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Theory and Practice of Export Control

Balancing International Security and International Economic Relations

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Chapter 1
Introduction Export Control

Philippe Achilleas

Abstract In a globalized world, the free movement of goods and technologies can lead to the proliferation of weapons and items that can be used for hostile purposes. Thus, free trade may conflict with national or international security. For this reason, it is important to ensure that market opening, supported by international trade law, is not at the expense of the state and people's right to live in a secure environment. To this end, States suppliers of sensitive goods and technologies have adopted export control regimes. An export control regime can be defined as a framework designed to regulate the international trade and transfer of sensitive and critical goods/items and related technologies. The export control regimes have given a new branch of international law which establishes a bridge between international trade law and the law of international security. To master this new regulated trade environment, it is necessary to understand the legal and political basis of the export control regimes as well as the terms of implementation of these schemes.

Keywords Export control · International sanctions · Weapons of mass destruction Conventional weapons · Dual use goods and technology · International trade

In a globalized world, the free movement of goods and technologies can lead to the proliferation of weapons and items that can be used for hostile purposes. Thus, free trade may conflict with national or international security. For this reason, it is important to ensure that the opening of the market, supported by international trade law, does not come at the expense of the State and an individual's right to live in a secure environment. To this end, States supplying sensitive goods and technologies have adopted export control regimes.

An export control regime can be defined as a framework designed to regulate the international trade and transfer of sensitive and critical goods/items and related

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technologies. The objective is to facilitate trade and transfer among friendly and reliable States and prevent hostile and dangerous States, terrorist organizations and individuals from acquiring sensitive items. These regimes can also be implicitly applied by States to protect their economies or to slow the technological development of their enemies or competitors.

These regimes have a very broad scope. Firstly, the concept of export encompasses several kinds of operations: (1) the actual shipment of any goods/items; (2) the transborder electronic or digital transmission of any technology; (3) the release or disclosure, including verbal disclosure, of technology, software or technical data to any foreign national; and (4) the actual use or application of covered technology on behalf of or for the benefit of any foreign entity or person anywhere. Secondly, these programs cover a wide range of items related to weapons of mass destruction, to conventional weapons and dual-use items.

Under these conditions, the persons concerned by these regimes are varied and numerous. On the one hand, these persons are the governments of supplier States of goods and technologies but also the governments of the States affected by the restrictions. On the other hand, exporters are also affected. Exporters include the person who has authority to determine and control the transfer of items out of the country. Of course exporters are first industries, but also public administrations such as technical agencies. Universities may also be considered as exporting entities.

Today the purpose of export control regimes is to prevent security breaches in all its forms. In particular, these regimes aim at preventing the risk of terrorism. However their application extends beyond this objective to include, e.g., the protection of human rights.

The need for security by States has become so important that export control regimes are a key element of international trade in technology goods and services. In addition, these regimes have an impact on the exchange of scientific knowledge including at university level.

As such, export control regimes have led to a new branch of international law which establishes a bridge between international trade law and the law of international security. This new discipline also raises the need to train specialists capable of both understanding the nature and purpose of controlled items and the threats associated with these items. To master this new regulated trade, it is necessary to understand both the legal and political basis of the export control regimes (Sect. 1.1) as well as the terms of implementation of these mechanisms (Sect. 1.2).

1.1 Part I. Establishing Export Regulation Regimes

Export control is organized on the basis of specific regimes adopted by States suppliers of goods and sensitive technologies (Sect. 1.1.1). These regimes are associated with international treaties on disarmament and non-proliferation. In addition to these specific arrangements, export control measures may be based on other mechanisms emanating from general and trade international law (Sect. 1.1.1).

1.1.1 Special Export Control Regimes

International law seeks to govern the international movement of goods and technologies of a military or sensitive nature, and in certain cases, the related know-how through the adoption of special laws and regulations. Originally, the international community sought to combat the proliferation of weapons of mass destruction and their constituents and other closely related matters as these have for many years presented the main threat to international peace and security. It soon became necessary to strengthen controls over conventional weapons and dual-use goods and technologies. This is due to the scale of the traffic of such items between countries over recent years and the destabilizing effect that this trade has on international, regional and national security. This is also due to the possible use of such goods by terrorist groups. The establishment of export control regimes addresses the need to strengthen the non-proliferation of such military and sensitive goods and technologies. Export control regimes are related both to weapons of mass destruction (1) and conventional arms and dual-use (2).

1. **Regimes related to weapons of mass destruction**

Weapons of mass destruction are designed to kill civilians as well as military personnel on a large scale. Although no universally accepted legal definition exists, weapons of mass destruction are often classified under the acronym "NBC": nuclear, biological and chemical weapons. In the area of weapons of mass destruction, export control mechanisms rely on conventional regimes.

It is useful to distinguish regimes dealing with nuclear activities from regimes dealing with biological and chemical activities.

Nuclear weapons are derived from atomic energy. During the Second World War, the USA launched two atomic bombs. The first bomb hit Hiroshima on 6 August 1945 and the second hit Nagasaki on 9 August 1945. After the war, the proliferation of the atomic bomb allowed other countries to acquire similar technology: Russia (1949), Great Britain (1952), France (1960), China (1964), India (1974), Israel (almost certainly since 1979) and Pakistan (1998). Since the 1950s, the international community has decided to limit nuclear weapons by banning nuclear testing[1] and proliferation of such weapons. The legal foundation for the non-proliferation policy is the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) which opened for signature on 1 July 1968.[2] From this point of view, the NPT represents a bargain between the Non-Nuclear-Weapon States (NNWS) and the Nuclear-Weapon States (NWS).[3] Indeed, based on Article II, the NWS agree

[1]The banning of nuclear testing is based on international conventions: the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water signed on 5 August 1963 (480 *UNTS* 43) and the Comprehensive Nuclear-Test-Ban Treaty, signed on 24 September 1996 (UN document A/50/1027).

[2]729 *UNTS* 161.

[3]NWS are the following: China, France, Russia, the United Kingdom and the United States.

not to transfer nuclear weapons technology or other nuclear explosive devices to NNWS and NNWS accept not to manufacture or acquire nuclear weapons and not to seek or receive any assistance in this field. In return, Article IV of the NPT states that all Parties have the inalienable right to develop the research, production and use of nuclear energy for peaceful purposes without discrimination. To this end, Articles IV and V of the Treaty encourage the international transfer of nuclear goods and technologies for civilian uses on a non-discriminatory basis.

The sovereign right to civilian nuclear motivates the establishment of export control regimes. It is thus vital for the international community to ensure that nuclear items and technology transferred for peaceful purposes are not diverted for military purposes. A first regime was established in 1971 following the coming into force of the NPT: the Zangger[4] Committee. It is composed of suppliers or potential suppliers of nuclear material and equipment. The main objective of the regime is to interpret and implement NPT Article III, par. 2 according to which NWS undertake not to provide source or special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any NNWS for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards set forth in an agreement negotiated and concluded with the International Atomic Energy Agency (IAEA). The regime focuses only on source material and special fissionable material. Following the explosion in 1974 of a nuclear device by India, States decided to establish a second regime called Nuclear Suppliers Group (NSG) to ensure that nuclear trade for peaceful purposes will not contribute to the proliferation of nuclear explosive devices. The Indian test has indeed demonstrated that certain non-weapons specific nuclear technology could be readily turned to weapons development. For this reason, the NSG focuses on the transfer of any item and technology that are especially designed or prepared for nuclear use but also on the transfer of nuclear related dual-use items and technologies.

The regimes on control of international transfers related to chemicals and biological weapons are also based on a non-proliferation convention: the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction[5] signed on 10 April 1972 and the Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction[6] signed on 13 January 1993. These two conventions prohibit States to develop, produce, acquire, stockpile, retain chemical weapons or transfer chemical as well as microbial or other biological agents or toxins weapons. They also prohibit the use of such items for military purposes.[7] These conventions also state that each party has the right to

[4]Prof. Claude Zangger was the first Chairman of the Committee.

[5]1015 *UNTS* 163.

[6]1974 *UNTS* 45.

[7]Article I of the Convention of the biological Convention; Article I of the Convention on chemical weapons.

develop, produce, otherwise acquire, retain, transfer and use chemicals as well as microbial or other biological agents or toxins for peaceful uses. As a consequence, States have to control that international transfers of such goods and technologies are carried on for purposes not prohibited.[8] After the UN concluded in 1984 that Iraq had used chemical weapons during the Iran-Iraq War, Australia proposed the organization of a conference of States to adopt a framework for controlling the export of chemical products. Since 1985, this informal group of States, known as the Australia Group, has been meeting every year to enhance cooperation in the field of chemical and biological weapons prohibition. The regime deals respectively with: chemical weapons precursors, dual-use chemical manufacturing and equipment and related technology; dual-use biological equipment; biological agents, plants pathogens and animal pathogens.

The international regimes on the non-proliferation of weapons of mass destruction are only effective to the extent they also deal with the transfer of weapons delivery systems. These systems are either aircraft (with or without pilots), or missiles, in particular ballistic and cruise missiles. There is no international treaty dealing with the non-proliferation of missiles and other delivery systems. The Hague Code of Conduct against Ballistic Missile Proliferation[9]—adopted on 25 November 2002—represents the first attempt to establish measures for all States to prevent and curb the proliferation of ballistic missile systems capable of delivering weapons of mass destruction. This gentlemen's agreement sets out the broad lines of policy cooperation in this field, including the principle of non-proliferation. Despite the absence of an international non-proliferation treaty, States have adopted an export control regime. Thus, in 1987, governments decided to set up the Missile Technology Control Regime (MTCR). This informal agreement controls international transfers that could make a contribution to delivery systems other than manned aircraft. The regime is focused on complete rocket and unmanned aerial vehicle systems (including ballistic missiles, space launch vehicles, sounding rockets, cruise missiles, target drones, and reconnaissance drones), their major complete subsystems (such as rocket stages, engines, guidance sets, and re-entry vehicles), and related software and technology.

2. **Regime on conventional weapons and dual-use items**

Each State has the right to produce, sell or buy any weapons which are not prohibited by law, so called conventional weapons. This right fits with two fundamental principles of international law recognized by the Charter of the United Nations adopted on 26 June 1945[10]: a country's right of legitimate self-defence[11]

[8]Article III of the Convention on biological weapons; Article VI of the Convention on chemical weapons.

[9]Not published.

[10]1 *UNTS* XVI.

[11]Article 51 of the UN Charter.

and the right of sovereignty on economic and security matters.[12] The proliferation of conventional weapons does however still represent a threat to international peace and security for several reasons: (1) a potential destabilization of areas where tension and regional conflict threaten international and national security; (2) an effect on the progress of the peaceful social and economic development of all peoples; and (3) a danger of increasing illicit and covert arms trafficking.

The international community therefore committed itself to cooperate on the issues of the non-proliferation of conventional weapons and dual-use technologies. In 1950, some States decided to establish the Coordinating Committee for Multilateral Export Controls (COCOM), an informal organization in order to restrict the export of sensitive items that could be used to contribute to military potential and the proliferation of weapons systems. During the Cold War, the COCOM was, in fact, designed to impose an embargo on Western States' exports on Socialist Countries. At the end of the Cold War, members of the COCOM recognized that East-West focus was no longer the appropriate basis for export controls and decided to adopt a new framework. COCOM ceased to exist in March 1994 and the Wassenaar Arrangement was adopted in order to contribute to international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies.

1.1.2 General Regimes as Basis for Export Regulation

Besides the export control mechanisms, there are other rules of international law which can establish export restrictions. These restrictions are based on the one hand on the regime of international sanctions (1) and, on the other, on security exceptions allowed by the international trade law (2).

1. **International sanctions**

Sanctions are tools used by countries or international organizations to persuade a particular entity or group of entities to change their policy or at least to demonstrate a country's opinion about the other's policies. The objectives of sanctions can be divided into several categories: conflict resolution; non-proliferation; counter-terrorism; promotion of democarty; and protection of civilians (including human rights).

International sanctions may be divided in several categories. Firstly, diplomatic sanctions include practices such as recalling of embassy and consular staff, non-recognition of a particular government and suspension of cultural relations. Secondly, military sanctions cover the use of force against a country and arms embargoes to cut off supplies of arms or dual-use items. Thirdly, economic sanctions seek to restrict trade and other economic activity with a country. Economic

[12]Article 2 of the UN Charter.

sanctions may apply to dealings with entire countries, non-state actors, such as terrorist organizations, or designated persons from a target country. Economic sanctions can take many forms: import/export restrictions; financial prohibition; asset freeze; travel ban; or asset freeze.

International sanctions should not be mistaken for export control regimes to the extent that the purpose of sanctions is to restrict international trade while the objective of the export control regimes is to regulate exports.

International sanctions can have as a legal basis Article 41 of the Chapter VII of the UN Charter which covers enforcement measures not involving the use of armed force. Article 41 States: "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". The Security Council first imposed mandatory sanctions in relation with the unrecognized State of Rhodesia [resolution 253 (1968)] and apartheid of South Africa [resolution 418 (1977)]. UN members are obliged to follow the decisions of the Security Council imposing sanctions.

The Iranian example represents a case study for UN sanctions. Between 2006 and 2010, the UN Security Council imposed four rounds of sanctions against Iran in response to the proliferation risks presented by Iran's nuclear program in light of Iran's failure to meet the requirements of the IAEA and to comply with the provisions of earlier Security Council resolutions. Acting under Chapter VII of the Charter, the Security Council adopted resolutions 1737 (2006), 1747 (2007), 1803 (2008) and 1929 (2010). These sanctions resulted in a broad prohibition on exports and imports to and from Iran, subject to certain exceptions, and on financial transactions. Diplomatic efforts to reach a comprehensive solution to the Iranian nuclear issue culminated in the Joint Comprehensive Plan of Action (JCPOA) concluded on 14 July 2015 by China, France, Germany, the Russian Federation, the United Kingdom, the United States, the European Union and Iran. On 20 July 2015, the Security Council adopted resolution 2231 (2015) endorsing the JCPOA. The text promotes the development of normal economic and trade relations and cooperation with Iran and resulted in significant sanctions relief for Iran.

However, sanctions may be taken in the absence of a UN decision. This situation occurs particularly when one of the permanent members of the Security Council is opposed to the adoption of a resolution establishing sanctions. Sanctions are then taken on a decentralized basis. In this case, States and international organizations, such as the EU, determine for themselves in the first instance if a country/organization has violated international law, and proceed to impose sanctions against it. For example, in 2014, in response to the annexation of Crimea by the Russian Federation, some governments and international organizations, led by the United States and European Union, imposed sanctions on Russian individuals and trade. In response, Russia adopted reciprocal sanctions especially against the United States, the EU, Norway, Canada and Australia. Such unilateral actions, called "countermeasures" are not prohibited under international law but are strictly

controlled. They fall under the law of the international responsibility of States and international organizations. Thus, an injured State or international organization may take countermeasures only against a State or an international organization which is responsible for an internationally wrongful act in order to induce that State/international organization to comply with its obligations to repair the injury caused.[13] International law also authorizes countermeasures by non-injured States/international organizations in two situations: (1) if the obligation breached is owed to a group of States or international organizations, including the State or organization that invokes responsibility, and is established for the protection of a collective interest of the group; (2) if the obligation breached is owed to the international community as a whole.[14]

2. **WTO security exception**

Any restrictions on international trade in goods and services may represent a violation of the World Trade Organization (WTO) agreements signed in Marrakesh on 15 April 1994. Indeed, such practices are contrary to the basic principles of the General Agreement on Tariffs and Trade (GATT),[15] which regulates trade in goods and the General Agreements on Trade in Services (GATS),[16] which regulates the trade in services. First, WTO members implementing export control regimes may violate of the so-called "most favored nation principle" provided for in Articles I of the GATT and 2 of the GATS. This rule imposes an absence of discrimination between WTO members. Second, export control is akin to a non-tariff barrier to trade in goods contrary to GATT. From this viewpoint, export control measures would be contrary to GATT Article VIII on fees and formalities connected with importation and exportation of which paragraph 1 (c) establishes a general duty to minimize the incidence and complexity of import and export formalities. Export control would also be contrary to GATT Article X imposing application of domestic trade regulations, including those impacting importation and exportation, in a uniform, impartial and reasonable manner.

However, WTO law recognizes the possibility of restricting trade relations for security reasons.

Article XXI b of the GATT and Article XIV bis b of the GATS provide: "Nothing in this Agreement shall be construed […] to prevent any contracting party from taking any action which it considers necessary for the protection of its

[13]Article 49 of the 2001 Articles on Responsibility of States for Internationally Wrongful Acts (Annex to General Assembly resolution 56/83 of 12 December 2001 as corrected by the document A/56/49(Vol. I)/Corr. 4) and 51 of the 2011 Draft articles on the responsibility of international organizations (*Yearbook of the International Law Commission*, *2011*, vol. II, Part Two).

[14]See Articles 54 and 48 of the 2001 Articles on Responsibility of States for Internationally Wrongful Acts and Articles 57 and 49 of the 2011 Draft articles on the responsibility of international organizations of the of the 2011 Draft articles on the responsibility of international organizations.

[15]1867 *UNTS* 187.

[16]1869 *UNTS* 183.