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# The Arms Trade Treaty and the Control of Dual-Use Goods and Technologies

What Can the European Union's Export  
Control Regime Offer?

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IES WORKING PAPER 1/2013



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Daniel Fiott & Katherine Prizeman

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ISSN Number: 2034-6697  
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## **ABSTRACT**

This paper seeks to delineate some preliminary factors and working methods that could work in favour of establishing a workable international export control regime for dual-use goods and technologies. Drawing on the work initiated by various United Nations initiatives and the Wassenaar Agreement, but specifically looking at the European Union export regime model, this working paper asks if and how a similar model could be adopted at the international level. Far from suggesting that the EU regime should or could be adopted on a global basis or that the regime is full-proof, the authors acknowledge that EU regulations are seen as among the most stringent of frameworks on dual-use goods and technologies available. Accordingly, this paper asks what elements of the EU's control regime could be of international benefit after the ATT negotiations and how it could be adopted on a more international basis. Indeed, any future ATT control mechanism for dual-use items will have to draw on existing arms transfers and control regimes. It does this through an analysis of the ATT and the current discourse on dual-use goods and technologies in the negotiations, an stocktaking of the strengths and weaknesses of the EU's export control regime and by asking what elements of the EU's regime could be utilised for international control mechanisms after a future ATT is negotiated.

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*Note: The authors would like to thank Dr. Sibylle Bauer, Director of the Stockholm International Peace Research Institute's Dual-Use and Arms Trade Control Programme, for her valuable input. We also want to thank Prof. Dr. Amelia Hadfield for her helpful comments. Needless to say, any faults remain with the authors.*

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## 1 Introduction

As the negotiations for an arms trade treaty (ATT) continue this year with the upcoming March 2013 “final” negotiating conference, much attention has been paid to the lack of common international standards for the transfer of different types of conventional weapons. As noted by the Foreign Ministers of the “co-author” States of the General Assembly Resolution calling for an ATT, ‘[t]he Conference will seek to negotiate the highest possible common international standards for the import, export and transfer of the complete range of conventional weapons. The Conference will be an historical opportunity to achieve a wide-ranging Treaty to address effectively the illegal flow of arms throughout the world’ (24 December 2012). Although there remains much uncertainty as to when and how an ATT will come to fruition, it is important, nonetheless, to evaluate the implications of a ratified, future ATT in all its aspects. One such evaluation comes in the form of examining the types of weapons to be covered and corresponding models of export control.

Formulation and implementation of robust export control systems will remain important challenges over the long-term despite the outcome of the March negotiations and, therefore, merit some attention. Whether or not an ATT will be agreed in March, or in 2013 in general, the authors see the value in examining such implementation challenges, even if only in theory at this point in time. In this way, the authors, in part, purposefully “suspend disbelief” and assume that some international conventional arms transfer standards will exist in the future. This paper, in particular, will focus on dual-use goods and technologies and a corresponding export control regime.

The regulation of the international transfer of conventional weapons has become much more complex than just the transfer of assembled goods, as it also relates to the trade in components forming such weapons. Weapons transfers have increasingly involved the transmission and diffusion of technologies and dual-use items – defined as items with civilian application and, through adaptation, military purposes (e.g. telemetry systems can be used to tune motorcars to run at optimal performance, but they can also be used for piloting drones through adaptation) (Bruno, 2012: 5; Gruselle and Le Meur, 2012: 27). Many governments have shown that they import not only finished weapons, but also integrate foreign technology and dual-use goods into such weapons systems (Bruno, 2012). Quite apart from weapons of mass destruction and chemical weapons a ‘strengthening of controls over conventional weapons and dual-use goods has also become necessary’ (Achilleas, 2011: 17).

Dual-use goods and technologies are an important component of the global defence market. As Gruselle and Le Meur remark, not only are “off the shelf” arms purchases common practice, but technology transfers – i.e. the knowledge to build weapons systems – play an increasingly important role in large arms contracts (2012: 5). In fact, given that the manufacturing of defence equipment is an increasingly globalized and sophisticated production process, many different states may be involved in producing any single item. As Watkins (1990) states, dual-use items have resulted from and proliferate due to market globalization, the increasing international division of labour and the fact that developments in civilian

technologies are leading military applications in many industrial areas. Accordingly, dual-use export control mechanisms are extremely complex governance systems, and given the obscurity of dual-use supply chains and production processes, different export regimes may be applied for the different components of any single product.

Therefore, many export control regimes have evolved to also include dual-use goods and technologies. Controlling dual-use items has a security and disarmament rationale, as lax controls may serve strategic and/or repressive purposes by allowing states to adapt items for security and military use. Consequently, the issue of export control of dual-use goods and technologies has not escaped those negotiating the proposed ATT. Indeed, the ATT must also address this category of items such that this new piece of international law – which seeks to set common international standards for the trade in conventional weapons – effectively regulates all aspects of conventional weapons trade.

Current thinking posits that the challenge of completely ensuring non-violent end-uses of exported dual-use goods and technologies is too high for any export control regime, especially considering that the term “dual-use” inevitably implies a degree of ambiguity (Alic, 1994; Molas-Gallart, 1997; McLeish, 2007). Another major challenge is that, given the high political stakes involved in the ATT negotiations, the dual-use issue will likely be neglected in lieu of other seemingly more pressing issues such as inclusion of ammunition in the primary scope of the ATT as well as the principles to be listed in the Treaty text. Nevertheless, the dual-use issue will grow in importance long after the ATT negotiations conclude and the international community begins to focus on implementation challenges rather than negotiating proposals. Longer-term strides towards an international set of standards – based on a balance between sovereign prerogatives, control harmonization and transparency – on dual-use exports will beg three very important questions. Firstly, is it possible to agree on an international dual-use goods and technologies export control standard with adequate stringency? Secondly, what existing export control standard will provide such stringency? Thirdly, what are the obstacles barring international agreement and adoption of such export standards?

Therefore, this paper seeks to delineate some preliminary factors and working methods that could work in favour of establishing a workable international export control regime for dual-use goods and technologies. Drawing on the work initiated by various United Nations (UN) initiatives and the Wassenaar Agreement, but specifically looking at the European Union’s (EU) export regime model, this paper asks if and how a similar model could be adopted at the international level. Far from suggesting that the EU regime should or could be adopted on a global basis or that the regime is full-proof (Wetter, 2009: 3), the authors acknowledge that EU regulations are seen as among the most stringent of frameworks on dual-use items available (Van Heuverswyn, 2010). Accordingly, this paper asks what elements of the EU’s control regime could be of international benefit after the ATT negotiations and how it could be adopted on a more international basis. Indeed, any future ATT control mechanism for dual-use items will have to draw on existing arms transfers and control regimes (Holtom and Bromley, 2011: vi). The paper does not deal with arguments for or against the adoption of an ATT.

With a focus on export control mechanisms rather than shared dual-use listings, this paper is divided into four sections: *part one* offers an analysis of the ATT and the current discourse on dual-use goods and technologies in the negotiations; *part two* analyses the EU's export control regime before summarizing its strengths and weaknesses in *part three*. In *part four* the paper asks if elements of the EU's regime could be utilized for international control mechanisms after a future ATT is negotiated and eventually implemented.

## 2 The Arms Trade Treaty and Dual-Use Goods and Technologies

The inclusion of dual-use goods and technologies under an ATT pose many challenges. Activities involving technology transfers, in particular, often constitute a large spectrum of procurement activities whereby obtaining an internationally accepted definition of such an activity would be difficult (Gruselle and Le Meur, 2012: 6). Importing governments, particularly those of emerging economies, are highly protective of their competitive interests and ability to develop their defense economy and capabilities (*ibid.*). The ability to import technological know-how is particularly sensitive for developing states. The issue of national prerogative and the "inalienable" right to national self-defense remains at the heart of the ATT debate and, therefore, the discussion as to whether dual-use items and technologies should be included in the scope is a sensitive matter. The May 2012 *Compilation of views on elements of an arms trade treaty* illustrates that few states have explicitly called for inclusion of dual-use items and technology in the scope of the proposed ATT (United Nations, 2012).

As noted by the Indonesian delegation (2012) during the July negotiations in their general statement to the plenary, 'the Treaty should not generate political conditionalities on countries in the development of their own legitimate capabilities in conventional weapons and in the transfer of technology of conventional weapons. It should not also undermine the primary responsibility of states in controlling their transfers of conventional arms.' Indeed, other governments such as Cuba, Japan, Mauritania (on behalf of the Arab League), Saudi Arabia and Sweden have expressly opposed the inclusion of dual-use items in the scope of the ATT. These states believe that restrictions of dual-use goods and technologies can result in extensive hurdles to civil industry and contradict development aims in these countries (Gruselle and Le Meur, 2012: 61).

Although strong arguments have been made regarding the exclusion of such items due to the interests and needs of importing and developing states, the push for a comprehensive scope is no less present in the negotiations. During the July Diplomatic Conference, a joint statement from a group of so-called "Progressive States" from Latin America and the Caribbean (The Bahamas, Chile, Colombia, El Salvador, Guatemala, Jamaica, Mexico, Peru, Trinidad and Tobago, and Uruguay) noted their preference to include a list of conventional arms in the ATT that includes 'all types of conventional weapons, regardless of their purpose and without exceptions, including small arms and light weapons, ammunition, components, parts, technology and related materials. Taking into account the object and purpose

of the ATT, opening the door to exceptions would create a serious loophole in the future Treaty' (Joint Statement, 2012). "Progressive" thus implying support for a wide-ranging ATT. The governments of Ireland, the Netherlands, Norway, and Togo have also called for inclusion of dual-use items intended for military, security, or policing purposes.

Several European states have also expressed support for the inclusion of dual-use items and technologies in the scope of the ATT. The government of Ireland – current holder of the EU rotating presidency – has been explicit in referring to the instruments already developed by the EU and the Wassenaar Agreement for use as a starting point for formulating the scope of the ATT (Gruselle and Le Meur, 2012: 42). As noted in Article 6 of the European Council's Common Position *defining common rules governing control of exports of military technology and equipment* from 8 December 2008, the common rules for the EU will 'also to apply to Member States in respect to dual-use goods and technology [...] where there are serious grounds for believing that the end-user of such goods and technology will be the armed forces or internal security forces or similar entities in the recipient country' (Council of the EU, 2008). As such, those Member States to which it already applies have understandably promoted the EU mechanism for regulating transfers of such dual-use items and goods. In a recent statement following the adoption of the GA Resolution establishing the March 2013 Conference, EU High Representative Catherine Ashton noted that the proposed ATT must have 'the widest possible scope, both in terms of weapons and transfers controlled' (December 2012).

Some of the most difficult discussions for the ATT lie in the development of the national assessment criteria and associated prohibited transfers, as these articles are at the heart of the ATT's implementation. All items in the scope of the proposed Treaty, including dual-use goods and technology, will be subject to these criteria. The most recent draft text of the ATT, issued under the responsibility of the President of the July Diplomatic Conference, Ambassador Roberto García Moritán of Argentina, on 26 July 2012, is also subject to the controversies around objectivity and national prerogative (ATT draft, 2012).

In this most current draft, the risk assessment process in Article 4 implies a "balancing" of the risk of violations of international humanitarian law (IHL) and international human rights law (IHRL against the weapons' 'potential contribution to peace and security'. Paragraph 6 under national assessment references items that are not directly included as standalone risk criteria—the risk of diversion to the illicit market, risk of gender-based violence or violence against children, risk of corruption, and risk of adversely impacting development. Rather, these criteria are in a paragraph that stipulates that when a State party is authorizing an export it 'shall consider taking feasible measures, including joint actions with other states involved in the transfer, to avoid the transferred arms' from being used to these ends. The text does not indicate what measures these entail nor does it make them mandatory. The text also suggests that optional measures should be taken to avoid these consequences rather obligating the State party to deny the transfer if the risk exists. Therefore, the subjectivity inherent in these assessments makes for inclusion of dual-use items and technologies a challenging addition to the text (as they are not currently included in the most recent draft text under the scope of items).

However, if the ATT is to truly have a broad and comprehensive scope and be enforceable it will require an export control mechanism that not only reconciles the interests of exporters and importers of dual-use goods and technologies, but also diminishes the degree of subjectivity of assessments to the greatest extent possible to ensure objective, non-discriminatory implementation. Such a task is made all the more difficult when one considers the weaknesses of available international export regimes.

## 2.1 United Nations

The *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects* (UNPoA-SALWs) (2001) is not a legally-binding document, but rather a set of “political” commitments to combat illicit trade in small arms and light weapons (SALWs). Political commitments relate to those states willing to appoint national coordinating agencies or actors in furtherance of the Programme. It covers a wide variety of activities involving SALWs – international transfer, brokering, manufacture, stockpile management, marking, tracing, and record keeping. The UNPoA-SALWs provides a framework for implementing national laws, regulations, and administrative procedures around these activities as they relate to illicit trade. While the UNPoA-SALWs is strong on its provisions, it is weak on enforcement and measurability. The Review Conferences held each cycle generally consist of reaffirming a commitment to the document, but do not actually “review” its implementation, as they are intended to. Furthermore, the *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition* (2001) does not specifically refer to dual-use items.

UN Resolution 57/66 (2002) on *National Legislation on Transfer of Arms, Military Equipment and Dual-Use Goods and Technology* invites Member States of the UN to enact or improve national legislation, regulations and procedures to exercise effective control over transfers of arms, military equipment and dual-use goods and technology. While any ATT reporting mechanism is likely to overlap with this Resolution (Holtom and Bromley, 2011: 10), it is not binding and only encourages the Member States to cooperate with the Resolution on a voluntary basis. Finally, Security Council Resolution 1540 (2004) obliges UN Member States to do everything in their power to ensure that domestic border control regimes stop illicit nuclear and biological weapons from falling in the hands of non-State actors (Wetter, 2009: 4). While this Resolution obligates states to control exports of dual-use goods and technologies that can have nuclear and biological applications, due to its origin in the Security Council, there is no UN sanctioning mechanism if states fail to observe the Resolution (Van Heuverswyn, 2010: 38). The so-called “1540 Committee” of experts that issues reports on the Resolution’s implementation provides some degree of measurability and accountability, but is still lacking in some robustness.

## 2.2 Organization for Security and Cooperation in Europe (OSCE)

While the OSCE is the world's largest security organization, its provisions extend only to its 57 Member States. Like the UNPoA-SALWs, the OSCE's *Document on Small Arms and Light Weapons* (2000) is a politically binding document and does not oblige the participating states to adopt the measures, but merely urges states to "consider" them. It is therefore rather weak on enforceability. The OSCE's *Principles on the Control of Brokering in Small Arms and Light Weapons* are also politically binding although export criteria are introduced to curtail illicit transfers in dual-use goods and technologies. Such criteria include whether or not a recipient country respects human rights and fundamental freedoms; there are internal or external conflicts and tensions; the goods and technologies are aimed at legitimate security and defence needs; or whether the items are to be diverted for the purposes of suppression, terrorism and/or organized crime.

## 2.3 The Wassenaar Agreement

Agreed in 1995 and formally established in Vienna in 1996, the *Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies* (WA) is one of the few multilateral agreements on dual-use goods and technologies. Forty-one states are currently signed-up to the Agreement. All EU Member States, with the exception of Cyprus, are signatories to the Agreement along with Argentina, Australia, Canada, Croatia, Japan, Mexico, New Zealand, Norway, the Republic of Korea, Russia, South Africa, Switzerland, Turkey, Ukraine and the United States. The Agreement works as follows. On restrictions of exports of dual-use technologies and goods, the Agreement relies on national export controls on a list of items. Under the WA, participating states agree to share information on 'aggregate transfers to non-participating states and of individual cases where licenses to transfer an item have been denied' (Anthony, Eckstein and Zanders, 1997: 3).

The WA does not apply to publicly available goods and technology that can be purchased over-the-counter, by telephone, online or through electronic transactions. The categories list goods and technologies on the basis of a scientific reading of them: i.e. if the goods represent certain dimensions and material strength, then they are listed – e.g. epoxy resin impregnated carbon is listed because, if imported in large quantities, it can be used on military aircraft maintenance rather than civilian aircraft. The participating states have also agreed to exchange information on the transfers and to work on best practices in order to develop guidelines.

The Agreement criteria, last updated by the WA's plenary meeting in 2005, are broad in scope. The criteria recognize that dual-use technologies and goods can be used for the development, production, use (including installation, maintenance, repair, and overhaul and/or refurbishing) and enhancement of military capabilities. There are a number of evaluation criteria for dual-use technology and goods under the WA, including whether the good/technology is exported to a non-Agreement state; that the export of

good or technology can be controlled effectively; that a clear and objective specification of the item can be made; and whether or not the dual-use technology or good is controlled by another regime.

Specifically on dual-items, rather than to focus on the Munitions List<sup>1</sup>, there are 9 categories of technologies and goods:

Category	Items
1	<b>Special materials and related equipment:</b> gas masks and hard body armour suits; biological and chemical agents (used for riot control); and remotely operated devices, detonators and signal disrupters.
2	<b>Material processing:</b> electro-magnetic bearing systems; certain machine and drilling tools; certain inspection and measuring devices; certain robotic devices.
3	<b>Electronics:</b> certain fibre- and acoustic-optics and super- and semi-conductive electromagnets
4	<b>Computers:</b> certain electronic and digital computers;
5i&ii	<b>Telecommunications and information security:</b> jamming equipment, radio direction finding equipment and laser equipment
6	<b>Sensors and lasers:</b> certain marine acoustic and sonar systems, imaging sensors, camera systems, magnetic sensors, radar
7	<b>Navigation and avionics:</b> certain navigation systems, airborne altimeters, underwater sonar navigation systems and flight control components
8	<b>Marine:</b> submersible vehicles that operate at depths exceeding 1,000 m and underwater vision systems
9	<b>Propulsion:</b> gas turbine engines designed to power aircraft to cruise at Mach 1 or higher for more than 30 minutes and unmanned aerial vehicles.

The WA also has two specific annexes on: *sensitive items* such as robots specially designed for underwater use and *very sensitive items* such as unmanned submersible vehicle components (Wassenaar Agreement, 2012).

Despite this quite comprehensive listing, the rules on dual-use exports are hardly full proof, especially if they only seek to develop dual-use lists and have a minimum of export control regulations. Firstly, it is difficult to know what is discussed and negotiated under the Agreement as deliberations are kept in confidence and are thus lacking in transparency. Secondly, export controls are implemented by individual states – it works with national control procedures - and practical implementation of the Agreement Lists varies from State to State and thus still relies on the stringency of national procedures. Thirdly, the Agreement stipulates that threshold parameters should be developed on a case-by-case basis. Given that it has no enforcement mechanism, it is for such reasons that Wassenaar has been called an

<sup>1</sup> This list applies to 22 main military capabilities including SALWs, tanks and armed vehicles, large calibre artillery systems, surface and submersible combat vessels, armoured and protective equipment, aircraft (helicopters) and unmanned aerial vehicles.

ineffective multilateral export control regime by some (Shehadeh, 1999: 297).

### 3 The EU's Dual-Use Export Control Regime

The EU's regime for export control on dual-use goods and technologies is divided between intergovernmental (under the Common Foreign and Security Policy (CFSP)) and supranational (under the European Commission) forms of governance, but the degree to which each form of governance has impacted the EU's dual-use export regime has altered over time. What is noticeable over the short history of dual-use control integration at the European-level is that convergence has occurred, and it is 'likely to continue to converge in the coming years around even higher levels of intergovernmental coordination and with further examples of explicit harmonization' (Davis, 2002: 266). On this basis, the rudiments of the EU's dual-use export control regime can be found in a number of Regulations. Under the EU Treaties, a Regulation has a direct effect on national legislation.

Council Regulation 3381/94 (1994) was the first attempt to establish a Community regime for the control of exports of dual-use goods. The Regulation subjected items listed under Annex I of Council Decision 94/942/CFSP to export control checks in the Member States, to develop mutual recognition of export licenses, and to further facilitate the free movement of intra-EU transfers of dual-use items and instill a degree of harmonization and common agreement on prohibited and authorized destinations. However, the Regulation was left entirely to the Member States to implement. The Member States had the exclusive right to give authorization for dual-use exports, and the European Commission was left the role of merely communicating Member State decisions. The Member States' position was further solidified under the EU's *Code of Conduct on Arms Exports* (1998), which stated that 'Member States will work within the framework of the CFSP to reinforce their cooperation and to promote their convergence in the field of conventional arms exports' (Council of the EU, 1998).

Whereas Regulation 3381/94 was overtly intergovernmental in nature, Council Regulation 1334/2000 (2000) (the "EC dual-use regulation") granted a much larger role to the Commission. Indeed, given that the European Court of Justice had ruled (in the "Leifer" and "Werner" cases) that dual-use items (given their primarily civilian application) fell under the Common Commercial Policy, the Commission was granted a much greater role in the dual-use export control regime. This was a decision bolstered by the Lisbon Treaty (2009), which exempted the production and trade of arms from the rules of the common market and competition rules (under Article 346 of the TFEU, ex Article 296), but included dual-use goods and technologies under the EU's trade policy. The Dual-Use Regulation gave the European Commission exclusive right of initiative over dual-use transfers, and it obligated the Member States to establish national systems, procedures and legislation to deal with dual-use transfers. The view taken here was that the existing system under Regulation 3381/94, which gave the Member States the lead role, 'was far too complex to be routinely managed by customs officials at the border and too cumbersome to be

useful for industry in practice' (Schmitt, 2001: 5). Regulation 1334/2000 not only recognized the role of dual-use technologies as well as goods, but it elaborated a clearer definition of control mechanisms and gave the Commission powers to encourage a harmonized licensing system (*ibid*: 6-7), something also aimed at in the revision of the EU's *Code of Conduct on Arms Exports* in 2008.

In 2009, the EC Dual-Use Regulation was updated through Regulation 428/2009. The Regulation was further developed as Europe's only common regime for arms exports, and one which 'illustrates Member States' will to both control efficiently EU common dual-use goods exports and respect strictly their national obligations which derive from individual participation in international export control regimes' (Aubin, Idiart, de Clercq and Papiernik, 2011: 106). The 2009 revision strengthened Annex I, which lists all dual-use items that are freely transferable within the EU, but which need authorization for export outside the EU. The listed items are covered by the Wassenaar Agreement, the Missile Technology Control Regime (MTCR), the Australia Group (AG) and the Nuclear Suppliers Group (NSG). Annex IV of the Regulation lists sensitive items such as those related to the development of nuclear weapons cores, chemical weapons and stealth technologies. Annex IV items are not freely transferable within the EU and require intra-EU export authorization. However, the general aim of the Regulation –in tandem with Directive 2009/43/EC (the "ICT Directive"), which simplifies the terms and conditions of transfers of defence-related products within the Community- is to harmonize and simplify intra-EU transfers of defence-related products in line with the proper functioning of the internal market.

Annex II of Regulation 428/2009 established a Community General Export Authorization (CGEA), which requires authorization in the form of a license for all non-EU transfers of listed items. Article 9 and Annex III of the Regulation obliges exporting companies to acquire an export license – this prevents companies from "side-stepping" one Member State by exporting to third-countries from another Member State. Under the EU export regime, one of four export authorization licenses is required: i) an EU CGEA; ii) a national general export authorization; iii) global authorization; and iv) individual licenses. Each of these authorization licenses are issued at the Member State-level, and they may thus be granted or denied at the national level, with the obligation that the European Commission is informed of export license refusals. Article 24 of the Regulation deals with sanctions regarding the import and export of dual-use items listed in Annexes I and IV. Again, it is left to the Member States' national authorities to impose fines and imprisonment for exportation without a license. However, the Community spirit of the Regulation still 'obligates all Member States to require licenses to export the items on the common list and have in place appropriate penalties for violations as well as effective systems for enforcing the relevant legislation' (Wetter, 2009: 49).

Furthermore, in keeping with the principle allowing Member States to restrict dual-use exports for national security or public policy concerns, Article 4 of Regulation 428/2009 introduces a "Catch-All Clause" whereby Member States can restrict exports of dual-use items not listed in Annexes I and IV. The thinking behind the "Catch-All" clause stems from the necessity to keep export controls up-to-date with rapid technological developments, and with new intelligence regarding possible military applications of civil items not listed by Annexes I and IV (Wetter, 2009: 57).

Another noteworthy practice strengthened by Regulation 428/2009 is the yearly discussion of the EU's Dual-Use Working Party. The discussion takes place between the Member States and the European Commission to transpose changes made to international lists (e.g. the Wassenaar Agreement) into Annexes I and IV. The Commission is the only entity allowed to propose changes to the Regulation, and every two years the Commission reports to the Parliament and Council on the status of the Regulation.

The European Commission has also weighed-in on the debate by producing a *Green Paper* that looks at current control measures and possible ways of improving them. The Commission admits that the current framework has advantages and disadvantages, and also offers recommendations for possible ways to improve the EU export control mechanism, including: the development of a common risk assessment approach to be used by all export control authorities; greater exchange of information on suspicious transactions and licenses issued in a systematic fashion; national, general export authorizations progressively phased out in favour of an EU general export authorization; a common approach developed for "Catch-All" approaches; a solution to the problem of intra-EU transfer controls; and a coordinated enforcement across the EU. The Commission believes that under this model the 'Member States would maintain control of their export control policies' but that 'a genuinely common approach to export controls would be launched across the entire EU' (European Commission, 2011).

A review process of the EU's dual-use legislation is currently underway. As of November 2012, the Council reaffirmed that it seeks convergence among Member States 'through the setting, upholding, and implementation of high common standards for the management of, and restraint in, transfers of military technology and equipment' (Council of the EU, 2012). In the wake of the political unrest in the Middle East and North Africa, the Council wants to further strengthen measures aimed at preventing exports of dual-use items that could go on to be used for internal repression and/or regional instability. The Council wishes to focus its work on the further development of the control lists, and it wants to ensure compatibility between the future ATT and the EU's control regime. Under the review process, the Council plans to dialogue with the European Parliament, civil society and defence industry representatives.

#### **4 The EU's Regime: Strengths and Weaknesses**

It is not the intention of this paper to claim that the EU export control regime is without reproach. Primarily, the legal reach of the European Commission over the Member States is still under-developed and in this sense it is still the Member States that are on the frontline of export control implementation. This raises a number of problems. Chief among these problems is the fact that the European control regime relies on the weakest export regimes for its harmonizing basis, when, as a report by the European Parliament states, if the EU wants to ensure a strict export control it 'should be aiming at application of the strictest export regimes on each of the items, applicable to all of its Member States' (European Parliament, 2010: 3). This

represents a lowest common denominator problem (Rudney and Anthony, 1996: 52; Anthony, Eckstein and Zanders, 1997: 19). Indeed, while Member States mutually recognize each others' export licenses they do not necessarily agree on the policies underlying the licenses (Wetter, 2009: 47). There are differences in the national procedures of EU Member States regarding both the end-user and end-use documents required for licensing purposes (Eavis, 1996). Problems also result from delays in the certification process of export licenses. The combination of national and EU-level control systems ensures that a lack of overall coherence still characterizes Europe in the field of strategic exports (Schmitt, 2001: 23).

Furthermore, the division between supranational and intergovernmental elements of the EU's export regime is cause for confusion. It is a regime caught between the Commission's exclusive competence in the area of trade policy and the Single Market, and the security interests of the Member States enshrined through the CFSP and the Council of the EU. Indeed, the EU's export control regime on dual-use items is a hybrid system of governance controlled by both Member States and the European Commission, which in effect retains the balance between the need to harmonize practices at the EU-level and the national security prerogatives of the Member States. These prerogatives, in large part, explain some of the difficulties of agreeing a truly common export regime, and 'it is up to individual Member States to decide how they will give force to the common legislation' (Wetter, 2009: 5). In this regard, while the European Commission would like to increase its supervisory powers over national export control legislation, the disparities between the Member States' control regimes still represent sizeable gaps in the EU's control efforts.

Finally, prosecutions of illegal export activities continue to represent a problem for the EU. Indeed, 'the gap between the likely number of illegal activities and the actual number of prosecutions is an indication that EU Member States may not be properly putting into force the international, multilateral and EU export control legislation' (Wetter, 2009: 3). Legal proceedings against offenders differ depending on the Member State, so that in Ireland an offender is given 12 months in prison whereas in Germany the total is 15 years (*ibid*: 67). There are then clear disparities in the national legislative and customs frameworks and punitive decision-making processes.

However, there are a number of important aspects of the EU's export control regime that could be of utility to any future ATT dual-use regime. The first interesting aspect of the EU's dual-use regime is the fact that at its basis is an agreement between the EU Member States to recognize each others' national export control systems (Anthony, Eckstein and Zanders, 1997: 15). Member States are still in the driver's seat when it comes to authorization procedures, but they have agreed collectively, with the European Commission as a supranational supervisor, to develop a common framework. This represents a potential model that could be adopted in the longer-term with regards to future ATT implementation. Although Member States will retain control over national risk assessments under a future ATT, agreement to and confidence in a common framework will be essential for successful implementation. True, while the EU represents a different regional setting to the UN, and while the EU has less Member States than the UN, the key to agreeing to a dual-use regime appears to be moderately successful when based on intergovernmental cooperation with a supranational supervisor charged with promoting harmonization and

transparency between the Member States. In terms of the post-ATT negotiation period that will inevitably be characterized by overcoming implementation challenges, a commitment to harmonize transfer standards, with an at least moderate level of international accountability, will be necessary for it to be considered a success in its implementation. The EU regime is not a panacea and nor does it represent a radical model that overcomes the dilemma of national sovereignty. But it does strike a balance between the needs of governments and traders and the collective interest to restrict the export of potentially harmful dual-use items (Taylor and Cornish, 1994: 11; Anthony, Eckstein and Zanders, 1997: 16). It is essentially an imperfect system striving for perfectibility.

Moreover, the EU's dual-use regime also has the strength that it is based on international goods and technology lists. Any future ATT will necessarily have to be based on existing regimes such that it takes into account already adopted standards. In order to compile the most vigorous list of criteria that will be consistently implemented in national risk assessments, it would prove both important and useful that each criterion be based, as closely and frequently as possible, on existing international law obligations as well as well-established international norms. Ensuring that the criteria are both legally-binding and legally-based will strengthen the validity of the criteria as well as combat the skepticism and alarm from many delegations around the possibility of political manipulation or subjective interpretation of the individual criterion.

Indeed, the Wassenaar list 'plays an important role in promoting transparency and responsibility in transfers of conventional arms and dual-use goods, thus helping prevent destabilizing accumulations' (European Union, 2012). But it is clear that more than lists are required. The inherent system of enforcement that is found in the EU's dual-use export regime could be useful for a post-ATT negotiation era, even though there are still critical gaps in enforcing punitive measures against offending exporters. An appropriate and transparent mechanism for securing robust implementation is important not only for consistent and full implementation of any international control system that is elaborated, but also for ensuring that such a system efficiently and effectively contributes to international peace and security. Any international dual-use regime should also aim to assist states in agreeing to exchange information on the transfers and to work on best practices, guidelines, or elements. Despite the political sensitivity that would inevitably accompany denials and information sharing regarding dual-use transfers, a solid information exchange mechanism would provide the opportunity over the long-term to address the circumstances that led to a denial and ultimately better achieve the goals of a future ATT.

As the rules of dual-use exports in the EU are also subject to national control, states will maintain the right to exercise authority over the decisions of whether a transfer may or may not be denied under the obligations of a future ATT. Nevertheless, some additional level of verification must be included, most especially since the methods for conducting assessments on dual-use items and technologies are neither clear nor uniformly defined. Buttressing any ATT such that "state assessment" is reinforced by solid verification and accountability measures is imperative. The fear of discriminatory interpretations and politically motivated manipulation is valid, but it is not insurmountable. Such fear should not deter states from strengthening any

Treaty's language beyond "state assessment" and "presumption against authorization," which is how State obligations are currently formulated in the latest draft text. Whether a document outlining general norms and objectives for carrying out arms transfers would have any effect on international peace and security is unclear, but states must go further in pushing for a framework that has sufficient structural capacity to provide for verification of transfers on all dual-use items related to conventional weaponry.

## 5 Opportunity for an International Export Control Regime

Moving beyond the notion that arms trade regimes can only be successful if imposed or negotiated by major arms exporters (Bromley, Cooper and Holtom, 2012), it is argued by some that any ATT export regime should be more ambitious and include 'dual-use items intended for military, security and police use' (Farha and Isbister, 2009: 1). Under this view, the proposed ATT should be broad in scope because non-military items are seen to play an increasingly larger role in military, police and security operations and are often incorporated into conventional arms systems (Control Arms, 2009). Accordingly, while there is acknowledgement that national customs systems need greater capacity (e.g. trained experts, exchange of information, etc.), there is here the desire that an international framework would help bolster a dual-use export control regime at the national level with trade, finance and justice ministries pushing for export verification rather than just foreign ministries (Bauer, 2012).

Yet, discussions about any future international export control regime for dual-use goods and technologies will not be easy, even though it would certainly meet Haas' point about regimes being 'designed to increase welfare by relying on scientific and technological knowledge' (Haas, 1980: 357). Any international regime will rest on compliance and adherence to established rules and convergent behaviour, norms and expectations (Haggard and Simmons, 1987: 492). Just like the World Trade Organisation and many other international regimes, some form of dispute settlement, information exchange and even punitive action will be required for a workable regime of dual-use items. Yet, it is unlikely that the issue of dual-use export controls will manage to gain the needed attention from ATT negotiators as much more concentration has been given to the issues of SALWs and ammunition. Indeed, with so many different aspects of arms control being debated under the ATT, it is unlikely that a sufficient solution for dual-use items can be found within the nine negotiating days allotted to the process in March, although such an issue will remain important over the long-term.

Furthermore, there are a number of political issues that stymie the possibility of an ambitious regime on dual-use items. As is the case with all other issues related to the negotiation of the ATT and arms trade in a general sense, political, economic and security interests play a great role in the divergence of opinion regarding dual-use goods and technologies (Neuman, 1993; Fuhrmann, 2008). The divides between developing versus developed states and between exporting and importing states are particularly challenging. Indeed, a running argument throughout the negotiations,

and in the preparatory committee (Prep Com) meetings held prior to July 2012's Negotiating Conference, has been the potential for political manipulation that is endemic to the Treaty due to its structure of national risk assessments of proposed arms transfers.

As previously referenced, the ATT's construction is such that states would be required to undertake national assessments according to uniform criteria against which to assess transfers. A one-sided construction of the ATT, essentially becoming an "exporters-only" Treaty, leaves room for a hostile interpretation of assessment criteria regarding all the items of scope given that non-exporting and non-manufacturing states may feel threatened by its "export exclusivity". The ability of exporting states to make insular and un-checked decisions on arms transfers, including of course denials, is a worry for many developing states. For instance, the delegate of Venezuela stated during July's negotiations that a Treaty that represents another "tool for the club of exporting states" is unacceptable. It is clear that many states refuse to allow anything with a hint of "subjectivity" in the scope and/or criteria sections and have a strong aversion to reinforcing the primacy of exporting states in the instrument.

Seen in this milieu, while the EU offers a robust example of relatively stringent regulation of dual-use items and technology, the feasibility of such a mechanism being replicated on a global basis over the longer-term after an ATT is negotiated is unlikely. This is because of the strong opposition to limiting the ability of importing and developing states to trade dual-use items and technologies that would contribute to what they constitute as civilian, peaceful, or otherwise "legitimate" uses. As the ATT process is also subject to the rule of consensus, the likelihood that a "watered-down" version of the EU model will emerge is unlikely. It has been argued that the rule of consensus can be interpreted as a "de-facto" veto power for each Member State, thereby producing a "lowest-common denominator" scenario. The "final" ATT Conference to be held March will also be subject to consensus. Therefore, highly ambitious proposals for any of the Treaty's elements will inevitably be tempered by the constraints of consensus.

Nevertheless, lessons can be learned and particular examples followed that would contribute to the creation of an ATT that indeed fulfills its goal - setting an obligation for states, with sufficient levels of accountability and oversight, to conduct a "risk assessment" before authorizing any export of weapons and related items covered under the scope of the Treaty with the potential to inflict violations of human rights, international humanitarian law, or otherwise be used for illegitimate or illicit activities. This certainly includes civilian items intended for military end-use. The model forwarded by the EU - supranational governance through intergovernmental and national controls - could be a blueprint for the ATT.

The latest draft of the ATT includes provisions for an Implementation Support Unit (ISU), referred to as a "Secretariat", but with rather limited functioning. Over the course of the ATT negotiations in July 2012, states expressed their opinions both on the structure and responsibilities of an ATT ISU, with the majority of states supporting an ISU with solely technical and administrative responsibilities with a minimal structure. Despite a limited scope for the proposed ISU, previous formulations of the draft text took into account the possibility of an incremental

increase in its tasks. The *Consolidated draft text* from 24 July 2012 notes that the ISU should perform other duties as mandated by the Conference of States Parties and also states in Article 21, sub-paragraph 2d, that the Assembly of States Parties shall 'Consider the establishment of any subsidiary bodies as may be necessary to improve the functioning of the Treaty'. These are important provisions that grant flexibility to the ISU's future functions. Implementation will be the key to the effectiveness of the ATT and the ability of an ISU to provide oversight and sufficient enforcement of implementation obligations must be assessed not only in the immediate future, but in the Meetings of States Parties in the years to follow.

A coalition of willing states beyond the EU could begin cooperating on harmonized practices, but whether a supranational body such as the European Commission could be instituted to ensure cooperation between states would be difficult, however necessary in some form for adequate and robust implementation of the Treaty's provisions. Perhaps the most appropriate strategy for those governments in favour of agreeing to a common international export regime would be to use existing instruments as a basis in a pragmatic and in a bottom-up fashion, including information exchanges and investing in capacity-building in those countries most in need of the high-level expertise required to monitor the export of dual-use goods and technologies.

## 6 Conclusion

This paper has shown that while much of the existing international export regimes are politically binding, they lack an enforcement mechanism on dual-use goods and technologies. After an overview of the political challenges facing the ATT negotiations on dual-use items, and existing international regimes, this paper provided an overview of the EU export control regime to ascertain whether or not elements of the regime offer positive contributions to international control efforts. On this basis, the paper has shown how the EU's export control regime on dual-use items offers a mixed regime system. On the one hand, the EU's control regime still falls short in a number of important respects. However, the EU's model also offers positive elements that could be incorporated into the ATT dual-use debate and beyond. The mix between supranational and intergovernmental governance, while plainly difficult to institute under the ATT negotiations, could be a potential future blueprint through which willing states could organize an international dual-use export regime. Coalitions in favour of a robust international dual-use export controls could begin cooperative work arrangements based loosely on the EU model by, firstly, increasing the transparency and stringency of national procedures (meaning the exchange of information between national systems); and secondly, giving reasonable oversight of the dual-use regime to a supranational body - a UN body perhaps - to facilitate cooperation and lessons-learned.

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