

Arms and Related Items Export Control Regime

The Eternal Quest to Reconcile Foreign Policy and
Economic Interests

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Introduction¹

The question to authorize or not the transfers of arms to a third country always raises the difficulty to balance commercial interests, national defence interests and foreign policy in terms of peace and security. In short, how to deal with the risk that the weapon we sell today could be used against us tomorrow?

The commercial importance of arms trade in international exchanges is not negligible. In 2005 the export of major conventional weapons has counted for more than 22.000 millions of US dollars at constant (1990) prices. The supply market is dominated by a small number of countries, which are USA, Russia, France, Germany, United Kingdom, Ukraine, Italy, China, Netherlands, Belarus, and Sweden. The first five suppliers² account for almost 80 %.

To evaluate more exactly the importance of arms exports, it should be added to these data the transfer of small arms, dual-use items and technology. Unfortunately, data for those exports are uneasy to establish. Nevertheless, an indicator of the economic importance of arms trade is the military expenditures which rise roughly 1118 billions of US dollars for 2005, or a world average of around US \$173 per capita.

The objectives of these notes are to provide the essential elements to understand how trade control of weapons and related items is organised. The analysis focuses on international instruments (formal and informal) and on European Union instruments. A particular importance is given to the non-proliferation instruments articulation, which constitutes the International Export Control Regime.

The notes are divided in two parts. The first is devoted to an analysis of arms and related items export control regimes and the second focuses on the different export control regimes.

The first part is divided in three chapters

- Approach to the definition of conventional weapons and weapons of mass destruction
- The necessity to establish export control regimes to implement States non-proliferation international commitments
- Analysis of basic elements of an export control regime

The second part will be divided in two chapters

- Conventional arms export control regime
- Weapons of mass destruction export control regime

¹ Data mentioned in the introduction come from the "SIPRI Yearbook 2005 armaments, disarmament and international security", Oxford University Press, 2005.

² Russia, USA, France, UK and Germany.

1. Arms Definition³

Usually, arms are divided in two categories: conventional arms (major and small) and weapons of mass destruction (nuclear, chemical and biological). The latter category usually includes weapons carriers, essentially missiles.

1.1 Conventional Arms

The definition of conventional weapons is usually made by exclusion. It includes all kinds of weapons that are not weapons of mass destruction. In this regard, the definition could include, in some extent, goods which are not weapons per se but which could be diverted from their peaceful use to instruments of death and injuries. The New York Twin Towers attack in September 2001 has clearly showed that some items such as box-cutters and commercial aircraft could be used as efficient means of destruction.

Conventional weapons are divided between major conventional and small weapons. The borderline between the two categories might differ in function of the export control regime taken into consideration.

1.1.1. Major Conventional Weapons

The commonly accepted definition of major conventional weapons is the one adopted by the United Nations Register of Conventional Arms⁴ which established 7 categories:

- Battle tanks (direct fire main gun at least of 75 millimetres calibre)
 - o Tracked or wheeled or self-propelled armoured fighting vehicles, with high cross-country mobility and high level of self protection, weighting at least 16,5 metric tonnes unladen weight; with a high-muzzle-velocity direct-fire main gun of a calibre of at least 75 millimetres.
- Armoured combat vehicles
 - o Tracked or semi tracked or wheeled self-propelled vehicles, with armoured protection and cross country capability, either: (a) designed and equipped to transport a squad of four or more infantrymen, or (b) armed with an integral or organic weapon of at least 12,5 millimetres calibre or a missile launcher.
- Large calibre artillery systems
 - o Guns, howitzers, artillery pieces combining the characteristics of a gun or a howitzer, mortar or multiple-launch rocket system, capable of engaging surface targets by delivering primarily indirect fire, with a calibre of 100 millimetres and above.
- Combat aircraft
 - o Fixed-wing or variable-geometry wing aircraft, including remotely piloted vehicles, designed, equipped or modified to engage targets by employing guided missiles, unguided rockets, bombs, guns, cannons or other weapons of destruction, including versions of these aircrafts which perform specialized electronic warfare, suppression of air defence or reconnaissance missions. The

³ See for conventional weapons, industries examples:

- <http://www.army-technology.com/>
- <http://www.armuria.com/prod01.htm> (small arms)
- <http://www.ctcmr.org/debut/munition.html> (small arms)
- <http://grandearmureric.multimania.com/ac-sommaire.htm> (small arms)
- <http://www.euroarms.net/> (small arms)

⁴ <http://disarmament2.un.org/cab/register.html>.

- term “combat aircraft” does not include primary trainer aircraft, unless designed, equipped or modified as described above.
- Attack helicopters
 - o Rotary-wing aircraft designed, equipped or modified to engage targets by employing guided or unguided anti-armour, air-to-surface, air-to-subsurface, or air-to-air weapons and equipped with an integrated fire control and aiming system for these weapons, including versions of these aircraft which perform specialized reconnaissance or electronic warfare missions.
- Warships (torpedoes and missile with an range of 25 km)
 - o Vessels or submarines armed and equipped for military use with a standard displacement of 750 metric tonnes or above, and those with a standard displacement of less than 750 metric tonnes, equipped for launching missiles with a range of at least 25 kilometres or torpedoes with similar range.
- Missiles and missile launchers (missile with an range of 25 km)
 - o Guided or unguided rocket, ballistic or cruise missile capable of delivering a warhead or weapon of destruction to a range of at least 25 km, and means designed or modified specifically for launching such missiles or rockets, if not covered by categories I to VI.

1.1.2. Small Weapons

Generally, small weapons are all kinds of weapons with a calibre under 100 mm, they are usually divided into two categories: small arms and light weapons. Small arms are weapons designed for personal use, while light weapons are designed for use by several persons serving as a crew. Examples of small arms include revolvers and self-loading pistols, rifles, sub-machine guns, assault rifles and light machine-guns. Light weapons include heavy machine-guns, mortars, hand grenades, grenade launchers, portable anti-aircraft and anti-tank guns and portable missile launchers. Usually ammunition, explosives and explosive devices are considered to form an integral part of small arms and light weapons used in conflicts. Nevertheless the lethality of small weapons is directly linked to the category of ammunitions used and accepted by the small weapons.

Small weapons are characterized by the fact that:

- They are portable by an individual or could be dismantle and carry by a small group.
- They require almost no maintenance and can essentially last forever.
- They can be hidden.
- They are inexpensive; in some areas of the world an AK-47 assault rifle can be bought for US\$ 20-30.
- They are numerous (estimation goes from one hundred to five hundred millions in circulation around the world).
- Only 50 to 60 per cent of the world’s trade of small arms is legal.

1.2. Weapons of Mass Destruction (WMD)

1.2.1 Chemical weapons

Chemical weapons are charged with a toxic chemical contained in a delivery system such as a bomb or artillery shell. It was used for the first time the 22 April 1915 near Ypres where 6,000 cylinders containing 168 tonnes of chlorine were deployed by two battalions along six kilometres of the battlefield. The cloud of gas was dispersed by the wind and killed 5,000 soldiers. After this test, chemical weapons had been used massively by both belligerents until the end of the war. The death toll raised 1,300,000 (nearly 100,000 of whom died in combat), while losses caused by other forms of weapons were put at 26,700,000 (6,800,000 of whom died in combat) even if improvements made with gas masks and other means of immediate protection considerably reduced total losses caused by gases - especially mustard gas - employed as a weapon of war.

Furthermore, chemical weapons have been used in⁵:

- 1922 - 1927 by Spain against the Rif rebels in the Spanish Morocco.
- 1936 by Italy which used mustard gas against Ethiopians during its invasion of Abyssinia.
- 1962 - 1970 by United States, which used tear gas and four types of defoliant, including Agent Orange in Vietnam.
- 1963 - 1967 by Egypt which used chemical weapons (phosgene, mustard) against Yemen.
- 1975 - 1983 by Soviet Union which used Yellow Rain (trichothecene mycotoxins) in Laos and Kampuchea.
- 1982 - 1988 by Iraq which used various chemical weapons against Iran and against Kurds.
- In March 1995 by the Aum Shinrikyo sect in Tokyo.

Contrary to conventional and nuclear weapons, the destructive power of chemical weapons is limited to life and does not affect infrastructure and buildings. It usually left few residuals after use.

If a chemical weapon was the first WMD used in an arms conflict, it was also the first to be banned by an international convention, the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Others Gases, and of Bacteriological Methods of Warfare. Chemical Weapons are often considered as a third-world country WMD, due to the fact that contrary to other WMD, they do not require highly and costly technology. Most of their components could be obtained rather easily on the international market. Moreover, the military purposes could be easily hidden due to the fact that peaceful chemical facilities could be diverted to produce toxic chemicals.

Chemical weapons have, like small weapons, a long lifetime and large stockpiles exist all around the world. A non-negligible part of those stockpiles is constituted by chemical weapons abandoned on the battlefield by the belligerents at the end of WWI.

Presently, States of concern are Algeria, China, Cuba, Egypt, Ethiopia, Iran, Israel, Myanmar, Pakistan, Russia, Sudan, Syria, Taiwan, North Korea and Vietnam.

The toxic component of a chemical weapon is called “chemical agent.” Based on their mode of action (i.e. the route of penetration and their effect on the human body), chemical agents

⁵ All the data come from Centre For Non-proliferation Studies, Monterey Institute of International Studies (<http://cns.miiis.edu>)

are commonly divided into several categories: choking, blister, blood, nerve and riot control agents⁶.

Choking agents inflict injuries mainly on the respiratory tract. They irritate the nose, throat, and especially the lungs. Victims typically inhale these agents, which cause the alveoli to secrete a constant flow of fluid into the lungs, essentially drowning the victim. Examples of choking agents include: chlorine (Cl), phosgene (PG), diphosgene (DP) and chloropicrin (PS). Choking agents were among the first agents produced in large quantities. During World War I both sides used them extensively. Because they sink into and fill depressions, they were well suited to trench warfare. Their successful use on the battlefield led to research and development programmes to create even more toxic and effective chemical weapons.

Blister agents, or vesicants, are one of the most common CW agents. These oily substances act via inhalation and contact with skin. They affect the eyes, respiratory tract, and skin, first as an irritant and then as a cell poison. As the name suggests, blister agents cause large and often life-threatening skin blisters, which look like severe burns. Examples include sulphur mustard (H, HD), nitrogen mustard (HN), lewisite (L) and phosgene oxide (CX). Mustard agents and lewisite are the best known. Blister agents were first tested in combat in 1917 by Germany and were in several conflicts since, notably in the Iran-Iraq War (1980–88). They are primarily dispersed in liquid or vapour (aerosol) form and may persist for days. Like phosgene, mustard agents have a delayed effect. Deaths typically only represent a small percentage of the casualties they cause. Exposure to blister agents often results in blindness and permanent damage to the respiratory system.

The name **blood agent**, like those of other groups of agents, derives from its effect on victims. Blood agents are distributed via the blood and generally enter the body via inhalation. They inhibit the ability of blood cells to utilise and transfer oxygen. Thus, blood agents are poisons that effectively cause the body to suffocate. Examples of blood agents include: hydrogen cyanide (AC), cyanogens chloride (CK) and arsine (SA).

Nerve agents tend to block impulses between nerve cells or across synapses. They act primarily via absorption through the skin and lungs. Nerve agents are divided into two main groups: G-series agents and V-series agents so called due to their military designations. Nerve agents are the product of the search for improved chemical agents between the two World Wars. In the late 1930s German chemists synthesised the first nerve agents, tabun (GA) and sarin (GB), which were the first of the G-series agents. Soman (GD) and cyclosarin (GE and GF) followed quickly thereafter. British chemists developed V-series agents, which tend to be more lethal, in the 1950s. The series includes: VE, VG, VM and VX, which is the best-known agent. Some G-agents, particularly tabun and sarin, persist for only short periods. Other agents, such as soman and cyclosarin, persist longer and present a greater threat to the skin. V-agents, in comparison, are extremely potent (only milligrams needed to cause death) and persist for long periods of time on the battlefield as, in military parlance, “slime.”

CW Agent Group	Persistence	Rate of Action
Choking Agents		
· (Cl) Chlorine	· Low	· Variable
· (PG) Phosgene	· Low	· Delayed
· (DP) Diphosgene	· Low	· Delayed
· (PS) Chloropicrin	· Low	· Rapid
Blister Agents		
· Sulphur mustard (H, HD)	· high Very	· Delayed
· Nitrogen mustard (HN)	· High	· Delayed
· Phosgene oxide (CX)	· Low	· Immediate
· Lewisite (L)	· High	· Rapid

⁶Data mentioned below are taken from Fact Sheet 4: What is a chemical weapon, <http://www.opcw.org/docs/fs4.pdf>

Blood Agents · Hydrogen cyanide (AC) · Cyanogen chloride (CK) · Arsine (SA)	· Low · Low · Low	· Rapid · Rapid · Delayed
Nerve Agents · Tabun (GA) · Sarin (GB) · Soman (GD) · Cyclosarin (GE, GF) · VX	· High · Low · Moderate · Moderate · Very high	· Very rapid · Very rapid · Very rapid · Very rapid · Rapid

1.2.2 Biological weapons

Throughout history, infectious diseases contracted naturally have had a significant impact on military operations. The intentional dissemination of disease added a new dimension to threats posed by infectious and toxic agents traditionally transmitted only by natural routes. Such agents have been used⁷:

- By Japan in 1939 to poison Soviet water supply with intestinal typhoid bacteria at former Mongolian border.
- By Japan in 1940 who dropped rice and wheat mixed plague-carrying fleas over China and Manchuria.
- By Germany in May 1945 to poison a large reservoir in Bohemia with sewage.
- In United States faced, in autumn 2001, a wave of letters contaminated with anthrax, which killed 5 people and affected 17 others.

Most of countries have in the past initiated a biological weapons research program but presently countries of concern are rather limited. It is mostly Algeria, China, Egypt, India, Iran, Iraq, Israel, Libya, North Korea, Pakistan, Russia, Sudan, Syria, and Taiwan. Since September 2001, concerns have mostly focused on the risk that non-states actors, such as terrorists, could elaborate biological weapons.

Biological weapons are characterized by the fact that they are rather difficult to elaborate and present a high level of instability (preservation conditions are uneasy to maintain). Nevertheless, facilities to elaborate such weapons and the weapon itself are rather easy to hide and in some ways to use. For instance, the toxic agent could be hidden and dispersed through a container looking like a classical perfume bottle.

The ability of biological agents to multiply in the body over time actually increase their effect and distinct them from their chemical counterparts.

Biological agents, which may be used as weapons, can be classified as follow⁸:

- *Bacteria*. Bacteria are small free-living organisms, most of which may be grown on solid or liquid culture media. The organisms have a structure consisting of nuclear material, cytoplasm, and cell membrane. They reproduce by simple division. The diseases they produce often respond to specific therapy with antibiotics.
- *Viruses*. Viruses are organisms, which require living cells in which to replicate. They are therefore intimately dependent upon the cells of the host, which they infect. They produce diseases which generally do not respond to antibiotics but which may be

⁷ All the data come from Centre For Non-proliferation Studies, Monterey Institute of International Studies (<http://cns.miiis.edu>)

⁸ This classification come from Federation of American Scientists, <http://www.fas.org>

responsive to antiviral compounds, of which there are few available, and those that are available are of limited use.

- *Rickettsiae*. Rickettsiae are microorganisms which have characteristics common to both bacteria and viruses. Like bacteria, they possess metabolic enzymes and cell membranes, utilize oxygen, and are susceptible to broad-spectrum antibiotics. They resemble viruses in the measure that they grow only within living cells.
- *Chlamydia*. Chlamydiae are obligatory intracellular parasites incapable of generating their own energy source. Like bacteria, they are responsive to broad-spectrum antibiotics. Like viruses, they require living cells for multiplication.
- *Fungi*. Fungi are primitive plants, which do not utilize photosynthesis, are capable of anaerobic growth, and draw nutrition from decaying vegetable matter. Most fungi form spores, and free-living forms are found in soil. The spore forms of fungi are operationally significant. Fungal diseases may respond to various antimicrobial.
- *Toxins*. Toxins are poisonous substances produced and derived from living plants, animals, or micro organisms; some toxins may also be produced or altered by chemical means. Toxins may be countered by specific antisera and selected pharmacological agents.

The intrinsic features of biological agents, which influence their potential for use as weapons, include: infectivity, virulence, toxicity, incubation period, transmissibility, lethality and stability.

1.2.3 Nuclear Weapons

Nuclear weapons have been and are still considered as a symbol of supreme power, not only military but also politically. If nuclear weapons have been used only twice in a war conflict, different nuclear explosive devices have been tested massively and large quantities of nuclear weapons are held by the eight officially and unofficially nuclear weapons states (USA, Russia, United Kingdom, France, China, India, Pakistan and Israel). This list should be complete by a few suspicious countries for which they are ground to believe that they are engaged in a nuclear weapons research program (Iran, North Korea⁹).

Nuclear weapon is the only weapon of mass destruction for which an international treaty legally recognizes the possession: the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). For this Treaty, legal holders are the states that have manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967¹⁰. In this regard, only USA, Russia, United-Kingdom, France and China have the right to hold nuclear weapons.

They are two categories of nuclear weapons: the one based on fission process¹¹ and the one based on fusion process¹². Both are based on the principle that to sustain a chain reaction a

⁹ North Korea made its first explosion of a nuclear explosive device in 2006, October 9th, and proclaimed itself a Nuclear Weapon Power but the proof has not been presented that it had the adapted delivery means to be considered as such. Moreover, it seems that North Korea made it only on the purpose of constraining the "Six-Party Talks" to resume.

¹⁰ Article IX.3 of the NPT.

¹¹ During the process of nuclear fission a particle such as a neutron strikes the nucleus of a uranium or plutonium atom and causes it to split into two fragments. Each of the two fragments consists of a nucleus with roughly half the neutrons and protons of the original nucleus. This fission process releases a large amount of energy in the form of warmth and radiation. Gamma rays are emitted as well as two or more neutrons that are no longer bound by the fission fragments. These so-called "free" neutrons are now capable of splitting other uranium or plutonium nuclei, which then release neutrons that split still more nuclei. A series of such nuclear fissions is called a "chain reaction," which is accompanied by an enormous release of nuclear energy.

minimum amount -called the critical mass- of fissile material is required but when this amount is assembled in a plain sphere shape the risk of spontaneous ignition of the chain reaction is high. So to avoid such risk, two types of fission bombs have been tested. The gun-barrel design which uses conventional explosives to propel a subcritical mass of uranium down a barrel for collision with another subcritical mass. The bomb drop on Hiroshima was of this type. The empty sphere shape design is an implosion device which uses conventional explosives and reflectors surrounding a subcritical mass of nuclear material. When the explosive are detonated simultaneously the pressure of the central core is so great that it compresses the material in a plain sphere shape and to criticality.

The fusion bomb constitutes in fission bomb boost up by a nuclear fusion which enhanced considerably the destructive potential. The fusion reaction is made by infusing a mixture of the heavy hydrogen isotopes deuterium and tritium into the fission reaction.

Nuclear weapons are characterized by the fact that their conceptual principles are rather easy to understand but are technically difficult to implement. Nevertheless, the system of the first uranium gravity fission bomb dropped on Hiroshima has not been tested before used. One of the main difficulties lies in the process to produce the necessary fissile material.

Compared to chemical and biological weapons, nuclear weapon has a high level and not selective destruction power¹³.

1.2.3 Delivery systems

This category, which does not include weapons, usually includes all delivery systems capable of carrying an explosive device to a selected target. It is divided into different categories such as:

- Unmanned aircrafts such as missiles
- Manned aircrafts
- Suicide commando

¹² Fusion constitutes in the melding of two atoms, which produces extraordinary amounts of energy.

Nevertheless, fusion reactions can occur only at many millions of degrees Kelvin when the electrostatic forces of repulsion that result from the presence of positive electric charges in both nuclei can be overcome so that the nuclear forces of attraction can perform a fusion. Such high temperatures, however, do only occur in suns or in uncontrolled nuclear chain reactions (fission bomb).

¹³ The bomb dropped on Hiroshima bomb has a yield of 12-15 Kt and the largest nuclear weapon tested was Russian and had a yield of 58 Mt (4296 times larger).

2. Why regulate arms trade?

Introduction

The arms trade regulation is considered as one of the essential instruments to obtain, stabilize and guarantee peace and security around the world. The risk that a weapon sold today might be used against the supplier state or against one of its allies tomorrow has always motivated states to carefully consider their weapons export policy. Such unwilling consequences have occurred during the Falkland War in 1982 where Argentinean Air Force sunk the British destroyer Sheffield with a French Exocet.

Some have also argued that a completely free trade and the multiplication of weapons, especially weapons of mass destruction, could be considered as a way to obtain and maintain peace. The "equilibrium of terror" applied during the Cold War between NATO and the Warsaw Pact was more or less based on this deterrence principle. However, with the multiplication of the decision poles in the post Cold War era, the concept does not seem to apply to the actual political balance.

Initially, States have preferred to ban the use of certain weapons than to regulate their trade. The escalation of the destruction capacities of both belligerents during the first world war has demonstrated the necessity to restrain the use of certain weapons and especially chemical which has been "condemned by the general opinion of the civilised world". In this regard a Protocol was adopted in 1925 to ban the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare.

Nevertheless, the concept of international cooperation and elaboration of weapons export control regimes will be initiated only at the beginning of the fifties after the use of a more destructive devices such as atomic bomb during the second world war. The process will be established in two main stages

Stage I The Monopoly

In the year following the use by the United States of two atomic bombs against Japan in August 1945, a restriction to the dissemination of information on nuclear items and technology, even with allied countries, was imposed by the US Atomic Energy Act, also known as the McMahon Act. It was thought that if potentially peaceful application of nuclear energy could be emphasized they could not be isolated from military applications.

The McMahon Act transferred control of all aspects of nuclear energy from the Army, which had managed the Government's World War II Manhattan Project to produce atomic bombs, to a five-member civilian Atomic Energy Commission (AEC). It designated the atomic energy information to be protected as "Restricted Data" and defined that data.

Nevertheless at the same time, the United States tabled at the United Nations a proposal of nuclear international cooperation. The proposal, known as the Baruch plan, suggested the internationalisation of all nuclear activities by the establishment of an International Authority for the Development of Nuclear Energy which should have the management, if not the ownership, of all nuclear facilities and especially the one considered as sensitive for international security. To reduce the risk of a national control of the complete nuclear fuel cycle, the Baruch plan requested an international geographical repartition of the different nuclear facilities. Moreover, national nuclear research programs and nuclear commercial transfers between states facilities should be limited unless they are duly authorized by the Agency.

The plan imposed the establishment of an independent safeguards system which should carry regular inspections to detect illegal activities. UN sponsored sanctions could be imposed to violators and these sanctions could not be vetoed by the UN Security Council. In exchange of this plan, the US Government accepted to stop the nuclear weapons production and development, and to eliminate all atomic weapons stockpiles.

The Baruch plan was refused by the Soviet Union who set a counterproposal to the plan which reverses the order envisioned by calling for the destruction of all United States nuclear weapons before the establishment of an international control system.

In the end, the United States and Soviet Union could not reconcile their differences and the project of an international control of nuclear energy was dropped.

Stage II The Sharing of Nuclear Peaceful Applications

After a few years of implementation, it slowly appeared that the US monopoly policy was ineffective. Its principal political competitor and allies succeeded to elaborate and test a nuclear explosive device (USSR 1949 and UK 1952). Moreover the fusion bomb tested by the Soviet Union in 1953, a few months after the United States, appeared to be based on a more advanced technology which demonstrated that a monopoly on nuclear activities was, de facto, non existent.

For foreign policy reasons, especially the beginning of the Cold War which impose the establishment of large spheres of influence, a monopoly was not any more suitable because the Soviet Union was developing a large peaceful application nuclear research program and was ready to share it with its allies and any potential allies. Moreover, in the few applications not covered by the secret policy -the production of isotope for medical use- the conditions of supply required by States developing ahead on civil nuclear programs were less constraining than the one imposed to US industries. The Mac-Mahon Act was blocking the US participation in the rapidly developing international nuclear market.

By 1953, it was evident that the US policy on nuclear secrecy had failed and it was urgent to reevaluate it. The new policy called "Atoms for Peace Plan" launched by the US president Dwight D. Eisenhower in December 1953 was a kind of compromise between the Baruch Plan's promise of access to nuclear technology and the Mac Mahon Act's concern for restricting such access. The policy was based on an agreement which consisted, one hand, of the US commitment to facilitate the dissemination of nuclear energy for peaceful purposes to all interested countries in return, on the other hand, of the acceptance by the interested country to accept safeguards against military use of fissile material. Between 1956 and 1962, Atom for Peace Plan provided research reactors, training and fissile material to 26 nations but safeguards did not cover all global nuclear transaction. Other nations with advanced nuclear technology joined US policy in marketing nuclear technology frequently without requiring adequate safeguards. It was the case in the different supplies of facilities and material to India by Canada, United States, and United Kingdom. It was also the case for the supply of technology and facilities to Israel by France and to China by Soviet Union¹⁴.

Atom for Peace Plan called also for the creation, in the United Nations sphere, of the International Atomic Energy Agency which will have in its charges a system of international nuclear safeguards that could be substituted to the one established by the supplying state. After long and heavy debate, the statutes of the International Atomic Energy Agency (IAEA) have been adopted in October 1956. They foresaw, in one of its three main tasks, the organisation of a nuclear safeguards system which will become rapidly the main activity of the Agency.

¹⁴ Gary, T. Gardner, Nuclear Nonproliferation, A Primer, Lynne Rienner Publishers, Inc, Colorado, 1994.

Complementary to the reevaluation of the US nuclear export policy and to avoid that US technology could be transferred directly or indirectly to a Warsaw Pact Member or an another sensitive country, such as China, the creation of multilateral control system was suggested to NATO members. This system called "Coordinating Committee for Multilateral Export Controls" (CoCom) was created in 1950 and its principle was to ban the export of sensitive items, mostly military related ones, to Soviet Union and its allies. Any derogation to this principle has to be authorized by consensus of all participating states.

3. Elements of an Export Control Regime

An export control regime should normally integrate three elements: an authorisation system to analyse the demand of items transfers, a control and verification system to verify the end-users and uses of the items transferred, and sanctions to penalize infringements.

3.1 An authorization system

3.1.1 Implementation field

One of the main difficulties in the elaboration of an export control regime lay in the determination of its implementation field. In its elaboration, the following points should be taken into consideration:

First, if there is no doubt that the system should cover the weapons transfer, which kind of weapons should be control: the one that have the best performance, the newest, the most destructive one?

Second does the system have to control the transfers of weapons components and if yes which kind of components?

Third, does the system have to control the transfers of weapons production facilities and the components of those facilities?

Four, does the system has to control the technology transfers? Since a few years the control of technology has become one of the main sensitive issues due to the fact its transfer from the supplier to the recipient has become with the development of means of communication mostly intangible and therefore rather difficult to control.

Consequently does the system should control intangible transfers such as information send by fax, email, read by phone or taken from an website?

Link to the implementation field, the authorization system should also define the different transfers it covers. Does it include import, transit and export or only export? Regarding exports some regimes include an *black countries list* to who transfers are banned or submit to special formalities other regimes rather prefer to adopt an *white countries list* to who simplified transfer formalities could be apply.

3.1.2 Decision process

To grant or not the transfer authorization, States take their decision on two kinds of elements which are conditions and criteria.

Conditions are objective elements that recipient countries have to meet to obtain the transfer authorisation from the supplier. Those elements could be the ratification of a treaty, the conclusion of a safeguard system or the submission of an end-users certificate.

Criteria are subjective elements to be considered by the Supplier State, on a case-by-case analysis, to authorize or not the transfer. Criteria could be the internal situation in the country of final destination, the existence of tensions or armed conflicts, the risk that the recipient

would use the proposed export aggressively against another country or to assert by force a territorial claim...

3.1.3 Procedure

The export control regime should also determine the decision making process to obtain the export authorization, the level of authority in charge of taking the decision, the possibilities of recourse in case of denials, the different formalities to let the items leave the territory, ...

3.1.4 Information Exchange System

Most of international export control regimes have established systems to exchange information between participating States. Information exchanges could concern the authorisation system such as exchanges of licences granted or denied which could be completed with a “no undercut” commitment¹⁵. But exchanges could also concern information on risks associated with transfers of conventional arms and dual-use items or information on non-participating states related to the acquisition activities, export policy, specific project of concern of these States.

Those information exchanges could take the form of bilateral exchanges or could be inserted in larger networks including all participating States

3.2 Control and Verification System

To guarantee the efficiency of the export control regime it is necessary to establish some controls and verifications, which intervene at different levels and could have several forms.

The first verification -the control of final destination- intervenes before issuing the authorisation. It consists to confirm that the proposed transfer is intended for the recipient State mentioned in the demand of transfer authorisation. Submitting a commitment of the recipient State authority such as an End User Certificate can do this control¹⁶.

The second verification consists in the confirmation, by the supplier embassy for instance, that the items have been delivered to the recipient country. It could take the form of a Delivery Verification Certificate (DVC)¹⁷

The third verification is an ongoing process to confirm all along its utilisation that items remain in the recipient State and they are used only for the different applications which have been duly authorized by the supplier. These safeguards could be assumed by an international organisation such as it is the case for nuclear transfers with the safeguards applied by the International Atomic Energy Authority.

Finally, some additional control could be imposed to the recipient. It could take the form of a commitment to require the prior consent of the supplier in case of retransfers of an items previously transferred, for special applications and for the transfers of items which has been produce with the hand of an items previously transferred.

¹⁵ No-undercut principle consists in the commitment taken not to grant an authorisation for an item that has been previously denied by another participating State.

¹⁶ An End User Certificate (International Import Certificate IIC) is a document issued by the recipient Government or by recipient company. It contains usually information on the items transferred, on the exporter, on the intermediary if used, on the end user, on the application authorized and finally a commitment of the recipient to not export or re-export without the prior consent of the selling country.

¹⁷ Official certification submitted by the exporter to its authorities which confirm that the items have arrived in the country of destination.

3.3 Sanctions

As any regulation, its efficiency requires the establishment of sanctions. Two kinds of sanctions could be distinguished.

The internal sanction, which concerns violation by individuals of national export control regulation and the external sanction which concerns violation by a State of the international export control regime.

4. Formal and Informal Regulation

To show their intention on nuclear weapons non-proliferation regime, States could intervene with two kinds of instruments. They could elaborate and adopt a formal act, which could give rise to different legal obligations: it is the case for the NPT. Nevertheless, in the field of nuclear weapons non-proliferation, the recourse of a formal instrument is rather rare and States trend to prefer the conclusion of informal agreements –more commonly know as soft law or gentleman agreement- to the adoption of a treaty. It is the case for the NSG Guidelines and, also for the Initial Elements and Dual-Use List of the Wassenaar Arrangement.

Strictly speaking, the difference between soft law and hard law could be defined by the fact that a soft law does not create legal obligation for States, which adopt such soft law. In other word, a soft law related to weapons non-proliferation is a political commitment taken by the different participating states by which they accept to integrate their obligations into their national export control regime. It usually requires the adoption of national regulation instruments. In this concern there is always a risk of an incomplete implementation or an “à la carte” implementation. In 1991, the EC Commission has conducted an analysis of the different items controlled by EU Members States and even if all those states were members of the same international export control regime and have taken a equal commitment, a few differences appeared in their national export control lists.

In the weapons of mass destruction field, soft law is often taken to precise, complete, define commitments adopted in an international Convention or Treaty. For instance, items concerned by the commitment taken in the NPT by participating states “not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards”¹⁸ is precisely defined by the NSG Guidelines¹⁹.

One of the reasons that States rather prefer to adopt a soft law than a hard law could lay in the fact that soft law obligations could not be invoked before the International Court of Justice. Nevertheless, the intervention of the International Court of Justice is even in hard law rather limited by the fact that its intervention is constrained to²⁰:

- Matters specially provided for in the Charter of the United Nations or in treaties and conventions in force:
 - o In the field of weapons of mass destruction related items trade, there is only the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.
- Cases in which States agree to refer to the Court;

¹⁸ Article III. 2 of the NPT

¹⁹ NFCIRC/254/Rev.5/Part 1 (Part I) Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology.

²⁰ Chapter II of Statute of the International Court of Justice.

- States which have declared that they recognize as compulsory ipso facto and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
 - o The interpretation of a treaty;
 - o Any question of international law;
 - o The existence of any fact which, if established, would constitute a breach of an international obligation;
 - o The nature or extent of the reparation to be made for the breach of an international obligation²¹.

Moreover, except for international treaties duly recorded by the UN secretariat, the precise definition of acts that created legal obligation and could be invoked in front of the International Court of Justice is very controversial.

Finally, if soft law does not create legal obligation for states, which adopted such soft law, does it mean that a soft law has no power of constraint?

In the field of nuclear weapons non-proliferation, soft law such as NSG guidelines usually established on one hand strict control for transfers of items to non member States and on the other hand free exchange of items between member States. In this regard, if a State does not respect a soft law obligation and transfers items to a third State without appropriate controls, others participating States might immediately freeze their transfers to this State. Such risk of a political or economical sanction might be even more dissuasive not to breach an informal obligation than a sentence of the International Court of Justice.

²¹ Not all UN States have made a similar declaration.

5. Conventional Arms Export Control Regime, International Obligation Linked to Arms Trade Control

5.1 From trade embargos to military intervention

5.1.1 Principle

To meet the objective to maintain or restore international peace and security, the UN Security Council is empowered by the UN Charter to decide and initiate a set of gradual measures against the different belligerents involved in the conflict. Usually one of the first resolutions adopted is to ban export of weapons and munitions to States of concerns.

United Nations Charter - Chapter VII Action with respect to threats to the peace, breaches of the peace, and acts of aggression

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures, as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

5.1.2 Implementation cases

The table below summarize embargoes related decision taken by the UN Security Council²².

States of concern	Embargos on arms and ammunition	Embargos on military vehicles and equipment paramilitary equipment and spare parts	Embargos on technical assistance related on military activities	Exercise diligence to prevent diversion and transshipment to unauthorized destination or end-user	Exercise diligence to prevent illicit trafficking
Côte d'Ivoire	1572/2004 1643/2005	1572/2004 1643/2005	1572/2004 1643/2005		
Democratic People's Republic of Korea	1718/2006	1718/2006	1718/2006		
Democratic Republic of Congo ²³	1493/2003 1718/2006	1493/2003 1718/2006	1493/2003 1718/2006	1493/2003 1718/2006	1493/2003 1718/2006
Lebanon	1701/2006	1701/2006	1701/2006		
Liberia	1647/2005	1647/2005	1647/2005		
Rwanda	1011/1995	1011/1995	1011/1995	997/1995	997/1995
Sierra Leone	1171/1998	1171/1998			
Somalia	733/1992 1425/2002	733/1992 1425/2002	1425/2002		
Sudan ²⁴	1556/2004	1556/2004	1556/2004		

²² Council of the European Union 12990/06PESC 879 COARM 49, List of EU embargoes on arms exports, UN Security Council embargoes on arms exports and arms embargoes imposed by the OSCE. 22 November 2006

²³ This embargo is applied only to foreign and Congolese armed groups and militias operating in the territory of North and South Kivu and of Ituri, and to groups not party to the Global and All-inclusive agreement, in the Democratic Republic of the Congo.

²⁴ This embargo is applied to all non-governmental entities and individuals, including the Janjaweed, operating in the states of North Darfur, South Darfur and West Darfur

5.2 UN Register of Conventional Arms

The UN Register of Conventional Arms was established by resolution of the General Assembly, in December 1991. It include data on international arms transfers as well as available background information provided by Members States on military holdings, procurements through national production and relevant policies²⁵. Every year in April, Members States are requested to provide data of imports into and exports from their territory in the previous calendar year for seven categories of major conventional arms:

- Main battle tanks
- Armoured combat vehicles
- Large calibre artillery systems
- Combat aircrafts
- Attack helicopters
- Warships (750 tonnes and above)
- Missiles and missiles launchers

Normally, the notification should also, in addition to the physical movement of equipment into and from national territory, integrate the transfer of title to and control over the equipment. An international transfer may also occur without the movement of equipment across State frontiers if a State, or its agent, is granted title and control over the equipment in the territory of the Supplier State. Therefore, for the Register a transfer of arms would occur when forces stationed abroad are granted title and control of equipment by the host country or any third State, or when title and control of such equipment are transferred to the host country or any third State.

As of 1 January 2006, more than 170 Governments have participated in this reporting instrument one or more times during the past decade and the Register estimate to capture more than 95 percent of the global trade in the seven categories of combat systems.

5.3 Guidelines for international arms transfers in the context of General Assembly resolution 46/36 H of 6 December

In its Resolution 46/36H, the General Assembly of the United Nations has enhanced that international transfer and production of conventional arms, in particular the illicit arms trade, has given rise to serious concerns. In this regard, the disarmament Commission has been charged to examine the issue.

In 1996, a text entitled "Guidelines for international arms transfers in the context of General Assembly Resolution 46/36H of 6 December 1991" has been adopted by the Disarmament Commission²⁶. This text and GA Resolution constituted one of the elements of the United Nations arms trade principles. It could be summarized as followed:

Members States:

- Should exercise effective control over their weapons and military equipment and their arms imports and exports to prevent them from getting into the hands of parties engaged in illicit arms trafficking. Adequate numbers of customs officials adequately trained should be provided to ensure such effective control.
- Should intensify efforts to prevent corruption.
- Should ensure that they had in place an adequate body of laws and administrative machinery for regulating and monitoring effectively their transfer of arms, to

²⁵ <http://disarmament2.un.org/cab/register.html>

²⁶ These guidelines have been "welcomed" by the General Assembly Resolution 51/45F of 10 December 1996 (<http://www.un.org>)

strengthen or adopt strict measures for their enforcement, and to cooperate at the international, regional and subregional levels to harmonize, where appropriate, relevant laws, regulations and administrative procedures as well as their enforcement measures with the goal of eradicating illicit arms trafficking. An import certificate from the recipient state covered the exported arms should be required by the supplier state. Recipient state should ensure that imported arms are covered by a certified licence of the authorities in the supplying State.

- Should maintain strict regulations on the activities of private international arms dealers.
- Should recognize the need for transparency in arms transfers.
- Have responsibilities in exercising restraint over the production and procurements of arms as well as transfers.
- Recognize that economic and commercial considerations should not be the only factors to take into considerations in international arms transfers (maintenance of peace security, promoting social and economic development, preventing arms race...).
- Recognize that arms producing or supplier states have a special responsibility to seek to ensure that the quantity and level of sophistication of their arms imports are commensurate with their legitimate self-defence and security requirements and they do not contribute to instability and conflict in countries or to illicit trafficking in arms
- Have a legal obligation to comply strictly with sanctions and arms embargoes imposed by the UN Security Council.

5.4 Convention against Transnational Organized Crime

This Convention which has entered into force in September 2003²⁷ does not concern directly arms export control except by the fact that it should be completed by a "Protocol Against the Illicit Manufacturing of And Trafficking in Firearms, their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime"²⁸.

This Protocol which have been adopted by the UN General Assembly in May 2001 focuses on²⁹:

- Criminalization of the illicit trafficking and manufacturing of firearms and their components.
- Confiscation and forfeiture of firearms.
- Marking and record-keeping of firearms.
- Organisation of an effective export, import and transit licensing or authorisation systems.
- Security and preventive measures against the risk of theft, loss and diversion.
- Reinforcement of cooperation, exchange of information and experience.
- Registration and licensing of brokers.

5.5 UN Conference on the Illicit Trade in Small Arms and light Weapons in All Its Aspect (July 2001)

Multilateral cooperation in this area took a step forward when the UN Conference on the Illicit Traffic in Small Arms and Light Weapons in All Its Aspects was held from 9-20 July

²⁷ The Convention has been signed by 147 states and ratified by 82. In the EU only Czech Republic, Greece, Ireland and Luxemburg have not yet ratified it.

²⁸ The Additional Protocol (A/RES/55/255) could be obtain on the United Nations website (<http://www.un.org>).

²⁹ The Protocol entered into force on July 2005, 3rd and is counting 52 signatories at the date of 1 february 2007.

2001 at UN Headquarters in New York. The conference adopted on July 20, the orally amended draft Programme of Action to Prevent Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects³⁰.

This Programme of Action includes a number of measures at the national, regional and global levels, in the areas of legislation, destruction of weapons that were confiscated, seized, or collected, as well as international cooperation and assistance to strengthen the ability of States in identifying and tracing illicit arms and light weapons. The General Assembly, in its Resolution 56/24V, welcomed the adoption of the Programme and reiterated Member States' support for action to curb the illicit flow of small arms and light weapons.

Regarding export control and related matters, the Programme integrated specific actions which could be summarized as follow:

- At the National level:
 - o Commitment to set in place adequate laws, regulations and administrative procedure regulating activities related to production, transfers, brokering and transit of small arms and light weapons.
 - o Commitment to prevent the illegal manufacture, possession, brokering and illicit trafficking in small arms and light weapons by:
 - Exercise effective control over the production, transfers-retransfers, and transit of light weapons and their components including the use of authenticated end-user certificates;
 - Establishing re-export notification/authorisation before the retransfer takes place;
 - Establishing criminal offences in order to assure that those engaged in such activities can be prosecuted under appropriate national penal codes;
 - Taking adequate measures against any activity that violates a United Nations Security Council Arms embargo;
 - Taking actions against groups or individuals engaged in those illegal activities;
 - Establishing appropriate national coordination agencies and a national point of contact for the implementation of the Programme of Action;
 - Ensuring an appropriate and reliable marking of small arms and light weapons manufactured;
 - Ensuring effective measures for tracing small arms and light weapons;
 - Ensuring that all collected, seized or confiscated small arms and light weapons are destroyed unless an other form of disposition has been duly authorized;
 - Managing and securing the stock of small arm and light weapons of authorized bodies (police, army);
 - Supporting actively programs involved in peace agreements (destroying surplus of small arms, reintegration of children involved);
- At the regional level:
 - o Participating States take the commitment to prevent at the regional level the illegal manufacture, possession of and illicit trafficking in small arms and light weapons by:
 - Encouraging the conclusion or the ratification of relevant legally binding instruments aimed to this objective;
 - Encouraging transborder customs cooperation, information sharing.

³⁰ see Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects (<http://www.un.org>).

- At the global level:
 - o Participating States undertake to:
 - Cooperate with the United Nations system to ensure the effective implementation of arms embargoes decided by the UN Security Council;
 - Strengthen the ability of States to cooperate in identifying and tracing in a timely and reliable manner illicit small arms and light weapons;
 - Encourage States and WCO and other relevant organisations to enhance cooperation with Interpol to identify groups and individuals involved in this illicit trade, in order to allow national authorities to proceed against them in accordance with their national laws;
 - Encourage States to consider ratifying or acceding to international legal instruments against terrorism and transnational organized crime;
 - Develop a common understanding of the basic issues and the scope of the problems related to illicit brokering in small arms and light weapons with a view to prevent, combat and eradicate those engaged in such brokering.

The Program of Action includes a specific section on implementation of international cooperation and assistance. If primary responsibility for solving the problems associated with illicit trade in small arms and light weapons falls on all States, it is more necessary that States cooperate, ensure coordination, strengthen partnerships to:

- Share resources and informations;
- Assist interested States to establish appropriate legislation and regulations, law enforcement, tracing and marking system, stockpile management and security measures;
- Exchange experience and training among competent officials, including customs, police, intelligence and arms control officials;

Moreover States undertake to provide assistance in the destruction of surplus, in the combat of illicit trade...

A direct link with the Protocol Against the Illicit Manufacturing of And Trafficking in Firearms is established by the Program of Action by the fact that participating States to the Conference recognise that the Protocol "establishes standards and procedure that complement and reinforce efforts to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects"³¹

As it was decided by the 57th United Nations General Assembly³², the implementation of the program has been reviewed in July 2003 and July 2005 at the first and second Biennial Meeting of States³³. The first Conference to Review Progress made in the Implementation of the Programme of Action was held from June to July 2006 in New-York but no final document was issued and no concrete action has been prescribed.

³¹ Paragraph 20 of the Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (in Report of the United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects (<http://www.un.org>)).

³² Paragraph 1 of Resolution 57/72.

³³ The first Meeting report could be found at <http://ods-dds-nv.un.org/doc/UNDOC/GEN/N03/436/04/PDF/N0343604.pdf?OpenElement>. The second Meeting report is available at: [http://www.un.org/events/smallarms2005/report%20\(e\).pdf](http://www.un.org/events/smallarms2005/report%20(e).pdf)

5.6 National Legislation on Transfer of arms, military equipment and dual-use goods and technology

In December 2002, the General Assembly of the United Nations has, for the first time, expressed some interests for the transfer of dual-use goods and technology. In its Resolution 57/66 dedicated to national legislation on transfer of arms, military equipment and also dual-use goods and technology, Member State are encouraged to provide information, on a voluntary basis, to the Secretary General on their national legislation, regulation and procedure on the transfer of arms, military equipment and dual use goods and technology, while ensuring that such national export control system are consistent with the obligation of States parties under international treaties.

5.7 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects

The primary aims of Convention³⁴ and its four Protocols are to protect civilians from the effects of weapons and to protect combatants in international or internal arms conflict from suffering more than necessary to achieve a legitimate military objective. The Convention does not concern directly conventional weapons export control. Nevertheless, by the prohibition of the use and in some cases of the transfer of weapons of a nature to cause unnecessary suffering or superfluous injury it affects the international arms trade exchanges.

The Convention does prohibit the use or the transfer of certain weapons but constitutes a framework supplemented by four individual protocols which govern the use and transfer of specific weapons. New protocols may be added whenever the States Parties deem it appropriate. It was the case in 1995 when a protocol on blinding lasers weapons was adopted. In 2001, States Parties decided to establish a Group of Governmental Experts to address the issue of explosive remnants of war and to further explore the issue of anti-vehicle mines.

In the four protocols of the Convention, two - the Protocol IV on blinding laser weapons³⁵ and Protocol II on mines, booby traps and other devices³⁶ - prohibit the employ of such weapons but also included dispositions regarding the transfers.

If, according to the blinding laser weapons protocol, transfers are clearly prohibited to any State or non-State entity, for the mines, booby traps and other devices protocol, the prohibition seems to be limited to mines, for which the use is prohibited by the protocol.

The two protocols concern non-detectable fragments (protocol I)³⁷ and incendiary weapons (protocol III)³⁸ are limited to the prohibition or the restriction of use of such weapons.

³⁴ Adopted in Geneva (Switzerland) on October 19, 1980. The Convention has entry into force in September 1984.

³⁵ Geneva October 13, 1980. Blinding laser weapons are for the protocol, weapons which use laser as their sole combat function or as one of their combat functions to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices.

³⁶ Geneva, October 10, 1980 as amended on May 3, 1996.

³⁷ Geneva October 10, 1980. Weapons aim under this protocol are weapon which have for primary effect to injure by fragments which in the human body escape detection by X-rays.

³⁸ Geneva, October 10, 1980

5.8 Wassenaar Arrangement

5.8.1. Introduction

The Wassenaar Arrangement was established after the dissolution of the COCOM in order to contribute to regional and international security and stability. It promotes transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilising accumulations. Participating States³⁹ to the Arrangement seek, through their national policies, to ensure that transfers of these items do not contribute to the development or enhancement of military capabilities that undermine these goals, and are not diverted to support such capabilities.

Its scope is to complement and reinforce, without duplication, the existing control regimes for weapons of mass destruction and their delivery systems, as well as other internationally recognised measures. In the light of the New York Twin towers terrorist attack in September 2001, the Seventh Wassenaar Plenary integrated in the Arrangement purposes the prevention of the acquisition of conventional arms and dual-use goods and technologies by terrorist groups and organisations, as well as by individual terrorists.

The decision to transfer or deny the transfer of any item is the sole responsibility of each Participating State. All measures undertaken with respect to the Arrangement will be in accordance with national legislation and policies and are implemented on the basis of national discretion. Therefore, for specifics on Export Controls in Participating States, it should be referred to their national laws, regulations and administrative procedures implementing the initials elements of the Arrangement.

Formally, the Arrangement is organised by a set of two documents:

- The Initial elements which define the purposes, scope, structures and the different procedures of the Arrangement
- A munitions list and a dual-use list, which are reviewed periodically to take into account technological developments and experience gained.

In July 2004, The Arrangement documents have been compiled into one single document called “Guidelines and Procedures, including the Initial Elements”.

5.8.2. Initial Elements

The initial elements define the purposes and the scope of the Arrangement and established systems and procedures of information exchanges between Participating States:

- General Information Exchange: information on risks associated with transfers of conventional arms and dual-use items. The information exchanges on non-participating states are related to the acquisition activities, export policy, specific project of concern of this state. Since 2003, the exchange of information has been extended to regions where a conflict is occurring.

³⁹ The Participating States of the Wassenaar Arrangement are: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Luxembourg, Malta, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom and United States.

All official documents of the Wassenaar Arrangement could be found in its website (<http://www.wassenaar.org>)

- Exchange of Information on Arms: information on any matters that a Participating States wish to bring to the attention of the others. For instance, emerging trends in weapons programmes and the accumulation of particular weapons systems.
- Exchange of Information on Dual-Use Goods and Technology: notification of licences to non-participants which have been denied. The notification content information on the item, on the country of destination and for some categories, should mention the reason of denial.
Notification of a denial does not impose an obligation on other Participating States to deny similar transfers. However, a Participating State will notify, normally within 30 and not later than 60 days an approval of a licence which has been denied by another Participating States during the last three previous years.

Complementary, the different Wassenaar Arrangement Plenary have adopted different documents such as best practises, statement of understanding, which delineate more precisely the approach of the different principles contained in the Initial Elements. Some are dedicated specifically to conventional weapons or certain categories of conventional weapons and others concerned dual-use goods and therefore weapons of mass destruction. To facilitate the understanding, this section will analyse Wassenaar documents dedicated to conventional weapons but also to dual-use goods even if these last items concern essentially weapons of mass destruction.

5.8.3. Elements for objective analysis and advice concerning potentially destabilising accumulations of conventional weapons

The “Elements for objective analysis and advice concerning potentially destabilising accumulations of conventional weapons”, which is like most of the Wassenaar documents non-binding, has for objective to assist national authorities during the deliberation process associated with considering transfers or denials of conventional weapons. The document is generally framed in the form of questions which are divided in six groups.

The first group concerns the motivation assessment of the state of destination. The following elements have to be considered by the supplier state:

- The state's military doctrine.
- The motivation of the state in accumulating conventional weapons beyond its current holdings, either through import or national production.
- The general directions of the state's foreign policy.
- The consistency of the quantities involved in the state's accumulation of conventional weapons with its likely requirements, and therefore possible diversion to an unauthorised end-user or efforts to reverse-engineer.
- The risk that the weapons might be used for the violation and suppression of human rights and fundamental freedoms.

The second group is dedicated to the analysis by the supplier state of the regional balance of forces and of the general situation in the region. Under this factor, it should be considered:

- The nature of the relationship between the states of the region (territorial claims, unlawful occupation, economic, ethnic, religious).
- The state's national security requirements (accumulation of conventional, appropriate and proportionate response to a threat, balance of forces and relative capabilities).

- The perception of the State's accumulation of conventional weapons by other states in the region.
- The risk of increasing tension or instability in the region or exacerbation of an existing conflict.
- Willingness of other states in the region to acquire similar quantitative or qualitative capabilities.

The third group analyses the political and economical standing or status of the recipient state. Under this factor, the supplier should consider:

- The signing and/or the ratification by the state of destination of relevant international or regional agreements and treaties pertaining to arms control and limitation, non-proliferation, and confidence and security building.
- State's military expenditures
- What percentage of GDP does it spend on the military? Is the information it gives on its military expenditures open and accurate, or does it seek to conceal the true costs?
- The risk of economic or social destabilisation, either nationally or regionally due to the accumulation of conventional weapons by the state of destination.

The fourth group is dedicated to the operational capability of the state of destination. This factor, divided between equipment and manpower, requires the analysis of the risk that the export authorisation of the conventional weapons might:

- have on the regional balance of forces and the situation in the region in terms of individual weapons;
- present by introducing a new capability into the region whether by import or through national production or replacing existing equipment or providing the state with an additional strategic capability or increasing quantitatively or qualitatively its operational capabilities;
- be appropriate to the manpower capabilities of the state of destination;
- enhance manpower's effectiveness (e.g., simulators) of the recipient state.

The fifth group examines the acquisition of military technology in terms of:

- providing a substantial technological advantage whether by tangible or intangible means or by indigenous development to the recipient state's military capability.
- the import will lead to an indigenous production capability.
- possibility to reverse engineering or involve components, spares or prototypes that can be reverse-engineered as well.
-

Finally the last group invites supplier states to consider if:

- the export of conventional weapons will put the recipient's national forces or those of its friends and allies or of an UNSC-approved operation at risk.
- the method used to import the additional conventional weapons raise concerns about how the weapons are likely to be used.

5.8.4. Best Practices Documents

The Wassenaar Arrangement Plenary has also adopted six «non-binding best practises».

The first regards the disposal of surplus military equipment and demilitarised military equipment capable of being remilitarised⁴⁰. For these items, it should be imposed similar export control principles as those imposed on new equipments. Moreover, safeguards, physical protection and inventory controls should be in place to prevent the risk of theft, diversion and illicit trafficking.

The second «non-binding best practises» adopted by the sixth plenary meeting on extreme vigilance on export control authorisation for some items considered as highly sensitive^{41,42}. For these items, the export authorisation should be granted only on a case-by-case basis. Risk diversion consultations among relevant government agencies within the exporting country should be organised to consider the appropriateness of the quantity and the technological level of the item to the stated end-use and the bona fides of the end-users. Furthermore import certification or end-user statement, assurance of no re-export without authorisation and delivery verification or other acknowledgement of delivery from the receiving Government should be required before issuing the authorisation. If necessary post-shipment verification should be carried out by the exporter, supplier or others officials of the exporting country;

The third «non-binding best practises» includes disposals regarding preventive enforcement, investigations, effective penalties, international cooperation and information exchanges⁴³. Participating Government should consider it as illustrative of an effective national enforcement programme.

The preventive enforcement investigations should include elements such as:

- Threat assessment techniques and procedures for evaluating parties involved in a proposed export transaction.
- Establishing of a list of problem end-users to identify licence applications deserving closer scrutiny.
- Confirm the stated end-user and end-use of items to be exported prior to issuing an export license.
- Obtain assurances regarding the end-use and non re-export of licensed items.
- Examine goods and the documentation required to be presented at point of export, using risk assessment techniques to aid selection. Detain suspect shipment and seize unauthorised exports, which may include items in transit.
- Confirm that exported goods have reached their intended destinations using appropriate means, ranging from documentation to on-site verification.
- Conduct industry awareness programs.
- Seek voluntary compliance by industry.
- Keep industry and the general public apprised of penalties for failure to comply.

The investigation measures propose by the best practices document are:

- The designation of law enforcement responsibilities for detection, prevention, and punishment of violations of export control laws.
- The necessity to provide adequate resources and training for enforcement officers.
- Ensuring that national laws and regulations have statutes of limitations sufficiently long to permit the detection and prosecution of export control violations.

⁴⁰ This best practises has been adopted by the sixth Plenary meeting of the Wassenaar Arrangement (WA) was held in Bratislava (Slovak Republic), 30 November – 1 December, 2000.

⁴¹ Items of the Very Sensitive List (Sub-set of Tier 2) see Dual use List

⁴² This best practises has been adopted by the sixth Plenary meeting of the Wassenaar Arrangement (WA) was held in Bratislava (Slovak Republic), 30 November – 1 December, 2000.

⁴³ The sixth Plenary meeting of the Wassenaar Arrangement (WA) was held in Bratislava (Slovak Republic), 30 November – 1 December, 2000.

- Cooperation with others governments in the investigation and prosecution of violations of export controls case.

The penalties approach suggested by the best practices should be sufficient to punish and deter violations of export controls and include, as appropriate, criminal sanctions, civil fines, publicity and restriction or denial of export privileges.

Finally, the best practices document proposes to reinforce the International Cooperation and Information Exchanges, consistent with national laws and international treaties, by:

- Sharing information bilaterally on persons and companies considered to present a high risk of diversion
- Maintaining formal and informal information exchanges between senior enforcement officials with their counterparts in member country governments.
- Respecting the confidentiality of information received and ensuring that access to it is restricted to those officials who have been duly authorised.

The fourth “non-binding best practises” are the Guidelines for Export of Small Arms and Light Weapons (SALW)⁴⁴. These Guidelines do not dispense supplier states from an export analysis as described by the “elements for objective analysis and advice concerning potentially destabilising accumulations of conventional weapons”. Nevertheless, it should be pointed out that the guidelines appear to be more binding on states participating to the Wassenaar Arrangement than the “elements for an objective analysis”. It clearly set some principles that States will “take into account” in considering the export of SALW. In this regard, States ensure that the principles contained in the guidelines will be reflected, as appropriate, in their national legislation and/or in their national policy documents governing the export of conventional arms and related technology. Principles contained in the guidelines could be summarized as following. First States will take into account:

- The need to avoid destabilising accumulations of arms, bearing in mind the particular circumstances of the recipient country and its region;
- The internal and regional situation in and around the recipient country, in the light of existing tensions or armed conflicts and details of the recipient within that country.
- The record of compliance of the recipient country with regard to international obligations and commitments (suppression of terrorism, non-proliferation, arms control and disarmament).
- The nature and cost of the arms to be transferred in relation to the circumstances of the recipient country, including its legitimate security and defence needs and to the objective of the least diversion of human and economic resources to armaments.
- The requirements of the recipient country to enable it to exercise its right to individual or collective self-defence in accordance with Article 51 of the Charter of the United Nations.
- Whether the transfers would contribute to an appropriate and proportionate response by the recipient country to the military and security threats confronting it.
- The legitimate domestic security needs of the recipient country.
- The requirements of the recipient country to enable it to participate in peacekeeping or other measures in accordance with decisions of the United Nations, OSCE or other relevant regional organisations with a peacekeeping mandate.
- The respect for human rights and fundamental freedoms in the recipient country.
- The risk of diversion or re-export in conditions incompatible with these Guidelines, particularly to terrorists.

⁴⁴ The eight Plenary meeting of the Wassenaar Arrangement (WA) was held in Vienna (Austria), 11 – 12 December, 2002.

Complementary States agreed to avoid issuing licences for exports of SALW where it deems that there is a clear risk that the small arms in question might:

- Support or encourage terrorism.
- Threaten the national security of other States.
- Be diverted to territories whose external relations are the internationally acknowledged responsibility of another State.
- Contravene its international commitments, in particular in relation to sanctions adopted by the Security Council of the United Nations, agreements on non-proliferation, small arms, or other arms control and disarmament agreements.
- Prolong or aggravate an existing armed conflict, taking into account the legitimate requirement for self-defence, or threaten compliance with international law governing the conduct of armed conflict.
- Endanger peace, create an excessive and destabilising accumulation of small arms, or otherwise contribute to regional instability.
- Contrary to the aims of this document, be either re-sold (or otherwise diverted) within the recipient country, re-produced without licence, or be re-exported.
- Be used for the purpose of repression.
- Be used for the violation or suppression of human rights and fundamental freedoms.
- Facilitate organised crime;
- Be used other than for the legitimate defence and security needs of the recipient country.

Furthermore, the guidelines recognise the necessity to establish prior-consent mechanism in case of re-export, the inconsistency unlicensed manufacture of foreign origin SALW, the threat of illicit flows of SALW. The guidelines raise also the importance of arms marking, record keeping and co-operation between authorities in charge of controlling SALW. Finally, States will put in place and implement adequate laws or administrative procedures to control strictly the activities of those that engage in the brokering of SALW and ensure appropriate penalties for those who deal illegally in SALW.

The fifth “non-binding best practices”⁴⁵ tend to implement controls on intangible transfers of technology. The Participating States undertake to convey on definitions of what and when an Intangible Transfer of Technology (ITT) occurs. Due to the inherent complexity of this problem, the States should identify the actors in possession of this knowledge, inform them about the risks of the spreading, and promote self-regulation of these actors in order to avoid undesirable transfers. According to these best practices, Participating States may educate the holders of these technologies, as well as the control authorities, to the necessary monitoring of the transfer activities, for example in keeping records of the end-users. Surveillance and appropriate sanctions shall be enhanced by the national authorities and the exchange of information on the various national implementations is promoted.

The sixth “non-binding best practices”⁴⁶ concern the licensing process in the transfer of Basic List items and Sensitive List items. For practical reasons, these items may be granted the export authorisation by global, general licences, or even licence exception –no authorisation application required. In global licences, a named exporter may export unrestricted quantities of specified items to a specified group of recipient States or end-users situated in a country or a group of countries. According to general licences or licence exceptions, exporters, which shall apply for or register to benefit from these two options, may export unrestricted quantities

⁴⁵ Agreed at the 2006 Plenary session, held in Vienna, 5 and 6 December 2006

⁴⁶ Agreed at the 2006 Plenary session, held in Vienna, 5 and 6 December 2006

of identified lists of entries or ranges of items, software or technologies to specified countries or group of countries.

These best practices aim to establish minimum formal requirements where a licence exists – global or general. In the case of general or licence exceptions, States may suspend the licence if the exporter has been informed of a risk of diversion – principle of a *catch-all* clause.

Moreover, according to the national rules, States may revoke the global licences, general licences or licence exceptions.

5.8.5. Elements to Control the Export of Man-Portable Air Defence Systems

Recognizing at the six plenary of the Wassenaar Arrangement⁴⁷ the threats posed by unauthorized proliferation and use of Man-Portable Air Defence Systems (MANPADS), especially to civil aviation, peace-keeping, crisis management and anti-terrorist Participating States agreed to adopt specific elements to control the export of these weapons. These elements have been revised in 2003 at the Ninth plenary meeting⁴⁸.

The scope of control is particularly large. It covers surface-to-air missile systems designed to be carried by an individual or by individuals, including complete systems, components, spare parts, models, training systems, simulators, technical assistance, ... All transfers and retransfers operation, tangible and intangible, are also covered such as classical sale but also loan, lease, co-production or licensing arrangement for production.

The elements define strict conditions and criteria to be considered by the supplier in the decision making process to grant or not the export authorisation.

Regarding conditions, general export authorisation should not be available, each transfer should be subject to individual decision, brokering activities should normally not be allowed, several recipient government's guarantees should be required concerning for instance the prior consent of the supplier in case of retransfer or storage and transport conditions, ...

Regarding criteria decisions to authorize MANPADS exports should take into account the potential for diversion or misuse in the recipient country, the recipient government's ability and willingness to protect against unauthorized re-transfers, loss, theft and diversion and the adequacy and effectiveness of the physical security arrangements of the recipient government for the protection of military property, facilities, holdings, and inventories.

5.8.6. End Use Assurance commonly used – indicative list

This non-binding list of end use assurance has been adopted at the Fifth Plenary of the Wassenaar Arrangement⁴⁹. It contains a list of information that should be contained in the export authorisation applying form provided by the exporters to its licensing authorities. It includes:

- Information on parties involved in the transaction: the full name and address of the exporter, the final consignee, the intermediate consignee if any and the end-user should be provided.

⁴⁷ The sixth Plenary meeting of the Wassenaar Arrangement was held in Bratislava (Slovak Republic), 30 November – 1 December, 2000.

⁴⁸ The ninth Plenary meeting of the Wassenaar Arrangement was held in Vienna, 10-12 December 2003. The elements are available on http://www.wassenaar.org/2003Plenary/MANPADS_2003.htm.

⁴⁹ The fifth plenary meeting of the Wassenaar Arrangement (WA) was held in Vienna (Austria), 1-3 December 1999.

- Detailed description of the items to be transferred, including quantities and values, which discloses their true identity.
- Description of the specific end-use of the items. Assurances should be given that the goods will be used for civil end-uses and only for the stated purposes. An End-user certification that the goods will not be used for chemical, biological or nuclear weapons, or for missiles capable of delivering such weapons should also be required.
- Certification should be provided that the goods will be installed at the premises of the end-user or will be used only by the end-user. Moreover, the final consignee/end-user should agree to allow on-site verification.
- Assurance should be given that the end-user undertakes not to tranship, re-export or divert to another destination the items and will not re-exports it without approval from the government of the original exporting country;
- A commitment should be provided by the final consignee to prove the importation (e.g., a Delivery Verification Certificate (DVC));

5.8.7. Statement of Understanding

The Wassenaar Arrangement has adopted three Statement of Understanding.

The first on Intangible Transfers of Software and Technology⁵⁰ recognise that a comprehensive export control regime should include controls on transfers of listed "software" and "technology" irrespective of the way in which the transfer takes place. This means at a minimum tangible transfers of such items but also include intangible transfers of these items via transmission by electronic media, fax or telephone. Therefore Participating States should include in their national export control legislation on intangible transfers.

The second Statement of Understanding dedicated to the Control of Non-Listed Dual-Use Items has adopted without saying it formally, the principle of a "catch-all clause"⁵¹. It requires that Participating States should take appropriate measures to ensure that their national regulation require authorisation for the transfer of non-listed dual-use items to destinations subject to a binding United Nations Security Council arms embargo, any relevant regional arms embargo either binding on a Participating State or to which a Participating State has voluntarily consented to adhere, when the authorities of the exporting country inform the exporter that the items in question are or may be intended, entirely or in part, for a military end-use. Moreover if the exporter is aware that items in question are intended, entirely or in part, for a military end-use, he must notify to its national authorities which will decide whether or not it is expedient to make the export concerned subject to authorisation.

The third document is a Statement of understanding on arm brokerage⁵². If the Wassenaar Plenary recognised the value of regulating the activities of arms brokers, a consensus was not possible on a common understanding on the definition of criteria for arms brokering legislation. Nevertheless, participating States have accepted to consider the importance of measures such as:

- Requiring registration of arms brokers;
- Limiting the number of licensed brokers;
- Requiring licensing or authorization of brokering; or

⁵⁰ This Statement of Understanding was adopted by the seventh plenary meeting of the Wassenaar Arrangement held in Vienna, 6-7 December 2001. It has been included in the Control Lists.

⁵¹ This Statement of Understanding was adopted by the seventh plenary meeting of the Wassenaar Arrangement held in Vienna 10-12 December 2003.

⁵² The eighth Plenary meeting of the Wassenaar Arrangement (WA) was held in Vienna (Austria), 11- 12 December 2003.

- Requiring disclosure of import and export licenses or authorizations, or of accompanying documents and of the names and locations of brokers involved in transactions.

5.8.8. List of Advisory Questions for Industry

Since a few years, most of international export control regimes consider that the industry should play an active role in the fight of the WMD proliferation. In this line, a list of 12 advisory questions have been drawn to give guidance to industry when suspicion should be raised and a contact with national export licensing authorities might be advisable⁵³.

The questions are:

1. Do you know your customer? If not, is it difficult to find information about him/her?
2. Is the customer or the end-user tied to the military or the defence industry?
3. Is the customer or the end-user tied to any military or governmental research body?
4. If you have done business with the customer before - is this a usual request for them to make? Does the product fit the business profile?
5. Does the customer seem familiar with the product and its performance characteristics or is there an obvious lack of technical knowledge?
6. Is the customer reluctant to provide an end-use statement or is the information insufficient compared to other negotiations?
7. Does the customer reject the customary installation, training or maintenance services provided?
8. Is unusual packaging and labelling required?
9. Is the shipping route unusual?
10. Does the customer order an excessive amount of spare parts or other items that are related to the product, but not to the stated end-use?
11. Is the customer offering unusually profitable payment terms, such as a much higher price?
12. Is the customer offering to pay in cash?

5.8.9. Munitions List

The Munitions List is divided in 22 items entries for which Participating States agree to control with the objective of preventing unauthorised transfers or retransfers. The list is reviewed regularly to reflect technological developments and experience gained by Participating States⁵⁴.

The Munitions List could be summary as followed:

- ML1. Arms and automatic weapons with a calibre of 12.7 mm or less and accessories and specially designed components.
- ML2. Armament or weapons with a calibre greater than 12.7 mm, projectors and accessories and specially designed components.
- ML3. Ammunition, and specially designed components for the weapons controlled by ML1, ML2. or ML12.
- ML4. Bombs, torpedoes, rockets, missiles, and related equipment and accessories specially designed for military use and specially designed components.
- ML5. Fire control, and related alerting and warning equipment, and related systems, test and alignment and countermeasure equipment specially designed for military use, and specially designed components and accessories.

⁵³ This list was adopted by the seventh plenary meeting of the Wassenaar Arrangement held in Vienna 10-12 December 2003.

⁵⁴ The list is available on http://www.wassenaar.org/list/wa-list_03_tableofcontents.html

- ML7. Chemical or biological toxic agents, "tear gases", radioactive materials, related equipment, components, materials and "technology".
- ML 8. "Military explosives" and fuels, including propellants, and related substances.
- ML9. Vessels of war, special naval equipment and accessories and components specially designed for military use.
- ML10. "Aircraft", unmanned airborne vehicles, aero-engines and "aircraft" equipment, related equipment and components, specially designed or modified for military use.
- ML11. Electronic equipment, not controlled elsewhere on the Munitions List, specially designed for military use and specially designed components.
- ML12. High velocity kinetic energy weapon systems and related equipment and specially designed components.
- ML13. Armoured or protective equipment and constructions and components.
- ML14. Specialised equipment for military training or for simulating military scenarios and specially designed components and accessories.
- ML15. Imaging or countermeasure equipment specially designed for military use, and specially designed components and accessories.
- ML16. Forgings, castings and other unfinished products the use of which in a controlled product is identifiable by material composition, geometry or function, and which are specially designed for any products controlled by ML1.to ML4., ML6., ML9., ML10., ML12. or ML19.
- ML17. Miscellaneous equipment, materials and libraries and specially designed components.
- ML18. Equipment and "technology" for the production of products referred to in the Munitions List.
- ML19. Directed energy weapon systems (DEW), related or countermeasure equipment and test model and specially designed components.
- ML20. Cryogenic and "super conductive" equipment and specially designed components and accessories.
- ML21. "Software".
- ML22. "Technology" according to the General Technology Note of the Munitions List for the "development", "production" or "use" of items controlled in the Munitions List, other than that "technology" controlled in ML7. and ML18.

5.8.10. Dual-Use List

The second pillar of the WA deals with the commitment taken by Participating States to control the transfers, to varying degrees, of the so-called "dual-use" items. This term is not defined by the Initial Elements but should be understand as items which can be used for both civil and military purposes. Originally, The Dual-Use List consists partly in a compilation of lists defined by the different international export control regimes such as the Missile Technology Control Regime (MTCR), Australia Group or Nuclear Suppliers Group (NSG).

The Dual-Use List is divided into:

- A basic list (tier1) divided in nine categories:
 - o Advanced material
 - o Materials Processing
 - o Electronics
 - o Computers
 - o Telecommunication and Information Security

- Sensors and Lasers
- Navigation and Avionics
- Marine
- Propulsion
- Two annexes listing
 - Sensitive Items (tiers 2)
 - A small group of Very Sensitive Items (sub-set of tier 2)

As it is defined by the Initial Elements, an extreme vigilance is demanded in order to export. Conditions and criteria should be exerted by Participating States regarding transfer of Very Sensitive Items.

6. Weapons of Mass Destruction Export Control Regime

6.1 UN Security Council Resolution 1540(2004)

The UNSC Resolution 1540(2004) of 28 April 2004 directly targets nuclear, chemical and biological weapons proliferation but also the missiles in that they are included in the term “means of delivery”. It may thus become a fundamental textual reference in the field of non-proliferation in a broad sense. Indeed, it affirms from the very beginning that the proliferation of these weapons constitutes in itself a “threat to international peace and security”, which is the funding of the Security Council competency for action under Chapter VI and VII of the UN Charter. In the Post 9/11th concerns, this resolution aims to target the terrorist proliferation whereas the major international conventions mainly focus their attention on inter-States proliferation, as it is the case for the Nuclear Weapons Non-Proliferation Treaty (1968).

Resolution 1540(2004) reaffirms the necessity of a multi-level action against the WMD but it mainly focuses on the national level.

It urges the States to prevent proliferation by non-State holders; Requires national implementation of judicial sanctions in case of violation of the first commitment; Requires that the States enhance internal control mechanisms for accounting and securing of items situated on their territory, assuring necessary physical protection, effective control of the transit of items from and toward their territory at the border; Enhancement of a Committee in charge of the monitoring of the implementation of Resolution 1540(2004); Claims that the Resolution must not go, in any sense, against the existing non-proliferation regimes.

Concretely, this resolution insists on the necessity for the States to compare their national rules in non-proliferation issues and help each other, through helping States where the rules are not effectively or efficiently implemented, and promote the reinforcement of the existing non-proliferation regimes and treaties and their effective application. On an other level, it promotes the dialogue between the national authorities and the producing-exporting industries.

The Committee 1540, created in application of Paragraph 4 of the Resolution, is still currently working on its mission. For doing so, it receives and analyses the reports given by the UN Member States on their national regimes. It created, in May 2006, a database aimed to comparison between the existing national regimes and organises seminars in regions or countries where needs for advices exist.

6.2 Nuclear Weapons

The basic principle of international nuclear export control regime consists in subordinating nuclear trade to international security policy. This policy is defined by one international treaty – the Treaty on the Non-Proliferation of Nuclear Weapons - and by several informal guidelines directly linked or not to the Treaty, adopted within various international forums such as the Zangger Committee, the NSG or the Wassenaar Arrangement. These guidelines required the establishment by the different participating States of a national regulation. Consequently, even if most of the national export control regimes are based on the same international guidelines, their national transcription vary from one state to another in function of its national interpretation of the guidelines.

The different international guidelines, which concern nuclear export control, are

- For the NSG:

- Guidelines for Nuclear Transfers⁵⁵
- Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Materials, Software, and Related Technology⁵⁶
- For the Zangger Committee
 - Communications of 15 November 1999 Received from Member States Regarding the Export of Nuclear Material and of Certain Categories of Equipment and Other Material⁵⁷
- For the Wassenaar Arrangement⁵⁸
 - The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies
 - List of Dual-Use Goods and Technologies
- For the Missile Technology Control Regime (MTCR)⁵⁹
 - International Code of Conduct against Ballistic Missile Proliferation

6.2.1 Commitments imposed by the NPT

Nuclear weapons are the only weapons of mass destruction for which an international Treaty legally recognizes the possession: the Treaty on the Non-Proliferation of Nuclear Weapons (NPT). For this Treaty legal holders are States, which have manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967⁶⁰. In this regard, only the USA, Russia, the United-Kingdom, France and China have the right to hold nuclear weapons.

Regarding nuclear trade, the NPT imposed, in its article II and III, two commitments to Participating States.

The first concern only non nuclear weapons states and consists in the commitment not to “receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices”.

The second commitment concern all states party to the NPT and consist in the obligation not to “provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article”.

If the commitment of article II is unequivocal, the interpretation of article III has raised some difficulties in its implementation by the different Participating States. Questions were, on one hand, to have a common understanding of the items covered by this obligation and, on the other hand, to define which kind of IAEA safeguards should be required by the supplying state.

To clarify those commitments some Participating States established an informal instrument known as the Zangger Committee which has adopted a list material, equipment and

technology⁶¹. This list has been updated regularly. The committee also decided that the IAEA safeguards required by article II of the NPT are those defined by the INFCIRC/66 which apply only to the material used in the facility concerned by the items transfer and not on all nuclear materials used in the country of destination. This interpretation of article III.2 appears to be under what a more comprehensive understanding should require. In other words, the terms “safeguards required by this article” should normally be understood as the safeguards imposed to non-nuclear weapons states by the article III.1 which “applies on all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control”⁶². Nevertheless, for policy reasons mainly due to the desire to obtain China’s participation, the Zangger Committee considered INFCIRC/66 sufficient regarding NPT commitments. However the situation has changed recently due to the fact that China has decided to require FSS application to grant the transfer authorisation. Therefore debates on the kind of IAEA safeguards to be required have disappeared.

6.2.2 Commitments imposed by the Nuclear Suppliers Group

The most important informal instrument regarding the control of nuclear trade are the Nuclear Suppliers Group (NSG)⁶³ and the Zangger Committee. Nevertheless, due to the fact that China became in May 2004 member of the Nuclear Suppliers Group, the Zangger Committee had rather lost its *raison d’être* which was to encourage China to constraint its export control policy by participating to at least one export control regime even if it is a soft version of the NSG guidelines. Therefore, this section is principally devoted to the analysis of the NSG export control regime.

The NSG which is not informally linked, like the Zangger Committee, to the NPT has been established at the end of the seventies to convince France -which refused to sign the NPT- to impose to its nuclear items international transfers similar constraints to those established by the Treaty. The NSG does not establish an international nuclear export control regime, its main objective is in the definition of a common understanding of export control principles that each participating States will introduce in their national export control regimes.

The NSG has adopted two groups of guidelines. The first set of guidelines governs the export of items that are especially designed or prepared for nuclear use (trigger list). This includes:

1. Nuclear material;
2. Nuclear reactors and equipment therefore;
3. Non-nuclear material for reactors;
4. Plant and equipment for the reprocessing, enrichment and conversion of nuclear material and for fuel fabrication and heavy water production; and
5. Technology associated with each of the above items.

The second set of guidelines governs the export of nuclear-related dual-use items and technologies, that is, items that can make a major contribution to an unsafeguarded nuclear fuel cycle or nuclear explosive activity, but which have as well non-nuclear uses in chemical

⁵⁵ INFCIRC/254/Rev.8/Part 1 (Part I) Communications Received from Certain Member States Regarding Guidelines for the Export of Nuclear Material, Equipment and Technology.

⁵⁶ INFCIRC/254/Rev.7/Part 2/ (Part I) Communications Received from Certain Member States Regarding Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Materials, Software and Related Technology

⁵⁷ INFCIRC/209/Rev.2

⁵⁸ <http://www.wassenaar.org>

⁵⁹ <http://www.mtrc.info/english/index.html>

⁶⁰ Article IX .3 of the NPT.

⁶¹ See page 3.

⁶² These safeguards are known as Full scope safeguards (FSS). They are defined by INFCIRC/193.

⁶³ Participating states to the NSG are Argentina, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Canada, China, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Kazakhstan, Republic Of Korea, Latvia, Lithuania, Luxembourg, Malta, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom, And United States. The European Commission participates as an observer. (<http://www.nsg-online.org/>)

industry for instance. The list of concerned items has been divided into six categories, which are:

1. Industrial equipment
2. Materials
3. Uranium isotope separation equipment and components
4. Heavy water production plant related equipment
5. Test and measurement equipment for the development of nuclear explosive devices
6. Components for nuclear explosive devices

Complementary to the nuclear and nuclear items related lists, the NSG has adopted several export control principles regarding transfer authorisation, verification system and sanctions.

Like the NSG the Zangger Committee has adopted one list of items, which are especially designed or prepared for nuclear use. The list is largely identical to the NSG trigger list. Nevertheless, the Zangger Committee did not adopt a dual-use list. The reasons lay in the fact that for Participating States, the Committee should limit strictly its action to the transfer of nuclear items and in particular to the interpretation of article III.2 of the NPT.

6.2.2.1 Authorisation

The NSG guidelines imposed an obligation to submit all items of the trigger and dual-use lists to a national export authorisation. The guidelines did not formally forbid transfers but suppliers are invited to refrain their transfers of sensitive facilities, technology and material usable for nuclear. If enrichment or reprocessing facilities, equipment or technology are to be transferred, suppliers should encourage recipients to accept, as an alternative to national plants, supplier involvement and/or other appropriate multinational participation in resulting facilities. In February 2004, the President Bush announced several proposals to strengthen the world's efforts to stop the spread of WMD. Under one of these proposals it is suggested that NSG participating states should refuse to sell enrichment and reprocessing equipment and technologies to any state that does not already possess full scale, functioning enrichment and reprocessing plants. This proposal is currently under discussion and tremendously debated among the non nuclear weapon states.

To take the decision to authorize or not the transfer, supplier States should examine the demand in the light of the non-proliferation principles which invite suppliers to authorize the transfer only when they are satisfied that it would not contribute to the proliferation of nuclear weapons or other nuclear explosive devices or be diverted to an act of nuclear terrorism⁶⁴. This principle, largely criticized by non-participating States, introduces a subjective approach in nuclear export control regime by the fact that it gives to suppliers the right to appreciate if an end-user country conforms its non-proliferation policy to the standards of the suppliers. The different criteria, which should be considered in function of the non-proliferation principle, are defined for dual-use items. These criteria are:

(a) Whether the recipient State is a party to the Nuclear Non-Proliferation Treaty (NPT) or to the Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco), or to a similar international legally binding nuclear non-proliferation agreement, and has an IAEA safeguards agreement in force applicable to all its peaceful nuclear activities;

⁶⁴ INFCIRC/254/Rev.8/Part 1, paragraph 10. For dual-use items this principle is called "basic principle" (INFCIRC/254/Rev.7/Part 2, paragraph 1)

(b) Whether any recipient state that is not party to the NPT, Treaty of Tlatelolco, or a similar international legally-binding nuclear non-proliferation agreement has any facilities or installations listed in paragraph 3(b) above that are operational or being designed or constructed that are not, or will not be, subject to IAEA safeguards;

(c) Whether the equipment, materials, software, or related technology to be transferred is appropriate for the stated end-use and whether that stated end-use is appropriate for the end-user;

(d) Whether the equipment, materials, software, or related technology to be transferred is to be used in research on or development, design, manufacture, construction, operation, or maintenance of any reprocessing or enrichment facility;

(e) Whether governmental actions, statements, and policies of the recipient State are supportive of nuclear non-proliferation and whether the recipient State is in compliance with its international obligations in the field of non-proliferation;

(f) Whether the recipients have been engaged in clandestine or illegal procurement activities;

(g) Whether a transfer has not been authorized to the end-user or whether the end-user has diverted for purposes inconsistent with the Guidelines any transfer previously authorized and

(h) Whether there is a reason to believe that there is a risk of diversion to acts of nuclear terrorism.⁶⁵

Before granting the authorisation the supplier should verify if the State end-user fulfils the different export conditions defined by the NSG guidelines.

The first condition of supply concerns the obligation for the end-user to have brought into force an agreement with the IAEA requiring the application of safeguards on all sources and special fissionable material in its current and future peaceful activities (FSS)⁶⁶. This condition suffers one exception for transfers to a non-nuclear-weapon State when they are deemed essential for the safe operation of existing facilities and only if safeguards are applied to those facilities. Before granting such authorisation suppliers should inform and, if appropriate, consult in the event that they intend to authorize or to deny such transfers. This exception has been used once by Russia to supply fissile material for a nuclear power plant to India in October 2000 in spite of the concerns expressed by others NSG members and in particular by the United States.

The second condition of supply concerns the submission of government-to-government assurances regarding the retransfers of the items previously transferred⁶⁸. In this regard, suppliers should transfer trigger list items or related technology only upon the recipient's assurance that in the case of retransfer of the concerned items and of items derived from facilities originally transferred, or with the help of equipment or technology originally transferred by the supplier; the recipient of the retransfer or transfer will have provided the same assurances as those required by the supplier for the original transfer.

Complementary to the conditions, suppliers should require from the recipient country that nuclear material and facilities should be placed under effective physical protection to prevent

⁶⁵ INFCIRC/254/Rev.7/Part 2, paragraph 4.

⁶⁶ Presently, if the NSG encourages suppliers to require as a condition of supply the entry into force of the FSS completed by the additional protocol (INFCIRC/540), it does not impose it.

⁶⁷ For dual-use items, the existence of a safeguards agreement is not a condition of supply but one of the factors to take in consideration for granting or not the export authorisation.

As it has been mentioned, the Zangger Committee does not require the FSS but only the safeguards application to the materials concerned by the transfer.

⁶⁸ INFCIRC/254/Rev.8/Part 1, paragraph 9.

unauthorized use and handling⁶⁹. The levels of physical protection on which these measures have to be based are the subject of an agreement between supplier and recipient.

6.2.2.2 Verification system

The NSG Guidelines did not impose directly a control of final destination. Nevertheless, imposing the submission by the recipient of End User Certificate might be considered for suppliers as a useful tool to meet their obligation required by the non-proliferation principle which imposed that the transfers will not contribute to the proliferation of nuclear weapons. Similar considerations could be made for the confirmation control of recipient delivery.

NSG Guidelines did not organise ongoing verification to confirm all along its utilisation that items remain in the recipient state and they are used only for the different applications which have been duly authorized by the supplier. However, if it does not organise an instrument, the transfer authorisation is submitted for trigger list items to the existence in the recipient country of an FSS agreement with the IAEA fully implemented.

Finally, some additional controls are imposed to the recipient. The prior consent of the supplier should be granted for⁷⁰:

- The transfer of dual-use items or any replica thereof and related technology to a country not adhering to the Dual-Use Guidelines;
- The design of the operation of a transferred enrichment facility, or any facility based on such technology for the production of greater than 20% enriched uranium;
- Any retransfer of trigger list items or related technology and any transfer derived from facilities originally transferred, or with the help of equipment or technology originally transferred by the supplier;
- Any retransfer of heavy water or material usable for nuclear weapons or other nuclear explosive devices.

6.2.2.3 Sanctions

The NSG Guidelines did not establish sanctions against participating states that did not respect its commitments. Nevertheless, the Guidelines established a consultation mechanism on specific sensitive cases, to ensure that any transfer does not contribute to increase the risks of conflict or instability. Moreover, in the event that one or more suppliers believe that there has been a violation of supplier/recipient understandings resulting from the NSG Guidelines, particularly in the case of an explosion of a nuclear device, or illegal termination or violation of IAEA safeguards by a recipient, suppliers should consult promptly through diplomatic channels in order to determine and assess the reality and extent of the alleged violation⁷¹. Pending the early outcome of such consultations, suppliers are invited not to act in a manner that could prejudice any measure that may be adopted by other suppliers concerning their current contacts with that recipient. Upon the findings of such consultations, the suppliers should agree on an appropriate response and possible action, which could include the termination of nuclear transfers to that recipient, and possible restitution of the items transferred⁷².

By the fact that the NSG guidelines required to authorize transfers of trigger list items, the existence of an FSS agreement with the IAEA into force, the detection mechanism and information system established by article XII of IAEA Statutes are indirectly implemented. In

⁶⁹ INFCIRC/254/Rev.7/Part 2, paragraph 6 and INFCIRC/254/Rev.8/Part 1, paragraph 3.

⁷⁰ INFCIRC/254/Rev.8/Part 1, paragraph 7, 8

⁷¹ INFCIRC/254/Rev.8/Part 1, paragraph 16

⁷² If the application of the safeguards is considered as no longer possible by the IAEA. INFCIRC/254/Rev.8/Part 1, paragraph 4

case of a non-compliance detected by the IAEA inspectors a report is made to the Director General who shall thereupon transmit the report to the Board of Governors. The Board shall call upon the recipient State or States to remedy forthwith any non-compliance, which it finds to have occurred. The Board shall report the non-compliance to the Security Council and General Assembly of the United Nations. The Security Council determines if the non-compliance could present a threat to the peace, breach of the peace, or act of aggression and could make recommendations, or decide what measures shall be taken to maintain or restore international peace and security.

6.3 Chemical Weapons and Biological Weapons

The regulation of dual-use items related to chemical and biological weapons is organised mostly by two international Conventions and one informal agreement.

6.3.1 Chemical Weapons Convention

In 1992, after a decade of long and painstaking negotiations, the Conference on Disarmament agreed on the text of the Chemical Weapons Convention (CWC)⁷³, which was then adopted by the General Assembly at its forty-seventh session, on 30 November 1992. This resolution was entitled “Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction” (A/RES/47/39). The Convention was opened for signature on 13 January 1993 in Paris by the Secretary-General of the United Nations with 130 States signing the Convention⁷⁴. On 31 October 1996, Hungary became the 65th State to deposit its instrument of ratification, thus triggering the process of entry into force of the CWC 180 days later⁷⁵. It reaffirms principles, objectives and obligations assumed under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed in Geneva on 17 June 1925.

The Organization for the Prohibition of Chemical Weapons (OPCW) was established in The Hague and is responsible for the implementation of the Convention. The OPCW is mandated to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among States Parties.

⁷³ The Convention has its own website : <http://www.opcw.nl>

⁷⁴ States which have ratified the CWC are, among others :Albania, Algeria, Armenia, Argentina, **Australia**, Austria, Azerbaijan, Bahrain, Bangladesh, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burundi, Burkina Faso, Cameroon, **Canada**, Chile, China, Colombia, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, **Czech Republic, Denmark**, Dominica, Ecuador, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Federal Republic of Yugoslavia, Fiji, **Finland**, Former Yugoslav Republic of Macedonia, **France**, Gabon, Gambia, Georgia, **Germany**, Ghana, Greece, Guinea, Guyana, Holy See, **Hungary**, Iceland, India, Indonesia, Iran (Islamic Republic of), Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kiribati, Kuwait, Lao People's Democratic Republic, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Malawi, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Micronesia (Federated States of), Monaco, Mongolia, Morocco, Mozambique, Namibia, Nauru, Nepal, **Netherlands**, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Papua New Guinea, **Peru** ; Philippines, Poland, Portugal, Qatar, **Republic of Korea**, Republic of Moldova, **Romania**, Russian Federation, Saint Lucia, San Marino, Saudi Arabia, Senegal, Seychelles, Slovak Republic, Slovenia, South Africa, **Spain**, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Tajikistan, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, United Arab Emirates, **United Kingdom of Great Britain and Northern Ireland**, United Republic of Tanzania, **United States of America**, Uruguay, Uzbekistan, Vanuatu, Venezuela, Viet Nam, Yemen, Zambia, Zimbabwe. As to date, there was 181 State-Parties to the CWC on the 1st February 2007.

⁷⁵ The Convention entered into force on 29 April 1997.

6.3.1.1 Principles

The CWC is based on four principles. The first principle is the prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons. This principle includes a commitment of each State Party to not, on one hand undertake the development, the production or the transfer, directly or indirectly, of an chemical weapons to anyone and, on the other hand assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under the Convention⁷⁶.

The second principle is the obligation to destroy chemical weapons and production facilities, that States Parties own, possess or abandoned on the territory of another State Party⁷⁷.

The third principle consist in the promotion of free trade in chemicals as well as international cooperation and exchange of scientific and technical information in the field of chemical activities for purposes not prohibited under the Convention in order to enhance the economic and technological development of all States Parties⁷⁸.

Finally, the fourth principle is the right for each State Party to develop, produce, otherwise acquire, retain, transfer and use toxic chemicals and their precursors for purposes not prohibited under this Convention⁷⁹. Those authorised purposes could be:

- Peaceful such as industrial, agricultural, research, medical, pharmaceutical;
- Protective namely directly related to protection against toxic chemicals and to protection against chemical weapons or other peaceful purposes;
- Military if not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare.

The CWC defined as chemical weapons, three categories of items -together or separately- which are:

- Toxic chemicals and their precursors, except where intended for purposes not prohibited under the Convention, as long as the types and quantities are consistent with such purposes;
 - o Toxic Chemical means any chemical which through its chemical action on life processes can cause death, temporary incapacity or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.
 - o Precursor means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.
- Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals, which would be released as a result of the employment of such munitions and devices;
- Any equipment specifically designed for use directly in connection with the employment of munitions and toxic chemicals and their precursors.

For the purpose of implementing the Convention toxic chemicals and precursors which have been identified for the application of verification measures are listed in the Annex on Chemicals of the CWC.

The CWC included a definition of an “Old Chemical Weapons”⁸⁰ and of an “Abandoned Chemical Weapons”⁸¹ for which simplified dispositions are established.

⁷⁶ Preamble and article I and V of the CWC

⁷⁷ Preamble and article IV and VI of the CWC.

⁷⁸ Preamble and article XI of the CWC

⁷⁹ Preamble and article VI of the CWC

6.3.1.2 Transfers and safeguards

As it is the case for most non-proliferation instrument, the implementation of the CWC commitments lay under the sole responsibility of States Parties. In this regard, the Convention precisely defines the measures that States have to adopt to encounter their obligations. Those measures are in particular:

- the prohibition of natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under the Convention, including enacting penal legislation with respect to such activity;
- The prohibition of any activity prohibited to a State Party under the Convention in any place under State Party control ;
- Extension of penal legislation to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

Regarding transfers of chemicals for purposes not prohibited, the Convention divided chemicals into three categories for which a specific regime is organised.

Category I⁸² which contents chemicals considered as very sensitive and for which State Parties shall not produce, acquire, retain or use them outside the territories of State-Parties and shall not transfer such chemicals outside their territories except to another State Party⁸³. Moreover, quantities of chemical that States Parties could acquire is, in any year through production or withdrawal from chemical weapons stocks and transfer, strictly limited to or less than 1 ton. The production of such chemicals should be carried in out at a single small-scale facility.

The transfers of equipment specifically designed for use in connection with chemicals is not submitted to specific conditions. Nevertheless, due to the general commitment not to assist, encourage or induce, in any way, anyone to engage in any activity forbidden by the Convention, it could be pretended that States Parties should not transfer such equipment, at least not to State Parties.

Category II⁸⁴ contains chemicals considered as sensitive for which States Parties have to declare annually data on the quantities produced, processed, consumed, imported and exported of each chemicals listed, as well as a quantitative specification of import and export for each country involved. Like for the first Category, chemicals of Category II should only be transferred to or received from States Parties. This obligation has taken effect in April 2001 three years after entry into force of the Convention. Before it was possible to transfer to non-State Parties as far as the Supplier State ensured the necessary measures that the transferred chemicals shall only be used for purposes not prohibited under the Convention and if the supplier has required an end-use certificate from the recipient State.

⁸⁰ (a) Chemical weapons which were produced before 1925; or (b) Chemical weapons produced in the period between 1925 and 1946 that have deteriorated to such extent that they can no longer be used as chemical weapons.

⁸¹ Chemical weapons, including old chemical weapons, abandoned by a State after 1 January 1925 on the territory of another State without the consent of the latter.

⁸² See Annex on Chemicals (Schedule I) of the CWC. It listed eight groups of toxic chemicals such as Sulfur mustards, Lewisites, Nitrogen mustards, Saxitoxin, Ricin and four groups of precursors such as Chlorosarin, Chlorosoman.

⁸³ Part VI activities not prohibited under this convention in accordance with article VI. Regime for schedule 1 chemicals and facilities related to such chemicals.

⁸⁴ See Annex on Chemicals (Schedule II) of the CWC. It listed three groups of toxic chemicals such as Amiton, PFIB, BZ and eleven groups of precursors such as Arsenic trichloride, Thiodiglycol, Pinacolyl alcohol.

Category III⁸⁵ contains chemicals considered as less sensitive for which States Parties have, like Category II, to declare annually data on quantities produced, imported and exported, as well as a quantitative specification of import and export for each country involved. Transfers of Category III items to States non-Parties of the CWC are authorised if the supplier have adopted the necessary measures to ensure that the transferred chemicals shall only be used for purposes not prohibited under this Convention. Inter alia, the Supplier State shall require from the recipient State a certificate stating, in relation to the transferred chemicals:

- (a) That they will only be used for purposes not prohibited under this Convention;
- (b) That they will not be re-transferred;
- (c) Their types and quantities;
- (d) Their end-use(s); and
- (e) The name(s) and address(es) of the end-user(s).

As far as the CWC authorises States Parties to develop, produce, transfer and use of toxic chemicals and their precursors for purposes not prohibited, a very specific verification system has been established. The system lays on:

- A State-parties obligation to elaborate an initial declaration and annual declarations regarding the relevant chemicals and facilities. The content of these declarations is determined in function of the three categories of items.
- A State-parties obligation to establish necessary measures to ensure that toxic chemicals and their precursors are only developed, produced, otherwise acquired, retained, transferred, or used for purposes not prohibited under this Convention. In this regard, each State Party has to designate or establish a National Authority to serve as the national contact point for effective liaison with the Organization and other States Parties.
- A Technical Secretariat that carries out the verification measures as provided in the Verification Annex of the CWC. Those measures varied in function of the categories of toxic chemicals and their precursors listed and could include systematic on-site inspection and monitoring with on-site instrument⁸⁶.

It should be precised that the system of verification concerns all State-parties of the CWC and does not establish exceptions.

6.3.1.3 Suspicion mechanism and sanctions

The CWC establishes in its article IX a suspicion mechanism which authorize State Party to request from the Executive Council⁸⁷ to assist in clarifying any situation which may be considered ambiguous or which gives rise to a concern about the possible non-compliance of another State Party with this Convention⁸⁸. If the requesting State deems the clarification given to be inadequate, it may request the Executive Council to obtain from the requested

⁸⁵ See Annex on Chemicals (Schedule III) of the CWC. It listed Toxic chemicals such as Phosgene, Carbonyl dichloride, Cyanogen chloride, Hydrogen cyanide, Chloropicrin: Trichloronitromethane and precursors: such as Phosphorus oxychloride, Phosphorus trichloride, Phosphorus pentachloride, Trimethyl phosphite, Triethyl phosphite, Dimethyl phosphite, Diethyl phosphite, Sulfur monochloride, Sulfur dichloride, Thionyl chloride, Ethyldiethanolamine, Methyl-diethanolamine, Triethanolamine.

⁸⁶ Article VIII D of the CWC.

⁸⁷ The Convention establish three bodies : the State Parties Conference, the Executive Council which is composed of 41 delegates elected for two years by the Conference and the Technical Secretariat (article VIII of the Convention).

⁸⁸ Prior any request to the Executive Council, States parties are encouraged to solve among themselves any different on any matter which may cause doubt about compliance with this Convention, or which gives rise to concerns about a related matter which may be considered ambiguous.

State-Party further clarifications. If it is not satisfied, it has the right to call for a special session of the Executive Council in which State-Parties involved that are not members of the Executive Council shall be entitled to take part. In such a special session, the Executive Council shall consider the matter and may recommend any measure it deems appropriate to resolve the situation. Finally, if the doubt or concern of a State Party about a possible non-compliance has not been resolved within 60 days after the submission of the request for clarification to the Executive Council, or if it believes its doubts warrant urgent consideration, it may request a special session of the Conference.

Complementary to this mechanism each State Party has the right to request an on-site challenge inspection of any facility or location in the territory or in any other place under the jurisdiction or control of any other State Party for the sole purpose of clarifying and resolving any questions concerning possible non-compliance with the Convention provisions. The inspection is conducted without delay by an inspection team designated by the Director-General. He transmits the inspection request to the inspected State Party not less than 12 hours before the planned arrival of the inspection team at the point of entry. The Executive Council may, not later than 12 hours after having received the inspection request, decide by a three-quarter majority of all of its members against carrying out the challenge inspection, if it considers the inspection request to be frivolous, abusive or clearly beyond the scope of this Convention. If the Executive Council decides against the challenge inspection, preparations shall be stopped, no further action on the inspection request shall be taken, and the State-Parties concerned shall be informed accordingly.

The final report of the inspection team contains the factual findings as well as an assessment of the degree and nature of access and cooperation granted for the satisfactory implementation of the challenge inspection. The Executive Council review the report regarding non-compliance and takes the appropriate measures to redress the situation and to ensure compliance with this Convention, including specific recommendations to the Conference which decide of the appropriate sanctions.

The sanctions imposed by the Conference may be the restriction or suspension of the State Party's rights and privileges under this Convention until it undertakes the necessary actions to conform to its obligations⁸⁹. In cases of serious damages to the object and purpose of the Convention the Conference may recommend collective measures to State-Parties in conformity with international law and in cases of particular gravity, it bring the issue, including relevant information and conclusions, to the attention of the United Nations General Assembly and the United Nations Security Council. It should be pointed out that CWC obligations are mostly negative –such as the obligation not to transfer items of Categories I and II to non State Parties- and it appears rather unclear which “right and privileges” the Convention could suspend, except the right to request and to receive assistance and protection against the use or threat of use of chemical weapons⁹⁰.

Regarding sanctions against nationals which have undertaking any activity prohibited, each State Party have to adopt the necessary measures to implement its obligations including enacting penal legislation with respect to such prohibited activities⁹¹.

6.3.2 Biological Weapons Convention

International efforts to constraint the proliferation of biological weapons is initiated and linked to chemical weapons non-proliferation. The Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare,

⁸⁹ Article XII of the CWC.

⁹⁰ Article X of the CWC.

⁹¹ Article VII 1 of the CWC

signed in Geneva on 17 June 1925 was also dedicated to biological weapons. It condemned explicitly: “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices”.

Export control regulation began to appear in 1972⁹² with the adoption of the Convention on the Prohibition of the Development, Production and stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction to have a first approach on the issue⁹³. Article III of the Convention stated explicitly that States parties should not transfer “to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organizations to manufacture or otherwise acquire any of agents, toxins, weapons, equipment or” their means of delivery. By biological weapons, it should be understood the necessary destruction material such as microbial or other biological agents or toxins whatever their origin or method of production of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes. Are also included in the implementation field of the Convention weapons equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

With no verification mechanism within the Convention, States parties must rely on intelligence assessments to determine whether or not others are complying with the Convention. Since the first review conference⁹⁴ doubts and concerns have arisen, in particular about the former Soviet Union, Iraq, North Korea, Libya and Syria. In 1994, an ad hoc group was established to conclude a legally binding protocol to strengthen the Convention. Negotiations were conducted for six and half years and emerged with a set of monitoring and verifications mechanisms which, if adopted should help to deter countries from pursuing illegal biological programs. Unfortunately the project was globally rejected by the United States in September 2001. Since then, the strengthening of the Convention has been stopped.

⁹² Entered into force in 1975.

⁹³ **Ratifying and Accessing Countries** : Afghanistan, Albania, Algeria, Argentina, Armenia, Australia, Austria, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bhutan, Bolivia, Bosnia Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Cambodia (Kampuchea), Canada, Cape Verde, Chile, People's Republic of China, Colombia, Congo, Republic of Congo, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador, El Salvador, Equatorial Guinea, Estonia, Ethiopia, Fiji, Finland, France, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea-Bissau, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Democratic People's Republic of Korea, Republic of Korea, Kuwait, Laos, Latvia, Lebanon, Lesotho, Libya, Liechtenstein, Lithuania, Luxembourg, Former Yugoslav Republic of Macedonia, Malaysia, Maldives, Mali, Malta, Mauritius, Mexico, Monaco, Mongolia, Morocco, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Russian Federation, Rwanda, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, San Marino, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Singapore, Slovak Republic, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, Suriname, Swaziland, Sweden, Switzerland, Taiwan, Thailand, Togo, Tonga, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom, United States, Uruguay, Uzbekistan, Vanuatu, Venezuela, Vietnam, Yemen, Yugoslavia, Zimbabwe. 155 countries as to date June 2005.

Signatory Countries: Burundi, Central African Republic, Cote d'Ivoire, Egypt, Gabon, Guyana, Haiti, Liberia, Madagascar, Malawi, Mali, Myanmar (Burma), Nepal, Somalia, Syria, United Arab Emirates, United Republic of Tanzania.

⁹⁴ Review conference of the Convention are convened every five years intervals.

6.3.3 Australia Group

6.3.3.1 Principles

The initiative to create the Australia Group (AG)⁹⁵ has been taken after the findings in April 1984 of the special investigatory mission sent by the UN Secretary General to Iran that chemical weapons had been used in the Iran-Iraq war in violation of the 1925 Geneva Protocol. Moreover, it was evident that Iraq had obtained much of the materials for its CW program from the international chemical industry by using the lack of uniformity of national export control system of Supplying States. In these circumstances the countries concerned saw an urgent need to address the problem posed by the spread of chemical weapons and ensure that their industries were not, either on purpose or inadvertently, assisting other states to acquire and use such weapons in violation of international law and norms.

This led Australia to propose, in April 1985, that the countries which had introduced licensing for exports might meet in order to examine the scope for harmonising the measures taken individually and for enhancing cooperation amongst them on this issue. The first meeting of this informal export control instrument took place in Brussels in June 1985 and meetings are now held in Paris on an annual basis.

At the beginning of the nineties, the AG has decided to extend its scope of actions against the diversion of dual-use materials to biological weapons (BW) programs. Considering the terrorist attacks in New York in September 2001 the AG has added to its aim of preventing the acquisition by states actors of chemical and biological weapons (CBW), the prevention against terrorism involving such weapons.

The objective of AG “is thus to ensure, through licensing measures on the export of certain chemicals, biological agents, and dual-use chemical and biological manufacturing facilities and equipment, that exports of these items from their countries do not contribute to the spread of CBW. The Group does this through consultation and harmonisation, thus maximising the effectiveness of participants’ national licensing measures. The Group’s activities are especially important given that the international chemical and biological industries are a target for proliferators as a source of materials for CBW programs”⁹⁶.

The AG considers its activities as complementary to the Chemical Weapons Convention (CWC) and the Biological and Toxin Weapons Convention (BWC) which are the principal instruments for addressing the threat posed by chemical and biological weapons.

6.3.3.2 Export Control System

The Australia Group is an informal instrument which trends to make the measures already taken by participating countries more effective, including through the exchange of information, the harmonisation of measures already taken and, where necessary, consideration of the introduction of additional national measures. In this regard, the Group has adopted, in June 2002, a set of Guidelines for Transfers of Sensitive Chemical or Biological items which should be implemented through national export control legislation.

The first element defined by the Guidelines consists in a list of non-exhaustive criteria to take into account in the export licence decision-making process. Those criteria are:

⁹⁵ Members are : Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Czech Republic, Republic of Cyprus, Denmark, Estonia, European Commission, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Japan, Republic Of Korea, Luxembourg, Malta, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Republic of Turkey, Ukraine, United Kingdom, United States.

⁹⁶ <http://www.australiagroup.net/agobj.htm>

- information about proliferation and terrorism involving CBW, including any proliferation or terrorism-related activity, or about involvement in clandestine or illegal procurement activities, of the parties to the transaction.
- Capabilities and objectives of the chemical and biological activities of the recipient State
- Significance of the transfer in terms of the appropriateness of the stated end-use, including any relevant assurances submitted by the recipient State or end-user and the potential development of CBW.
- Assessment of the end-use of the transfer, including whether a transfer has been previously denied to the end-user, whether the end-user has diverted for unauthorized purposes any transfer previously authorized, and, to the extent possible, whether the end-user is capable of securely handle and store the item transferred.
- Applicability of relevant multilateral agreements including the BTWC and the CWC

The transfer should be denied if the Government estimate that the items will be used in a chemical or biological weapons program or for CBW terrorism or if there is a significant risk of diversion.

Complementary to the criteria analysis, states should “satisfy itself” that the items are not intended to be retransfer to a third state. In case of further re-export, items should be submitted to the guidelines principles in the recipient state and the prior consent of the initial exporter should be required. Government to government assurance confirming such obligation should be exchanged before authorizing the transfer.

The Australia Group has adopted a “no undercut” mechanism by which an authorisation for an export that is essentially identical to the one denied by another supplier state should only be granted after consultations with this state, provided the delay has not expired or been rescinded. Long debates have been conducted within the Australia group to define precisely what should understand under the terms “essentially identical”. A consensus has been obtain to consider an essentially identical transfer as the same biological or chemical agent or in the case of dual-use equipment, equipment which has the same or similar specifications and performance being sold to the same consignee.

Like the others WMD regimes, the Australia Group has adopted several control lists of items which should be submitted to transfer authorisation. However, it remain under the State discretion to apply expedited licensing measures to states which it judges possess consistently excellent non-proliferation credentials. Six common control lists of sensitive items have been adopted for which participating countries have taken the commitment to require export licences. The lists are

- A Chemical weapons precursors list which contains 54 items.
- A Control list of dual-use chemical manufacturing facilities and equipment and related technology divided within three groups
 - o Manufacturing facilities and equipment
 - o Toxic gas monitoring systems and detectors
 - o Related technology
- A list of dual-use biological equipment for export control divided between equipment and related technology
- A list of biological agents for export control which contains
 - o A core list with six categories of biological (viruses, rickettsiae, bacteria, toxins and subunits, genetic elements and genetically-modified organisms)
 - o A warning List with two categories (bacteria, genetically-modified organisms)
- A list of plant pathogens for export controls divided between

- o Core list (bacteria, fungi, genetic elements and genetically-modified organisms)
- o Items for inclusion in awareness-raising guidelines with three categories (bacteria, fungi, viruses, genetic elements and genetically-modified organisms)
- List of animal pathogens for export control divided within four categories ((bacteria, viruses, genetic elements and genetically-modified organisms)

The above list of items forms the basis for the Group’s ‘common control lists’, which have been developed during Australia Group consultations and are adjusted from time to time to ensure their continued effectiveness. The difference between core list and awareness-raising or warning list remain in the degree of sensitivity of the items regarding its use in a chemical or biological weapons program or for CBW terrorism.

Complementary to the list, Australia Group requires that States include in the export control system two catch-all clauses. The first requires that exporter apply for a transfer authorisation of non-listed items when they have been informed by their competent national authorities that the items in question may be intended, in their entirety or part, for use in connection with chemical or biological weapons activities. The second catch-all clause requires that if the exporter is aware that non-listed items are intended to contribute to WMD activities it must notify to its national authorities, which will decide whether or not it is expedient to make the export concerned subject to an export authorisation.

6.4 Missiles

If the export of items necessary for the elaboration of weapons of mass destruction was covered by different informal export control regimes, none of these regimes was dedicated to the means of delivery of such weapons. It should be waited, on one hand, the end of the eighties for the first informal instrument of missile technology non proliferation to be established and, on the other hand, November 2002 with the International Code of Conduct against Ballistic Missile Proliferation to have a normative instrument potentially open to the adhesion of all states.

6.4.1 International Code of Conduct against Ballistic Missile Proliferation (ICOC)

The principle of a Code of Conduct against Ballistic Missile Proliferation was elaborated within the MTCR during its plenary meeting in October 1999 when it was stressed the need for “possible new, qualitative responses to face the new proliferation threats”. At the following plenaries, a draft text which contains a set of principles, general measures, cooperation and confidence building measures was discussed and elaborated. Finally, the code was inaugurated during its launching Conference at 25 and 26 November 2003 in The Hague. If the code is a MTCR creation, it should be seen as an independent instrument dedicated to missile non-proliferation which has no formal or informal link with its genitor.

The Code is divided in four sections: principles, general measures, transparency measures and organisational aspects⁹⁷.

⁹⁷ A copy of the code is available on the US Department of State Website (<http://www.state.gov/t/us/rm/15488.htm>).

6.4.1.1 Principles

Like for nuclear research programs, one of the main difficulty of the non-proliferation of ballistic missiles lays in the fact that research and development of space peaceful programs, in particular Space Launched Vehicles (SLV), are very similar to the uses for the development of military application. Consequently, if the curb and the prevention of the proliferation of Ballistic Missile capable of delivering weapons of mass destruction is considered, as a essential principle of the Code, it should not have for consequence to exclude some states from the benefits of space peaceful application. To conceal this antagonism, the Code establishes several complementary principles.

Regarding the non-proliferation risk, the Code recognizes the importance of strengthening and gaining wider adherence to, multilateral disarmament and non-proliferation mechanism. It invites implicitly states to participate and to act in full compliance with international arms control, disarmament and non-proliferation norms.

Regarding peaceful applications, the Code recognizes that appropriate transparency measures on Ballistic Missile programmes and SLV programmes should be necessary to increase confidence and to avoid that peaceful program could be used for military application. Considering the access and sharing of space technology, the states should confirm their commitment to the United Nations Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States taking into particular Account the Needs of Developing Countries, adopted by the United Nations General Assembly (Resolution 51/122 of 13 December 1996).

6.4.1.2 General measures

The general measures impose to subscribing states several commitments which implement the Code's principles. On missile non-proliferation states are required to refrain from any contribution to the development of Ballistic Missile programmes in countries which might attempt to elaborate weapons of mass destruction in contradiction with international non-proliferation regimes. On their internal policy, subscribing states should ratify the major international instruments⁹⁸, refrain from the development of missiles capable of delivering weapons of mass destruction and reduce national holdings of such missiles. On peaceful space application, subscribing states should exercise the necessary vigilance in the consideration of assistance to Space Launch Vehicle programmes in any other country so as to prevent contributing to delivery systems for weapons of mass destruction, considering that such programmes may be used to conceal Ballistic Missile programmes.

6.4.1.3 Transparency measures

The Code established a set of transparency mechanisms with the objective to increase confidence between subscribing states. As usual, those confidence-building measures do not affect the possibility to develop bilateral or regional transparency mechanisms. The measures are divided between those applicable to Ballistic Missile programmes and those applicable to SLV programmes. Both are based on an annual declaration providing an outline of policies and land (test-) launched sites completed by annual information on the generic class of missile and SLV launched during the preceding year. Complementary, a pre-launch notification is established which should include information on the generic class of missile or SLV, the planned launch window notification, the launch area and the planned direction.

⁹⁸ The international instruments are : the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967), the Convention on International Liability for Damage Caused by Space Objects (1972), and the Convention on Registration of Objects Launched into Outer Space (1975).

6.4.1.4 Organisational aspects

Like the other non-proliferation instruments, the Code established an annual meeting to define, review and further develop the workings of the Code. All decision is taken by consensus. A point of contact assumed by Austria is also established for mainly collecting and disseminating Confidence-Building Measures submissions, receiving and announcing the subscription of additional states.

6.4.2 Missile Technology Control Regime (MTCR)

Facing the threat that a country could easily divert a peaceful space launch vehicle or another ballistic missile to a nuclear warhead carrier, a group of seven countries decided in 1987 to coordinate their national export-licensing efforts to counter the risk of such proliferation⁹⁹. In 1992 the scope of the regime was extended to missiles capable of delivering biological and chemical and not only nuclear weapons. Principles which ruled the Missile Technology Control Regime known as "Guidelines for Sensitive Missile-Relevant Transfers" appear to have been based on those established by the NSG and those of the presently abrogated CoCom¹⁰⁰. The Guidelines form the basis for controlling transfers to any destination beyond the 34 participating states of WMD delivery system (other than manned aircraft) and their related equipment and technology. If missiles submitted to MTCR are limited to certain categories defined in terms of payload¹⁰¹ and range exceeding stated parameters¹⁰², the Guidelines invite participating states to restrain their transfer of any missile whether or not there are included in those parameters. A list of 20 items divided into two categories have been adopted and incorporated in the Guidelines annexe¹⁰³. The transfer of the two items in category I¹⁰⁴ are, like those of the NSG "sensitive export", almost forbidden even if the text of the MTCR guidelines is not that restrictive. Participating states are encouraged to consider transfers of category I items with particular restraint and there "will be a strong presumption to deny such transfer". There is one absolute prohibition in the regime which is the transfer of category I production facilities.

In the rare case were the transfer might be contemplated, binding government-to-government assurance on end use and retransfer prohibition should be required. Moreover, the responsibility of the supplier and not only of the recipient is involved. As far as the MTCR Guidelines specified that suppliers should "assume responsibility for taking all steps necessary to ensure that the item is put only to its stated end-use".

The transfer of category II items should be submitted to export control authorisation and when the supplier State "judges on the basis of all available, persuasive information, evaluated according to factors, that they are intended to be used for the delivery of weapons of mass

⁹⁹ At present, the MTCR count 33 participating states which are : Argentina (1993), Australia (1990), Austria (1991), Belgium (1990), Bulgaria (2004), Brazil (1995), Canada (1987), Czech Republic (1998), Denmark (1990), Finland (1991), France (1987), Germany (1987), Greece (1992), Hungary (1993), Iceland (1993), Ireland (1992), Italy (1987), Japan (1987), Luxembourg (1990), Netherlands (1990), New Zealand (1991), Norway (1990), Poland (1998), Portugal (1992), Republic of Korea (2001), Russian Federation (1995), South Africa (1995), Spain (1990), Sweden (1991), Switzerland (1992), Turkey (1997), Ukraine (1998), United Kingdom (1987), United States of America (1987).

¹⁰⁰ Guidelines, list an other relevant documents are accessible at the MTCR web site (<http://www.mtcr.info>).

¹⁰¹ The total mass that can be carried or delivered by the specified rocket system or unmanned aerial vehicle (UAV) system that is not used to maintain flight.

¹⁰² Those parameters are a payload of 500 kg and a range of 300 km.

¹⁰³ The Guidelines and/or the list have been slightly amended in 1991, 2002 and 2003.

¹⁰⁴ Essentially complete systems and subsystems of rockets and unmanned air vehicles with at range of at least 300 km and a delivering capacity of 500 kg payload. Production facilities for these systems are included in category one.

destruction, and there will be a strong presumption to deny such transfers⁷. Factors to be considered by the supplier in the authorisation decision making are concerns about proliferation of weapons of mass destruction, capabilities and objectives of missile and space programs of the recipient state, significance of the transfer in terms of a potential development of WMD delivery systems, assurances given by the recipient and the applicability of relevant multilateral agreements. In 2002, considerations regarding the risk of controlled items falling into the hands of terrorist groups and individuals have been added in the Guidelines.

Similarly to the NSG, a contamination principle is also set up by the MTCR which imposes the prior consent of the supplier for any retransfer of an item or transfer of replicas, derivatives of an item previously transferred when the transfer could contribute to a delivery system of WMD. The authorisation should be granted only after receiving such assurance from the recipient state which should include a statement that the item would be used only for the stated purpose.

In September 2003, a paragraph had been included in the Guidelines, requiring that participating states include in their national export control system two catch-all clause. The first required that the exporter apply for an authorisation for the transfer of non-listed items where he had been informed by its competent national authorities that the items in question may be intended, in their entirety or part, for use in connection with delivery systems for WMD other than manned aircraft. The second catch-all clause require that if the exporter is aware that non-listed items are intended to contribute to activities related to delivery system of WMD it must notify to its national authorities, which will decide whether or not it is expedient to make the export concerned subject to an export authorisation.

Like other informal non-proliferation instruments, the MTCR established an annual meeting to review its activities and further strengthen the efforts to prevent missile proliferation¹⁰⁵.

¹⁰⁵ The 2004 Plenary meeting took place in Seoul (Korea) from 6 to 8 September.

7. Conventional Weapons Export Control in the European Union

7.1. The Question of Competencies

The European Union, in its different components, intervenes with varying degrees in the organisation of arms transfers into or out of Member States. To understand the process of intervention, one should distinguish between the inter-governmental cooperation mechanism set up by the Treaty on the European Union (EU Treaty) and the European Community legislation instituted by the Treaty establishing the European Community (EC Treaty).

The principal difference between the inter-governmental mechanism and the EC mechanism stands in the effect of the decision adopted.

Regarding the EC Treaty, default by an EC Institution or a Member States of an obligation imposed by an EC regulation opens the possibility of the EU Court of Justice intervention. In particular, if a Member State had failed to fulfil an obligation under the Treaty, the matter could be brought by the Commission or another Member State before the Court of Justice¹⁰⁶. If the Court finds that the Member State of concern has failed to fulfil its obligation, it can be required to take the necessary measures to comply with the judgment. Subsequently, if the State does not take such measures in due time, the Commission could bring again the case before the Court which may impose a lump sum or penalty payment¹⁰⁷.

Concerning act adopted by an EC institution, the Court of Justice has competencies to review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties. The action could be brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers¹⁰⁸. The Court has also jurisdiction to give preliminary rulings concerning the interpretation of this Treaty and the validity and interpretation of acts of the institutions of the Community¹⁰⁹.

Regarding default by a Member State to an act adopted through the inter-governmental cooperation mechanism -the Common Foreign and Security Policy (CFSP)- the intervention of the Court of Justice is explicitly excluded by the EU Treaty¹¹⁰. Subsequently to constraint a Member state to respect its commitments taken in the CFSP framework, only bilateral or multilateral political pressure of others Member States could play. Nevertheless, the Court states in its judgment C-170/96 of 12 May 1998, that the Court has jurisdiction to review the content of a CFSP Act in the light of the EC Treaty in order to ascertain whether the Act affects the powers of the Community under that provision and to annul the Act if it appears that it should have been based on the EC Treaty.

¹⁰⁶ Article 226 and 227 of the EC Treaty.

¹⁰⁷ Article 228 of the EC Treaty.

¹⁰⁸ Article 230 of The EC Treaty.

¹⁰⁹ Article 234 of the EC Treaty. If a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

¹¹⁰ Article 46 of the EU Treaty.

7.2. Actions taken under the EC Treaty

Intervention under the EC Treaty in the field of arms trade is rather restricted. Article 296 stated explicitly that:

“The provisions of this Treaty shall not preclude the application of the following rules:

[...]

(b) Any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply.”

The difficulties remain in the fact that the April 1958 list of arms, munitions and war material has never been published. Consequently, the borderline between military items submitted to this exception and none specifically military items is rather vague and EU Member States act rather freely in this domain.

Nevertheless, if the list of military items has not been drawn up, it appears to be clear that the exceptions should be strictly interpreted and limited to conventional weapons. Therefore items linked to WMD programs as defined by the NSG or the Wassenaar Arrangement, could not be covered by this exception. The Court of Justice stated, in two cases-law¹¹¹, that neither the particular nature of goods nor the fact that control measures are taken in light of foreign policy or security consideration could exclude them for the Common Commercial Policy established by article 133 of the European Community.

7.2.1 Export Control on Dual Use Items

Export control of dual-use items in the European Union is organised by the Council Regulation 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology¹¹². Dual-Use items are, for the regulation, items, including software and technology, which can be used for both civil and military purposes, and shall include 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. The list of items has been drawn up by compiling the different lists established by the Wassenaar Arrangement¹¹³, the Missile Technology Control Regime (MTCR), the Nuclear Suppliers' Group (NSG), the Australia Group and the Chemical Weapons Convention (CWC).

The main characteristics of the common export control regime are:

- The establishment of a common external fence by the adoption of an identical list of items requiring an authorisation if exported from the Community. This authorisation can be granted directly by the regulation –it is the Community General Export Authorisation- or by competent authorities of the Member State where the exporter is established, this authorisation may be an individual, global or general authorisation¹¹⁴.

¹¹¹ Judgement of the Court of 17 October 1995, Case C-70/94, Fritz Werner Industrie-Ausrüstungen GmbH et Bundesrepublik Deutschland, Rec. 1995, p. I-3189 and Judgment of the Court of 17 October 1995, Case C-83/94, Peter Leifer, Reinhold Otto Krauskopf, Otto Holzer, Rec. 1995, p. I-3231

¹¹² Council Regulation (EC) N° 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology (Official Journal of the European Communities 30.06.2000 L 159/1) This Regulation has been amended several times.

¹¹³ Only the Dual use list has been taken into consideration

¹¹⁴ Article 6 of the EC Regulation 1334/2000

- Mutual recognition of export licence: an authorisation is valid throughout the Community¹¹⁵.
- Free movement of dual-use items inside the Community except for a short list of very sensitive items¹¹⁶.
- Establishment of common elements to take into account to grant or not the authorisation¹¹⁷. These considerations include:
 - o Commitment and obligation taken in the relevant international non-proliferation regime;
 - o Obligation under sanctions imposed by the CFSP, OSCE or a binding resolution of UN Security Council;
 - o Consideration of national foreign and security policy, including those covered by the European Union Code of Conduct on arms exports;
 - o Consideration about intended end-use and risk of diversion;
- Establishment of a different catch-all clause which submits non-listed items to an authorisation if there is a proliferation risk associated with their export¹¹⁸.
 - o An authorisation has to be required for not listed items if:
 - Exporter has been informed by its public authorities that the items might be used in weapons of mass destruction program;
 - The purchasing country is submitted to arms embargo decided by the CFSP, OSCE, an UN Security Council binding resolution and the exporter has been informed by its public authorities that the items might be intended for a military end-use;
 - The items may be intended for use as parts or components of military items exported without the authorisation.
 - o If the exporter is “aware” that the items not listed that he proposes to export are intended for any misuse described above, he has to inform its authorities which will decide or not to submit the export to authorisation.
 - o Member State may adopt or maintain in their national legislation an obligation for exporter to apply for an authorisation if he has “grounds for suspecting” that the item is intended for any misuse describe above.

The regime established by the EU regulation does not constitute a common export policy for dual-use items even if some dispositions -such as the Community General Export Authorisation- tend to do so. It consists mostly in the harmonisation of Member States export control regimes by establishing a common framework (list of items, type of authorisation, consultation mechanisms) although national authorities still hold the decision-making power to grant or not the export authorisation.

7.2.2 The European firearms pass

With the establishment of the internal market in January 1993 in which the free movement of goods, persons, services and capital is ensured and whereas the total abolition of controls and formalities within intra-Community frontiers necessitated the adoption of effective rules enabling controls to be carried out within Member States on the acquisition and possession of firearms and on their transfer to another Member State. To meet the objective the Council has

¹¹⁵ Article 6.2 of the EC Regulation 1334/2000

¹¹⁶ Article 21 of the EC Regulation 1334/2000

¹¹⁷ Article 7 of the EC Regulation 1334/2000

¹¹⁸ Article 4 of the EC Regulation 1334/2000

adopted a Directive of 18 June 1991 on control of the acquisition and possession of weapons¹¹⁹.

The main provisions of the Directive could be sum up in four points.

First, the Directive classified firearms into four categories which correspond to the different regime of acquisition and possession defined by the annex:

- Prohibited firearms, such as automatic arms¹²⁰ and explosive military missiles and launchers (category A)
- Firearms subject to authorization, such semi-automatic¹²¹ or repeating short firearms¹²² or single-shot short firearms (category B)¹²³
- Firearms subject to declaration such as repeating, single shot or semi-automatic long firearms (category C)¹²⁴
- Other firearms, mostly long firearms with smooth-bore barrels (category D)

The Directive also applies to essential parts of firearms and does not apply to certain objects which correspond to the definition of firearms, if they are used, for instance, for animal slaughter or industrial or technical purposes. It is important to note that this classification does not affect the right of Member State to take more stringent classification than those provided by the Directive. For instance certain Member States classify in category A certain weapons that are considered to be hunting arms in the other Member States.

Second, the Directive lays down the minimum level of harmonisation of the conditions for the activity of arms dealers. This activity is either subject to an authorisation which should check at least “on the private and professional integrity of the dealer” for categories A and B and to a declaration for categories C and D¹²⁵

Third the Directive establishes conditions and principles for acquisition and possession of firearms. If the Directive lays down minimum conditions to be met, it is important to note that it does not affect national provisions on the carrying of weapons (rules banning the carrying of weapons, special hunting disposals,...).

In principle, the possession and acquisition of firearms of category A is prohibited but special authorisation could be granted. Regarding category B, Member States should submit the acquisition and possession to authorisation. For category C the possession should be subject to a declaration to the authorities of the Member State where the firearms is held. Finally for category D, Member States do not have to submit the possession or the acquisition to a declaration or authorisation. Nevertheless, the Directive establishes minimum conditions, in terms of age, reason, to be met by the persons acquiring a firearm.

The acquisition and possession of firearms in one Member State by a person who is resident of another Member State is subject, depending the category of firearms, to the prior consent or information of the Member State of residence¹²⁶. The Directive also lays down rules as

¹¹⁹ Council Directive of 18 June 1991 on control of the acquisition and possession of weapons (91/477/EEC) Official Journal L 256, 13/09/1991 P. 0051 - 0058

¹²⁰ For the Directive 'automatic firearm' means a firearm which reloads automatically each time a round is fired and can fire more than one round with one pull on the trigger.

¹²¹ For the Directive 'semi-automatic firearm' means a firearm which reloads automatically each time a round is fired and can fire only one round with one pull on the trigger;

¹²² For the Directive 'repeating firearm' means a firearm which after a round has been fired is designed to be reloaded from a magazine or cylinder by means of a manually-operated action;

¹²³ For the Directive 'single-shot firearm' means a firearm with no magazine which is loaded before each shot by the manual insertion of a round into the chamber or a loading recess at the breech of the barrel..

¹²⁴ For the Directive long firearm' means any firearm other than a short firearm and 'short firearm' means a firearm with a barrel not exceeding 30 centimetres or whose overall length does not exceed 60 centimetres

¹²⁵ Article 4 of the Directive 91/477/EEC.

¹²⁶ Article 7,8 of the Directive 91/477/EEC

regards the handing over of a firearm by a dealer to a person who is not resident of the Member State in question¹²⁷

Fourth, the transfer of firearms within the Community is organised through two procedures:

- transfers of firearms between Member States¹²⁸
- Transfers of firearms by an individual during a journey¹²⁹

The transfers of firearms from one Member State to another are based on the prior granting of a licence by the Member State in which the firearm is originate. In the case of transfers of firearms between arms dealers, Member States may replace this system of prior licences by an authorization valid for a maximum of three years. The Directive defined the information which has to be transmitted to the Member State of destination in case of definitive transfers of firearms. A network for exchanging information has been set up.

Complementary, the transfer of firearms may also be subject to authorisation in the Member State of destination. Nevertheless, if a Member State does not require authorisation for the transfer of certain firearms to its territory, it should communicate the list of the concerned firearms to the other Member States.

In principle, moving inside the EU in possession of a firearm is submitted to authorisation from each Member State visited. Nevertheless, hunters in respects of categories C and D and marksmen in respect of categories B, C and D may, without prior authorisation, be in possession of these firearms during a journey under the following conditions:

- the purposes of the journey is to engage in hunting or shooting activities
- they are in possession of the European firearms pass¹³⁰ stating the firearm or firearms in question
- they are able to substantiate the reason of their journey, in particular by producing an invitation.

This derogation does not apply if the Member State prohibited the arms in question. It should be noted that, to verify the conformity of the European firearms pass to the national classification, some Member States require to receive the pass so that they can enter or not the authorization in it with the stamp of the competent authority.

¹²⁷ Article 9 of the Directive 91/477/EEC

¹²⁸ Article 11 of the Directive 91/477/EEC

¹²⁹ Article 12 of the Directive 91/477/EEC

¹³⁰ The directive precises in the annex that the European firearms pass must include the following sections:

- (a) identity of the holder;
- (b) identification of the weapon or firearm, including a reference to the category within the meaning of the Directive;
- (c) period of validity of the pass;
- (d) section for use by the Member State issuing the pass (type and references of authorizations, etc.);
- (e) section for entries by other Member States (authorizations to enter their territory, etc.);
- (f) the statements:

'The right to travel to another Member State with one or more of the firearms in categories B, C or D mentioned in this pass shall be subject to one or more prior corresponding authorizations from the Member State visited.

This or these authorizations may be recorded on the pass.

The prior authorization referred to above is not in principle necessary in order to travel with a firearm in categories C or D with a view to engaging in hunting or with a firearm in categories B, C or D for the purpose of taking part in target shooting, on condition that the traveller is in possession of the firearms pass and can establish the reason for the journey.'

Where a Member State has informed the other Member States, in accordance with Article 8 (3), that the possession of certain firearms in categories B, C or D is prohibited or subject to authorization, one of the following statements shall be added:

'A journey to... (State(s) concerned) with the firearm... (identification) shall be prohibited.'

'A journey to... (State(s) concerned) with the firearm... (identification) shall be subject to authorization.'

7.2.3 Regulation on certain goods

The Council Regulation (EC) No 1236/2005¹³¹ aims to restrict trade of items which are not arms in a proper sense but for which their destructive capacities on physical or intellectual integrity has revealed cruel: the goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.

The Regulation reminds that capital punishment, torture or other treatments as those described are prohibited in the Member States by many texts which they are parties to, such as the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and fundamental Freedoms, or more recently, the Charter of Fundamental Rights of the European Union, annexed to the Nice Treaty. The Regulation applies thus *vis-à-vis* third countries and on trade of listed goods and services that could be used for such purposes¹³².

Annex II lists the items and services that have no use but for capital punishment, torture and other cruel, inhuman or degrading treatments. For those goods and services, articles 3 and 4 strictly prohibit exports to and import from third countries¹³³.

Annex III lists the items that “could” be used for such applications. An authorisation for the export to third countries of those goods is required, unless they are addressed to some Member States under a defence-related mission of the EU or UN.

In deciding whether or not granting the authorisation, Member States shall take due consideration to the international “case-law” and reports from actors such as Member States or non-governmental organisations, but also take into account the past denials from other Member States during the three previous years. The principles of the “no-undercut mechanisms” and those of the vertical information laying in the “catch-all” clauses are thus met like in other sensitive trade regulations. The Member States may also maintain more prohibitive conditions for the export of items such as handcuffs, leg irons, portable electric shock devices and gang chains. As in other control regimes, the States have to implement the guidelines into their national authorisation procedures¹³⁴ but denials have to be notified for the purpose of the no-undercut mechanisms: authorisation grantings where another Member State denied it less than three month before shall be explained and argued. It supposes an improved exchange of information between the Commission and the Member States, on the one hand about denials, to follow the technological improvements in the list updatings on the other hand. Finally, Member States have to implement efficient and effective sanctions in case of infringements by their nationals.

7.3 Actions taken under Title V of EU Treaty

Regarding the inter-governmental cooperation mechanism -the Common Foreign and Security Policy- set up by Title V of the EU Treaty, Member State intervene regularly, by Common Position or Action, in the field arms trade.

The CFSP intervention could be divided in fourth fields:

- The Code of Conduct on Arms Exports.
- Arms and related items embargos decision.
- The EU Strategy against the proliferation of WMD.

¹³¹ Council Regulation (EC) No 1236/2005, OJ L 200/1, 30.7.2005

¹³² Items entering into the exclusive self-defence purposes are thus excluded from the Regulation’s provisions.

¹³³ Unless they are exported or imported for the exclusive purpose of public or museum exhibitions.

¹³⁴ Annex I lists the competent authorities for each Member State and Annex V provides an application Model valid through the Community.

- European Council Statements and other Presidency Declaration on arms trade and related matters.

7.3.1 EU Code of Conduct on Arms Exports

On June 6, 1998, the Council reached a political agreement on a EU Code of Conduct on arms exports. The Code has been built on the Common Criteria for arms exports adopted in 1991 by the Lisbon European Council and by the Luxembourg European Council in 1992.

The principle element of the code lays in the commitment taken by Each EU Member State to take due consideration to the eight Common Criteria to issue or not the export authorisation.

The criteria are:

- Respect for the international commitments of EU member states, in particular the sanctions decreed by the UN Security Council and those decreed by the Community, agreements on non-proliferation and other subjects, as well as other international obligations.
- The respect of human rights in the country of final destination. This criteria includes also to consider carefully the equipments that might be used for internal repression, which includes torture and other cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearances, arbitrary detentions and other major violations of human rights and fundamental freedoms.
- The internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts
- The preservation of regional peace, security and stability
- The national security of the member states and of territories whose external relations are the responsibility of a Member State, as well as that of friendly and allied countries
- The behaviour of the buyer country with regards to the international community, as regards in particular to its attitude toward terrorism, the nature of its alliances and respect for international law.
- The existence of a risk that the equipment would be diverted within the buyer country or re-exported under undesirable conditions.
- The compatibility of the arms exports with the technical and economic capacity of the recipient country, taking into account the desirability that states should achieve their legitimate needs of security and defence with the least diversion for armaments of human and economic resources.

Complementary to those criteria Member States have to circulate through diplomatic channels details of licences refused in accordance with the Code of Conduct for military equipment together with an explanation of why the licence has been refused. Normally, before any Member State grants a licence that has been denied by another Member State or States for an essentially identical transaction within the last three years, it will first consult the Member State or States which issued the denial(s), according to a “no-undercut mechanism” principle. If following consultations, the Member State nevertheless decides to grant a licence, it will notify the Member State or States issuing the denial(s), giving a detailed explanation of its reasoning.

The Council has adopted in June 2000 a common list of military equipment covered by the European Union code of conduct on arms exports¹³⁵. This list which is not the weapons list of article 296 of the EC Treaty includes the control of technology required for the development,

¹³⁵ Council Declaration of 13 June 2000 (2000/C 191/01) establishing a common list of military equipment covered by the European Union code of conduct on arms exports.

production or use of items controlled even if the technology is applicable to any uncontrolled item.

The list is divided in 23 entries which are:

1. Arms and automatic weapons with a calibre of 12.7 mm (calibre 0.50 inches) or less and accessories.
2. Armament or weapons with a calibre greater than 12.7 mm (calibre 0.50 inches), projectors and accessories.
3. Ammunition, and specially designed components for the weapons controlled by the items 1, 2 or 12.
4. Bombs, torpedoes, rockets, missiles, and related equipment and accessories specially designed for military use, and specially designed components.
5. Fire control, and related alerting and warning equipment, and related systems and countermeasure equipment specially designed for military use, and specially designed components and accessories.
6. Ground vehicles and components specially designed or modified for military use.
7. Toxicological agents, tear gases, related equipment, components, materials and technology.
8. Military explosives and fuels, including propellants, and related substances.
9. Vessels of war, special naval equipment and accessories, as follows, and components, specially designed for military use.
10. Aircraft, unmanned airborne vehicles, aero-engines and aircraft equipment, related equipment and components, specially designed or modified for military use.
11. Electronic equipment, not controlled elsewhere on the List, specially designed for military use and specially designed components.
12. High velocity kinetic energy weapon systems and related equipment and specially designed components.
13. Armoured or protective equipment and constructions and components.
14. Specialised equipment for military training or for simulating military scenarios and specially designed components and accessories.
15. Imaging or countermeasure equipment specially designed for military use, and specially designed components and accessories.
16. Forgings, castings and other unfinished products the use of which in a controlled product is identifiable by material composition, geometry or function, and which are specially designed for any products controlled by item 1 to 4, 6, 9, 10, 12 or 19.
17. Miscellaneous equipment, materials and libraries, as follows, and specially designed components.
18. Equipment and technology for the production of products referred to in the List.
19. Directed energy weapon systems (DEW), related or countermeasure equipment and test models and specially designed components.
20. Cryogenic and superconductive equipment and specially designed components and accessories.
21. Software specially designed or modified for the development, production or use of equipment or materials controlled by this List and specific software.
22. Technology for the development, production or use of items controlled in the List, other than that technology controlled in item 7 and item 18.
23. Security and Para-military (smooth-bore weapons/firearms, ground vehicles, simulators)
24. Other equipment

It shall be noted that the 23rd category “Security and Para-military equipments” has been suppressed in the latest version of this list, adopted in March 2006, denominated (2006/C 66/01).

Confidence-building measures are established to develop the exchanges of information on control policies for the export of arms to certain countries or regions regarded as requiring special vigilance. These exchanges of views and information amongst all Member States are undertaken on a regular and systematic basis within COARM, the expert group of the CFSP dealing with arms export.

To promote transparency on their arms export, EU Member States publish in the EU Official journal an annual report on the defence exports and on the implementation of the Code. The

report also includes some information on the operations of the Code and identifies improvements that need to be made¹³⁶.

7.3.2 Arms and Related Items Embargos Decisions

Regarding the inter-governmental cooperation mechanism -the Common Foreign and Security Policy- set up by Title V of the EU Treaty, Member States intervene regularly, by Common Position or Action, in the field of export control of arms and related items.

If most trade embargoes are decided by the Security Council of the United Nations or, in some cases, by national decision, implementation measures are usually assumed by States. In this concern, the provisions adopted by a State could be different from the ones adopted by other States. These variations could be due to legal, commercial or political factors such as the importance of trading exchanges.

In the European Union the question appears to be slightly different as embargoes applied by Members States can be decided by the Security Council of the UN or individually by States but also by a Common Decision or a Regulation adopted by the Council of Ministers within the Common Commercial Policy of the European Community Treaty or within the Common and Foreign Security Policy (CFSP) established by the EU Treaty.

The selection by the Council of a European Community legal instrument or an intergovernmental one depends on the category of items concerned by the embargo. If it concerns arms, munitions and war material, it should be implemented by EU Members States as long as Foreign Policy remains an unshared prerogative of EU Member States even if the Council within the CFSP adopts a common decision¹³⁷. This is the case for imposition of an embargo on arms, munitions and military equipment against Sudan¹³⁸. If the embargo decision concerns any other goods, it should be organized by a regulation adopted within the Common Commercial Policy constituted by Title VII of the EC Treaty.

Nevertheless, most embargoes decisions concern firstly arms trade and from time to time other goods. Consequently, the CFSP Common Positions adopted by the Council on arms trade are sometimes reinforced by an EC Regulation. For instance, the embargo imposed to Zimbabwe is implemented, on the one hand, by the Council Common Position 2004/161/CFSP of 19 February 2004 renewing restrictive measures against Zimbabwe¹³⁹ and, on the other hand, by the Council Regulation (EC) No 314/2004 of 19 February 2004 concerning certain restrictive measures in respect of Zimbabwe¹⁴⁰.

7.3.3 List of Embargos Adopted by EU

Burma/Myanmar

¹³⁶ See for the last report : Eighth annual report according to operative provision 8 of the European Code of Conduct on Arms Exports (2006/C 250/01) Official Journal C 250 , 16/10/2006 P. 1.

¹³⁷ Cf supra (article 296 of the EC Treaty which allows Member States to take “measures considered necessary for the protection of the essential interests of their security which are connected with the production of trade in arms, munitions and war material”).

¹³⁸ Council Common Position 2004/31/CFSP of 9 January 2004 concerning the imposition of an embargo on arms, munitions and military equipment on Sudan (Official Journal L 006 , 10/01/2004 P. 0055 – 0056).

¹³⁹ Council Common Position 2004/161/CFSP of 19 February 2004 renewing restrictive measures against Zimbabwe (Official Journal L 050, 20/02/2004 P. 0066 – 0072).

¹⁴⁰ Council Regulation (EC) No 314/2004 of 19 February 2004 concerning certain restrictive measures in respect of Zimbabwe (Official Journal L 055, 24/02/2004 P. 0001 – 0013).

On 28 October 1996, the Council, concerned at the absence of progress towards democratisation and at the continuing violation of human rights in Burma/Myanmar, imposed certain restrictive measures against Burma/Myanmar by Common Position 1996/653/CFSP. In view of continued severe and systematic violations of human rights by the Burmese authorities, and in particular continuing and intensified repression of civil and political rights, and the failure of those authorities to take steps towards democracy and reconciliation, the restrictive measures against Burma/Myanmar were subsequently extended several times, lastly by Common Position 2004/423/CFSP. The restrictive measures provided for by Common Position 2004/423/CFSP impose an ban on the sale, supply, transfer or export of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment. It include also a ban on supply, or transfer of brokering services and other services related to military activities Complementary, it include a ban on technical assistance, financing and financial assistance related to military activities, a ban on the export of equipment which might be used for internal repression. As long as, the embargo concerns items and technologies not covered by the exception of article 296 of the EC Treaty, measures that could constraint economical exchanges with third states should be adopted on the basis of the EC Treaty. Therefore to complete the Common Position and in order to avoid any distortion of competition, the Council Regulation (EC) 798/2004 of 26 April 2004 renewing the restrictive measures in respect of Burma/Myanmar has been adopted. Some exceptions were enhanced by the Council Common Position 2006/318/CFSP of 27 April 2006 concerning the non-lethal or the repression-ends material if intended for the humanitarian uses, EU or UN missions intended uses, and for equipments to take part to demining activities.

China

The embargo on trade towards China has been decided by a Declaration of the European Council in Madrid on 26-27 June 1989. Controversial have been raised to determine if an embargo adopted within the framework of the European Political Cooperation, before the entry into force of the CFSP can be assimilated to Common Action or Common Position and therefore if the embargo on China is still valid.

Nevertheless, if we considered that the embargo should be still apply, it should cover:

“In the present circumstances the European Council thinks it necessary to adopt the following measures: [...] interruption by the member states of the community of military cooperation and an embargo on trade in arms with China”

Democratic People's Republic of Korea

After DPRK claimed it has exploded a nuclear device on October 9th, 2006, the UN Security Council voted the Resolution 1718(2006) establishing a strict embargo on arms-related material and WMD or ballistic-related, technical assistance and luxury goods. The Member States were invited to implement this resolution into their national legislations and to enhance effective mechanisms in order to prevent illicit trafficking of WMD or ballistic-related items from and to the DPRK through cargos searches.

The Council adopted the Common Position 2006/795/CFSP of the 20 November 2006¹⁴¹ in order to implement the embargo on the items listed in the annex to the UNSC resolution. Moreover, the Commission launched a proposal¹⁴² for a Council Regulation in order to reinforce the Common Position under the Community angle but it did not end up.

¹⁴¹ Common Position 2006/795/CFSP, 20 November 2006, Official Journal No. L 322 of 22.11.06, p.32

¹⁴² COM(2006)710 final, 15 November 2006.

Democratic Republic of Congo

On 7 April 1993, the Council agreed on imposing an arms embargo on Zaire (now the Democratic Republic of Congo). On 21 October 2002, the Council by the Common Position 2002/829/CFSP has renewed it.

On 28 July 2003, the United Nations Security Council decided in its Resolution 1493 (2003), to impose an embargo on the supply of arms and related material as well as the provision of assistance, advice or training related to military activities to all armed groups and militias operating in the territory of North and South Kivu and of Ituri, and to groups not party to the Global and All-inclusive Agreement, in the Democratic Republic of Congo.

The Council Common Position 2003/680/CFSP of 21 October 2002 which amended the Common Position 2002/829/CFSP provide for the implementation of the measures imposed by UNSCR 1493 (2003), including, inter alia, for a ban on assistance, advice and training related to military material. The content of this common position was repeated in the Common Position 2005/440/CFSP.

As long as, the embargo concerns items and technologies not covered by the exception of article 296 of the EC Treaty, measures that could constraint economical exchanges with third states should be adopted on the basis of the EC Treaty. Therefore to complete the Common Position 2002/829/CFSP and in order to avoid any distortion of competition, the Council Regulation (EC) No 1727/2003 has been adopted and then confirmed by the Council Regulation (EC) No 889/2005.

Ivory Coast (Côte d'Ivoire)

Under UNSC Resolution 1572, 15 November 2004, a ban on sale and supply of arms and related-material was decided. The European Union Foreign Policy implemented it in a Common Position, 2006/30/CFSP. It bans the arms and related material exports, exports of certain services and those of instruments that could be used for internal repressions. It also forbids imports of diamonds coming from Ivory Coast.

However, the Community was the first to intervene on this issue through two regulations: (EC) No 174/2005 on the ban for certain services and equipment for internal repression and (EC) No 560/2005 on the freezing of funds of certain persons who participated actively in the conflict. In the present case, the action of the Union came to consolidate the one of the Community.

Lebanon

On the basis of the UNSC Resolution 1701(2006), 11 August 2006, the Union adopted a Common Position, 2006/625/CFSP of 15 September 2006¹⁴³. It provides the basis for the Member States for banning exports of arms and related items, technical assistance if intended for militias without permission from the Government of Lebanon or the United Nations envoy mission. The Common Position was reinforced by a Council Regulation (EC) No 1412/2006 intended to avoid possible distortion due to the ban on certain services.

Liberia

The UNSC resolutions, 1343(2001) repeated by 1647(2005), on Liberia established an embargo on arms and related material and on technical services. The Community and the Union acted both on the same day¹⁴⁴ with Council Regulation (EC) No 872/2004 and

¹⁴³ Common Position 2006/625/CFSP of 15 September 2006, OJ No.L 253, 16.09.2006, p.36

¹⁴⁴ Council Regulation (EC) No 872/2004 (OJ L 162, 30.4.2004, p.32)

Common Position 2004/487/CFSP on the freezing of funds of peoples, mainly related to former President Taylor. Later on, Council Regulation (EC) No 234/2004 and Common Position 2006/31/CFSP promoted bans on the export of arms and related material and technical services but also on other services and import of diamonds.

Sierra Leone

The Council Common Position 1999/261/CFSP of 8 June 1998 imposed an embargo on sale or supply of arms and related material of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment and spare parts for the aforementioned to Sierra Leone. These restrictions are not apply, on one hand, to the Government of Sierra Leone, provided such supplies will be subject to examination by the UN and its Member States and, on the other hand to the sale or supply of arms and related material for the sole use in Sierra Leone of the Military Observer Group of the Economic Community of West African States (ECOMOG) or the United Nations.

Somalia

The Council Common Position of 10 December 2002 concerning restrictive measures against Somalia (2002/960/CFSP) imposed an embargo of supply or sale of arms and related material of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment and spare parts for the aforementioned to Somalia by nationals of EU Member States or from the territories of EU Member States whether originating or not in their territories. Moreover, the direct or indirect supply to Somalia of technical advice, financial and other assistance and training related to military activities, including in particular technical training and assistance related to the provision, manufacture, maintenance or use of the items mentioned in paragraph 1 is also prohibited

The embargo is not apply to supplies of non-lethal military equipment intended solely for humanitarian or protective use, or for material intended for institution building programmes of the Union, Community or Member States, including in the field of security, carried out within the framework of the Peace and Reconciliation Process, as approved in advance by the Committee established by paragraph 11 of UNSCR 751 (1992). It is not applied to protective clothing, including flak jackets and military helmets, temporarily exported to Somalia by United Nations personnel, representatives of the media and humanitarian and development workers and associated personnel for their personal use only.

The Council Regulation (EC) No 147/2003 of 27 January 2003 completed the arms traded embargo established by the Common Position (2002/960/CFSP). It covers the prohibition:

- to provide financing or financial assistance related to military activities, including in particular grants, loans and export credit insurance, for any sale, supply, transfer or export of arms and related materiel, directly or indirectly to any person, entity or body in Somalia,
- to grant, sell, supply or transfer technical advice, assistance or training related to military activities, including in particular training and assistance related to the manufacture, maintenance and use of arms and related materiel of all types, directly or indirectly to any person, entity or body in Somalia.

The participation, knowingly and intentionally, in activities the object or effect of which is, directly or indirectly, to promote the transactions referred above is also prohibited except to promote activities that have been approved by the Committee established by paragraph 11 of Resolution 751 (1992) of the Security Council of the United Nations.

Common Position 2004/487/CFSP (OJ L 162, 30.4.2004, p. 116)

The Council regulation does not applied to:

- the financing and financial assistance for the sale, supply, transfer or export of non-lethal military equipment intended solely for humanitarian or protective use, or for material intended for institution building programmes of the Union, Community or Member States, including in the field of security, carried out within the framework of the Peace and Reconciliation
- the provision of technical advice, assistance or training related to such non-lethal equipment, if such activities have been approved in advance by the Committee established by paragraph 11 of Resolution 751 (1992) of the Security Council of the United Nations.
- to protective clothing, including flak jackets and military helmets, temporarily exported to Somalia by United Nations personnel, representatives of the media and humanitarian and development workers and associated personnel for their personal use only.

Sudan

The Council Decision of 15 March 1994 on the Common Position defined on the basis of Article J.2 of the Treaty on European Union concerning the imposition of an embargo on arms, munitions and military equipment on Sudan (94/165/CFSP) covers arms, munitions and military equipment (weapons designed to kill and their ammunition, weapons platforms, non-weapons platforms and ancillary equipment as well as spare parts, repairs maintenance and transfer of military technology). Contracts entered into prior to the onset of the embargo are not covered.

In view of the ongoing civil war in Sudan, Common Position 2004/31/CFSP has maintained the arms embargo imposed against that country by Council Decision 94/165/CFSP and has strengthened that embargo to include a ban on technical assistance and other services related to military activities, and on financial assistance related to military activities.

The embargoes on certain technical and financial assistance fall within the scope of the Treaty. Therefore, notably with a view to avoid distortion of competition, Council Regulation (EC) No 131/2004 of 26 January 2004 concerning certain restrictive measures in respect of Sudan has been adopted to implement the embargoes as far as the territory of the Community is concerned. They were reinforced by Council Regulation (EC) No 1184/2005 on the freezing of funds and economic resources for targeted persons, and by the Common Position 2005/411/CFSP which confirmed the arms embargo and the ban of services but added restrictions of admissions of certain persons.

Uzbekistan

Restrictions toward Uzbekistan are not considered as United Nations motivated embargoes¹⁴⁵. However, Regulation (EC) No 1859/2005 and Common Position 2005/792/CFSP, published the same day¹⁴⁶, enhanced respectively a ban on services and equipments for internal repression, and an arms embargo with a ban on services and instruments for internal repression. The Common Position was renewed by Common Position 2006/787/CFSP in its effects.

Zimbabwe

¹⁴⁵ Council of the European Union, 22 November 2006, "List of EU embargoes on arms exports, Un Security Council embargoes on arms exports and arms embargoes imposed by the OSCE".

¹⁴⁶

The EU Council Common Position 2002/145/CFSP and the EU Council Regulation (310/2002) imposed an embargo to Zimbabwe on the supply or sale of arms and related material of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned to Zimbabwe by nationals of Member States or from the territories of Member States shall be prohibited whether originating or not in their territories. The provision to Zimbabwe of technical training or assistance related to the provision, manufacture, maintenance or use of the items mentioned in above by nationals of Member States or from the territories of the Member States, shall be prohibited.

It is also prohibited, knowingly and intentionally, to sell, supply, export or ship, directly or indirectly, equipment which might be used for internal repression as listed in Annex II of the Regulation (310/2002) to any natural or legal person, entity or body in Zimbabwe or for the purpose of any business carried on in or operated from the territory of Zimbabwe.

Nevertheless, this prohibition is not apply to supplies of non-lethal military equipment intended solely for humanitarian or protective use, and related technical assistance or training, nor shall they apply to protective clothing, including flak jackets and military helmets, temporarily exported to Zimbabwe by United Nations personnel, representatives of the media and humanitarian and development workers and associated personnel for their personal use only.

This embargo has been renewed by the Council Common Position (2006/51/CFSP) July 30 2006 and the EU Council Regulation (314/2004) of February 19 2004. The list of equipment which might be used for internal repression are in Annex I of the new Regulation.

7.3.4 Declarations of the European Council and of the Council of Ministers

Since its creation, the European Council has also intervened, through the Presidency Conclusions or it annexes, several times in the field of export control of items related to Weapons of Mass Destruction.

In 1998, after the nuclear tests conducted by India and Pakistan, the European Council has expressed its deep concern and has called upon India and Pakistan to adhere to international non-proliferation regimes, by signing the Comprehensive Test Ban Treaty as it stands and actively contributing to negotiations on a Fissile Material Cut-off Treaty¹⁴⁷.

In June 2001, the European Council stated on, one hand, for strengthening international norms and political instruments to prevent the proliferation of weapons of mass destruction and their means of delivery is of prime importance to the EU and, on the other hand, for the need to maintain strict enforcement of national export controls and to reinforce the multilateral non proliferation and export control regimes¹⁴⁸.

Following up the September 11 Attacks, the European Council stated that The Union is moreover prepared to engage with the United States in reciprocal initiatives to enhance the joint efforts with regard to non-proliferation and export controls regarding both arms and

¹⁴⁷ Presidency Conclusions on India/Pakistan Nuclear Tests (Cardiff European Council of June 15 and 16 1998).

¹⁴⁸ Annexes to the Presidency Conclusion: Declaration on the Prevention of Proliferation of Ballistic Missiles (Göteborg, June 15 and 16 2001).

chemical, bacteriological and nuclear substances capable of being used for terrorist purposes¹⁴⁹.

In December 2002, a few months before the second Iraq war, the European Council stated “The European Council notes Iraq’s acceptance of Resolution 1441 and that it has, as required, submitted a declaration on its programmes to develop weapons of mass destruction and related products.

The EU will continue to give its full support to the efforts of the UN to ensure full and immediate compliance by Iraq with Resolution 1441. The role of the Security Council in maintaining international peace and security must be respected.

The European Council expresses its full support for the inspection operations of UNMOVIC and IAEA headed by Dr Blix and Dr El-Baradei. The European Council stresses that the weapons inspectors should be allowed to proceed with their important task without interference using the full range of tools available to them under Resolution 1441. The EU looks forward to their assessment of the Iraqi declaration.”¹⁵⁰.

On North Korea, the European Council called in February 2003 on North Korea to abstain from any action which could aggravate the situation further and reaffirmed that North Korea’s non-compliance with its international obligations in the field of nuclear weapons was a serious concern for the whole of the international community and was detrimental to its own interests¹⁵¹. This statement has been reiterate been in June¹⁵² and December 2003¹⁵³.

On Iran, the European Council stated in June 2003 that: “The European Council discussed developments in relations with Iran. On Iran’s nuclear programme, it has taken note of the statement issued yesterday by the Chairperson of the IAEA Board of Governors. It reiterates its full support for the IAEA in its efforts to conduct a comprehensive examination of Iran’s nuclear programme. It expresses serious concern at some aspects of the Iranian programme, in particular as regards the closing of the nuclear fuel cycle, especially the uranium centrifuge, announced by President Khatami. The European Council expects Iran to make good its commitment, reaffirmed at yesterday’s IAEA meeting, to full transparency. It calls on Iran to be fully cooperative vis-à-vis the IAEA in all its nuclear activities and urgently and unconditionally to sign, ratify and implement an Additional Protocol to its Safeguards Agreement. This would be a significant step towards creating the much-needed confidence”¹⁵⁴.

¹⁴⁹ Declaration by The Heads of State or Government of The European Union and the President of the Commission Follow-Up to the September 11 Attacks and the Fight Against Terrorism - Brussels, 19 October 2001 (SN 4296/2/01).

¹⁵⁰ European Council Declaration On Iraq (European Council - Presidency Conclusions - Copenhagen, 12 and 13 December 2002 – Annex IV).

¹⁵¹ European Council - Presidency Conclusions - Brussels, 17 February 2003.

¹⁵² The European Council remains seriously concerned at North Korea’s nuclear programme and its failure to comply with its IAEA safeguards agreement, which undermine the non-proliferation regime (Presidency Conclusions - Thessaloniki European Council, June 20 2003).

¹⁵³ The European Council remains gravely concerned at the Democratic People’s Republic of Korea ’s nuclear programme, which poses a serious threat to regional and global security. It urges the DPRK to return to full compliance with the NPT and completely, verifiably and irreversibly dismantle its nuclear programme (Presidency Conclusion – European Council – Brussels – December 12 2003).

¹⁵⁴ Presidency Conclusions - Thessaloniki European Council, June 20 2003

In October 2003, the European Council stated its grave concern on Iran's nuclear programme and gives its full support to the IAEA Board of Governors Resolution of 12 September. "The Union expects Iran to cooperate fully with the IAEA in its implementation. The European Council renews its call on Iran promptly and unconditionally to sign, to ratify and to implement the IAEA Additional Protocol on Safeguards and to act immediately in accordance with it. It also calls on Iran to suspend all uranium enrichment-related and reprocessing activities. The European Council rejects the perspective of nuclear proliferation in the region, which is already far from stable."¹⁵⁵

In June 2004 the European Council stated that "the Union's desire to move towards a closer relationship with Iran, on the basis of action by Iran to address the EU's concerns regarding Iran's nuclear programme, the fight against terrorism, human rights, and Iran's approach to the Middle East Peace Process. It notes the ongoing work of the IAEA in Iran and urges full cooperation with the Agency in a spirit of full transparency in relation to its nuclear programme, with a view to solving all outstanding questions. The European Union will continue discussion in light of IAEA Director-General El-Baradei's recent report and the outcome of the IAEA Board of Governors meeting currently taking place in Vienna"¹⁵⁶.

In November 2005, the Brussels Summit deeply deplored the resumption by Iran of its activities of conversion despite the calls for diplomatic negotiations by the IAEA.

Nevertheless the Council "underlines the EU's continued support for diplomatic solution to international concerns over Iran's nuclear programme".

In May 2006, after failures by Iran to comply with IAEA prescriptions, and UNSC resolution which urged Iran to halt its enrichment activities and renounce to the construction of heavy water reactor (double-use item), the Council states that "building on the proposals of August 2005 as confirmed by the Council in its February 2006 conclusions, the EU would be prepared to support Iran's development of a safe, sustainable and proliferation-proof civilian nuclear programme, if international concerns were fully addressed and confidence in Iran's intentions established. The EU hopes that Iran will not fail to take up such an offer".

Finally, after the UN Security Council Resolution 1737(2006), of 23 December 2006, the Council in its conclusion of the 22 January 2007 meeting, hardened its tone toward Iran and "deplored Iran's failure to take the steps repeatedly required by the IAEA Board of Governors and the UNSC. It welcomed the unanimous adoption of Security Council Resolution 1737 on 23 December 2006. This decision represents a necessary and proportionate response to Iran's disregard for the concerns of the international community and for Security Council Resolution 1696".

7.3.5. The EU Strategy against the proliferation of WMD

At Thessaloniki, the European Council adopted in June 2003 a Declaration on non-proliferation of weapons of mass destruction. A Commitment was taken by Member States to draw a coherent EU strategy to address the threat of proliferation, and to continue to develop and implement the Action Plan adopted in June by the Council. A European Security Strategy « A Secure Europe in a Better World » was adopted on 12 December 2003 by the European Council. This Strategy identifies a number of threats for the next decade, one of these major threats being the proliferation of WMD. While addressing the root causes of this threat, the EU also takes measures in order to counter it, a European Strategy against the proliferation of WMD was adopted by the Council also on 12 December 2003.

This Strategy is divided in three main chapters which provide a wide roadmap for immediate and future action in the fight against proliferation of WMD.

¹⁵⁵ Presidency Conclusions - Brussels European Council, October 16 and 17 2003.

¹⁵⁶ Presidency Conclusions - Brussels European Council, June 17 and 18 2003.

The first chapter concerns the growing threat of the proliferation of WMD and means of delivery to international peace and security. It is considered that proliferation is driven by a small number of countries, usually not members of current control regimes, and non-state actors that present a real threat through the spread of technologies and information and because proliferating countries may help one another.

Regarding nuclear weapons proliferation, the document stated that the Treaty on the Non-proliferation of Nuclear Weapons (NPT) has helped to slow down, and in some cases reverse, the spread of military nuclear capability, but it has not been able to prevent it completely. The possession of nuclear weapons by States outside the NPT and non-compliance with the Treaty's provisions by states parties to the Treaty, risk undermining the non-proliferation and disarmament efforts.

The second chapter concerns the necessity for the European Union not to ignore the threat of the proliferation of weapons of mass destruction and to seek a multilateralist approach to this threat. A wide spectrum of actions are suggested which should be organised around three main principles:

- Effective multilateralism is the cornerstone of the European strategy for combating proliferation of WMD.
- Promotion of a stable international and regional environment is a condition for the fight against proliferation of WMD
- Close co-operation with key partners is crucial for the success of the global fight against proliferation.

The third chapter concerns the need for the European Union to use all its instruments to prevent, deter, halt, and if possible eliminate proliferating programmes that cause concerns at global level. This objective will be implemented around four groups of measures:

The first focuses on how rendering multilateralism more effective by acting resolutely against proliferators. Practically it consists in

- Working toward the universalisation and -when necessary- strengthening of the main treaties, agreements and verification arrangements on disarmament and non-proliferation.
- Fostering the role of the UN Security Council, and enhancing expertise in meeting the challenge of proliferation.
- Enhancing political, financial and technical supports to verification regimes.
- Strengthening export control policies and practices in co-ordination with partners of the export control regimes; advocating, where applicable, adherence to effective export control criteria by countries outside the existing regimes and arrangements; strengthening suppliers regimes and European co-ordination in this area.
- Enhancing the security of proliferation-sensitive materials, equipment and expertise in the European Union against unauthorised access and risks of diversion.
- Strengthening identification, control and interception of illegal trafficking.

The second group of measures consists in promoting a stable international and regional environment. It will reinforce EU co-operative threat reduction programmes with other countries, targeted at support for disarmament, control and security of sensitive materials, facilities and expertise. This group of measures will also integrate the WMD non-proliferation concerns into the EU's political, diplomatic and economic activities and programmes, aiming at the greatest effectiveness.

The third group of measures concerns the cooperation with the United-States and other key partners with an adequate follow up of the EU-US declaration on non-proliferation issued at the June 2003 summit as well as coordination and -where appropriate- joint initiatives with other key partners.

Finally the fourth group of measures consists in developing the necessary structures within the Union by organising a six monthly¹⁵⁷ debate on the implementation of the EU Strategy at the External Relations Council. A unit will also be set up which would function as a monitoring centre, entrusted with the monitoring of the consistent implementation of the EU Strategy and the collection of information and intelligence, in liaison with the Situation Centre. This monitoring centre would be set up at the Council Secretariat and fully associate the Commission. In application of these plans, the Council decided in December 2006 to start working on a concept paper, prepared by the Personal Representative of the CFSP High Representative, intended to give birth to a Weapons of Mass Destruction Monitoring Centre

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¹⁵⁷ Six Monthly Reports are published. For example, 12 December 2002 5183/07 “Six-monthly Progress Report on the Implementation of the EU Strategy against the Proliferation of Weapons of Mass Destruction (2006/II)”

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