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THE ARMS TRADE : COMPARATIVE ASPECTS OF LAW

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When approaching the problem of the international arms trade from a legal perspective one might suggest first to look for applicable norms of international law (1). However, such an approach will only lead to limited findings for until now the history of controlling and restricting international arms transfers has primarily been a history of national legislation. Nevertheless, this comment will begin with an outline of relevant developments in international law (I.) thereby setting the scene for the subsequent comparative analysis of national arms export regulations (II.-IV.). The interaction of national and international restrictions on the arms trade will then be discussed on the basis of this comparative analysis, finally, leading to some concluding remarks (V.).

I. RELEVANT DEVELOPMENTS IN INTERNATIONAL LAW

The negative consequences of the arms trade have once again become a matter of serious international concern in the aftermath of the Iraqi invasion of Kuwait (2). However, as has been the case so often whenever similar problems arose in the past the international community — apart from the

(1) For an analysis of relevant norms of international law see J. DELBRÜCK, « International Traffic in Arms — Legal and Political Aspects of a Long Neglected Problem of Arms Control and Disarmament », *GYIL 24* (1981), pp. 114 *et seq.* and T. ROESER, *Völkerrechtliche Aspekte des internationalen Handels mit konventionellen Waffen* (1988).

(2) R. YAKEMTCHOUK, « Le commerce des armes », *Studia Diplomatica XLV* (1992), p. 9 at pp. 25-30.

measures directed against Iraq (3) — has only adopted faint-hearted responses (4). The key role of the arms industry in the economies of the major arms-producing countries, the use of conventional arms transfers as a foreign policy tool, and also the option of conventional weapons in the former republics of the Soviet Union being sold for hard currency have so far and once again prevented any legally binding commitment restraining traffic in arms. Thus, it is not surprising that there is no general rule of customary international law in this area although — since the second half of the 19th century — the problem of regulating arms transfers has again and again been of concern to the international community (5).

Apart from peace treaties (6) there have been only two (7) multilateral treaties expressly regulating traffic in arms which ever entered into force. First, the Brussels General Act of 1890 (8) aimed at the suppression of the African slave trade and, *inter alia*, restricted the importation into Northern Africa of firearms and ammunition (9). A few years later, several articles of the Algeciras General Act of 1906 (10) which addressed the situation in Morocco dealt with the surveillance and suppression of illicit weapons imports (11).

The provisions of the Covenant of the League of Nations only addressed the subject matter without expressly restricting the arms trade. As many saw the activities of private arms manufacturers as a prime cause of World War I (12), Art. 8, para. 5 of the Covenant envisaged the Council to « advise how the evil effects attendant upon such manufacture can be prevented » and according to Art. 23, lit. d the Members of the League « [s]ubject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon » entrusted « the League with

(3) Cf. D.G. ANDERSON, « The International Arms Trade : Regulating Conventional Arms Transfers in the Aftermath of the Gulf War », *Am. U.J. Int'l. L. & Pol'y 7* (1992), p. 749 at pp. 774-778 and T. MARAUHN, « The Implementation of Disarmament and Arms Control Obligations Imposed upon Iraq by the Security Council », *ZaöRV 52* (1992), pp. 781 *et seq.*

(4) For a discussion of recent developments see ANDERSON (note 3) at pp. 749-758.

(5) J. DELBRÜCK, « Arms, Traffic in », in : R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. I (1992), pp. 267 *et seq.*

(6) Restrictions on arms trade and production which were effected by peace treaties after World War I and by unilateral action of the occupation forces after World War II are not covered here. They were directed against the defeated countries and therefore only of limited general effect as other nations did not join in the effort. For further information see DELBRÜCK (note 1) at pp. 134-135.

(7) Some authors do not mention the Algeciras General Act of 1906 (cf. note 10), thus regarding the Brussels General Act (cf. note 8) as the only multilateral treaty to enter into force (see e.g. ANDERSON [note 3] at pp. 758-759). However, the provisions of the Algeciras General Act are not less important than those of the Brussels General Act. Both agreements were linked to the Covenant of the League of Nations by its Art. 23, lit. d (cf. ROESER [note 1] at p. 63).

(8) Text in : MARTENS, *Nouveau Recueil Général des Traités* (2nd Series), Vol. XVI, 3.

(9) For an analysis of the relevant provisions see ROESER (note 1) at pp. 52-54.

(10) Text in : MARTENS, *Nouveau Recueil Général des Traités* (2nd Series), Vol. XXXIV, 238.

(11) As to the background of the Algeciras General Act see H. BLOMEYER-BARTENSTEIN, *Algeciras Conference* (1906), in : R. Bernhardt (note 5), pp. 99 *et seq.*

(12) See J. STANLEY/M. PEARTON, *The International Trade in Arms* (1972) at pp. 5 and 18-19.

the general supervision of the trade in arms and ammunition with the countries in which the control of this traffic is necessary in the common interest » (13).

The Saint-Germain Convention on the Control of International Traffic in Arms and Ammunitions of 1919 (14) and the Geneva Convention on the Control of International Traffic in Arms and Private Arms Production of 1925 (15) both failed to receive sufficient political support because of discriminatory provisions in favour of the major arms-producing countries.

Compared to the League of Nation's Covenant, the UN Charter includes only relatively brief provisions on disarmament and arms trade issues (16). This shows how diminished the subject had become after World War II. Nevertheless, in spite of the pre-eminence of the nuclear question immediately after the War a few countries, namely Malta (in 1965) (17), Denmark (in 1968) (18) and Japan (in 1976) (19) raised the issue of traffic in arms in the UN General Assembly, however, without any action being taken (20). On the other hand, both the General Assembly and the Security Council on several occasions adopted resolutions calling for an arms embargo directed against certain states (21). However, only the measures adopted by the Security Council are legally binding in character. Such measures have gained a new dimension in the context and aftermath of the Gulf War of 1990/91 (22).

Regional initiatives, such as the Declaration of Punta del Este of 1967 (23) and the Declaration of Ayacucho of 1974 (24), were adopted as it proved difficult to achieve world-wide acceptance of a particular set of rules. An important bilateral initiative, the Conventional Arms Transfer Talks between the United States and the Sowjetunion of 1977/78 unfortunately failed because of bureaucratic infighting in the US administration (25).

(13) For an analysis of these provisions see ROESER (note 1) at pp. 62-64.

(14) LNTS Vol. 7, 333. For the substance of this draft convention see R. YAKEMTCHOUK, *Les transferts internationaux d'armes de guerre* (1980) at pp. 44 *et seq.*

(15) Text reprinted in : Société des Nations, *Journal Officiel*, Vol. VI.2. (1925), 1117. The provisions of this draft convention are discussed in detail in : YAKEMTCHOUK (note 14) at pp. 100 *et seq.*

(16) Arts. 11, 26, and 47 UN Charter.

(17) UN Doc. A/C.1/L.347.

(18) Proposal of Denmark, Iceland, Malta, and Norway of 21 November 1968 (UN Doc. A/7441).

(19) UN Doc. A/C.1/31/L.20.

(20) Cf. DELBRÜCK (note 1) at p. 139 and ROESER (note 1) at pp. 73-75.

(21) For an analysis of relevant activities of UN organs see YAKEMTCHOUK (note 14) at pp. 418 *et seq.*

(22) For recent UN practice on arms embargoes see U. BEYERLIN, « Sanctions », in : R. Wolfrum (ed.), *United Nations : Law, Policies and Practice (forthcoming)*.

(23) Declaration of Punta del Este of 14 April 1967, text in : *International Legal Materials*, Vol. 6 (1967), 535 at 544.

(24) Declaration of 9 December 1974, text in : UN Doc. A/10044.

(25) Cf. C. CATRINA, *Arms Transfers and Dependence* (1988) at pp. 129-132.

There have also been attempts not directly to restrain the arms trade but to increase the transparency of arms transfers. The most recent development in this respect was the adoption of General Assembly Resolution 46/36 L of 9 December 1991 which called for the establishment of a register of conventional arms transfers on a voluntary basis, with effect from 1 January 1992 (26).

Whereas, apart from the rules of neutrality (27) and the principle of non-intervention (28) international law imposes no restrictions on conventional arms transfers, traffic in weapons of mass destruction (29) is not only limited by Arts. I and II of the Non-Proliferation Treaty (30) and Arts. I and III of the Biological Weapons Convention (31) but will also be restricted by a number of provisions of the 1993 multilateral Chemical Weapons Convention (32).

Thus, as this introduction has shown there are only few restrictions in international law on the arms trade. Therefore, states — beginning in the 1930s and increasingly after World War II — have attempted to restrict such trade through national laws and regulations (33). The lack of international agreements and the wealth of practice of national export control law are the basis for a discussion of comparative aspects of law. Such a discussion, due to the confused material representing state practice, will hardly contribute to define a common standard with respect to arms transfers. It may, however, illustrate where international agreement is possible and it may help to identify problems which need to be solved. With the prospec-

(26) The registration approach can be traced back to the Statistical Yearbook of the Trade in Arms, Munitions and Implements of War, issued by the Secretariat of the League of Nations from 1924 to 1938. This model has been advanced by several authors. Cf. A. ROSAS, « Conventional Disarmament : A Legal Framework and Some Perspectives », in : H. Tuomi/R. Väyrynen (eds.), *Militarization and Arms Production* (1983), p. 259 at p. 264 and YAKEMTCHOUK (note 14) at pp. 100-123. For a discussion of the UN register see M. MOHR, « Kontrolle und Eindämmung des internationalen Waffentransfers », *Humanitäres Völkerrecht — Informationsschriften 5* (1992), p. 125 at pp. 131-132 and YAKEMTCHOUK (note 2) at pp. 173-176.

(27) The applicable rules of international law have recently been analyzed in detail, cf. S. OETER, *Neutralität und Waffenhandel* (1992).

(28) U. BEYERLIN, « Intervention », in : R. Wolfrum (ed.), *United Nations : Law, Policies and Practice (forthcoming)*.

(29) For a discussion of relevant problems see YAKEMTCHOUK (note 14) at pp. 177-189.

(30) UNTS Vol. 729, 161.

(31) UNTS Vol. 1015, 163.

(32) Text in : *International Legal Materials*, Vol. 32 (1993), 800. For an analysis of the relevant provisions of the CW Convention see T. MARAUHN, « National Regulations on Export Controls and the CWC », in : M. Bothe/N. Ronzitti/A. Rosas (eds.), *Chemical Weapons Disarmament : Strategies and Legal Problems (forthcoming)*.

(33) Legislation was introduced in the United Kingdom in 1931, in Belgium in 1933, in the United States, Sweden and the Netherlands in 1935, and in France in 1939 (cf. I. ANTHONY, « Introduction », in : I. Anthony [ed.], *Arms Export Regulations* [1991], p. 1 at p. 9 ; *Stanley/Pearton* [note 12] at p. 5).

tive EC regulation on export controls for dual use items (34) in mind, a comparative analysis may further contribute to the envisaged harmonization of national regulations. Nevertheless, given the serious problems of proliferation, in the long run there is no alternative to developing an international regime not only controlling but also restraining the arms trade (35).

As to the methodology of this comparative analysis the focus will be on specific aspects of national legislation as identified on the basis of national reports included in a number of recently published studies on arms trade regulations (36). Three issues will be dealt with by way of horizontal legal comparison : first, underlying legislative concepts will be analyzed, second, substantive and procedural provisions will be discussed, and third, the administration of export controls will be addressed. Finally, the comparative analysis will be put in perspective with the international context.

II. Legislative concepts underlying national arms export regulations

Based on the idea of economic liberalism prevailing in the second half of the 19th century arms were generally exported as freely as any civil item (37). Up until the 1930s it was only on a temporary basis that special control was imposed by governmental decree, as for example during World War I (38). From the 1930s onwards the principal arms manufacturing countries in North America and Western Europe introduced systems requiring a government licence before exporting weapons or war material at any time (39). Today's arms export control systems of the most impor-

(34) Cf. Yakemtchouk (note 14) at pp. 134-161 ; T. Jestaedt, *EG-Harmonisierung der Exportkontrolle für Dual-Use-Produkte, Europäisches Wirtschafts — und Steuerrecht 3* (1992), p. 53 ; J. Sakellariou/N. Schöbel, « Die Europäische Gemeinschaft auf dem Weg zu einer gemeinsamen Rüstungsexportkontrolle », *Vierteljahresschrift für Sicherheit und Frieden 10* (1992), p. 40 ; H. Müller, « The Export Controls Debate in the 'New' European Community », *Arms Control Today*, 23 (March 1993), p. 10 ; Bericht der Bundesregierung zum Stand der EG-Harmonisierung des Exportkontrollrechts für Güter und Technologien mit doppeltem Verwendungszweck (Dual-use-Waren), Stand Ende Oktober 1993, Deutscher Bundestag, Drucksache 12/6187.

(35) Recently, the creation of an international arms agency to deal with the immediate concerns associated with the currently unregulated arms market has been suggested, cf. Anderson (note 3) at pp. 797-804.

(36) Cf. I. Anthony (ed.), *Arms Export Regulations* (1991) ; Oeter (note 27) ; K.M. Meessen (ed.), *International Law of Export Control — Jurisdictional Issues* (1992) ; Marauhn (note 32).

(37) Stanley/Pearton (note 12) at p. 5 ; Oeter (note 27) at p. 151 ; for a different position, claiming that there has never been a free market in arms or military equipment see Anthony (note 33) at p. 8.

(38) Cf. A. Briggs, « The World Economy : Interdependence and Planning », in : *The New Cambridge Modern History*, Vol. XII : The Shifting Balance of World Forces 1898-1945 (1968), p. 37 at p. 49.

(39) See note 33 above.

tant arms exporters reveal to what degree the state has gained decisive control over arms exports. It is possible to speak of an instrumentalization of arms export control policy in the service of economic and foreign policy goals.

The primary focus of export control legislation are the activities of private enterprises. Without underestimating neither the importance of governmental transactions (such as the Foreign Military Sales of the United States government (40)) nor the ever-growing relationship of dependency between state organs and enterprises producing military goods (which is fairly obvious in countries like France where the arms-producing industry is to a large extent dominated by the government or public enterprises (41)) a comparative analysis of arms trade regulations must thus concentrate on the criteria relevant for the control of non-governmental arms transfers.

Although it is true that « selling arms is no ordinary commercial operation » (42) arms transfers nevertheless are part of a country's foreign trade. Especially when addressing the issue of dual use items it is important to take into account that foreign policy objectives cannot be isolated from the economic context. Thus, in order to understand and to evaluate national arms trade regulations it is necessary to take a closer look at the legal framework of a country's foreign trade activities.

1. *Foreign trade activities : the legal framework*

State control over arms exports is self-evident in state-trading countries. Apart from this economic model, in principal two different approaches to governmental involvement in foreign trade can be distinguished. They will be illustrated on the basis of applicable US legislation on the one hand and relevant German legislation on the other.

The underlying principle of US export control legislation is that doing business with a foreign country is viewed as a privilege granted by the government and not as a subjective right. According to the US Supreme Court there does not exist a constitutional right to engage in international commerce (43). This constitutional background rendered possible the development of a whole network of legislation for the imposition of export controls. These controls are primarily based on five statutes (44) : the Export

(40) A.B. GREEN/M.T. JANIK, « The Law and Politics of Foreign Military Sales », *George Washington J. of Int'l. L. and Economics 16* (1982), p. 539.

(41) On the French arms producing industry see OETER (note 27) at pp. 184-185.

(42) STANLEY/PEARTON (note 12) at p. 13.

(43) Buttfield v. Stranahan, 192 U.S. 470, 493 (1904).

(44) A survey of the statutory bases of US export controls is provided by M.K. HENTZEN, *US-amerikanische Exportkontrollen* (1988) at pp. 55-103.

Administration Act (45), the Arms Export Control Act (46), the Atomic Energy Act (47), the Trading with the Enemy Act (48), and the International Emergency Economic Powers Act (49). These statutes are complemented by various regulations (50), such as the Export Administration Regulations, the Export Commodity Control List and the International Traffic in Arms Regulations. Any systematic approach to US export control legislation will be subject to the reservation that the applicable norms reflect a pragmatic approach to the problems addressed. The constitutional division of powers between the Congress and the President in the field of foreign affairs, and in that of foreign trade and military affairs in particular, is far from being clear cut and uncontroversial, which adds to the flexibility, if not fluidity of the regulatory system.

According to the German Constitution freedom of foreign commerce is guaranteed (51). Measures limiting the exercise of this right may only be enacted either by statute or on the basis of statutory authority. The measures have to be supported by public policy. Also, the principle of proportionality (52) governs the balancing process between fundamental rights of private parties and governmental acts. On the other hand, there is a constitutional provision restraining the manufacture, transportation, and marketing of weapons designed for warfare (53). Flowing from the constitutional framework two statutes provide for the possibility of supervising foreign trade and for preventing, if necessary, certain transactions. These statutes are the War Weapons Control Act (Kriegswaffenkontrollgesetz) (54) and the Foreign Trade and Payments Act (Außenwirtschaftsgesetz) (55) together with the Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung) (56).

(45) *Export Administration Act* 1979, as amended, 50 App. U.S.C.A. 2401-2420 (1993), extended by Publ.L. No. 103-10 of 27 March 1993 (107 Stat. 40).

(46) *Arms Export Control Act* 1976, as amended, 22 U.S.C.A. 2751-2796 (1993).

(47) *Atomic Energy Act* 1954, as amended, 42 U.S.C.A. 2011-2296 (1993).

(48) *Trading with the Enemy Act* 1917, 50 App. U.S.C.A. 1-44 (1993).

(49) *International Emergency Economic Powers Act* 1977, as amended, 50 U.S.C.A. 1701-1706 (1993).

(50) These regulations are subject to numerous changes which are published in the Federal Register.

(51) The applicable provisions are Art. 2, para. 1 (« Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or against morality. ») and Art. 12, para. 1 (« All Germans shall have the right freely to choose their trade, occupation, or profession, their place of work and their place of training. The practice of trades, occupations, and professions may be regulated by or pursuant to a law. ») of the Basic Law.

(52) For the German administrative and constitutional law concept of proportionality see M.P. Singh, *German Administrative Law in a Common Law Perspective* (1985) at pp. 88-92.

(53) Art. 26, para. 2 of the Basic Law reads : « Weapons designed for warfare may not be manufactured, transported or marketed except with the permission of the Federal Government. Details shall be regulated by a federal law. »

(54) *BGBl*, 1990 I, 2506 ; latest amendment of 21 December 1992, *BGBl*, 1992 I, 2149.

(55) *BGBl*, 1961 I, 481 ; latest amendment of 21 December 1992, *BGBl*, 1992 I, 2150.

(56) *BGBl*, 1986 I, 2671 ; latest amendment of 4 August 1993, *Bundesanzeiger*, 1993, 7333.

Whether governmental privilege or subjective right to engage in international commerce, the consequences of these two different approaches have to be considered. In those countries which guarantee a subjective right (57) as outlined above not only the burden of proof for relevant legislative and administrative bodies why there is a necessity to restrict foreign trade activities of individuals seems to be higher but also the degree of judicial control exercised by the courts may be more intense than in those countries which consider foreign trade as governmental privilege. However, the second effect should not be overestimated as can be illustrated by looking at the principle of proportionality in Germany. In the field of foreign policy, German courts usually tend not to question the executive branch's determination of what is in the interest of the Federal Republic (58).

2. *Arms* stricto sensu *and dual use items : different regimes ?*

Most of the major arms-producing countries draw a distinction between arms *stricto sensu* on the one hand and dual use items on the other. A different approach was adopted by the United Kingdom where there is no separate regime for arms and armaments. Instead, they are subject to the norms governing trade in strategie goods (59).

The rationale of the distinction between arms *stricto sensu* and dual use items is to provide different regimes for these two categories which reflect and take into account the respective interests involved in the export of these goods. Whereas the primary objective of the arms trade in the narrow sense usually is a strategie one or at least within the context of security policy, trade in other — including dual use — goods is more directly influenced by economic and other rather general foreign policy objectives (60). In the latter case, it is especially difficult to take due account of all relevant interests in the context of dual use technology transfer, when development, economic, financial, security and other aspects have to be weighed. As a consequence of these principal differences between the export of arms *stricto sensu* on the one hand and dual use items on the other the

(57) Sec. 1 of the Austrian Foreign Trade Act (Außenhandelsgesetz) reads : « Save as provided to the contrary in this Act or any related regulations exports to and imports from foreign countries are not subject to any restrictions. » (*öBGBl*, 1984, 184 ; for amendments of August 1992 see *öBGBl*, 1992/469). For the implications of this principle in Austrian law see O. Weiss-Tessbach/F.J. Heidinger, « Austria », in : Meessen (note 36), p. 31 at pp. 33-34. In Italy the principle of freedom of export was only established by Art. 1 of the decree No. 313 of 14 July 1990 (Regolamento concernente i regimi di importazione e di esportazione delle merci [G.U., No. 350 of 11 May 1990]). On the legal basis for export control in Italy see *F. Francioni/A. Bianchi*, « Italy », in : Meessen (note 36), p. 105 at pp. 106-109.

(58) BVerfGE 41, 1.

(59) See C.M. Schmitthoff, *The Export Trade* (6th ed. 1975) at pp. 390 *et seq.*

(60) For the various interests involved in the control of exports see Hentzen (note 44) at pp. 26-41.

first ones are subject to stricter controls than the latter. Also, the interests of private enterprises are less important in the case of arms exports than in the case of other goods. Consequently, there is more room for governmental discretion in the first case than in the second.

Keeping these differences in mind, the effect of two different normative concepts depends on the definition of the goods subject to the stricter regime, i.e. arms and ammunitions in the narrow sense. As it is difficult to lay down an abstract normative definition (61) weapon lists are a common means to avoid a lack of clarity. State practice, however, is far from uniform. In Germany, for example, the definition of arms in the context of the War Weapons Control Act as compared to other countries is a relatively narrow one (62). The weapon list which is exclusive in character, *inter alia*, does not include means of transport even if intended for purely military purposes, radar systems, means of electronic communication, nor the production equipment for such items and relevant know-how. Similarly, the Austrian weapon list appended to the Law on War Materials (63), is restricted to core items of military hardware (64). This differs from the situation in other countries as for example Sweden (65), where the term war material (66) covers a wide range of items including, *inter alia*, cameras and apparatus designed for military purposes, bridge-building equipment, machinery, tools, etc. Other far reaching definitions can be found in US (67) and French (68) legislation.

The restrictive definition of arms *strictu sensu* in German law does not mean that items not covered by the weapon list are not subject to any control at all. The goods falling under the War Weapons Control Act are also regulated by the Foreign Trade and Payments Act and the relevant Ordinance. Thus, the two statutes overlap as far as exports are concerned. However, the free enterprise-oriented Foreign Trade and Payments Act sets less stringent provisions for exports than does the War Weapons Con-

(61) On the problem of definition in the context of arms export controls see ROESER (note 1) at pp. 90-162.

(62) Sec. 1 of the War Weapon Control Act ; OETER (note 27) at p. 195 ; for an analysis of this provision see K. POTTMEYER, *Kriegswaffenkontrollgesetz* (KWKG), Kommentar (1991) at pp. 115-184.

(63) Law on War Materials (Kriegsmaterialgesetz), *öBGBl*, 1977/540 ; amendments : *öBGBl*, 1982/358 and *öBGBl*, 1991/30a. For a discussion of the 1991 amendments of the Act see *G. Loibl/ W. Brandstetter*, « The Amendments of the Austrian Legal Provisions concerning the Export and Transit of War Materials and the Gulf Crisis 1990/91 », *Austrian Journal of Public Int'l. L. 43* (1992), pp. 73-79.

(64) OETER (note 27) at p. 210.

(65) OETER (note 27) at p. 206.

(66) As classified in an appendix to the Ordinance concerning Prohibition of the Exportation of Military Equipment, and Related Matters of 1988 (Förordning om kontroll över tillverkningen av krigsmateriel, m.m. [SFS 1983 :1036], as amended in 1988 [SFS 1988 :562]).

(67) ROESER (note 1) at pp. 127-132.

(68) ROESER (note 1) at pp. 122-127.

trol Act (69). And although the government guidelines applicable to the granting of export licences under both statutes as far as weapons and war material are concerned are identical (70) there is a major difference in the exercise of discretion under both statutes. On the other hand, it may be noted that the product lists applicable to the less stringent provisions governing the export of other, including dual use items, are very extensive in Austria (71) and Germany (72). The relevant German export list not only includes production technology and weapon-related material but even covers all strategically important goods.

Finally, evaluating the two track system in general it seems suitable to sufficiently take into account the different interests involved in the export of arms *strictu sensu* and dual use items (73). The effects of this distinction in national law vary to a great extent depending on the relevant definitions. Given the growing risks of proliferation inherent in the transfer of dual use items, technology and know-how a restrictive definition of arms *strictu sensu*, however, does no longer seem adequate. On the other hand, there is an economic necessity not too seriously to impede the transfer of technology. This has to be taken into account whenever trying to harmonize national regulations, especially definitions. How to combine the conflicting objectives indicated above then remains a political decision (74).

III. Substantive and procedural provisions in national export regulations

Having outlined the legislative concepts adopted in a number of arms-exporting countries the substance of national arms export regulations and relevant procedural aspects need to be discussed. As already indicated there is virtually uniform state practice of the major arms-producing countries that licence requirements have been applied in order to exercise go-

(69) H. Wulf, « The Federal Republic of Germany », in : Anthony (note 36), p. 72 at p. 75. The applicability of either of the two control systems in Germany to some extent can only be described as arbitrary and has been qualified as one of the major problems with regard to the efficiency of German export control regulations ; see S. Oeter, « Neue Wege der Exportkontrolle im Bereich der Rüstungsgüter. Überlegungen zur laufenden Reform des Außenwirtschaftsrechts », *Zeitschrift für Rechtspolitik 25* (1992), p. 49 at pp. 50-52.

(70) Political Principles of the Federal Cabinet for the Export of Arms and other Military Equipment of 28 April 1982, in : *Bulletin of the Press and Information Office of the Government of the Federal Republic of Germany*, 1982, 309 (5 May 1982).

(71) A new Ordinance entered into force on 1 September 1992 (*öBGBl*, 1992/540).

(72) Oeter (note 27) at p. 197.

(73) It may be noted that the EC Treaty (Arts. 113 and 223) also applies a two track system as far as the distribution of competences between the Community and member states is concerned. Cf. P.J. Kuijper, « European Economic Community », in : Meessen (note 36), p. 57 at p. 71.

(74) W.J. Long, « Defining Strategic Exports in the 1990s : From Export Control to the Management of Technology Exchange », in : G.K. Bertsch/S. Elliott-Gower, *Export Controls in Transition* (1992), p. 105 at p. 123.

vernmental control on arms exports since the 1930s. State practice is less uniform with regard to the extent of statutory regulation and to the degree of discretion granted to the authorities dealing with the implementation of relevant legislation. This can be illustrated by looking at the activities subject to a licence requirement and at the relevant criteria for granting export licences, as well as addressing the question of extraterritoriality of export controls.

1. *Activities subject to a licence requirement*

The licence requirements usually depend on the products involved and the countries of destination.

In addition to the remarks on the distinction between arms *strictu sensu* and dual use items a few tendencies with regard to the items covered by export control regulations can be described. First, increasingly not only the export of products is subject to licence requirements but also the export of blueprints for the manufacture of listed products and the export of documents containing technology, technical data and technical processes for the manufacture of listed items. Second, in some countries additionally the passing on of know-how suitable for the manufacture of certain listed products requires a licence even if no physical products, not even blueprints or other documents cross the border (75). Third, there is a growing tendency to rely on the exporter's knowledge in respect of potential applications of dual use items. Thus, due to recent changes in US law controls apply to certain exports when the exporter knows or is informed by the Department of Commerce that an export will be used for certain weapon categories, or is destined for a country, region, or project engaged in such activities (76). And in Germany, according to the recently introduced sec. 5 c of the Foreign Trade and Payments Ordinance (77) an export licence is required if the exporter has any knowledge of intended military

(75) See e.g. sec. 45 Foreign Trade and Payments Ordinance (Germany). In the Netherlands know-how is also covered by the list of strategic goods if it is embodied (P.J. KUIJPER, « Netherlands », in : Meessen (note 36), p. 117 at p. 123.

(76) These changes were enacted as a consequence of the Enhanced Proliferation Control Initiative of President Bush of 13 December 1990 (see CD/1086 at 9-10). For an analysis of the new regulations see F.P. WAITE/M.R. GOLDBERG, « Responsible Export Controls or 'Nets to Catch the Wind' ? The Commerce Department's New U.S. Controls on Exports of Chemical Precursors, Equipment and Technical Data Intended to Prevent Development of Chemical and Biological Weapons », *California Western Int'l. L.J. 22* (1991/92), p. 193 at pp. 197 *et seq.*

(77) Sec. 5 c of the AWV reads as follows : « (1) The export of goods and documents for the manufacture of such goods shall be subject to licence if they are destined for the establishment or operation of a plant exclusively or partly for the manufacture, modernisation or maintenance of weapons, munition or defece material as defined in Part I Section A of the Export Control List (Annex AL) or to be installed in these objects, and the country of purchase or destination or installation is on Country List H and if the exporter has knowledge of this. (2) The licence requirement pursuant to Subsection 1 shall not apply if according to the contract regarding the export, the value of the goods to be exported does not exceed five thousand Deutschmarks ».

use of the exported goods in arms production even if the good is not on the export list but is to be exported to certain listed countries. This provision is based on what the exporter knows, not on what he ought to know. The effect of this provision has been that many exporters apply for a licence even if they have only minor doubts about the potential use of the goods in question which then led to an unexpected workload for the anyhow not very well staffed administrative authorities.

According to their foreign policy and security interests weapon exporting countries do not apply the same degree of export controls to every country and to this end have developed country lists. In respect of COCOM such lists were a means of members to enforce their obligations under COCOM (78). Western arms-exporting countries usually apply several lists, distinguishing for example between members of NATO, EC countries, OECD countries, communist countries, countries under embargo, sensitive countries, and other countries. The effects of country lists are not uniform. Whereas sometimes the licence requirement itself depends on the country of destination being listed, in most exporting countries the application of specific licencing requirements, including administrative procedures or the presentation of import certificates and delivery verifications, depends on the recipient country's listing position.

It also has to be noted at this point that in a number of states licence requirements do not only apply to the export of goods but cover negotiations, the signing of contracts, and sometimes even the presentation of offers abroad (79).

2. *Rationale for restrictions and criteria for granting export licences*

Foreign policy objectives are of primary importance in the context of granting export licences. This does not only apply to arms exports in the narrow sense but also to national regulations dealing with foreign trade in general, covering dual use items and other strategic products. Even if provisions are formulated in a restrictive way they can be understood as

(78) For the legal situation in Germany see B. GROßFELD/A. JUNKER, *Das CoCom im Internationalen Wirtschaftsrecht* (1991) at pp. 27-28. In France Art. 11 of the decree of 30 November 1944 (*Journal Officiel* of 1 December 1944) is applied ; it reads : « exports or re-exports towards foreign countries which are designated by ministerial arrêté of goods equally listed by ministerial arrêté cannot be authorised unless a certificate of ultimate destination and a commitment of non-re-export are produced » ; see J. DUTHEIL DE LA ROCHÈRE, « France », in : Meessen (note 36), p. 79 at p. 85.

(79) See e.g. Sec. 1, para. 1 of the *Swedish Lag om förbud mot utförsel av krigsmateriel* (*SFS* 1988 :558) ; E. GULLIKSTAD, « Sweden », in : Anthony (note 36), p. 147 at p. 149. Also, in France authorization is required for the marketing of weapons and military-related equipment, the acceptance of orders implying export of weapons, the selling or leasing of production licences, and any kind of technology and information transfer (Art. 5 of the decree of 12 March 1973, *Journal Officiel* of 30 March 1973) ; see OETER (note 27) at pp. 187-188.

to provide only few limits to the objectives legitimately pursued. This can be illustrated by Art. 21 of the French Customs Code which provides that in case of mobilisation, aggression obliging the country to organise its defence, and in case of external threat, when circumstances so require, the government may, by decree in Counsel of Ministers, regulate or prohibit imports and exports of certain goods (80). Taken together with the decree of 30 November 1940 (81) authorizing the government to establish a list of goods the powers of government and public authorities cover the safeguarding of national security, the implementation of agreements of defence policy among allies, and other rationales as e.g. responding to a call for trade sanctions by an international organization, adopting trade sanctions by way of retaliation or as resprisal, and exercising pressure on foreign governments for policy ends. Looking at the rationale of restrictions in Germany sec. 5 of the Foreign Trade and Payments Act requires a licence in all cases where the Federal Republic has committed itself to restricting the export by binding international agreement. This is supported by the necessity to honour the country's international obligations, including embargoes imposed by the UN Security Council. According to sec. 7 of this Act restrictions may be placed upon the export where such restriction is necessary to guarantee the national security of the Federal Republic of Germany, to prevent a disturbance in the peaceful co-existence of nations, or to prevent a substantial disturbance in the external relations of the Federal Republic (82). Apart from these provisions stating the rationale of restrictions and giving room for relevant legislative activities there is no express provision in German export control law stating the criteria under which the relevant authorities are to decide upon the granting of an export licence. The relevant provisions of the Foreign Trade and Payments Ordinance (especially secs. 5 to 6 b) merely introduce the requirement of a licence. It appears that the written export control law is « quite formalistic hiding the true criteria as well as commercial realities » (83). The situation is similar in most other arms-exporting countries (84).

It is at this point that government guidelines become important (85). They reflect government policy with regard to transfers of arms and dual use items. From a legal perspective these guidelines — usually without having binding force — are criteria for the exercise of government discretion

(80) DUTHEIL DE LA ROCHÈRE (note 78) at p. 80.

(81) See note 78 above.

(82) A. WEITBRECHT, « Germany », in : Meessen (note 36), p. 89 at pp. 94-95. See also OETER (note 27) at pp. 196-197.

(83) WEITBRECHT (note 82) at p. 95.

(84) For the Italian legal situation and its improvements in 1990 see FRANCIONI/BIANCHI (note 57) at pp. 109-110.

(85) It may be noted that there is great diversity among the major arms-exporting countries as to the criteria applied ; see A. COURADES ALLEBECK, « Arms trade regulations », in : *SIPRI Yearbook* 1989, p. 319 at p. 320.

thereby providing some clarity for exporters when applying for a licence. However, the criteria hardly ever legally restrain the exercise of government discretion. It has already been explained that the principle of proportionality which is applicable to the exercise of discretion by public authorities in Germany is less effective in the field of foreign policy, where the courts regularly uphold the executive branch's decisions (86). In France, where the principle of freedom of trade is not recognised as a constitutional principle (87), there does not seem to exist any constitutional principle able to limit administrative discretion in the area of the control of exports by the executive apart from the obligation to respect international treaties and international obligations according to Art. 55 of the French Constitution of 1958 (88).

These wide powers of discretion and the only limited guidance provided by government guidelines reflect the general notion that arms export control policy is instrumentalized in the service of foreign policy goals within governmental prerogative. Thus, as a general feature of export control law participation of parliament appears to be limited (89). Once again, however, state practice is diverse. In most countries parliament has no role in the administration of arms trade decisions other than adopting the legislation which sets its parameters. Nevertheless, there are possibilities for increased parliamentary participation and different models have been adopted by some countries. The 1990 Italian law on new rules for the control of export, import and transit of weapon material institutes an ex-post parliamentary right to be informed about arms exports. The Prime Minister annually has to submit a written report with a description of the previous year's authorizations and deliveries (90). In Sweden, in 1984, the Advisory Board on Exports of Military Equipment was appointed, thus introducing an element of parliamentary participation in the decision-making process. On the basis of parliamentary representation six representatives of the political parties participate in the work of this body which meets on a monthly basis to discuss and give advice on major issues related to arms exports (91). In France, in 1978, legislation which would have obliged the government to consult and inform the National Assembly about arms transfers was unsuccessfully proposed. Since 1983 only post-export bi-annual reports on arms sales have been sent to the National Assembly and the Senate. This does not identify specific clients but merely

(86) See note 57 above, and accompanying text.

(87) Dutheil de la Rochère (note 78) at p. 80.

(88) This provision is important in respect of GATT and EC rules.

(89) It does not seem adequate in any of the countries discussed to speak of full parliamentary involvement in the review an authorization process ; but see Courades Allebeck (note 85) at p. 320.

(90) P. Miggiano, « Italy », in : Anthony (note 36), p. 92 at p. 97.

(91) Gullikstad (note 79) at p. 154.

consists of aggregate information broken down by region (92). The most active role has been played by US Congress. Not only by adopting legislation reducing the scope of governmental discretion but also by strengthening the power of Congress to veto arms exports by use of the power of budgetary control vested in Congress the US parliament has become closely involved in the arms export procedures. All arms exports to a certain value must be approved by Congress within 30 days (93). When the US Supreme Court in 1983 declared unconstitutional the legislative veto enacted by Congress (94) the US parliament amended the relevant provision allowing for a joint resolution to block a certain transaction (95). This shows how parliamentary control in this sensitive field can be exercised.

As to the usually limited participation of parliament it is interesting to note that in Britain (96) and France (97) the relevant laws were voted by parliament in time of war or crisis. They were not abolished when peace was restored. In the United Kingdom peacetime Export of Goods (Control) Orders have been based on the Import, Export and Customs Powers (Defence) Act 1939 which provides wide powers to make regulations for the control of the « exportation from the United Kingdom or any specified part thereof ... of all goods of any specified description » (sec. 1, para. 1). When in 1983 this wide use of powers, now exercised by the Secretary of State for Trade and Industry, was challenged in the courts it was held that in spite of parliament's motivation by the emergency of war in 1939 « the powers were not ... limited to security but extended to control over imports and exports generally » (98).

3. *End-use and re-export controls*

One of the most important features of recent legislative activities in the field of export control has been the strengthening of end-use and re-export controls. However, the effects of these controls are not uniform. The elaborate system of re-export control established under US legislation contrasts with « mere bureaucratic facade(s) of control (elsewhere) which in reality leave() total freedom to exporters » (99).

As between states participating in COCOM, including a limited number of other states, the so-called IC/DV system has been applied whereby the

(92) A. Courades Allebeck, « France », in : Anthony (note 36), p. 64 at pp. 67-68.
(93) See I. Anthony, « The United States », in : Anthony (note 36), p. 183 at pp. 192-193.
(94) Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).
(95) See Oeter (note 27) at p. 182.
(96) See L. Collins/C. McLachlan, « United Kingdom », in : Meessen (note 36), p. 147 at pp. 147-148.
(97) See Dutheil de la Rochère (note 78) at pp. 79-80.
(98) *R v. Secretary of State for Trade ex p Chris Intl Foods* (Nos 1 & 2) (Unrep., 1983), as cited by Collins/McLachlan (note 96) at p. 148.
(99) Oeter (note 27) at p. 258.

regulating state grants licences only if the import is certified and delivery verified (100). The purpose of this system is to ensure that the products in question are actually delivered into the state of export and not to another country export to which would be prohibited. There is no further controlling effect with regard to the whereabouts of the products after delivery. It is assumed that the state of export will then control any further export of these goods. What is not ensured under the IC/DV system is the application of certain criteria for the examination and licencing of re-exports.

As far as the problem of extraterritorial jurisdiction is concerned there are only very few countries going beyond the extraterritorial effect of the IC/DV system. Some states even handle the IC/DV system in such a liberal manner that the control in reality is deprived of its effect. In Austria this became obvious when during the 1980-88 Iraq-Iran war artillery pieces were illegally exported to Iraq and Iran by the state-owned company Noricum (101). In the case of non-governmental transactions even less extraterritorial control is exercised in the United Kingdom as far as the statutory requirements are concerned. However, in practice the authorities push exporters not to enter into a contract unless it includes provisions on the ultimate destination of the exported products (102). At the other hand the United States apply an extensive system of re-export controls. In principle all re-exports to third countries of US commodities or technical data require some form of authorization if the direct transfer of such goods to the third country would have been subject to a licence requirement (103). This eventually means a right to veto the transfer of certain products before these are exported to a third country (104). Looking at state practice the IC/DV system which has been qualified as one of « indirect extraterritoriality » (105) is widely applied even by countries usually adopting a critical attitude towards extraterritorial jurisdiction exercised by other states. Any use of « direct extraterritoriality » which is to be understood as national regulations immediately addressing nationals or residents of foreign states has several times been strongly objected by third states

(100) K.M. MEESSEN, « Extraterritorial Jurisdiction in Export Control Law », in : Meessen (note 36), p. 3 at p. 8.

(101) OETER (note 27) at pp. 210-211 ; *H. Wulf*, « Austria », in : Anthony (note 36), p. 24 at pp. 24 and 29.

(102) OETER (note 27) at p. 129 ; as to the meaning of « ultimate destination » according to the United Kingdom's statutory provisions see COLLINS/MCLACHLAN (note 96) at pp. 153-154 with reference to the Court of Appeal in Supertheater v. Commissioners of Customs and Excise ([1969] 1 WLR 858).

(103) W.M. REISMAN/W.D. ARAIZA, « United States of America », in : Meessen (note 36), p. 163 at p. 166 ; see also A.L.C. DE MESTRAL/T. GRUCHALLA-WESIERSKI, *Extraterritorial Application of Export Control Legislation : Canada and the U.S.A.* (1990) at pp. 81-84.

(104) ANTHONY (note 93) at p. 186.

(105) MEESSEN (note 100) at p. 9, pointing to the fact that the IC/DV system does not directly impose obligations upon persons in foreign territory.

concerned (106). The most striking examples in this respect were the Pipeline Dispute of 1982 and the Toshiba/Kongsberg Affair (107). It would go beyond the scope of this comment to discuss in detail the difficult jurisdictional problems arising under international law (108). However, it should be noted that « territoriality is not the exclusively controlling principle » (109). The United States (110) and Germany (111) thus prohibit certain activities of their nationals abroad thereby restricting the export of know-how. At least as far as individuals are concerned the nationality principle provides a proper basis for prescriptive jurisdiction in the context of export control regulations (112).

The private law context can not be discussed within the scope of this comment. However, it may be noted that references to foreign export control law are more widespread than is commonly assumed (113).

IV. The administration of export controls

The administration and implementation of export controls is important not only as part of state practice but also in terms of evaluating the efficiency of applicable national regulations. There are different authorities involved in the examination of applications for and the granting of licences, in controlling the actual performance of export transactions, and finally, in dealing with breaches of applicable norms.

1. *Centralized or decentralized administration of export controls*

Even in federal states the licencing procedure in general is dealt with by a centralized administrative authority. Not only foreign trade legislation

(106) Especially France has always stressed the need to protect the integrity of national sovereignty. However, increasingly pragmatism seems to win out over principle as far as the extraterritorial effects of export controls are concerned. See DE MESTRAL/GRUCHALLA-WESIERSKI (note 103) at pp. 233-235.

(107) For a discussion of the respective controversies see MEESSEN (note 100) at pp. 4-6.

(108) For an analysis of the general rules of public international law in this context see DE MESTRAL/GRUCHALLA-WESIERSKI (note 103) at pp. 13-56.

(109) MEESSEN (note 100) at p. 13.

(110) See e.g. C. FORWICK, *Extraterritoriale US-amerikanische Exportkontrollen* (1992) at pp. 54-58.

(111) This was only introduced recently by sec. 21 of the War Weapons Control Act ; see V. EPPING, *Die Novellierungen im Bereich des Rüstungsexportrechts, Recht der Internationalen Wirtschaft 37* (1991), p. 461 at pp. 465-467. Sec. 21 has been criticized for not being in conformity with international and German constitutional law (K. POTTMEYER, « Die Strafbarkeit von Auslandstaten nach dem Kriegswaffenkontroll — und dem Außenwirtschaftsrecht », *Neue Zeitschrift für Strafrecht 12* (1992), p. 57), however, without presenting really convincing arguments. See also sec. 7, para. 3, *Foreign Trade and Payments Act.*

(112) DE MESTRAL/GRUCHALLA-WESIERSKI (note 103) at pp. 20-21. For a critical analysis of the nationality principle applied to corporations by US law see FORWICK (note 110) at pp. 73-78.

(113) MEESSEN (note 100) at pp. 6-8 and 13.

falls within federal competence but also the implementation of such legislation. In Germany, requests for licences for the export of weapons and strategie goods have to be forwarded to the Federal Office for Economics (Bundesamt für Wirtschaft) which is subordinated to the Federal Ministry of Economics (114) ; in the United States applications for the export of dual use items are handled by the Office of Export Administration within the Department of Commerce whereas arms exports are dealt with by the Centre for Defence Trade (formerly called the Office of Munitions Control) within the State Department (115).

However, the fact that the administration of export controls falls within federal competence does not exclude that various ministries and agencies are involved. Thus, in the United States « foreign military sales » (116) as an example are first handled by the State Department, subsequently submitted to other governmental agencies which may have an interest in the particular case, such as the Department of Commerce, the Central Intelligence Agency (CIA), the Office of Management and Budget, the Agency for International Development, the Arms Control and Disarmament Agency, etc., then the Department of Defence evaluates the application, and finally it is usually the Director of the Bureau of Politco-Military Affairs within the State Department who formally decides on the application (117). A different approach was adopted in France where the decision-making process is concentrated within one administrative body, nevertheless, having due regard to the various interests involved in the transactions. Although formally the Prime Minister authorizes arms transfers (118), in practice, it is the Interministerial Committee for the Study of War Equipment Exports (Commission interministérielle pour l'étude des exportations de matériels de guerre) which considers the applications (119). This Committee includes the General Secretariat of National Defence (Secrétariat Général de Défense Nationale) and representatives of the Ministries of Foreign Affairs, Defence, Economy and Finance, as well as other interested ministries on an *ad hoc* basis (120).

(114) For the formal procedure of the decision-making process in Germany see WULF (note 69) at pp. 79-81.

(115) See ANTHONY (note 93) at p. 188.

(116) For a survey of the complex procedure applied see R.P. LABRIE/J.G. HUTCHINS/E.W.A. PEURA/D.H. RICHMAN, *U.S. Arms Sales Policy. Background and Issues* (1982) at p. 26 *et seq.*

(117) See OETER (note 27) at pp. 178-179. On 29 September 1993 US President Clinton announced a new non-proliferation and export policy ; one of the primary aims to be pursued thereby is to simplify the export approval process (*ACR* 1993 at 250.B.15).

(118) Article 7 of an arrêté of 12 March 1973 (*Journal Officiel* of 30 March 1973 at p. 3525 *et seq.*).

(119) OETER (note 27) at p. 187.

(120) COURADES ALLEBECK (note 92) at p. 67.

An interesting aspect of the French procedure is that another licence is required for the actual performance of the transaction (121). In so far the relevant competence lies with the Ministries for Trade and Finance and the licence requirement is designed to ensure the application of customs regulations. It does not include another political evaluation of the envisaged export.

In Germany, two separate administrative bodies are competent for the granting of licences on the one hand (the Federal Office for Economics) and for the subsequent supervision of the actual performance of the transactions on the other (customs authorities). As has been correctly stated this has led to major deficiencies in the administration of export controls (122), quite often due to a lack of mutual information. Recent legislative changes (123) in the aftermath of the Rabta affair and allegedly illegal exports to Iraq have improved the administration of controls (124). Thus, computerized exchange of data among relevant administrative authorities has been provided for. Further, the investigating department of the customs office now has the power to intercept post and telecommunications even before a breach of foreign trade regulations has occurred if there is actual cause for suspicion that such an intentional breach will occur (125). Also, the Federal Minister of Economies now has the possibility of intervening to stop individual exports by administrative act (126).

As stringent as these administrative procedures may be the implementation of national legislation also depends on a credible threat of sanctions in cases of violations of export regulations.

2. *Available Sanctions*

There is a variety of sanctions states are prepared to impose in case of non-compliance with national export regulations. These include administrative sanctions and fines as well as imprisonment and criminal fines, seizure and forfeiture, and finally, the civil invalidity of the contract concluded between exporter and recipient. State practice, once again, is diverse. Whereas there are hardly any sanctions available in Italy's export system except for the provisions of Law No. 185 of 1990 (127) prison sentences up to ten years may be imposed in Austria (128). The sanctions

(121) Arts. 6 and 9, para. 1 of the arrêté of 12 March 1973 (*Journal Officiel* of 30 March 1973 at p. 3525 *et seq.*).

(122) OETER (note 27) at pp. 199-200.

(123) *BGBl*, 1990 I, 2428 ; *BGBl*, 1992 I, 372.

(124) For a discussion of these developments see OETER (note 69) at pp. 52-54.

(125) Secs. 39-43 *Foreign Trade and Payments Act* ; these provisions expire at the end of 1994.

(126) Sec. 2, para. 2 *Foreign Trade and Payments Act.*

(127) G.U., No. 163, 14 May 1990. This statute has also increased the transparency of the licencing procedure ; see FRANCIONI/BIANCHI (note 57) at pp. 107-108.

(128) Sec. 17, para. 3 *Foreign Trade Act.*

envisaged in most other countries range somewhere in between these two models with a tendency to qualify most of the infringements as misdemeanors. Even if major criminal sanctions are provided for relevant norms often are formulated in such a restrictive manner that courts easily run into difficulties in respect of sufficient proof of criminal intent.

In general, major economic interests are involved in transactions of war material and strategic goods. Therefore, there are two options to strengthen relevant legislation by threatening to impose economically severe sanctions : First, the threat with the seizure of goods and the forfeiture of profits made in the course of an illegal transaction can have a major impact on an exporter's policy in respect of norm abidance because the imposition of such sanctions can directly effect the financial basis of an enterprise. At present seizure and forfeiture are generally linked to criminal sanctions which can be seen as to weaken the effect outlined above because of the already mentioned difficulties to proof criminal intent. The effect of seizure and forfeiture could well be increased if these measures were also applied in case of minor offences followed by administrative sanctions. However, due regard then will have to be paid to the constitutional protection of property as provided for in numerous arms-exporting countries (129). Apart from the seizure of goods and the forfeiture of profits it is the civil invalidity of transactions which primarily addresses the economic interests involved. Although German law seems to offer such sanctions their application in practice is not without difficulties. To a certain extent this is due to the wording of the relevant provisions of the Foreign Trade and Payments Act (130). In Austria, as a consequence of sec. 2, para. 1 of the Foreign Trade Act any transaction entered into is null and void if in case of a licencing requirement a licence is not applied for, is not granted or is refused. However, it is doubtful whether this provision has had any practical effects for there do not seem to have been recent cases where contracts suffered from nullity (131).

Unless sanctions are actually imposed in case of non-compliance with export control legislation any provisions on administrative and penal sanctions will be largely symbolic in character (132). This was one of the reasons

(129) Recently, it was argued in German courts that the constitutional protection of private property required compensation for national export restrictions implementing the UN embargo against Iraq and Kuwait. The Federal Court of Justice held that the German government was under no obligation to pay such compensation (III ZR 42/92 of 27 January 1994). For a different position see E.-J. MESTMÄCKER/C. ENGEL, *Das Embargo gegen Irak und Kuwait* (1991) at pp. 73-89.

(130) Sec. 31 Foreign Trade and Payments Act which provides that a legal transaction that takes place without the necessary licence is largely deprived of its effect because — according to the provisions on licence requirements — it is not the contract which requires a licence but the physical act of transferring a product into foreign territory ; such act by its very nature can not be legally valid or invalid.

(131) WEISS-TESSBACH/HEIDINGER (note 57) at p. 34.

(132) OETER (note 69) at p. 54.

to strengthen the investigating powers of relevant authorities in Germany (133). Nevertheless, loopholes will always remain and economies dependant on their export industry have to face the fact that a watertight system of export controls is not feasible. On the other hand it is doubtful whether the approach adopted by the French customs authorities which seem to negotiate a transaction with an offender instead of bearing prosecution to its end (134) can at all contribute to an adequate implementation of export control legislation.

Generally, it is difficult to precisely assess the effect of the threat with and the imposition of sanctions as a consequence of infringements of export control regulations on individual exporters' policies. This has to be borne in mind when analyzing international norms such as Art. VII, para. 3 of the 1993 Chemical Weapons Convention which requires states parties to enact penal legislation to prevent the violation of obligations under the Convention (135).

V. The interaction of national and international restrictions on the arms trade

Despite the lack of legally binding international agreements national export regulations have taken into account and to a large extent implemented less formal multilateral export control systems such as the controls agreed upon in the Nuclear Suppliers Group, the Australia Group, the Missile Technology Control Regime, COCOM (136), and recently, the Permanent Five-Talks and the UN arms registry. Some of these agreements have even become part of national export regulations. This *prima facie* seems surprising in view of the lack of legally binding international instruments. It is difficult to adequately explain this phenomenon. However, two tendencies can be identified as underlying factors. Whereas states or at least certain groups of states seem to agree that effective controls must be maintained over the sales and purchases of armaments, at the same time they are reluctant to enter into legally binding agreements on this subject matter for they still perceive their security to be best dealt with from a national perspective, thus remaining an essential part of national sovereignty. Legally binding international agreements only cover nuclear, biological, and chemical weapons, i.e. weapons of mass destruction. Their

(133) See above notes 123-125 and accompanying text.

(134) Dutheil de la Rochère (note 78) at p. 84.

(135) The term « penal » does not expressly mean criminal sanctions but also covers administrative penalties such as fines, property forfeitures, etc. ; see B. Kellman/E.A. Tanzman/D.S. Gualtieri/S.W. Grimes, *Manual for National Implementation of the Chemical Weapons Convention* (1993) at p. 31.

(136) In November 1993 the 17 COCOM members in principle agreed to abolish the organization and to start a new, broader one (*ACR* 1993, 250.B.17-250.B.18).

proliferation seems to be regarded as a more imminent threat to states than the spread of conventional weapons. Because of its unprecedented interference with industry the Chemical Weapons Convention of 1993 has to be considered. It includes a number of provisions on export controls (137). Their implementation will certainly have repercussions on the future development of national regulations on export controls in strategic goods, especially in dual use items.

A first step towards a more general legally binding regime seems to be in reach within the European context. Although Art. 223 EC Treaty was not removed in the process of drafting the Maastricht Treaty there is a convincing basis for Community legislation in the field of export controls on dual use items (138). Considering the limited scope of Art. 223, taking into account the preliminary ruling of the European Court of Justice in the Aimé Richardt Case (139), Art. 113 with its exclusive Community competence in foreign trade policy does not only allow for but even requires the enactment of Community export control legislation (140). As this position is disputed among member states a pragmatic consensus has been developed not to base the prospective community export control system exclusively on a community regulation but that the product list, the licencing criteria and the country list will be decided upon by the member states themselves within the framework of the common foreign and security policy. Both acts will refer to each other and will be published simultaneously (141). Nevertheless, in spite of intense efforts of the Belgian presidency it was not possible to reach agreement on a framework regulation until the end of 1993.

This comment has concentrated on legislation of Western states. Although, *inter alia*, Brazil, China, India, Israel, and Russia certainly are among the major arms-exporting countries their export control legislation

(137) For an analysis of relevant provisions see KELLMAN/TANZMAN/GUALTIERI/GRIMES (note 135) at pp. 23-27.

(138) P.J. KUIJPER, « European Economic Community », in : Meessen (note 36) at pp. 69-76 ; see also P. GILSDORF, Art. 224, in : H.v.d. Groeben et al., *Kommentar zum EWG-Vertrag*, Vol. 4 (4th ed. 1991) at p. 5597 no. 8 and — with specifie reference to dual use chemicals and the applicable regulation 428/89 — at p. 5606 no. 29.

(139) For a discussion of the Aimé Richardt case see I. GOVAERE/P. EECKHOUT, « On dual use goods and dualist case law : the Aimé Richardt judgement on export controls », *CML Rev. 29* (1992), pp. 941 *et seq.*

(140) On 21 February 1994 the division on criminal matters of the provincial court (Landgericht) of Darmstadt asked for a preliminary ruling according to Art. 177 EC Treaty on the community legality of German export control legislation being stricter than the norms applicable in other member states.

(141) See Bericht der Bundesregierung zum Stand der EG-Harmonisierung des Exportkontrollrechts für Güter und Technologien mit doppeltem Verwendungszweck (Dual-use-Waren), Stand Ende Oktober 1993, Deutscher Bundestag, Drucksache 12/6187 at p. 1.

still is very rudimentary (142). Also, this paper does not cover import regulations nor the problem of government subsidies.

What must be stated first in summing up the outcome of this horizontal legal comparison is that state practice is too diverse in order to derive a common standard from the confused material even less to be considered as a basis for an emerging rule of customary international law. Although this finding can not in itself contribute to restraining the dangers inherent in an increasing proliferation of high technology weapons the comparative analysis at least allows to identify specific problems when discussing the harmonization of national and the development of legally binding international instruments in the field of export controls. From a legal perspective one of the major problems is the definition of relevant material and activities. Also, there is a need to develop common criteria for the granting of licences as based on a consensus in terms of international security needs. Finally, the problems related to extraterritoriality have to be addressed.

Thus, a comparative analysis of national export regulations can support such tendencies to further develop relevant international regimes and it may contribute to consensus-building on the basis of existing national regulations.

(142) Recently, new export control regulations were adopted by Romania (approved on 28 September 1992 ; see CD/1178), Belarus (22 February 1993 ; see *ACR* 1993 at 250.B.3), Russia (approved by the Council of Ministers on 3 March 1993, voted by parliament on 29 April 1993 ; see *ACR* 1993 at 250.B.5 ; further criminal sanctions added on 18 May 1993 ; see *ACR* 1993 at 250.B.9), South Korea (restrictions to be announced on 1 July 1993, to take effect on 1 October 1993 ; see *ACR* 1993 at 250.B.7), Kyrgyzstan (22 April 1993 ; see *ACR* 1993 at 250.B.8), South Africa (end-use certificates, 1 May 1993 ; see *ACR* 1993 at 250.B.8), Armenia (presidential edict signed on 8 May 1993 ; see *ACR* 1993 at 250.B.9), and the Czech Republic (approved by the government on 22 November 1993, voted by parliament in February 1994 ; see *ACR* 1993 at 250.B.20).