may be prohibited at any time but does not necessarily require authorisation.

97 Technical assistance was previously covered by the Council Joint Action of 22 June 2000 concerning the control of technical assistance related to certain military end-uses (OJ L 159, 30.6.2000, pp. 216–217).

2.2.2.4. Procedures

With regard to licencing the dual-use items export, brokering and technical assistance provision, the regulation specifies the types of export licenses that may be issued or established. The five types of licenses are described below.

(1) Individual export authorisations. These are issued by national authorities (for up to 2 years) to an exporter for the export of one or more dual-use items to one end user in a non-EU country.

(1) Global export authorisations. These are issued by national authorities (for up to 2 years) to an exporter for the export of multiple items, to multiple countries and end users.

(1) Union general export authorisations. These are for exports of specific items to specific destinations under certain conditions.

(1) National general export authorisations. These are issued by Member States if they are consistent with existing EU general export authorisations and do not cover the export of dual-use software and technology to certain countries.

(1) Large project authorisations. These are individual or global export authorisations issued to a specific exporter, in respect of a type or category of dual-use items, and remain valid for exporting to one or more specified end-users in one or more specified non-EU countries for the purpose of a specified large-scale project ([98]).

Additionally, the text delineates the period of validity, the prerequisites to be met and the specific details operators must furnish to national authorities. In certain cases, such as authorisations for large projects, national authorities have some discretion in determining validity, although the EU stipulates that these authorisations should not be valid for more than 4 years (with a few exceptions). Concerning the required information, it encompasses various elements, including details about the end user, the intended use of the exported item and descriptions and quantities of the dual-use items.

Furthermore, the regulation sets out the timeframe within which applications for individual or global authorisations must be processed.

98 Dual-use export controls, summary of: Regulation (EU) 2021/821 setting up an EU regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items, EUR-Lex, accessed on 6 September 2023 (https://eur-lex.europa.eu/EN/legal-content/summary/dual-use-export-controls.html).

With regard to customs formalities, details and requirements are defined in the regulation. The text also specifies that these formalities can only be completed at the authorised customs office. Furthermore, Member States may develop guidelines to support inter-agency cooperation between licensing and customs authorities. This is particularly important where regulations allow states to prohibit an export if they have reason to believe that relevant information was not taken into account when the licence was granted, if there has been a material change in circumstances since the licence was granted or if they have relevant information about potential illicit trafficking.

Finally, operators are required to keep detailed records of their exports. It is important to specify not only this requirement, but also the specific period for which these records must be kept (i.e. at least 5 years) and the specific information required (e.g. description and quantity of dual-use items, end use and end-user of dual-use items). The regulation also underlines that the competent authorities are empowered to collect information on any order or transaction involving dual-use items and to determine whether the export control measures are being properly applied.

2.2.2.5. Raising awareness and ICP

Providing guidelines, recommendations, training and other forms of support is crucial in a system where operators' compliance plays a pivotal role. The EU actively participates in these efforts, also ensuring the timely and transparent communication of laws, regulations and administrative procedures, which is undeniably crucial. Moreover, the EU publishes an annual report with accurate and comprehensive data on STC, which serves not only to raise awareness but also to enhance transparency. This report benefits both operators and decision-makers, as it provides a clearer overview of the system for informed action.

The EU is actively engaged in raising awareness both internally and externally. Internally, it supports a capacity-building program for EU licensing and enforcement, which includes the development of standardised training programmes for Member State officials. Furthermore, the EU offers guidelines for implementation and encourages the Member States to do the same. Externally, the EU endeavours to raise awareness in non-EU countries, aligning with its goal of fostering global convergence of controls through dialogue and collaboration with these nations. Such cooperation may involve sharing information, best practices, outreach initiatives and capacity building. Mechanisms like mutual administrative assistance agreements, customs protocols or mutual recognition agreements relating to dual-use export controls can significantly facilitate the effective implementation and operation of STCs.

A relevant tool to raise awareness and facilitate compliance is the ICP. The recast regulation introduced the definition of the ICP by dedicating an article to it for the first time ([99]). As the ICP is becoming an increasingly important element in STC systems, the fact that a definition is provided may further attract the attention of operators and clarify what is expected from them in this respect. The regulation also establishes the obligation to implement an ICP in order to use global export authorisations. It requires Member States not only to implement such an obligation, but also to define reporting and ICP requirements at the national level. It is noteworthy that the regulation recognises the specificities of different actors and provides guidelines to help them find their own solutions for compliance, taking into account differences in size, resources, scope of activities, etc. The regulation and the accompanying guidelines explicitly avoid the 'one-size-fits-all' approach. The EU issued recommendations on ICP particularly oriented to industry in 2019 ([100]) and guidelines mostly dedicated to research organisations in 2021 ([101]). As mentioned in the regulation, these guidelines aim at achieving a level playing field between exporters and to enhance the effective application of controls.

The regulation also establishes the mandatory implementation of an ICP as a prerequisite for using global export authorisations. It mandates Member States to implement this requirement and to define reporting standards at the national level. Importantly, the regulation recognises the diversity among different actors and offers guidelines to help tailor compliance solutions according to individual circumstances, such as variations in size, resources and scope of activities.

99 Article 2(21) of the regulation reads: 'internal compliance programme' or 'ICP' means ongoing effective, appropriate and proportionate policies and procedures adopted by exporters to facilitate compliance with the provisions and objectives of this Regulation and with the terms and conditions of the authorisations implemented under this Regulation, including, inter alia, due diligence measures assessing risks related to the export of the items to end-users and end-uses;'.

100 Commission Recommendation (EU) 2019/1318 of 30 July 2019 on internal compliance programmes for dual-use trade controls under Council Regulation (EC) No 428/2009 (OJ L 205, 5.8.2019, pp. 15–32).

101 Commission Recommendation (EU) 2021/1700 of 15 September 2021 on internal compliance programmes for controls of research involving dual-use items under Regulation (EU) 2021/821 of the European Parliament and of the Council setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (OJ L 338, 23.9.2021, pp. 1–52).

2.2.2.6. Enforcement and penalties

The enforcement and penalties for infringement of the dual-use regulation lie in Member States' competences. In fact, the regulation clearly calls on Member States to take appropriate measures to ensure the proper enforcement of the regulation and lay down penalties that shall be 'effective, proportionate and dissuasive'. These penalties apply to infringement of the regulation's provision or of those adopted for its implementation ([102]).

Enforcement and infringements may vary significantly among different Member States. For example, they can be either criminal or administrative ([103]). Nevertheless, it is crucial to highlight that the competent authorities and enforcement agencies of each Member State are mandated to engage in information-sharing and cooperation. To facilitate this, the EU has instituted the enforcement coordination mechanism under the auspices of the Dual-Use Coordination Group. This mechanism streamlines the confidential exchange of information, allowing for the sharing of national best practices concerning risk-based audits, the identification and prosecution of unauthorised dual-use item exports and potential infringements of both the regulation and pertinent national legislation. The enforcement of controls and in particular the number of infringements and penalties are provided in the annual report.

102 Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), Article 25.

103 Michel, Q., Caponetti, L., Pulita, T. and Vella, V. (2020), 'The European Union Dual-Use Items Control Regime – Comment of the Legislation Article-by-Article', European Studies Unit – University of Liège, Liège.

2.2.3. Can any lessons be drawn?

Notwithstanding the specific and unique nature of the EU, some lessons can be drawn from the regulation establishing controls on trade in dual-use items that may apply to non-EU countries.

In light of the above, it appears imperative to clearly define the scope of controls, the activities covered and the rationale for their implementation. These elements must be determined and assessed not only in the light of national priorities and international commitments that Member States have decided to undertake, but also in response to the unique and rapidly evolving nature of trade in dual-use items.

A second, important lesson emphasises the need for clear and continuously updated delineations of subjects and definitions. Throughout the years, the EU has vigilantly tracked the evolution of dual-use items trade and the associated challenges and has actively sought solutions. For instance, it has expanded the scope of its controls to encompass activities like technical assistance and has broadened the definitions and lists of dual-use items.

All STC systems stakeholders should remain vigilant, adapting to the ever-evolving landscape of strategic trade, innovations and critical considerations. In this regard, the EU's approach to amending the list of controlled items can serve as an inspirational model. Delegating such authority to the executive branch can enhance the system's agility and responsiveness, particularly given the periodic need for list amendments, driven by evolving obligations, commitments and emerging threats.

Regarding the definitions of activities and lists of dual-use items, the EU's practice underscores three key points. First, it emphasises the significance of clearly defining and elucidating these items within national legal and political frameworks. These items constitute the focal point of the controls upon which the entire system relies. Second, it underscores the importance of specifying not only whether these items encompass software and technology, but also their potential applications. Clarity in this area is critical for all stakeholders, especially operators and national authorities, in order to understand whether controls extend to intangible transfers. Third, with regard to activities, the

EU showed the importance of aligning the terms of the regulations with the customs code. This is an important aspect to consider when establishing or strengthening an STC system, given the crucial role of customs in the enforcement of controls. Regarding export, explaining whether it encompasses intangible transfers ('making available') and/or natural persons carrying dual-use items in their personal baggage, can be particularly relevant for those operators, such as research institutes and academia, that are mainly involved in intangible transfers (e.g. scientific collaborations) or transfers involving cross-border movement (e.g. a researcher travelling with a computer containing controlled software or technology). Consequently, extending the scope of controls to intangible transfers would help improve the detection and prevention of illicit trade, as this is an important aspect of it.

While export is the primary activity addressed by any STC system, albeit with varying approaches, the same may not hold true for technical assistance. Nonetheless, technical assistance is a significant operation within the realm of strategic trade. Dual-use items frequently necessitate technical intervention for assembly, operation, maintenance and more. Furthermore, it is imperative to acknowledge the impact of evolving technologies and consequently integrate controls on various forms of assistance communicated electronically. Clear definitions are essential to distinguish between technical assistance and technology transfer, as these two distinct items call for different procedures.

A fourth lesson underscores the importance of establishing transparent licensing procedures. This involves defining not only the various types of accessible authorisations, but also delineating the process, required documentation and prerequisites for requesting and potentially obtaining such an authorisation. In certain 'safe' circumstances, facilitating trade through these procedures can be vital in ensuring the efficient and unhindered flow of commerce.

Fifth, it is imperative that outreach efforts are undertaken by each Member State to the best of its abilities, with an unwavering commitment to enhancement. In STC systems, raising awareness, including the implementation of ICP, transparency, and outreach, holds a pivotal role. These aspects contribute to a more effective system, where operators are not left to navigate it alone, and national authorities have access to data and information to continually enhance the systems and meet stakeholders' needs.

Collaboration with non-EU countries is a crucial and strategic dimension to consider, as it can streamline and enhance controls on activities spanning multiple nations. Moreover, assisting other countries in fortifying their systems contributes to a level playing field and bolsters the overall effectiveness of international efforts to combat illicit strategic trafficking.

Finally, on administrative cooperation, implementation and enforcement, general lessons can be drawn despite the fact that these are closely linked to the raison d'être of the EU and its complex institutional architecture. These relate, once again, to the central role of cooperation between agencies, national licensing authorities and institutions in an effective STC system.

PART 3

Partner countries' STC systems

CHAPTER 1

Nabil Boubrahimi ([104])

3.1. Morocco

3.1.1. Introduction

Morocco is diligently supporting all actions to enhance cooperation with its partners, especially in the economic and trade fields. Morocco gives special attention to these relationships across numerous measures, like the signing of many agreements on preferential trade and by participating in almost all multilateral economic and trade initiatives.

Morocco adopted a policy for strengthening its presence in international trade through early accession to the multilateral trade system. Many regulations have also been established for more trade liberalisation and to improve the business and investment climate.

In this perspective, Morocco is actively engaged in the modernisation and enhancement of its legal system so as to fit constructively into the efforts of the international community for the pacification of trade relations.

In this regard, particular attention is paid to strengthening the measures and levers for controlling and supervising trade in dual-use products. Because of their nature, exports of dual-use items are subject to authorisation. The purpose of the export control is to contribute to the prevention of the spread of WMDs and to prevent unwanted military use of the items. The existence of effective

104 **Nabil Boubrahimi** holds a PhD in Economics and currently serves as a Professor of Higher Education at Ibn Tofail University in Kenitra. He is an Associate Expert at the Institut Royal des Etudes Stratégiques and the Institut Marocain de l'Intelligence Stratégique. Mr. Boubrahimi also works as a consultant for several international organisations (ILO, UNDP, ADB, ITC, CEA-UN, CUTS International). He is a FIATA-certified trainer in international trade procedures (customs and transit) and an ITC-certified advisor on international small and medium enterprises development.

export control regimes means that Moroccan companies can purchase goods and technologies manufactured elsewhere that are subject to controls. It follows that the strategic orientations of Morocco largely adhere to existing partnership programmes such as the EU P2P.

At the beginning of 2000, Morocco was one of the first countries in its region to initiate the elaboration of an STC system. The process was lengthy and required an increase in the interest and commitment of all concerned authorities. The adoption of the Moroccan STC system has paved the way for other countries in the region.

3.1.2. Context

Morocco supports the efforts of the international community in the field of disarmament and non-proliferation of WMDs and related materials, equipment and technologies, along with the UN process in this area. Morocco is making considerable efforts to apply best practices in controlling the trade in dual-use items and to put in place the necessary measures to ensure compliance with its international obligations, in particular the requirements of the UNSCR 1540. In fact, Morocco actively interacts with several regional and international initiatives aimed at regulating and controlling dual-use products, and the country considers cooperation as a key entry point with regard to the issues linked to this area. Morocco has ratified several international conventions, including the BTWC on 21 March 2002, the CWC on 28 December 1995 and the NPT on 27 November 1970. However, it should be noted that despite its multilateral commitments, Morocco is not yet a member of the five MECRs which have been established by the main states producing and exporting dual-use goods and technologies with the aim of harmonising their export policies for these items and filling the gaps in international treaties in this respect.

3.1.3. Regulatory framework and implementation

3.1.3.1. Process

It is within this framework that Morocco adopted Law No. 42-18 on the control of the export and import of dual-use goods, both civil and military, and related services, promulgated by dahir (105) No 1-20-83 of 19 November 2020 (106).

The text of Law No. 42-18 on the control of exports of dual-use goods and related services, as stated in Article 1, establishes the regulatory framework for the export of dual-use goods and services in alignment with the international commitments of the Kingdom of Morocco. To this end, and without prejudice to the application of any other legislative or regulatory provision relating to the export of goods or services, it determines the system for controlling exports and, where applicable, the transit of dual-use goods and related services, and sets out the obligations of exporters of such goods and services. It also provides for the creation of a commission for dual-use goods and related services to ensure the consistency and durability of the control system adopted.

The implementation of this law is dictated by the need to fulfil Morocco's international commitments in combating the proliferation of WMDs.

It should be noted that these multilateral instruments, to which Morocco has acceded, impose an obligation on State Parties not to transfer to anyone and not to assist, encourage or induce any state or non-state organisation to manufacture such agents, toxins, weapons, equipment and their means of delivery.

105 A dahir is a royal decree or edict issued by the King of Morocco.

106 For more details, see the text of the law on the website of the Secretariat General of the Government of Morocco, available at the following link: http://www.sgg.gov.ma/Portals/0/BO/2020/BO_6944_Fr.pdf.

3.1.3.2. Scope

The initiative to establish a legislative framework for export control in Morocco was driven by the need to have a legal arsenal in place to control the export of dual-use goods and related services, in line with Morocco's international commitments, and particularly in accordance with the UNSCR 1540, in order to contribute to international security by ensuring the legitimate use of these goods. This initiative was carried out with the support and technical assistance of the EU P2P ([107]) and the United States Export Control and Related Border Security Assistance program (US EXBS).

It should be noted that the development of the Moroccan legal system was initiated in an environment where the export and import of dual-use items were unrestricted. The exception was maintained for goods governed by specific texts, such as Law No. 13-89 on foreign trade. For instance, this law subjected chemical products to export and import restrictions, in accordance with the relevant international convention governing these products.

The development of this system has been progressing since 2010, with the creation of an ad hoc inter-ministerial commission to examine the Moroccan legal system for controlling trade in dual-use items. The members of this commission ([108]) are:

- Ministry of Foreign Trade;
- Ministry of Foreign Affairs and Cooperation;
- Ministry of the Interior;
- Ministry of Trade and Industry;
- Ministry of Energy and Mines;
- National Defence Administration;
- General Directorate of National Security;
- Customs Administration and indirect taxes;
- Royal Gendarmerie;
- National Center of Radioprotection;
- Moroccan Agency for Nuclear and Radiological Safety and Security;
- National Center for Nuclear Energy, Science and Technology.

107 The EU P2P aims to facilitate long-term cooperation in the field of export control of dual-use goods in several partner countries in Africa, Asia and Europe.

108 This commission, chaired by the government authority, is in charge of foreign trade. The secretariat of the commission is provided by this department.

It should be emphasised that the control of dual-use items, given their specific security requirements, involves all administrations and organisations related to regulation and border control. Thus, the national regulatory framework sets up a dual-use goods commission, which is the competent body to examine and provide its opinion on all actions relating to authorisations (application, modification, re-examination, etc.). This commission is made up of all administrations and organisations involved in regulation and border control (as listed above). More specifically, the commission is responsible for giving its opinion on the granting and amendment of export licences for dual-use items and/or related services and on drawing up and updating the list of dual-use items.

It decides on requests for review and proposes measures likely to contribute to the proper application of this law and the texts adopted for its application.

Finally, the commission gives its opinion on any draft legislative or regulatory text relating to dual-use goods and examines any question submitted to it by the competent authority in the area of dual-use goods or related services.

3.1.3.3. Items

Law No. 42-18 applies to dual-use items. Pursuant to Articles 13 and 14, the regulations contain a system of catch-all provisions. These provisions ensure the possibility of applying an export license to a dual-use item that is not listed as such if the competent authority considers that the item may contribute, in whole or in part, to the design, production, handling, transportation, operation, maintenance, storage, possession, detection, identification or dissemination of WMDs or their means of delivery. Likewise, if an exporter is aware that a good not listed as a dual-use item, which they intend to export, may contribute to the design, production, handling, transport, operation, maintenance, stockpiling, possession, detection, identification or dissemination of WMDs or their delivery systems, they must inform the competent authority, which will decide whether the export of the item in question requires an export license.
Apart from these two articles, no activity other than exporting is covered by catch-all clauses.

3.1.3.4. Operations

Concerning the scope of application of the Moroccan system for controlling trade in goods dual-use items, as stated earlier, Morocco has adopted Law No. 42-18 on the control of the export and import of dual-use goods, civil and military, as well as services, and its implementing decree No 2.21.346 ([109]). These legislative and regulatory texts cover dual-use goods, technologies and related services. Military items, however, are not governed by these regulations, but rather by Law No. 10-20 concerning defence, security materials and equipment, weapons and ammunitions. At the end of June 2021, Law No. 10-20 came into force in Morocco, with the publication of implementing decree No. 2.21.405 in the Official Journal.

Regarding the activities and operations governed by the legislative and regulatory texts relating to dual-use products, article 2 of Law No. 42-18 specifies the operations covered by Moroccan legislation on the control of trade in dual-use goods. These operations concern the export, import and transit of dual-use goods, technology transfer and related services such as brokering, and technical assistance relating to dual-use items.

The national control list for dual-use products is currently being drawn up and adopted by the national commission for dual-use goods. It will be established by order of the Minister for Foreign Trade. In principle, this list will be drawn up on the basis of the EU list as an international benchmark and with due respect for the specific nature of Morocco's economy and foreign trade.

109 For more details, see the text of the decree on the website of the Secretariat General of the Government of Morocco, available at the following link: http://www.sgg.gov.ma/BO/FR/2873/2022/BO_7114_Fr.pdf.

3.1.3.5. Procedures

The licensing process is illustrated below.

- Licenses for the export or import of dual-use goods and related services are granted by the competent authority after obtaining the commission's assent.
- The exporter submits the license application to the department in charge of foreign trade, either physically or electronically, against a receipt.
- After examination, the department in charge of foreign trade forwards the license application to the dual-use goods commission for its opinion, within a period not exceeding 10 working days from the date of receipt of the complete and compliant file.
- The commission has a period not exceeding 30 working days from the date of referral to give its opinion on the export license application; the commission's opinion is immediately notified by its chairman to the government authority in charge of foreign trade.
- Upon receipt of the commission's opinion, the governmental authority in charge of foreign trade notifies the applicant of the export license within a period not exceeding five working days, or otherwise notifies the applicant of the reason of the refusal to issue the export license.

In addition, article 11 of Law No. 42-18 provides for the possibility of amending a valid export license at the initiative of the competent authority or at the request of its beneficiary, with the assent of the commission, when one or more of the abovementioned criteria change.

In addition, article 12 of the same law provides for the possibility of requesting reconsideration of the competent authority's decision in cases of refusal to issue or modify an export license, withdrawal of an export license or modification of an export license initiated by the competent authority.

It should be noted that licences can also be cancelled, suspended or revoked.

For dual-use licensing procedures, the import and export of dual-use items are subject to a prior licensing procedure. Licensing is based on the following conditions and criteria, set out in article 10 of Law No. 42-18:

- Morocco's ratified commitments under international treaties, conventions and agreements on the non-proliferation of WMDs;
- considerations relating to the internal or external security of the state;
- considerations relating to the intended end use of the good or service for which the export license is requested;
- the capacity of the country of destination to ensure the end use of the good or service, considering whether it has legislation or regulations in place to control the export of dual-use goods or related services.

The assessment of license applications takes into account the international sanctions applied by the state as one of the criteria for issuing licenses, in line with the implementation of Morocco's international commitments in this regard.

It should be noted that for exports, regulations distinguish between three types of licenses.

(1) Individual export license. A license issued to a specific exporter for the export of a dual-use item on the above-mentioned list, or of one or more services related to dual-use items, for a single final consignee in the country of destination.

(1) Global export license. A license issued to a specific exporter, for the export of a category of dual-use goods on the aforementioned list or for one or more services related to dual-use goods, for one or more final consignees in one or more destination countries.

(1) General export license. A license issued to a specific exporter for the export of one or more categories of dual-use goods on the aforementioned list, or services related to them, to the countries of destination specified on the list drawn up for this purpose by the regulation.

For imports, and for reasons of internal national security, a licence is required for dual-use goods. This is a specific feature of Moroccan law, which provides for this type of import licence for dual-use products.

3.1.3.6. Raising awareness and ICP

The law and its implementing decree do not provide for an ICP requirement. The committee considered that operators should not be required to comply with this procedure in the first instance, but noted that each operator can comply with the ICP according to its human capacity and financial resources. Support is needed to ensure compliance in the years ahead.

Raising operators' awareness of the need to improve their system for controlling any dual-use products they may place on the market is planned by the national authorities as the system is gradually implemented. Meetings are planned by the commission at the appropriate time to ensure the success of this programme.

3.1.3.7. Enforcement and penalties

It should be noted that the application of Law No. 42-18 imposes obligations on exporters and importers of dual-use goods and providers of related services, along with penalties for breaches of the provisions of the law.

Without prejudice to the stipulations outlined in the Penal Code and the Customs and Indirect Taxes Code, the law imposes fines on individuals or entities engaged in the export or import of dual-use items or related services under the following circumstances: (a) without a license; (b) with an export license obtained based on inaccurate or falsified documents; or (c) to a country or importer other than those specified on the export license. The fines for such violations range from MAD 500 000 to 5 000 000. Furthermore, the law imposes fines, ranging from MAD 5 000 to 500 000, on the beneficiary of an export or import license who fails to: (a) maintain the export or import license and its accompanying documents; (b) submit the required reports to the competent authority as mandated by the law; (c) submit the semi-annual reports as prescribed by the law; or (d) comply with the record-keeping requirements, following the specified procedures.

The law specifies that the amount of the fine can be determined considering the nature of the offense, the item's classification in the national list and the intended use of the item. In the event of a breach of these provisions, the law authorises the seizure of the relevant items, following the procedures outlined in the law related to criminal procedure. Upon conviction, the confiscated items will be forfeited for the benefit of the state.

CHAPTER 2

Janice Sacedon-Dimayacyac [110]

3.2. The Philippines

3.2.1. Introduction

Situated in South-East Asia, the Philippines is an archipelagic state consisting of more than 7 600 islands. Among the country's policies for ensuring the effective implementation of strategic trade management is the implementation of import controls, a practice that is not commonly observed in many nations worldwide. The adoption of such measures is primarily due to the Philippines' vulnerable geographic location, porous borders and the presence of local terrorists. By imposing import controls, the country can ensure the safety and security of its citizens by preventing the entry of items that could potentially be utilised in the development of WMDs. It is also worth noting that the Philippines is the first Association of Southeast Asian Nations (ASEAN) Member State to ratify the Arms Trade Treaty. This treaty obligates the country to regulate the import of conventional weapons, thereby ensuring compliance with its obligations under the agreement.

110 **Atty. Janice Sacedon-Dimayacyac** is a highly respected legal professional who has made significant contributions to the Strategic Trade Management Office (STMO) in the Philippines. Serving as the Director of the STMO, she played a pivotal role in drafting the implementing rules and regulations of the Strategic Trade Management Act (STMA) of 2015. Additionally, she established inter-agency protocols and developed licensing and enforcement systems to ensure the effective implementation of the law. With her extensive experience in law and the judiciary, including her work for the Supreme Court of the Philippines, the Court of Tax Appeals and PricewaterhouseCoopers, she has proven to be an invaluable asset to the Philippines in its ongoing efforts in the area of strategic trade controls. Atty. Sacedon-Dimayacyac's leadership and expertise have been critical to the Philippines' success in implementing the STMA.

3.2.2. Context

Republic Act No 10697 ([111]), otherwise known as the Strategic Trade Management Act (STMA), emerged from a confluence of factors that led to the country's regulation of strategic goods.

Disarmament as a Philippine state policy is enshrined in Article II, Sections 2 ([112]) and 8 ([113]) of the 1987 Constitution. These legal provisions serve as the constitutional foundation for the Philippines' approach towards disarmament and its commitment to the different non-proliferation treaties to which it is a Member State party, such as the NPT, CWC and BTWC. In keeping with this constitutional mandate, the STMA's policy declaration states that the Philippines shall be free from WMDs within its territory, in accordance with its national security interest and international commitments and obligations, including the UNSCR 1540 ([114]).

While the Philippines is not a member of any of the MECRs, it has identified the need to adopt the UNSCR 1540 to address gaps in its implementation of existing non-proliferation treaties, particularly for non-state actors. This gap was clearly established in the cases of Parviz Khaki ([115]) and Daniel Frosch ([116]). Khaki and Frosch were both arrested in the Philippines in 2012 and were identified as part of a proliferation network that provides a sanctioned country with nuclear-related materials in violation of UN Security Council resolutions. This brought to light the urgent necessity for a strategic trade management system in the Philippines to safeguard the country from being used as a hub for proliferators.

111 An Act Preventing the Proliferation of Weapons of Mass Destruction by Managing the Trade in Strategic Goods, the Provision of Related Services and for Other Purposes.'
112 Section 2. The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations.
113 Section 8. The Philippines, consistent with the national interest, adopts and pursues a policy of freedom from nuclear weapons in its territory.
114 See Section 2 of the STMA.
115 United States Department of Justice, 'Two Indicted for Alleged Efforts to Supply Iran with U.S.-Materials for Gas Centrifuges to Enrich Uranium', 13 July 2012, https://www.justice.gov/opa/pr/two-indicted-alleged-efforts-supply-iran-us-materials-gas-centrifuges-enrich-uranium.
116 Gillard, N. (2015), 'Catch Me if you Can: The Illicit Trade Network of Daniel Frosch', Proliferation Case Study Series, Project Alpha, King's College London, pp. 14–17.

There is also an economic rationale for having a strategic trade management regime in the country. Long before the enactment of the STMA, the Philippines was a major exporter of semiconductor and electronic products. As a result, it had to position itself with like-minded countries that have implemented export controls to enable local businesses to expand. Now, with a strong strategic trade management regime in place, the country seems to have experienced a sharp increase in the export value of strategic goods since the STMA's implementation in 2019, i.e. USD 3.6 million in 2020, USD 4.5 billion in 2021 ([117]) and USD 13.9 billion in 2022 ([118]).

3.2.3. Regulatory framework and implementation

3.2.3.1. Process

International partners helped to kickstart and support the process of establishing a legislative framework for strategic trade management in the Philippines. The country received assistance from the EU P2P, Japan's Ministry of Economy, Trade and Industry, and the US EXBS.

As early as 2005, the Office of the Special Envoy on Transnational Crime held a series of inter-agency consultations to develop national legislation on strategic trade management. The draft legislations were filed in both the House of Representatives and the Senate during the 14th (2009), 15th (2010) and 16th (2013) Congresses. After reaching an impasse during the 15th Congress, the Presidential Legislative Liaison Office (PLLO) conducted a series of inter-agency consultations to develop a consensus bill on strategic trade management ([119]).

On 28 January 2015, the PLLO completed the consensus bill on strategic trade management and became the version approved by the 16th Congress. It is the outcome of the PLLO's initiative with other executive department offices such as the Department of Foreign Affairs, Department of Justice, Department of

117 Louella Desiderio, 'Strategic goods exports surge to $4.5 billion in 2021', the Philippine Star, 22 February 2022, https://www.philstar.com/business/2022/02/22/2162375/strategic-goods-exports-surge-45-billion-2021.
118 Data for 2022 has been internally released by the Strategic Trade Management Office (STMO).
119 Pabeliña, K. M. G. (2016), 'The Strategic Trade Management Regime in the Philippines', *Strategic Trade Review*, Vol. 2, No 2, pp. 121–125.

Agriculture, Department of Trade and Industry, Department of the Interior and Local Government, Department of Budget and Management, Armed Forces of the Philippines, Philippine National Police and the Anti-Terrorism Council – Program Management Center ([120]).

Following a decade of diligent work, the STMA was signed and passed into law on 13 November 2015.

The enactment of the STMA was only the beginning of the journey towards the implementation of an STC system in the Philippines. The next steps involved the drafting and publishing of the implementing rules and regulations (IRR) and the establishment of the regulatory office – the Strategic Trade Management Office (STMO).

In 2016, an IRR committee, composed of the members and supporting agencies of the National Security Council – Strategic Trade Management Committee (NSC-STMCom) ([121]), was established to review and finalise the draft IRR. The NSC-STMCom is a high-level council that acts as the central policymaking body for all matters relating to strategic trade management. It is composed of the Office of the Executive Secretary as Chairperson, the Department of Trade and Industry as Vice-Chairperson and the following departments as members of the council: Foreign Affairs, Justice, National Defense, Interior and Local Government, Finance, Transportation, Information and Communications Technology, Environment and Natural Resources, Science and Technology, Agriculture, Health and the National Security Council. The STMO ([122]) and the Anti-Terrorism Council – Program Management Center ([123]) spearheaded the IRR Committee. At the time, the draft IRR did not include, for the most part, registration and authorisation procedures, guidelines on administrative penalties, procedures for filing and reviewing of appeals or details on mutual legal assistance, among others.

120 Pabeliña, K. M. G. (2016), 'The Strategic Trade Management Regime in the Philippines', p. 125.
121 See Section 6 of the STMA.
122 See Section 8 of the STMA.
123 The Anti-Terrorism Council – Program Management Center serves as the secretariat of the NSC-STMCom.

For nearly 2 years, the IRR committee drafted the IRR after benchmarking with the STC systems of the EU and countries like Japan, Korea, Malaysia, Singapore, the United Kingdom and the United States to align STMA implementation with global best practices. As an annex to the IRR, it was also proposed and approved by the IRR Committee that the Philippine control list, referred to as the National Strategic Goods List (NSGL), be modelled after the control list of the EU.

After conducting a public consultation to obtain and integrate private-sector input, the final version of the IRR and NSGL were submitted to the NSC-STMCom for approval. Accordingly, on 31 August 2017, the NSC-STMCom approved the IRR and the NSGL during its council meeting. However, it took another year to obtain all the signatures of the 14 cabinet members of the NSC-STMCom and address the issues raised by the principals, such as overlapping regulatory jurisdiction and the lack of an inter-agency coordination mechanism for implementing the STMA. Finally, following the resolution of these issues, the IRR and the NSGL were published in the Official Gazette on 25 September 2018.

3.2.3.2. Items and operations

The STMA applies to any natural or juridical person who engages or intends to engage in the cross-border trade of strategic goods, particularly export, import, transit, transhipment, re-export, reassignment and the provision of related services. Related services refer to brokering, financing, transporting and technical assistance ([124]). The STMA also has extraterritorial jurisdiction over all Filipino persons who provide these types of services, wherever they are located. Given the number of activities covered under the STMA, the STMO adopted a phased implementation to give the industry ample time to adequately comply with the requirements of the legislation ([125]). The implementation timeline is as follows: export in 2020, transit and transhipment in 2024, reexport and reassignment in 2025, provision of related services in 2026 and imports in 2028.

The STMA has also established the NSGL, which lists strategic goods that fall within the STMO's regulatory jurisdiction. The NSGL is reviewed and updated annually upon the recommendation of the STMO, with the concurrence of the Sub-Committee on Technical Reachback and approval of the NSC-STMCom. The NSGL is composed of Annex 1 (Military goods), Annex 2 (Dual-use goods), Annex 3 (Nationally controlled goods) and any unlisted goods subject to end use/catch-all controls as provided for under Section 11 of the STMA.

124 See Section 5(t) of the STMA.
125 Department Administrative Order No 19-07: Guidelines on the Implementation of the STMA.

Annexes 1 and 2 were derived from the control list of the EU. Annex 3, on the other hand, is the Philippines' own control list and covers items placed under unilateral controls by reason of national security, foreign policy, anti-terrorism, crime control and public safety. Currently, Annex 3 covers the export, import, transit and transhipment of items, software and technology coming from or bound to Iran and North Korea (DPRK).

Corollary to this, the STMO issued Memorandum Circular (MC) No 21-06 ([126]) on the implementation of brokering and financing under the STMA. The circular strictly prohibits any person from engaging in brokering or financing activities if the parties involved in the transaction is a designated person under UNSCR 1718 or UNSCR 2231, any entity owned or controlled by a designated person, any individual or entity who acts on behalf of or under the direction of a designated person, or any person in the DPRK or who is a national of the DPRK. The inclusion of items in Annex 3 and the issuance of MC No 21-06 are measures to comply with the requirements of the Financial Action Task Force on targeted financial sanctions relating to proliferation financing.

With respect to unlisted items subject to the STMA's end use/catch-all controls, the STMO issued MC No 21-35 ([127]) to guide the industry and the public on how to verify if the export, re-export, reassignment, transit and transhipment of unlisted goods and related services are subject to end use/catch-all controls pursuant to the conditions set forth under Section 11 ([128]) of the STMA. The circular includes a commodity watch list which enumerates items below the technical parameters provided under the NSGL but that may be used for WMDs or military-related activities. More recently, as some servomotors manufactured in the Philippines were used as unmanned aerial vehicle components in conflict areas, the STMO issued MC No 23-06 ([129]) to cover the export of servomotors under its end use/catch-all controls.

126 Implementation of Financing and Brokering under Republic Act No 10697, otherwise known as the Strategic Trade Management Act (STMA).
127 Guidelines on end-use or catch-all controls.
128 See Section 11 of the STMA.
129 Individual Export Authorization for the Export of 'Servomotor' Pursuant to Section 11 of the STMA.

3.2.3.3. Procedures

Registration and authorisation are the two mandatory steps before any person can engage in the trade of strategic items in the Philippines. Registration is the first step before an exporter, importer or broker may apply for an authorisation or a governmental end-use assurance ([130]) from the STMO. Authorisation, on the other hand, refers to an individual, global or general license issued by the STMO prior to engaging in the export, import, re-export, reassignment, transit or transhipment of strategic items and provision of related services.

An 'individual authorisation' is a license issued to engage in any of the covered activities under the STMA with respect to one end user or consignee. This type of license can cover several NSGL codes and is valid for 2 years. An individual authorisation is processed within 30 calendar days after complete submission of all the necessary information or documents to the STMO.

A 'global authorization', on the other hand, is a license granted to engage in the STMA-covered activities with respect to several end users and/or countries of destination. This type of license also covers several NSGL codes, is valid for 5 years and requires an ICP ([131]). Based on the number of strategic items and countries of destination to be assessed, a global authorisation is evaluated for a maximum period of 90 calendar days.

Lastly, a 'general authorisation' is a license that lists specific strategic items, countries of destination and conditions that exporters must comply with when using the authorisation, such as registration, submission of an annual report and recordkeeping. This type of authorisation is valid for a lifetime, unless revoked or amended by the STMO. To date, the STMO has already issued two types of General Export Authorization – GEN-2022-A ([132]) for the repair, maintenance or replacement and GEN-2022-B ([133]) for export after repair of certain strategic goods.

The STMA also provides for exemptions from the authorisation requirement when it pertains to the import and temporary export of strategic goods by the Philippine military or police, including export, transit and transhipment in

130 See Section 4(k), Rule I of the STMA IRR.
131 See Section 4(m), Rule I of the STMA IRR.
132 General Export Authorization Certificate for Repair, Maintenance, or Replacement of Certain Strategic Goods.
133 General Export Authorization Certificate for After Repair of Certain Strategic Goods.

connection with a military, peacekeeping, government humanitarian mission or in connection with law enforcement activities ([134]). Correspondingly, the STMO issued MC No 22-02 ([135]) to guide covered persons on the documentary requirements and procedures that they need to follow with respect to STMA authorisation exemptions.

Since the start of its implementation in 2019, the STMO has issued and amended 27 memorandum circulars designed to help the industry comply with the STMA. It also regularly issues sanctions advisories on existing multilateral and unilateral sanctions, in order for the public to exercise due diligence and avoid sanctionable activities. In addition, the STMO has published brochures on commodity classification, restricted party screening guidelines, common red flags / know-your-customer guidelines and others. For the licensing process, the STMO released the Guidelines on Strategic Trade Management Registration and Guidelines on Export Authorization ([136]) to provide a step-by-step guide on how the industry can comply with the STMO's registration and authorisation procedure.

For registration, an applicant is required to submit the standard application form for registration together with additional documentary requirements, such as the relevant license or business permits, a copy of the document appointing the person responsible for STM compliance or an organisational structure. After receipt of these documents, the STMO reviews the application and makes a corresponding decision within 30 calendar days. If additional information or documentation is required, the period for review may be extended for an additional 30 calendar days. If the applicant does not submit the information or documentation requested within the deadline, the STMO may close down the application for registration.

Upon issuance of the registration certificate, the registered person can apply for an individual or global authorisation, governmental end-use assurance or use the general authorisation. If a registered entity is eligible to apply for a global authorisation, the STMO will conduct an ICP pre-audit and pre-authorisation checks.

134 See Section 15 of the STMA.
135 Revised Guidelines on STMA Authorization Exemption.
136 See Memorandum Circular 20-06.

During the ICP pre-audit, the STMO will verify whether the company's ICP conforms with the ICP elements prescribed under the STMA. To reduce the 90-day period for processing global authorisations, a pre-authorisation check is also carried out in parallel to the ICP pre-audit. During the pre-authorisation checks, the STMO conducts: (1) a technical review or verification of the commodity classification and appropriateness of the end-use; and (2) a policy review or end-use/end-user screening and country of destination checks based on the risk assessment criteria under the STMA.

When assessing an authorisation application, the STMO takes into consideration the risk assessment criteria stated under Section 6, Rule IV of the STMA IRR. These criteria set out the different grounds for the STMO's refusal or denial to issue an authorisation or governmental end-use assurance, such as when the strategic goods will be exported to an individual, entity or country subject to UN sanctions or embargoes. On the other hand, the criteria enumerate the different risk assessment factors that the STMO takes into consideration in assessing whether to grant an authorisation application. Considering the number of risk assessment factors that STMO licensing officers need to consider when assessing licenses, the STMO developed its own risk assessment matrix to come up with an objective and evidence-based way of rating risks. The information gathered during the technical and policy review is integrated into the matrix to obtain the risk rating for the application. This risk rating will provide an initial recommendation on the action plan to be undertaken with respect to the application. If the rating is low, the application will be approved with normal licensing conditions; if the rating is medium, the application will be approved with specific licensing conditions; if the rating is high, the NSC-STMCom Sub-Committees will be convened for their recommendations; and, if the rating is extreme, the application will be denied and escalated to the NSC-STMCom or reported to appropriate international organisations, as deemed necessary.

In the event of denial, suspension, modification, limitation, revocation or annulment of a registration or authorisation by the STMO, the aggrieved party has the right to appeal, in accordance with the procedures laid down in Rule VII of the STMA IRR.

An aggrieved applicant or authorisation holder may file a motion for reconsideration within 15 calendar days from receipt of the STMO's decision. If the STMO denies the motion for reconsideration, the decision may be appealed administratively through a position paper filed with the NSC-STMCom within 15 calendar days from receipt of the decision ([137]).

During the appeal to the NSC-STMCom, an ad hoc committee shall be created consisting of three to five designated NSC-STMCom member agencies, with expertise on the subject matter of the appeal. The ad hoc committee shall make a recommendation and state the reasons for upholding, reversing or modifying the decision of the STMO. The recommendation of the committee shall then be submitted to the NSC-STMCom for review ([138]). The committee's recommendation shall be deemed adopted after approval by a majority of the members of the NSC-STMCom. The decision of the NSC-STMCom to reverse, affirm or modify the decision of the STMO shall be final and executory, without prejudice to judicial appeal ([139]).

3.2.3.4. Raising awareness and ICP

As defined under the STMA, an ICP refers to an effective, appropriate and proportionate set of means and procedures – including the development, implementation and adherence to standardised operational compliance policies, procedures, standards or conduct and safeguards – developed by exporters to ensure compliance with the provisions and with the terms and conditions of authorisations set out in the STMA ([140]). Essentially, an ICP is a comprehensive framework of guidelines and protocols designed to prohibit the transfer of strategic goods to prohibited and restricted end users. It serves as a crucial tool for entities and organisations to adhere to the STMA and its IRR, ensuring full compliance with the regulations.

An ICP, under the STMA, is a mandatory requirement before a company can apply for a global authorisation with the STMO. It has the following 10 elements: management commitment, ICP structure and responsibility, screening procedures, shipment control, ICP training, internal audit, standard operating procedures manual, recordkeeping, reporting and corrective action and, when applicable, a technology control plan for intangible transfers of technology.

137 See Sections 1-2, Rule VII of the STMA IRR.
138 See Section 3, Rule VII of the STMA IRR.
139 See Section 4, Rule VII of the STMA IRR.
140 See Section 4(m), Rule I of the STMA IRR.

Conducting awareness forums for government and industry stakeholders is another crucial aspect of the STMO's mandate. As a regulatory body, the STMO understands that the compliance of industry stakeholders and the government's regulatory mechanism are interdependent on stakeholders being well-informed. To that end, the STMO regularly organises town hall meetings, consultation sessions and awareness forums to disseminate vital information to stakeholders. These forums serve as a platform for stakeholders to engage with the STMO and ask questions about its guidelines and regulations.

Moreover, the STMO periodically administers perception surveys to gather valuable feedback from government and industry stakeholders regarding STMO guidelines and procedures. This proactive approach allows the STMO to consistently enhance its regulatory approach and ensure that stakeholders' concerns are adequately addressed. The STMO recognises that compliance officers of industry stakeholders and frontline officers from customs and freeport zones play a crucial role in ensuring compliance with STMA regulations. To equip them with the necessary knowledge to comply and effectively implement the STMA, the STMO has also developed an e-learning portal called LearnSTM with modules on STMA overview, commodity classification for industry, commodity identification for frontline officers and others. Through these efforts, the STMO ensures that stakeholders are up to date with the latest regulations and equipped with the necessary training to carry out their duties effectively.

3.2.3.5. Enforcement and penalties

For violations under the STMA, the STMO may impose administrative penalties ([141]) or request the Department of Justice to prosecute criminal violations ([142]) under the law.

For STMA violations warranting administrative sanctions, the STMO may: (1) issue a warning letter or order for corrective action; (2) limit, revoke or annul a registration or authorisation; (3) impose fines; or (4) order the cancellation or suspension of the company's registration and authorisation to operate ([143]).

141 See Section 22 of the STMA.
142 See Sections 19 to 20 of the STMA.
143 See Sections 1 to 5, Rule VI of the STMA IRR.

In line with this, the STMO issued MC No 21-42 ([144]) to serve as a guide to the public regarding administrative investigations conducted by the STMO, administrative proceedings and the imposition of administrative fines and penalties. If the violation warrants the imposition of administrative penalties, the STMO may take into consideration the following attendant circumstances to mitigate the administrative penalty imposed: (1) voluntary self-disclosure ([145]) of any STMA violation; (2) level of the company's compliance under the STMA; (3) prior STMA violations; (4) quantity and value of the transaction; and (5) potential harm to the Philippines' national security or foreign policy interest ([146]). The imposition of an administrative penalty shall be without prejudice to the filing of appropriate criminal charges against the persons responsible for the criminal violation.

If in the course of conducting its investigation, the STMO finds criminal violations as stated under Sections 19 ([147]) and 20 ([148]) of the STMA, the STMO may refer the matter and turn over all available evidence to the Bureau of Customs, Philippine Coast Guard, Philippine National Police or National Bureau of Investigation. After finding that a prima facie case exists, any of the aforementioned law enforcement agencies shall refer the case to the Department of Justice for preliminary investigation ([149]). If probable cause exists to hold a person or company for trial, the prosecutor shall file an information with the appropriate Regional Trial Court ([150]) in the Philippines.

For purposes of international legal cooperation, the Department of Justice, through the Office of the Chief State Counsel, shall make and receive requests for mutual legal assistance, and to execute or arrange for the execution of such requests pursuant to Section 29 ([151]) of the STMA. Subject to the provisions of the extradition law and the applicable extradition treaty, the offenses defined in the STMA shall be deemed included as extraditable offenses in an extradition treaty to which the Philippines is a party ([152]).

144 Guidelines on Administrative Proceedings and Imposition of Administrative Fines and Penalties.
145 Memorandum Circular No 21-39: Guidelines on Voluntary Self-Disclosure (VSD).
146 See Section 6, Rule VI of the STMA IRR.
147 See Section 19 of the STMA.
148 See Section 20 of the STMA.
149 See Section 21 of the STMA.
150 See Section 28 of the STMA.
151 See Section 29 of the STMA.
152 See Section 11, Rule VIII of the STMA IRR.

CHAPTER 3

Jasmina Roskic ([153])

3.3. Serbia

3.3.1. Introduction

As an EU candidate Member State, the Republic of Serbia (hereinafter Serbia) is undertaking efforts to align its legislation with the EU *acquis*. Its geopolitical position on the transit routes connecting Western Europe with the Mediterranean and South-East Europe significantly determines and reflects on the position of Serbia in different fields, including STC. The globalisation process, accompanied by the free movement of people, information, goods, services and capital, contributes to the threat of potentially dangerous substances being available to different actors. This creates a favourable environment for increasing the potential misuse of dual-use items, the unauthorised transfer of technologies and software by electronic means by groups, non-state actors or individuals in order to develop and use WMDs. Having all that in mind, the harmonisation process of STC is necessary, with the main intentions of ensuring access to the EU and preserving international security.

The relative obsolescence of technical equipment available for authorities and technical development of the country makes Serbia's national security particularly sensitive. This necessitates the continual enhancement of collaboration and coordination among all parties within the Serbian export control system, and a legal framework that aligns with all global criteria.

153 **Jasmina Roskić** has held the position of Head of Department for International Agreements and Foreign Trade in Controlled Goods at the Ministry of Internal and Foreign Trade of the Republic of Serbia since 2010. She is a lawyer who graduated from the Law University in Belgrade and completed postgraduate studies at the same university. She successfully passed the bar exam. With experience as a legal adviser and previous work at the prosecutor's office, she was involved in the harmonisation process of Serbian national legislation in the field of export control with the EU framework. She is also the author of several articles in national publications relating to the export control of strategic goods.

3.3.2. Context

In 2003, Serbia started to adopt international standards in STC by harmonising its legislation with the EU, bearing in mind its aspiration to become a full Member State as soon as possible. On the other hand, as a member of the UN and the Organization for Security and Cooperation in Europe (OSCE), Serbia is committed to strengthening regional and international peace and security, and endeavours to use all available mechanisms, starting with arms control and disarmament, to prevent the proliferation of WMDs.

Inspired by the UNSCR 1540 and wishing to harmonise its legislation with the EU *acquis*, Serbia recognised the importance of preventing the proliferation of WMDs and the means of their delivery. The first step was to establish an efficient and effective export control system by enacting new laws on export control in 'strategic goods'. Concerning nuclear, chemical and biological weapons targeted by the UNSCR 1540, Serbia is a party to all international treaties relating to the control and non-proliferation of WMDs, namely the NPT (1970), the CWC (1997) and the BTWC (1974).

National legislation for implementation of the NPT was adopted in 1970 – the Law on ratification of the treaty on the non-proliferation of nuclear weapons ('Official Gazette of the SFRY – Addendum', number 10/70) and the new Law on radiation and nuclear safety and security from 2018.

National legislation for implementation of the CWC was adopted in 2009 (Law on prohibition of development, production, storage and use of chemical weapons and their destruction –'Official Gazette of the Republic of Serbia', No 36/09). Based on the provisions of this law, the Serbian Commission for the implementation of the CWC ([154]) was formed, consisting of representatives of all the relevant ministries. Serbia actively participates in the work of the Organisation for the Prohibition of Chemical Weapons through the National Commission.

National legislation for implementation of the BTWC was adopted in 2011 (Law on the prohibition of development, production and stockpiling of bacteriological (biological) and toxic weapons and on their destruction).

154 The National Commission for the implementation of the CWC was established in 2012.

Serbia is also developing operational capabilities for defence against atomic, biological and chemical weapons. The development of these capabilities is under the competence of the Ministry of Defence. There is an expert/specialist centre for individual training in the field of atomic/biological/chemical defence (ABḤD Centre) based in Kruševac, Serbia. The ABḤD Centre provides training and development mainly for the Ministry of Defence, but also for Serbian civil institutions, the Organisation for the Prohibition of Chemical Weapons, countries from the region, members of NATO and the Partnership for Peace programme and other countries that are interested in such training, in accordance with bilateral agreements between Serbia and other states.

In Serbia, there is a nuclear state-owned institute called 'Vinča', officially organised by the state and recognised as such by the IAEA. There are two research reactors with supporting infrastructure at the Vinča institute, along with scientific laboratories that use radiation sources for research and commercial purposes. According to the current legal provisions, all radioactive waste generated in Serbia must be stored in the prescribed manner and in facilities specially built and intended for that purpose. The radiation and nuclear safety strategy adopted by the government describes the elements of the national radiation and nuclear safety regime, and defines the necessary steps and resources for its construction, maintenance and improvement. The control and prevention of illegal traffic of radioactive and nuclear materials across the state border is carried out by the Customs Administration and the Border Police, using radioactivity detection equipment, along with other methods for detecting illegal traffic.

Serbia started negotiating for accession to the MECRs in 2008.
In this regard, procedures have been initiated or completed in the following export control arrangements.

- On 30 April 2013, Serbia became a Member State of the NSG.
- The procedure of application for WA membership is still pending. Serbia submitted an application and started the procedure for membership in 2009. In accordance with the internal procedure for new membership, co-rapporteurs for Serbia were nominated, namely representatives of the United Kingdom and the United States. Until now, the recommendations of the co-rapporteurs regarding Serbia's membership have not yet been given to the WA Secretariat.

- In March 2017, the application for Serbian membership in the AG was launched (the proposal was discussed at the annual meeting in Paris in June 2018). In December of that year, Serbia prepared and submitted to the AG Secretariat the answers to the questionnaire ([155]). Since then, there has been no further information or activity on the AG membership.
- Serbia has not officially submitted a request for the regulation of its status in the MTCR. However, in February 2004, the State Union of Serbia and Montenegro (hereinafter State Union) unilaterally agreed to adhere to the MTCR documents 'Equipment, Software and Technology' dated 30 May 2003 and 'Instructions for Important Transfers of Sensitive Missiles' dated 7 January 1993.
- Serbia plans to submit a request to regulate its membership in the Zangger Committee after it regulates its status in the WA and the AG.

It is important to highlight that the European Commission supported Serbia's accession to all MECRs.

3.3.3. Regulatory framework and implementation

3.3.3.1. Process

Until 2005, the competences for issuing licenses for the export and import of arms, military equipment and dual-use items were at the Ministry of Defence, meaning that the ministry was in charge for all STC, based on the Law on production and trade in arms and military equipment from 1996. Trade in dual-use items was also subject to that law. Other activities were not recognised and not controlled, like brokering or technical assistance services. The Federal Republic of Yugoslavia ceased to exist in 2003 and the new State Union was established, with very limited competences at the state union level. Those common competences were in the fields of foreign affairs, defence and partly in foreign trade (the majority of them were at the state party level).

Serbia's process to join the EU started in 2000. Since then, awareness of the necessity of a comprehensive STC system has been growing. In accordance with international standards, the idea of issuing licenses by the 'civilian ministry' instead of the Ministry of Defence became clearer, especially since Serbia has

155 The questionnaire was prepared and requested by some AG Member States that were asking for additional information.

some state-owned factories that produce arms and military equipment, which are under the patronage of the Ministry of Defence. The political processes, the termination of the former Federal Republic of Yugoslavia and the establishment of the new State Union significantly determined those processes. Supported by the EU, the State Union enacted a new Law on foreign trade in arms, military equipment and dual-use items in 2005 (a single law covering control in trade of arms and military equipment on one hand, and dual-use items on the other hand). Based on this law, issuing licenses became a competence of the civilian ministry.

The main goal of the law was to establish state control for the purpose of achieving and protecting security, foreign policy and the economic interests of the State Union and international integrity and credibility, along with ensuring the fulfilment of the international obligations that the State Union had undertaken from the former state Federal Republic of Yugoslavia. During the law adoption process, no public consultations with industry or other stakeholders were carried out.

In accordance with the law, the following are subject to control:

- weapons, military equipment and related technologies (aligned with the Common Military List of the European Union included in the EU code of conduct for arms exports); and
- dual-use goods, including software and technologies, which in addition to civilian purposes may have a military purpose, aligned with the EU list of dual-use goods and technologies.

The national control lists of weapons, military equipment and dual-use items, along with other lists for the purpose of fulfilling obligations of international agreements, were established by the decision of the Council of Ministers of the former State Union. At that time, harmonisation with the relevant EU lists was not done on a regular basis. As an example, in 2014, when new separate laws on STC entered into force, EU lists from 2009 were in use.

The 2005 law covered a type of old-fashioned catch-all provision, which stated that 'goods that are not covered by the mentioned lists, are considered controlled goods in the event that a person intending to carry out foreign trade becomes aware, warned by the competent state authorities, or if he has ground to think that the goods in question are, or may be, in whole or in part, used for the development, production, disposal, maintenance, storage, detection, identification or proliferation of chemical, biological or nuclear weapons, or other nuclear-explosive devices, or for the development, production, maintenance or storage of missiles and launchers'.

The law explicitly stated that foreign trade, transport, transit, possession and use of nuclear, chemical or biological weapons and their means of delivery, especially for terrorist purposes, by any non-state actor is prohibited, exactly as stated in the UNSCR 1540.

The definition of foreign trade in controlled goods covers different activities, but not brokering or technical assistance services.

It was also stated in the law that foreign trade in controlled goods can only be carried out on the basis of a license issued (at that time) by the Ministry of International Economic Relations of the State Union, unless otherwise regulated by that law. We note that, in the second part of the sentence ('unless otherwise regulated by that law'), the door remained open for other solutions, for example the possibility of each Member State issuing its own licence. The main reason was the fact that the State Union, as mentioned before, had just a few common competences in accordance with its Constitutional Chapter from 2003. In fact, that never happened.

In the law, the criteria for making decisions on issuing licenses were prescribed separately for each ministry involved in the process. It was stated, for example, that the 'Ministry of Foreign Affairs is going to give its opinion based on….' or the 'Ministry of Defence is going to give its opinion based on….'.

The law also defined the time period for issuing licenses as 30 days from the date of the duly submitted application.

According to the law, the decision on denying a license application and revoking an issued license was prescribed under the special conditions enumerated in two separate articles. In each of the above-mentioned cases, it was stated that the State Union is not responsible for any possible damage to operators caused by rejection of the application or revocation of issued licenses. The other options, like license modification or termination, were not covered by the law.

Supervision and control in implementation of the law was carried out by the Ministry for International Economic Relations (at the state union level), in cooperation with other relevant authorities (the ministries responsible for defence and foreign affairs, the ministries of the Member States responsible for internal affairs, the customs administrations of the Member States, intelligence services, etc.), illustrating the weak position and competences of the State Union.

Concerning the license usage, the authorised person in the company was obliged to inform the ministry in writing about each transaction, or to return the license if it had not been used or had expired, within 15 days from the date of its issuance or expiration. The exporter was also obliged, at the request of the ministry, to submit the delivery verification certificate issued by the competent authority of the country of final destination confirming the receipt of the controlled goods.

The Member State courts dealing with misdemeanours were responsible for conducting the proceedings and imposing penalties for breaching the provisions of the law, in accordance with the laws of the Member States.

So, as we can see, the majority of the competences were at the level of the Member States. For that reason, the 2005 law was not efficient enough.

Having in mind the necessity of harmonisation with the EU *acquis* and the EU code of conduct for arms sales introduced in 1998, the Council of Ministers of the State Union adopted in 2005 a decision on criteria for issuing licences in arms, military equipment and dual-use items. It involved eight criteria, similar to the code of conduct in that time period. The decision was the only sub-legal act fully harmonised with the EU *acquis*.

Having all that in mind, and supported by the EU outreach programme ([156]), the procedure of drafting two separate laws started in 2008. Serbia has been a beneficiary countries of EU funds since 2005, and has received considerable support in implementing EU legislation and STC standards. That process was finalised with the adoption of two laws: the Law on export and import of dual-use items (2013) ([157]) and the Law on export and import of arms and military equipment ([158]).

156 Serbia has been a beneficiary country of the EU outreach programme since 2008 in various fields, such as increasing capacity building, harmonisation of national legislation, identification of items and raising awareness.
157 Official Gazette of RoS, no 95/13 and 77/19.
158 Official Gazette of RoS, no 107/14.

3.3.3.2. Scope

The current law on export and import of dual-use items was fully harmonised with Regulation (EC) No 428/2009. EU experts, nominated by the EU outreach programme, were involved in drafting the law. The main purpose of the law was to establish control in the export and import of dual-use items and in providing brokering and technical assistance services relating to dual-use items, in order to exercise and protect the defence, economic, security and foreign policy interests of Serbia, along with its international credibility, and to ensure compliance with its international commitments in this field. During the adoption procedure of the law, no public consultations were carried out with industry or stakeholders. The reason is that trade in dual-use items, in accordance with the EU *acquis*, is subject to the EU common trade policy.

3.3.3.3. Items

According to the law, dual-use items are defined as 'items, including software and technology, which may be used both for civilian and military purposes, items that may be used for non-explosive purposes, and items which may be used in any way for proliferation of or manufacturing WMDs'. This definition is in line with the definition of 'dual-use items' in Regulation (EC) No 428/2009 and approved by the EU experts and the Commission (159).

Serbia's national control lists are inspired by the EU lists. The lists are harmonised on a regular basis – once per year – and in accordance with the EU lists and their amendments. The lists have been adopted by governmental decision and published in the national Official Gazette.

The procedure of adoption is as follows: as soon as the new EU lists are adopted and published, they are translated into Serbian and sent to the relevant technical experts for their final checks. This is followed by the governmental adoption procedure, which involves sending the draft list to the relevant governmental authorities (Ministry of Defence, Ministry of Interior, Ministry of Foreign Affairs, Security Information Agency, Ministry of Finance-Customs Administration and Governmental Legal Department) for their opinions. After that, the decision of determination of the new national control list is adopted by the government and published. It enters into force on the eighth day after the date of publication in the Official Gazette.

159 As a prospective EU Member State, Serbia is obliged to send draft text of each legal act (laws, decrees, decisions) to the European Commission for its opinion and comments.

It is important to highlight that new lists are adopted each year in accordance with the EU lists on dual-use items and on arms and military equipment. The entire procedure lasts between 1 and 2 months, during which time there may be discrepancies between the EU lists and the Serbian lists. It is very important for the national control lists to be harmonised with the relevant EU lists on a regular basis, so that the same items are subject to control as in the EU. Serbia does not implement controls on other additional items or categories added to the EU list. The lists that are currently implemented in Serbia are the EU dual-use list (published in January 2023), adopted by the governmental Decision ('Official Gazette of RoS', no 30/23) and the EU Military List (February 2023), adopted by the governmental Decision ('Official Gazette of RoS', no 39/23).

The current legislation covers export, import, brokering, transit, transhipment and technical assistance of both tangible and intangible operations and items.

Prior to exporting, importing or providing brokering services or technical assistance, the exporter, importer, broker or technical assistance provider shall determine whether the items in question are dual-use items.

In such cases, the knowledge of technical experts from different fields that are members of the Serbian Working Group for identification is used. The group was established by the Decision of the Minister of Trade and consists of experts from the Military Technical institute, the Military Medical Academy, the Faculty of Chemistry, the Faculty of Electrical Engineering, the Faculty of Technology and the Vinča institute.

The catch-all clause is included in Serbian law. A license shall be required for exporting dual-use items not included in the list in cases when the person intending to export has been informed by the ministry, or if an exporter is aware of or has grounds to suspect that dual-use items they intend to export:

- are intended or may be intended, in their entirety or in part, for the development, production, modification, operation, assembling, testing, repair, disposing, application, maintenance, storage, detection or dissemination of WMDs;
- will be used or may be used, in their entirety or in part, for a military end use in the country of the buyer or in the country of the end user, if such a country is subject to a weapons and military equipment embargo based on the decisions of the UN Security Council, OSCE and other international organisations which are binding for Serbia, or based on relevant provisions of the national legislation;

- will be or may be used, in their entirety or in part, as parts or components of weapons and military equipment products referred to in the national control list of weapons and military equipment, and which have been exported from Serbian territory without a license or contrary to requirements from the license issued in accordance with the law.

Also, in the case that the exporter is aware of or has grounds to suspect that dual-use items they intend to export, which are not mentioned in the list, are intended for, or may be used, in entirety or in part, for any of the purposes covered by the catch-all clause, they are obliged to inform the ministry, which will determine whether the export requires a license.

At the moment, the provisions of catch-all control covers export activity only. The other types of activities (brokering, technical assistance) are not covered by the catch-all clause.

3.3.3.4. Operations and procedures

The ministry may issue a decision to prohibit transit of dual-use items specified in the list or items that are, or may be intended, in entirety or in part, for purposes specified in the catch-all clause. Upon making such a decision, the ministry would immediately inform the authorities competent for internal affairs and customs.

For performing activities like export, import (only items from the lists of the CWC), brokering and technical assistance services, the license is necessary. Governmental bodies (like the Ministry of Defence or the Ministry of Interior) are also required to have a license for export or import, even for their own purposes. The licenses are issued based on the simplified procedure.

The competent authorities involved in the dual-use trade control in Serbia are the Ministry of Internal and Foreign Trade, as a regulator and issuing license authority, the Ministry for Foreign Affairs, the Ministry of Interior, the Ministry of Defence, the Security Information Agency, and, during the implementation process, the Customs Administration.

The license-issuing procedure starts with the application. The application for a license for exporting and importing dual-use items and/or providing brokering services and technical assistance shall be submitted to the Ministry for Internal and Foreign Trade in the prescribed form ([160]). The applicant shall enclose the original end-user certificate, obtained from the official authority of the end-user's country and not older than 6 months, along with the translation of the original certificate into Serbian, certified by a court interpreter.

The decision-making process is prescribed by the law in the following way.

The ministry shall submit for consent the complete application for granting the license to the Ministry of Defence, the Ministry of Foreign Affairs, the Ministry for Interior Affairs and the authority competent for national security affairs (the Security Information Agency). If any of these authorities withhold their consent, the government shall decide on whether to grant the license. If two or more stakeholders withhold their consent, the license cannot be issued.
The ministry shall grant the license within 10 days from the day of receiving the last consent of the above-mentioned authorities.

There is continual inter-agency cooperation on all three levels: on the commodity identification (with the Working Group on the Identification of Dual-Use Items), during the license-issuing procedure (e.g. checking the end-user certificate with the Ministry of Foreign Affairs, information sharing, etc.) and at the law enforcement level (with the Customs Administration).

When deciding on whether to grant the license, the ministry and other state authorities involved in the procedure shall consider whether the export or import of dual-use items, or providing brokering services or technical assistance related to dual-use items:

- threatens compliance with international commitments of Serbia, stemming from membership in the UN, OSCE and other international organisations, that are binding for Serbia, or from membership in international export control regimes;
- threatens the respect of human rights in the end-user's country;
- threatens the preservation of peace, security and stability in the region;
- threatens Serbian security or defence interests, public security or constitutional order;

160 Available at www.must.gov.rs.

- is contrary to Serbia's foreign policy or economic interests;
- facilitates outbreaks or the continuation of armed and other conflicts in the country of end use of the items;
- facilitates the use of such items for inciting unrest in the country of end use of the items;
- contributes to the risk of diverting such items;
- has an adverse impact on national security, and on the end-user's country dealing with terrorism and internationally organised crime, on the nature of its alliances and compliance with international law; and
- can proceed, depending on whether the documents enclosed correspond to the end use as specified in the application.

The criteria involved in the law are aligned with the EU common position criteria.

Concerning international sanctions, Serbia is implementing those imposed by international organisations of which it is a member, such as the UN Security Council and OSCE.

The application for a license can be denied by the administrative decision issued by the ministry, in the cases prescribed by law.
The issued license can also be terminated, modified or revoked by a decision of the ministry. The conditions for each of the above-mentioned situations are strictly prescribed by the law.

All decisions (on denying application, revocation, termination or modification of the license) may be appealed by initiating an administrative dispute at the Administrative Court.

For all of these cases (denying the application, revocation, termination or modification of the issued license), the law states that Serbia shall not be liable for any damage that may have been caused to the company.
For the implementation of the Law on export and import of dual-use items, the government adopted two separate rulebooks:

(1) on the form and content of applications for licenses and all related documents, such as international import certificates, end-user certificates, delivery verification certificates;
(2) on the form and content of the report that exporters, importers and providers of brokering and technical assistance services are obliged to submit to the Ministry within 15 days after the foreign trade activity takes place.

In Serbia, only individual licences are issued, with a validity period of 1 year. There is a possibility of extending the validity period, if there is a long-term contract in place until the time period stipulated by the contract.
In that case, the license holder is obliged to report annually to the ministry on the license usage.

3.3.3.5. Raising awareness and ICP

The fact that Serbia issues only individual licenses is the main reason why the ICP is not yet legally binding. As there is no possibility for issuing global, general or other types of licenses, companies are not very motivated to introduce and implement ICP. However, the ICP has been introduced to industry and academia during outreach activities. It can be found on the website of the Ministry of Internal and Foreign Trade, so it is available to all stakeholders. As Serbia does not issue other types of licenses than individual, all the benefits of using ICP are still not implemented.

It is important to highlight that the representatives of the issuing license authority (Ministry of Internal and Foreign Trade) organise regular, yearly outreach activities to academia and industry, where all the changes in current legislation, along with current trends in implementing efficient STC, are introduced.

A new law on the export and import of dual-use items, that is fully harmonised with Regulation (EU) 2021/821, is under the adoption procedure. Under this law, some new types of licenses will be introduced (global licence, license for big projects), along with ICP implementation in companies, as a precondition for issuing the new kinds of licenses. This means that ICP would not be obligatory for companies applying only for individual licences. The new law also contains new definitions, namely of cybersurveillance items, large project authorisations and the fact that natural persons as exporters would be involved in national legislation.

3.3.3.6. Enforcement and penalties

The Serbian customs authorities, security service authorities and competent inspection authorities shall carry out constant control of all the transactions that are subject to the law on the export and import of dual-use items, within their powers. On the other hand, exporters, importers, brokers and technical assistance providers are obliged to keep records of each transaction for at least 10 years from the day the transaction has been completed, and to allow competent authorities to collect all the necessary information on each transaction.

The offences prescribed by the law are pecuniary penalties only. It is also stated that the responsible person will be fined in the amount of 5 to 20 times of the value of the items for breaching the provisions of the law. There is also the possibility of imposing a sentence for temporary prohibition to a legal person, entrepreneur and responsible person to export or import dual-use items and provide brokering services and technical assistance. That injunction shall last for 3 years for a legal person and entrepreneur and up to 1 year for a responsible person, and shall apply from the day such a ruling is final and enforceable. There are also prescribed criminal sanctions, in accordance with the Serbian Criminal Code.

Jesudevan Viveganandam ([161])

3.4. Singapore

3.4.1. Introduction

As a major trading and logistics centre and the world's busiest transhipment hub, Singapore recognised that it may be vulnerable to being used as a conduit for illicit activities, and saw the need to strengthen trade controls on dual-use items to mitigate new and evolving security challenges ([162]).

The terrorist attacks of 11 September 2001 in New York, and the uncovering of biological substances such as anthrax in the United States mail ([163]), among other things, led security agencies around the world to consider the implications for their countries. They underscored the need for international efforts to fight terrorism and curb the illicit trafficking of WMDs. Developments in Singapore, such as the arrest of members of the Jemaah Islamiyah network, an affiliate of the Al-Qaeda network, for plotting attacks on strategic locations ([164]) also

161 **V. Jesudevan** is the President of the Centre for Trade Excellence, Singapore. He has nearly two decades of dispute resolution, judicial and enforcement expertise. He is concurrently an Adjunct Professor at the National University of Singapore. He last held the position of Deputy Senior State Counsel at Singapore's Attorney-General's Chambers (AGC), where he led and oversaw financial crime prosecutions and counterproliferation initiatives. Prior to joining the AGC, he was appointed as a District Judge. Recognised as a thought leader in compliance and risk management and strategic trade management, Jesudevan is a Fulbright Scholar with an LLM from New York University. He was admitted to the Singapore Bar in 2005.

162 Singapore, *Hansard Parliamentary Debates*, 10th Parliament, Vol. 75 , cols 1550–1551, 2002 (https://sprs.parl.gov.sg/search/#/topic?reportid=021_20021125_S0002_T0009). In 2021, the Port of Singapore handled 32.3 million TEUs of transhipment throughput, more than the next three largest transhipment ports combined (source: Drewry Container Forecast and Annual Review 2022/2023).

163 https://www.fbi.gov/history/famous-cases/amerithrax-or-anthrax-investigation.

164 'IN FOCUS: The inside story of how ISD crippled a terrorist network targeting Singapore after 9/11', *Channels News Asia*, accessed 23 May 2023 (https://www.channelnewsasia.com/singapore/isd-terrorist-ji-9-11-mas-selamat-2355686).

reinforced the need for proactive measures for trade controls on dual-use items, in order to prevent such items from being acquired by terrorists and uphold our country's reputation as a responsible trading and transhipment hub.

Further, rapid globalisation and technological advancements had led to a significant increase in cross-border flows of goods and people. While this has fuelled economic growth and innovation, it also presented new security challenges. The emergence of highly advanced products with both civilian and military applications had raised concerns about their potential misuse for building deadly weapons. The risk of nuclear, biological, and chemical weapons falling into the wrong hands is a tangible threat that cannot be ignored ([165]). Historical cases, such as the use of sarin gas and anthrax, serve as sobering reminders of the physical and psychological damage that such items can inflict.

Relatedly, global trade had expanded significantly and with it the opportunities for rogue traders to exploit the conduits of commerce for illicit purposes. The smuggling of various weapons, including those of mass destruction, had become a growing concern. The methods employed by these illicit actors to divert sensitive strategic goods to proscribed entities have also become more sophisticated. This had raised international alarm, particularly in recent years, regarding the possibility of such sensitive goods and weapons falling into the hands of terrorists. To effectively address this global challenge, it is evident that no country can tackle it alone, necessitating close partnerships and cooperation among nations. These elements made it clear that the threat of proliferation is real and necessitates proactive measures.

165 'IN FOCUS: The inside story of how ISD crippled a terrorist network targeting Singapore after 9/11', *Channels News Asia*.

3.4.2. Context

Against this backdrop, in 2003, when Singapore enacted its Strategic Goods (Control) Act 2002 ([166]) (SGCA), it became the first country in South-East Asia to implement export control legislation. However, it bears mention that Singapore's commitment to prevent the proliferation of WMDs predated the enactment of the SGCA and its concomitant regulations ([167]). Indeed, Singapore's commitment can be traced to as early as the 1970s through its ratification of several international conventions ([168]).

In 2002, even before the adoption of the UNSCR 1540, Singapore implemented its STC system in response to international efforts to counter terrorism and curb the illicit trafficking of WMDs.

The Ministry of Foreign Affairs and the Ministry of Trade and Industry ([169]) (MTI) took the initiative to extensively consult with the industry and key stakeholders. Eventually, MTI took the lead in establishing the legislative framework and announced that an export control system would be implemented to regulate the trade in strategic goods and their related technology. At that time, and given that the country remains one of the busiest transhipment hubs in the world, Singapore was mindful that an overly stringent system might cause its traders to incur additional cost and time, and could potentially have the adverse effect of hampering legitimate trade. As a trade-dependent nation, it was therefore important to put in place an export control system that would enable Singapore to fulfil its obligations in preventing the proliferation of WMD-related items without impeding normal legitimate trade. The SGCA was then subsequently enacted.

166 Strategic Goods (Control) Act, 2002, Singapore Statutes Online, accessed on 23 May 2023 (https://sso.agc.gov.sg/Act/SGCA2002).

167 Strategic Goods (Control) Regulations, 2004, Singapore Statutes Online, accessed on 23 May 2023 (https://sso.agc.gov.sg/SL/SGCA2002-RG1). See also Strategic Goods (Control) Order, 2001, Singapore Statutes Online, accessed on 23 May 2023 (https://sso.agc.gov.sg/SL-Supp/S564-2021/Published/20210802?DocDate=20210802).

168 Singapore ratified the Biological Weapons Convention in 1975, the Treaty on the Non-Proliferation of Nuclear Weapons in 1976, the Chemical Weapons Convention in 1993 and the International Convention for the Suppression of Acts of Nuclear Terrorism in 2006. The full list of conventions that Singapore is a signatory to, or has ratified, can be found here: https://treaties.unoda.org/s/singapore.

169 Singapore. *Hansard Parliamentary Debates*, 10th Parliament, Vol. 75, col 1557, 2002.

While Singapore is not a party to any of the MECRs, Singapore had adopted the WA Munitions List and the EU dual-use list, namely the WA, MTCR, AG and NSG, as the basis for Singapore's Strategic Goods (Control) Order 2021 ([170]) (SGCO), which is the subsidiary legislation to the SGCA. The SGCO is reviewed and updated annually.

Singapore is also party to several international conventions relating to the regulation of strategic goods, technology and dual-use items, such as the CWC, BTWC, the International Convention for the Suppression of Acts of Nuclear Terrorism and the NPT ([171]).

3.4.3. Regulatory framework and implementation

3.4.3.1. Process

Before the enactment of the SGCA, the Regulation of Imports and Exports Act 1995 (RIEA) ([172]) and the Regulation of Imports and Exports Regulations ([173]) regulated imports and exports. Initially, these regulated the import and export of military items but did not specifically extend to dual-use items. The SGCA became the first piece of legislation to regulate the trade of dual-use items. It also regulated the transfer and brokering of strategic goods and strategic goods technology, including export, brokering, transit and transhipment of such goods.

170 Strategic Goods (Control) Regulations, 2004, Singapore Statutes Online, accessed 23 May 2023 (https://sso.agc.gov.sg/SL/SGCA2002-RG1). See also Strategic Goods (Control) Order, 2001, Singapore Statutes Online, accessed 23 May 2023 (https://sso.agc.gov.sg/SL-Supp/S564-2021/Published/20210802?DocDate=20210802).

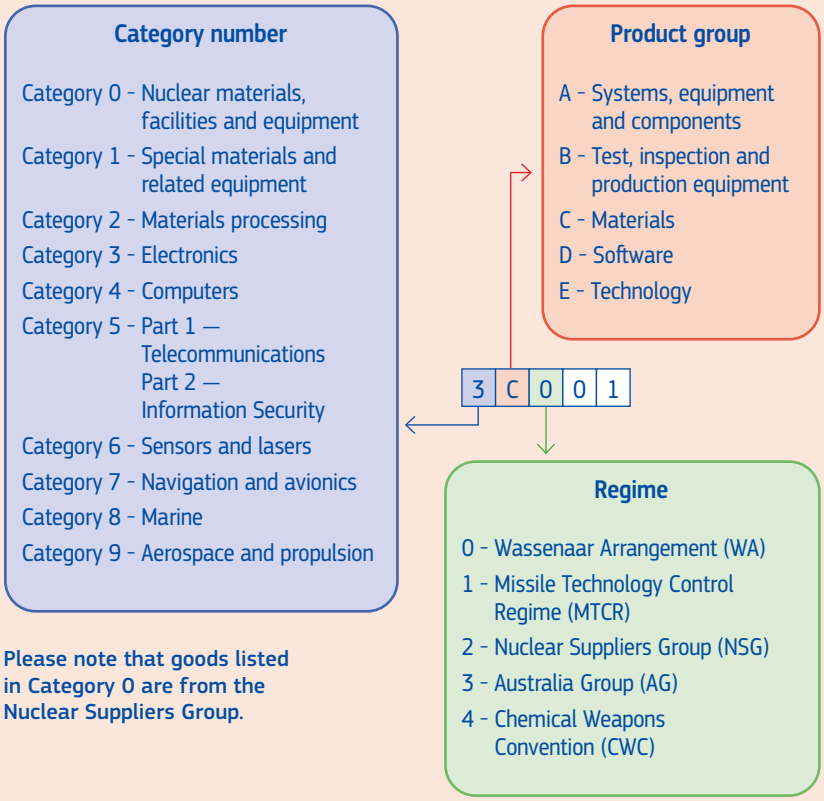
171 Singapore ratified the Biological Weapons Convention in 1975, the Treaty on the Non-Proliferation of Nuclear Weapons in 1976, the Chemical Weapons Convention in 1993 and the International Convention for the Suppression of Acts of Nuclear Terrorism in 2006. The full list of conventions that Singapore is signatory to, or has ratified, can be found here: https://treaties.unoda.org/s/singapore.

172 Regulation of Imports and Exports Act 1995, Singapore Statutes Online, accessed 27 May 2023 (https://sso.agc.gov.sg/Act/RIEA1995#xy-).

173 Regulation of Imports and Exports Regulations, Singapore Statutes Online, accessed 27 May 2023 (https://sso.agc.gov.sg/SL/RIEA1995-RG1).

Significantly, the SGCA defined 'strategic goods' and 'strategic goods technology', and expressly provided for a 'Dual-Use List', which was set out under Part II of the Schedule to the SGCO. The list of dual-use goods adopts a five-digit alphanumeric code, which distinguishes goods and technology according to the category, product group and control regime ([174]). The list is currently divided into 10 categories and each category is further divided into five product groups as set out in the infographic below.

Figure 1. The five-digit alphanumeric code used for goods and technologies in the Singapore list of dual-use items



Source: adapted from Singapore Customs ([175]).

174 Strategic Goods (Control) Order 2021, Part 2 Dual-Use Goods, Division 2. Infographic adapted from: https://www.customs.gov.sg/businesses/strategic-goods-control/strategic-goods-control-list/list-of-dual-use-goods.

175 Singapore Customs, List of Dual-Use Goods, accessed on 28 June 2023, https://www.customs.gov.sg/businesses/strategic-goods-control/strategic-goods-control-list/list-of-dual-use-goods/.

Since its enactment, the SGCA has been amended several times. Initially, the control list comprised about one third of the items under the four multilateral export control regimes. With the amendments, the newly prescribed list covered all goods under the four MECRs. Subsidiary legislation such as the Strategic Goods (Control) Regulations (SGCR), SGCO and Strategic Goods (Control) (Brokering) Order 2019 (SGCBO) were also enacted.

One significant amendment was to the definitions of 'strategic goods' and 'strategic goods technology'. The SGCA was amended to include a definition for 'dual-use goods' and 'dual-use technology' under Section 4A.

The expanded dual-use list, now known as the list of dual-use goods, can be found in the SGCO. When SGCA was first enacted, the list of strategic goods under control was drawn up with reference to other export control systems, such as those of the EU, Hong Kong, Japan and the United States ([176]).

While Singapore did not rely on external support in drafting either its legislative or administrative acts on dual-use items trade, it did refer to known export control regimes such as those of the EU, Hong Kong, Japan and the United States ([177]).

Prior to the introduction of the SGCA, extensive consultations were undertaken with several hundred companies and key stakeholders from various industries that could be potentially impacted by the implementation of the export control legislative framework ([178]).

After the enactment of the SGCA, the then national authority in charge of the control of strategic goods, International Enterprise Singapore, a statutory board under MTI, took steps to raise awareness of the SGCA among key stakeholders such as traders, freight forwarders, cargo agents and carriers through organising and conducting awareness programmes so that key stakeholders were familiar and could ensure compliance with their obligations under the SGCA ([179]).

176 Singapore. *Hansard Parliamentary Debates*, 10th Parliament, Vol. 75, col. 1550–1559, 2002 (https://sprs.parl.gov.sg/search/#/topic?reportid=021_20021125_S0002_T0009).
177 Singapore. Hansard Parliamentary Debates.
178 Singapore. Hansard Parliamentary Debates.
179 Singapore Customs, New Joint Declaration For the Export and Transhipment Transit of Strategic Goods, accessed 28 June 2023 (https://www.customs.gov.sg/news-and-media/circulars/2002-12-02-Circular2002.pdf).

3.4.3.2. Scope

Against this backdrop, the SGCA and the various subsidiary legislation items, such as the SGCR and SGCO, provide a comprehensive legal framework that provides for the deterrence of illicit activities. In this respect, the SGCA contains prohibitions against the transfer and brokering of relevant goods ([180]). The transfer of such goods includes export, tranship or bringing in transit ([181]), while brokering includes any arrangement, negotiation or acts to facilitate contracts concerning the acquisition or disposal of such relevant goods ([182]).

3.4.3.3. Items

These prohibitions also apply to goods and technology prescribed by the Minister for Trade and Industry as strategic goods and strategic goods technology in the Schedule of the SCGO ([183]). Beyond the strategic goods and technology prescribed, the SGCA extends the prohibitions to goods or technology where the person knows or has reasonable grounds to suspect that they will be used in connection with any relevant activity ([184]).

The list of items covered by Singapore's legislation and the specifications for each category are set out in the SCGO. It includes items from the four MECRs ([185]). It includes both dual-use goods (Part 2) and military goods (Part 1), with the precise list of goods covered in Division 2 of the schedule to the SCGO ([186]).

Singapore adopts the WA Munitions List and the EU dual-use list as the basis for SGCO, which is updated annually to reflect the latest updates to the multilateral export control regimes.

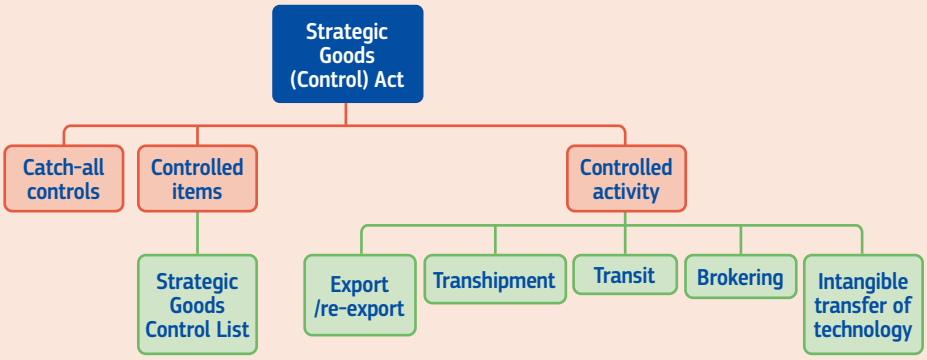
180 SGCA s 5 and 6 respectively.
181 SGCA s 5(1)(a).
182 SGCA s 6(1).
183 S 4A(1) of the SGCA confers power on the Minister for Trade and Industry to prescribe any military or dual-use goods or dual-use technology as strategic goods and strategic goods technology through an Order in the Gazette.
184 'relevant activity' is defined in the SGCA as: (a) the development, production, handling, operation, maintenance, storage, detection, identification or dissemination of any nuclear, chemical or biological weapon, or (b) the development, production, maintenance or storage of missiles which are capable of delivering any such weapon.
185 Singapore Customs, Strategic Goods Control List, accessed on 27 May 2023 (https://www.customs.gov.sg/businesses/strategic-goods-control/strategic-goods-control-list/).
186 Strategic Goods (Control) Order 2021, The Schedule.

3.4.3.4. Operations

The SGCA broadly covers two kinds of activities, namely transfer and brokering. 'Transfer' under the SGCA includes export, transhipment, or bringing in transit ([187]), export of any document in which strategic goods technology is recorded, stored or embodied ([188]) and transmission of any strategic goods technology ([189]). Controls also apply to intangible transfers of technology. 'Brokering' includes arrangement, negotiation or any act to facilitate the arrangement or negotiation of contracts for the acquisition or disposal of the relevant goods ([190]).

Further, Section 5 of the SGCA provides a catch-all control for export of strategic goods or strategic technology if a person or entity has been notified by an authorised officer that the goods are or if the technology is intended or likely to be used in connection with a relevant activity, or if the person or entity knows or has reasonable grounds to suspect that the goods are or if the technology are likely to be used in connection with a relevant activity ([191]).
Additionally, activities other than export are captured under Sections 5 and 6 of the SGCA concerning the transfer and brokering of strategic goods or strategic goods technology. This extends to any act which facilitates arrangement or negotiation of contracts for acquisition, disposal or transmission of the relevant goods ([192]). An illustrative image of the SCGA's scope of control is provided below.

Figure 2. Scope of control of the Singapore SGCA



Source: adapted from Singapore Customs.

187 S 5(1)(a) SGCA.
188 S 5(1)(b) SGCA.
189 S 5(1)(c) of SGCA.
190 S 6(1) SGCA.
191 S 5(2)(d), (e), (f) SGCA.
192 S 6 SGCA.

3.4.3.5. Procedures

Under the SGCA, an applicant who wishes to engage in the act of either transferring or brokering strategic goods or technology must obtain the requisite permit and registration to export dual-use items as set out in Sections 7 and 8 of the SGCA and in the SGCR. Applications must be made to the Director-General, who may grant a permit and impose any other conditions on the applicant. An appeal on the Director-General's decision may be made to the Minister, whose decision is final ([193]).

Further, Singapore also adopts prohibitions against sale or supply of arms and related material to terrorists under Sections 7A-C of the UN (anti-terrorism measures) regulations.

Singapore Customs routinely publishes circulars, guidelines and best practices to the trading community to provide updates on our export control regime. Though non-legal in nature, they are additional resources to supplement the traders with the knowledge for them to comply with Singapore's domestic laws and international obligations. While there are no explicit legal prescriptions with regard to an ICP, implementation of an effective ICP is incorporated into Singapore's TradeFIRST assessment framework in deciding whether to grant a bulk permit under the Strategic Trade Scheme ([194]). It includes seven elements: company's commitment, nomination of strategic goods control officer(s), product screening, end-user screening, record keeping, awareness and training, and audits ([195]).

In order to be eligible for a Strategic Trade Scheme permit, companies would have to be a registered trader with Singapore Customs and/or in the case of a bulk permit application, the company must (a) maintain a good trade compliance record with Singapore Customs; (b) implement an effective ICP; and (c) obtain at least the 'Enhanced' band under TradeFIRST.

A bulk permit is thus suitable for exporters, manufacturers and logistics providers who wish to export, re-export or tranship multiple strategic goods or transmit the related technology to multiple end users or destination countries

193 See also SCGR.
194 Singapore Customs, Bulk Permit: Export, Transhipment and Transit, accessed 27 May 2023 (https://www.customs.gov.sg/businesses/strategic-goods-control/permit-and-registration-requirements/bulk-permit-export-transhipment-and-intangible-transfer-of-technology).
195 Singapore Customs, Bulk Permit: Export, Transhipment and Transit.

regularly and have short order fulfilment times. With a bulk permit, the holder does not have to apply for an individual permit prior to every transfer of strategic goods/technology as long as the products/technology they are transferring and the end users are covered within the scope of the approved bulk permit. The bulk permit holder only has to declare the appropriate permit before the cargo is lodged with the sea port operators or air cargo ground handling agents, or brought into Singapore for transhipment, thereby enjoying greater operational certainty and efficiency ([196]).

For the issuance of a bulk permit, companies would have to submit an application with supporting documents. Singapore Customs will then conduct a TradeFIRST assessment on the company to determine its banding under the assessment framework and the effectiveness of the company's ICP. Bulk permits are valid for up to 3 years from the date of approval, depending on the nature of the transactions and the band that the company achieves under TradeFIRST. Companies would have to comply with the terms and conditions issued under the bulk permit.

For the application of an individual permit (i.e. single-use permit), the application should be made at least 5 working days before loading the goods onto the conveyance to be brought out of Singapore for every export, re-export or transhipment or before the arrival of the conveyance on which the goods are to be brought in transit through Singapore. The declaring agent and/or exporter would have to comply with the permit conditions listed in the approved permit.

For the application of an intangible transfer of technology permit, an application must be made at least 7 working days before the transmission of the controlled strategic goods technology from Singapore, and each permit is valid for 1 year upon approval.

For the registration of a broker, a registration has to be made at least 14 working days before the brokering of items and technology listed in the SGCBO.

196 See the Singapore Customs' Strategic Trade Scheme Handbook (https://www.customs.gov.sg/files/businesses/seb/sts %20handbook %20- %20may %202022 %20.pdf). For information on the permit and registration requirements under the Strategic Goods Control scheme, please refer to this link: https://www.customs.gov.sg/businesses/strategic-goods-control/permit-and-registration-requirements/. For information on the amendments/cancellation of a permit, please refer to this link: https://www.customs.gov.sg/businesses/exporting-goods/export-procedures/permit-amendments-and-cancellation. For information on TradeFIRST, please refer to this link: https://www.customs.gov.sg/businesses/customs-schemes-licences-framework/trade-first/.

3.4.3.6. Raising awareness and ICP

The importance of an effective and robust ICP cannot be overstated. While the seven elements ([197]) discussed above are mandatory to apply for a bulk permit, the manner by which these elements may be implemented depends on a variety of factors, such as the size of the company, nature of its operations, the type of strategic goods or technology concerned, the potential end use of the same as well the consignee(s) / end-users(s) involved.

To raise awareness within the industry, Singapore Customs, together with Japan and the United States, organises outreach events as the annual 'Joint Industry Outreach Seminar on Strategic Trade Management' ([198]), where a host of topics related to strategic trade law, export controls and compliance are discussed.

3.4.3.7. Enforcement and penalties

Singapore does not enforce unilateral sanctions imposed by other countries. As a member of the UN, Singapore implements the UNSCRs through its domestic laws. Activities that contravene the decisions of the UNSCRs are prohibited. Traders are advised to exercise prudence and look out for red flags to ensure that their trading activities comply with Singapore's domestic laws and the UNSCRs.

The Singapore Customs, which is responsible for trade control enforcement, conducts regular inspections and audits of businesses involved in the trade of dual-use items. They have the powers to seize goods, documents and electronic devices for investigation purposes, conduct searches and make arrests ([199]). To ensure effective prosecution of offences, Singapore adopts a whole-of-government approach when it comes to 'sense-making', investigation and interdiction. The Singapore Customs work closely with other government agencies, including the Singapore Police Force, the Ministry of Home Affairs, the Ministry of Defence, the Attorney-General's Chambers and the Ministry of Foreign Affairs. Furthermore, Singapore actively cooperates with our international partners to enhance the effectiveness of its enforcement efforts.

197 See Annex A to the Singapore Customs' Strategic Trade Scheme Handbook (https://www.customs.gov.sg/files/businesses/seb/sts %20handbook %20- %20may %202022 %20.pdf).
198 See the Singapore Customs' website (https://www.customs.gov.sg/business-resources/courses-and-events/joint-industry-outreach-on-strategic-trade-management-2023/).
199 Singapore Customs, Enforcement, accessed 28 June 2023 (https://www.customs.gov.sg/businesses/strategic-goods-control-1/overview/enforcement).

A person aggrieved by the decision of Singapore Customs in connection to a grant or renewal of a single-use permit, bulk permit, suspension or cancellation of the permit may appeal to the Minister, within 30 days of the date of the written notice, whose decision is final.

Finally, in terms of penalties, any person who contravenes the prohibitions under the SGCA will be liable for criminal sanctions of a fine not exceeding SGD 100 000 or three times the value of the goods, whichever is greater, or to imprisonment not exceeding 2 years or to both ([200]) and repeat offenders face higher penalties.

200 SGCA s 5(7), 6(9). For the first conviction only. A second/subsequent conviction will be liable for a fine not exceeding SGD 200 000 or four times the value of the goods, or to imprisonment not exceeding 3 years or to both.

3.5. Ukraine

3.5.1. Introduction

Following Ukraine's independence in 1991, establishing an effective export control system became an urgent priority. The challenge was amplified by both internal complexities and a volatile external environment. Ukraine possessed significant military assets, including the world's third-largest nuclear weapons potential, strategic weapons delivery systems, vast conventional weaponry, numerous defence industry enterprises and scientific institutions. Simultaneously, conflicts along Ukraine's borders in the early 1990s, stemming from various factors in former Soviet republics like Moldova, Georgia, Armenia and Chechnya, created opportunities for illegal arms trafficking due to undefined borders. These circumstances and risks necessitated the development of clear rules and comprehensive export control legislation. Specialised institutions were established and coordination across all government branches became imperative.

Ukraine's export control landscape has been significantly reshaped by Russia's aggression and the ensuing full-scale war. The occupation of Crimea and parts of the Donetsk and Luhansk regions in 2014 posed a critical challenge: the need to establish effective export control along Ukraine's administrative borders with these temporarily occupied territories. The Ukrainian authorities responded swiftly by setting up checkpoints at these borders and imposing a complete ban on the transfers of military goods and dual-use items to/from these regions. Subsequently, these measures were incorporated into the Ukrainian law 'On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in Temporarily Occupied Territories of Ukraine' ([202]), along with corresponding regulations.

201 This contribution has been prepared and compiled by several authors working in the State Service for Export Control of Ukraine.

202 Law Of Ukraine On Ensuring Civil Rights and Freedoms, and the Legal Regime on the Temporarily Occupied Territory of Ukraine, Document 1207-VII, valid, current version – revision on 18 October 2023, on the basis of 3200-IX, https://zakon.rada.gov.ua/laws/show/1207-18#Text.

The further war of aggression against Ukraine launched in 2022 has prompted a substantial shift in Ukraine's strategic goods trade profile. It has transitioned from primarily being a net exporter to becoming a net importer, driven by the necessity to import a significant volume of military and dual-use items to address unprecedented defence and security needs. To address these challenges, the Ukrainian government has implemented several regulations aimed at facilitating essential import operations.

3.5.2. Context

In 1992, Ukraine laid the foundation for its export control system by establishing the Governmental Expert-Technical Commission. This pivotal step has since evolved into a sophisticated and multifaceted system. Today, the State Service of Export Control of Ukraine ([203]) collaborates extensively with various government agencies, the intelligence community and law enforcement, all working together to construct a robust export control framework. This framework is dedicated to preventing the proliferation of WMDs, ensuring oversight of conventional arms transfers and combating terrorism.

Ukraine's national export control system has received substantial support from Ukraine's strategic partners, particularly in the form of the US EXBS and the EU P2P, and drawn inspiration from the existing international legal provisions and practices.

Ukraine has demonstrated a robust engagement in international organisations, reaffirming its commitment to global cooperation and adherence to fundamental international treaties and conventions. Notably, Ukraine's active participation includes membership in key international organisations.

- Founding Member of the UN. Ukraine, as an ex-Soviet republic, was one of the founding members of the UN in 1945. This early involvement underscores its dedication to international peace, security and cooperation.
- OSCE. Ukraine has been a member of the OSCE since 1992, contributing to regional stability and security through dialogue and cooperative initiatives.

Ukraine has also ratified essential international treaties, including the NPT, the CWC, the BTWC, the Comprehensive Nuclear-Test-Ban Treaty and an agreement with the IAEA.

203 State Service for Export Control of Ukraine, official website, https://www.dsecu.gov.ua/en.

Furthermore, Ukraine actively participates in all international export control regimes: Zangger Committee, since 1996; NSG, since 1996; WA, since 1996; MTCR, since 1998; AG, since 2005.

One key regulation is Cabinet of Ministers Resolution No 1378 ([204]), issued on 9 December 2022. This resolution establishes temporary exceptions from import licensing requirements for a specific list of controlled items (excluding weapons and ammunition). It primarily covers accessories, components, spare parts and non-lethal equipment and applies during periods of martial law. Importantly, licensing requirements for the export of all military and dual-use goods remain unchanged.

Despite these formidable challenges, Ukraine's national export control system remains fully operational and is continuously evolving. This evolution encompasses ongoing legislative reforms, internal process enhancements, infrastructure and technological upgrades and the development of human resources.

Currently, the State Service for Export Control of Ukraine (SSECU), in collaboration with other government institutions, is actively engaged in drafting a new law on state export control for international transfers of strategic goods. This legislative initiative is conducted in close cooperation with civil society, economic entities and international partners, including programmes such as the EU P2P and US EXBS. The primary goal is to align Ukrainian export control legislation with the EU *acquis* and incorporate best international practices.

Additionally, the EU and the United States are providing technical support to develop a new digital platform for SSECU's online e-licensing system, which is anticipated to be implemented soon.

204 Resolution of the Cabinet of Ukraine dated 9 December 2022, No 1378, 'About the list of goods, the international transfers (imports) not subject to the Law of Ukraine 'On the State Control of International Transfers of Military and Dual-Use Goods' during the period of martial law on the territory of Ukraine, https://zakon.rada.gov.ua/laws/show/1378-2022-%D0%BF#Text.

3.5.3. Regulatory framework and implementation

3.5.3.1. Process

When delving into the historical context of the Ukrainian STC system's genesis, it is crucial to note that the initial steps towards creating national export control legislation were taken even before the country achieved its independence. This significant development occurred with the adoption of Law on Foreign Economic Activities No 959-XII on 16 April 1991 by the Ukrainian Parliament ([205]). Article 20 of this law stipulated that the export and import of various items, including weapons, ammunition, military equipment and related components, must be exclusively conducted by entities authorised by the Cabinet of Ministers of Ukraine.

Institutionally, Ukraine's control over exports was initiated through Presidential Decree No 45, dated 20 January 1992, and Cabinet of Ministers Resolution No 153, dated 25 March 1992. These documents led to the establishment of the Governmental Expert-Technical Commission, overseen by the Minister of Engineering, Military-Industrial Complex, and Conversion. This commission was entrusted with the authority to make determinations concerning the export and import of specific products from military–industrial complex enterprises.

The following year, in accordance with the Cabinet of Ministers' resolution No 160 of 4 March 1993, entitled 'On Improving State Control over the Export (Import) of Weapons, Military Equipment, and Materials That Can Be Used for Their Creation', the Governmental Expert-Technical Commission was transformed into the Government Commission on Export Control, led by the Vice Prime Minister of Ukraine. Simultaneously, the Export–Technical Committee was established within the Cabinet of Ministers of Ukraine, tasked with preparing materials on issues falling under the purview of the Government Commission on Export Control and overseeing the implementation of decisions made by the commission.

Fast forward to 11 June 1996, when complex issues relating to the state system of export control and arms exports were brought before the National Security and Defense Council (NSDC) of Ukraine. Following the NSDC's decision and the guidance of the President of Ukraine, significant steps were taken to enhance the state export control system.

205 Law Of Ukraine On Foreign Economic Activity, Document 959-XII, valid, current version – revision on 4 March 2023, on the basis of 2881-IX, https://zakon.rada.gov.ua/laws/show/en/959-12#Text.

On 28 December 1996, through Presidential Decree No 1279/96 entitled 'On the Further Improvement of State Export Control', the Government Commission on Export Control underwent a transformation into the Government Commission on Export Control Policy. Concurrently, the Expert Technical Committee was restructured into the State Service for Export Control of Ukraine (SSECU). This overhaul was driven by the objectives of safeguarding national security interests, honouring international non-proliferation obligations and establishing effective governmental oversight over the international trade of diverse goods and technologies associated with weaponry, military equipment and related items.

In July 2000, to enhance Ukraine's military–technical cooperation with foreign nations, Presidential Decree No 868 established the Committee on the Policy of Military-Technical Cooperation and Export Control under the President of Ukraine. This committee was tasked with proposing concepts, priority areas of state policy and other matters related to military–technical cooperation and export control to safeguard Ukraine's political, economic, and military interests.

A significant milestone in shaping the national export control system was the enactment of the Law of Ukraine 'On State Control of International Transfers of Military and Dual-Use Goods' No 549-IV on 20 February 2003 ([206]). This law established the fundamental principles of state policy in export control. It defined state export control as a set of measures to regulate international transfers of military and dual-use goods and their legitimate utilisation by individuals or entities. Besides, it empowered the SSECU, as an executive body authorised for state export control function, to collaborate with other state agencies safeguarding national security interests and upholding Ukraine's international commitments.

The main principles of the state export control policy, as outlined in Article 4 of the law, encompass the following:

- prioritisation of Ukraine's national interests, including political, economic and military, to ensure national security;
- adherence to international commitments regarding the non-proliferation of WMDs and their delivery systems;
- establishment of state control over international transfers of controlled goods and prevention of their use for illegal purposes, including terrorism;
- compliance with legality;

206 Law Of Ukraine On the State Control over International Transfers of Military and Dual-Use Goods, Document 549-IV, valid, current version – revision on 17 September 2023, on the basis of 3345-IX, https://zakon.rada.gov.ua/laws/show/en/549-15#Text.

- alignment of state export control procedures and regulations with international legal norms and practices;
- implementation of mechanisms for international agreements and non-proliferation policies, including compliance with UN Security Council sanctions against specific countries and measures targeting terrorism;
- collaboration with international organisations and foreign states in the realm of export control to enhance global security, prevent WMDs proliferation, and ensure stability.

The Cabinet of Ministers of Ukraine, as the executive branch, is responsible for implementing the provisions of the law and state export control policy through various government resolutions and regulations. These encompass special examination, end-use control, licensing procedures and more.

Several noteworthy examples of specific resolutions issued by the Cabinet of Ministers of Ukraine include:

- Resolution No 767 of 15 July 1997, which approved the 'Procedure for conducting expertise in the field of state export control.';
- Resolution No 838 of 6 August 1998, which approved the 'Procedure for granting authorisations for the right to export and import goods for military purposes and goods containing information constituting a state secret.';
- Resolution No 920 of 27 May 1999, which approved the 'Procedure for providing guarantees and exercising state control over the fulfilment of obligations regarding the use for the declared purposes of goods subject to state export control procedure.';
- Resolution No 86 of 28 January 2004, which approved the 'Procedure for State Control over International Transfers of Dual-Use Goods.';
- Resolution No 500 of 6 June 2012, 'On the approval of the State Export Control Procedure for conducting negotiations related to the conclusion of foreign economic agreements (contracts) on the export of goods.';
- Resolution No. 1378([207]) of December 9, 2022, which establishes temporary exceptions from import licensing requirements for a specific list of controlled items (excluding weapons and ammunition). It primarily covers accessories, components, spare parts, and non-lethal equipment and applies during periods of martial law. Importantly, licensing requirements for the export of all military and dual-use goods remain unchanged.

207 Resolution of the Cabinet of Ukraine dated 28 January 2004, No 86, approving 'Procedure for state control over international transfers of dual-use goods', https://zakon.rada.gov.ua/laws/show/86-2004-%D0%BF#Text

It is noteworthy that the latter Resolution has been adopted in a formidable challenging time, during which however Ukraine's national export control system remains fully operational and is continuously evolving. This evolution encompasses ongoing legislative reforms, internal process enhancements, infrastructure and technological upgrades, and the development of human resources.

Currently, the State Service for Export Control of Ukraine (SSECU), in collaboration with other government institutions, is actively engaged in drafting a new Law on State Export Control for International Transfers of Strategic Goods. This legislative initiative is conducted in close cooperation with civil society, economic entities, and international partners, including programs such as EU P2P and US EXBS programs. The primary goal is to align Ukrainian export control legislation with the EU acquis communautaire and incorporate best international practices.

Additionally, the US and the EU are providing technical support to develop a new digital platform for SSECU's online e-licensing system, anticipated to be implemented soon.

3.5.3.2. Items

When discussing current Ukrainian legislation regarding dual-use international transfers, it is essential to note that the legal framework for state export control is comprised of various elements, including the Constitution of Ukraine, Ukrainian laws, international agreements ratified by the Ukrainian Parliament, presidential decrees, cabinet resolutions, and specific departmental legal acts.

The Law of Ukraine 'On State Control over International Transfers of Military and Dual-Use Goods' (the Law), which was mentioned earlier, establishes the fundamental principles, general rules and methods of state export control over all the categories of controlled items. It covers state control over the international transfers of military and dual-use goods, and other items not listed in the state export control lists but subject to control to safeguard Ukraine's national interests, comply with international non-proliferation commitments, restrict conventional weapons transfers and prevent the goods' use for illegal purposes (catch-all clause).

The SSECU is also authorised to apply export control procedures to other items, especially when informed by government institutions about potential misuse by end users for various purposes relating to WMDs production or their means of delivery.

Additionally, the state export control procedure may apply to international transfers of unlisted items when certain conditions are met. This includes instances where:

- such items are imported into Ukraine with the issuance of an international import certificate upon the exporting state's request;
- the export or temporary export of such items from Ukraine is directed to countries subject to either full or partial embargoes on the supply of such items; these embargoes may be established through resolutions by the UN Security Council, other international organisations of which Ukraine is a member, or national legislation.

The law broadly encompasses various types of operations involving controlled goods, which include export, import, re-export, transit, and temporary import/export. State export control extends to other related activities such as services, including intermediary (brokerage) services, technical assistance, training, financing and transportation. This comprehensive scope covers both tangible and intangible international transfers of goods and transactions.

The law provides a definition for dual-use items, which encompass certain products, equipment, materials, software, technologies and associated services (technical assistance). The specific list of these dual-use goods is determined by the Cabinet of Ministers of Ukraine.

It is worth mentioning that dual-use services involve providing foreign legal entities or individuals with support related to the repair, development, production, use, assembly, testing, modification, modernisation, maintenance (including warranty supervision), or any other form of maintenance for systems, equipment, components, software and technologies subject to state export control. These services can include the transfer of technical data.

The procedure for international transfers of dual-use goods is governed by Resolution No 86 of the Cabinet of Ministers of Ukraine, dated 28 January 2004 ([208]), with subsequent amendments through Resolution No 974,

208 Resolution of the Cabinet of Ukraine dated 28 January 2004, No 86, approving 'Procedure for state control over international transfers of dual-use goods', https://zakon.rada.gov.ua/laws/show/86-2004-%D0%BF#Text.

dated 24 October 2018 ([209]). The current single control list of dual-use goods, which is an integral part of Resolution No 86 and appended to the 'Procedure for State Control of International Transfers of Dual-Use Goods', aligns with Annex 1 of Council Regulation (EC) No 428/2009, subsequently amended by Regulation (EU) 2021/821. This alignment ensures compliance with internationally agreed dual-use controls, including the WA, the MTCR, the NSG, the AG, the CWC and the BTWC.

According to this procedure, international transfers of dual-use goods must conform to the requirements specified in the law and require the issuance of relevant licenses (permits) by the SSECU for all exports and certain imports.

The SSECU issues three types of licenses: single, general, and open.

(1) A single license is issued to entities participating in specific international transactions under foreign economic contracts and remains valid for a specified period, which should not exceed 1 year. The SSECU may extend this duration upon a justified request from the entity, but it cannot surpass the contract's validity period.

(2) A general license may be granted to entities engaged in multiple transfers to specific end-users, with the validity period determined by contracts, though not exceeding 3 years.

(3) An open license can be issued to entities involved in multiple (repeated) transfers to various end users in a specific destination country within the framework of relevant international (bilateral) treaties or with countries participating in international export control regimes. This license is valid for a specified term, not exceeding 3 years. A prerequisite for obtaining open or general licenses is the establishment and certification of an internal compliance system by the applicant entity, as detailed below.

209 Resolution of the Cabinet of Ukraine dated 24 October 2018, No 974, approving the amendments to 'Procedure for state control over international transfers of dual-use goods', https://zakon.rada.gov.ua/laws/show/974-2018-%D0%BF#Text.

3.5.3.3. Operations and procedures

To understand the export control authorisation procedure, it is essential to review the various governmental institutions involved, as specified by current legislation.

Under the Constitution of Ukraine ([210]) and Article 6 of the Law, the President of Ukraine is responsible for overseeing general state policy in the field of state export control. The National Security and Defence Council of Ukraine ([211]) coordinates and supervises the actions of executive bodies related to state export control, while the Cabinet of Ministers of Ukraine is tasked with implementing state export control policy.

As previously mentioned, the SSECU, as the central executive body, plays a pivotal role in enforcing state export control regulations. It collaborates with various ministries, security and intelligence agencies, and other executive authorities empowered by law to carry out export control functions.

The procedure for reviewing license applications for the export of controlled goods to destination countries subject to partial embargo or restrictions, based on Ukraine's international obligations or national security concerns, involves the participation of authorised government institutions and the Interdepartmental Commission on the Policy of Military–Technical Cooperation and Export Control.

In cases necessitating additional interdepartmental coordination, such as risks related to Ukraine's national interests, deviations from declared end use or verification of end-user identity, the SSECU engages in consultations with relevant government authorities. Specific agencies involved in dual-use transfer regulation include the Security Service, the State Service of Special Communication and Information Protection, the State Space Agency and the State Nuclear Regulatory Inspectorate, depending on the specific goods or services in question.

210 Constitution of Ukraine, https://www.president.gov.ua/documents/constitution.
211 National Security and Defense Council of Ukraine, official webpage, https://www.rnbo.gov.ua/en/.

The internal process for issuing licenses is outlined in SSECU administrative regulations, such as the 'Instruction on the interaction of structural divisions of the state export control service', which was approved by SSECU Order No 117, dated 5 December 2022 (recently replaced by Order No 66, dated 29 June 2023, introducing an updated regulation on the interaction between SSECU units).

To obtain a license or international import certificate, entities involved in international transfers of controlled goods must initiate the process by submitting an application to the SSECU. This application should provide comprehensive information required for examination and decision-making. The application should include details about the legal entities or individuals involved in the international transfer, precise descriptions of the goods, their characteristics, intended end use and all contractual documents related to the international transfer.

Special examination plays a critical role in correctly identifying the goods. The SSECU employs several criteria during this process, including comprehensive goods examination and risk analysis, alignment of goods characteristics with declared end use, any known reasons for special goods control (such as WMDs proliferation risks), technical feasibility of the declared end use, whether the declared end use poses a direct proliferation threat, alignment of declared end use with the activity of the declared end-user (importer), confirmation of the existence and activity of the end-user (importer), and any connections between the end user or importer and entities or individuals of concern.

In all cases, applications must include the original guarantee documents. Additional documentation may be requested by the SSECU for examination if necessary.

The SSECU reviews applications for licenses or international import certificates and may involve other state authorities in the assessment of matters within their jurisdiction.

Applications submitted by unauthorised entities, improperly completed, or incomplete will not be considered by the SSECU. In such cases, the SSECU will leave the application without consideration and notify the applicant accordingly within 3 days, providing a proper explanation.

The SSECU may decide to refuse, cancel or suspend a license or international import certificates under various circumstances. These circumstances include the need to protect national interests or comply with Ukraine's international obligations, the termination of the entity's activity, the entity's bankruptcy, the SSECU's request for additional document examination, violations of the law by the entity or the cancellation of the entity's registration with the SSECU. In case of refusal, the SSECU notifies the applicant within 3 days, providing proper justification for the decision.

The SSECU is required to make a decision on issuing licenses for international transfers of dual-use goods within 30 days from the date of receiving the relevant documents from the entity, unless interdepartmental approval processes are necessary.

The SSECU is responsible for uploading issued licenses and related information, as well as information about cancellations or suspensions, to the government web portal 'Single window for international trade' ([212]) in the form of electronically certified documents.

In cases where international transfers of goods or services occur within the framework of interstate or intergovernmental agreements of Ukraine, the SSECU applies a simplified licensing procedure, provided that the legal basis for such a procedure is defined in the agreements, including specific details such as goods, exporters, end users and other relevant information.

Article 55 of the Constitution of Ukraine guarantees the right to appeal to the courts against any decisions, actions, or inaction of state authorities, local self-government bodies and officials. This means that legal entities and individuals have the right to seek redress through the court system in cases of perceived wrongdoing, authorisation refusal, suspension or cancellation.

212 State Customs Service of Ukraine, web portal 'Single window for international trade', https://cabinet.customs.gov.ua/.

3.5.3.4. Raising awareness and ICP

Ukrainian export control authorities employ various methods to raise awareness effectively. These methods include scheduled educational activities, online information dissemination via official websites and direct communication with stakeholders, including the media, defence procurement agencies, the scientific community, businesses and entities involved in strategic goods and services transfers.

A highly effective tool in this context is the ICP mechanism. The requirement for ICPs for entities engaged in international transfers of controlled goods or services is outlined in Article 14 of the law. It mandates the creation of internal export control systems (SVFEK).

However, SVFEK is mandatory only for entities seeking authorisation from the Cabinet of Ministers of Ukraine as exporters or importers of military goods, goods containing classified information or entities applying for general or open licenses (permits). The SSECU is responsible for certifying SVFEK created by entities involved in international transfers of controlled goods. SVFEK certificates are issued after a successful SVFEK inspection, following the certification procedure defined by Cabinet of Ministers of Ukraine's Resolution No 1080, dated 17 July 2003. Additionally, SSECU regularly publishes methodological recommendations on the establishment and operation of SVFEK.

Another important platform for awareness-raising efforts is the Public Council of the SSECU, which not only oversees the government body's operations, but also engages in extensive communication with civil society, experts, the industry and other stakeholders.

3.5.3.5. Enforcement and penalties

The existing enforcement procedure and associated measures encompass both routine and case-based monitoring of entities engaged in international controlled goods transfers. These measures involve verifying the sufficiency and authenticity of submitted documentation, applying administrative sanctions for proven violations of rules and procedures and conducting investigations into criminal offenses as per the Criminal Code of Ukraine ([213]).

Article 25 of the law establishes the sanctions for violations of export control legislation. In certain cases, the SSECU is authorised to conduct administrative investigations and impose penalties on entities involved in international transfers of controlled goods. The same enforcement authority applies to officials of entities responsible for export control violations. The administrative enforcement procedure for export control violations by entities is outlined in the Ministry of Economic Development and Trade's Order No 1490, dated 16 December 2013.

The fine amounts of administrative sanctions (penalties) for export control violations depends on their severity and is determined as a percentage of the value of the transferred goods or, if the violation is not directly related to a specific international transfer, as a proportion of a certain number of non-taxable minimum incomes of citizens ([214]). Penalties stipulated in Article 25 of the law are imposed on behalf of the SSECU by its head or a deputy head.

In addition to imposing penalties, the SSECU may cancel or suspend relevant licenses (permits) or international import certificates issued to entities, or cancel their registration with the SSECU.

If the SSECU identifies signs of criminal offenses related to international transfers, it escalates the matter to law enforcement agencies. Upon confirmation and proof of criminal offenses by the court, specific provisions of the Criminal Code of Ukraine, including Article No 333, may be applied against the guilty parties.

213 Criminal Code of Ukraine, Document 2341-III, valid, current version – revision on 5 October 2023, on the basis of 3380-IX, https://zakon.rada.gov.ua/laws/show/en/2341-14#Text.
214 State Tax Administration of Ukraine (regarding the non-taxable minimum incomes of citizens), https://lv.tax.gov.ua/media-ark/news-ark/print-402663.html.

It is worth noting that the SSECU has prioritised post-shipment verifications and inspections. To address this task, a dedicated unit has been established within the SSECU structure, and it has already commenced enforcement and monitoring activities concerning entities that have completed sensitive international transfers of controlled goods or services. These measures underscore Ukraine's commitment to effective export control enforcement and security.

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