Dual-Use Export Control: Security and Human Rights Challenges to Multilateralism

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Contents

Abstract International standard-setting in the field of export control has been shaped by the presence of non-binding multilateral regimes. Central to international regulatory harmonisation is the Wassenaar Arrangement concerning export controls for conventional arms as well as for dual-use goods and technologies. Institutionalised regulatory coordination through multilateral regimes is essential, in part because the multilateral trade regime accommodates apologetic security exceptions that flexibly allow each member's own export control practices. Multilateralism in the context of dual-use export control has been subject to various political and normative challenges, however. Numerous attempts to circumvent the Wassenaar Arrangement have been based not only on national security narratives. The multilateral regime has also been fundamentally challenged by human rights

The research for this paper is supported by a grant (2020–2021) from Gerda Henkel Stiftung.

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M. Bungenberg et al. (eds.), *European Yearbook of International Economic Law 2020*,
European Yearbook of International Economic Law (2022) 11: 265–290,
https://doi.org/10.1007/8165_2021_67, Published online: 11 March 2021

narratives. This paper sheds light on these dual challenges through the analysis of export controls over digital and so-called emerging technologies.

1 Introduction

Export control is one of the fields of law in which international standard-setting has been led by non-binding multilateral regimes. Central to international regulatory harmonisation is the Wassenaar Arrangement concerning export controls for conventional arms as well as for dual-use goods and technologies. The regime was established in 1996 in the Dutch town of Wassenaar and has 42 participating states as of October 2020. As its core product, the Wassenaar Arrangement furnishes the lengthy so-called "control lists",[1] which serve as the catalogue of military and dual-use items. According to the Wassenaar Arrangement, each participating state controls the export of all listed items therein for the sake of preventing the unauthorised cross-border transfer of such items.[2] The Wassenaar Arrangement is by no means a treaty regime. Instead, it is an international forum in which the diplomats of some 42 industrial states gather, exchange information on a confidential basis,[3] and update the list of sensitive items subject to export control. While it is ultimately up to each participating state to decide at the national level whether to allow the transfer of controlled items in specific instances,[4] the Wassenaar Arrangement has served, overall, as a well-recognised multilateral venue for setting standards for export control practices, exchanging information, and reducing regulatory gaps across participating states.

The presence of multilateral export control regimes is relevant, not merely for the sake of ensuring effective export control practices and procedures. The locus of the multilateral export control regimes should also be understood as contributing, simultaneously, to the normative stability of the multilateral trade system under the World Trade Organization (WTO) agreements. Export control over military and dual-use items is one of the fields of law that necessarily counterbalances the idea of removing trade barriers across WTO members. Despite this inherent tension, the WTO regime in itself does not furnish guidance on export control practices, as will be pointed out in Sect. 3 of this paper. The lack of foreseeability in the imposition of

[1]The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Control Lists, https://www.wassenaar.org/control-lists/ (last accessed 15 November 2020).

[2]The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Initial Elements, 11 July 1996, Section III.1.

[3]The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Initial Elements, 11 July 1996, Section IX (Confidentiality).

[4]The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Initial Elements, 11 July 1996, Section II.3.

trade restrictions has in part been remedied, instead, by the functioning of multilateral export control regimes.

Against this background, this paper analyses some of the challenges to multilateralism in the context of export control, and, more precisely, export control over dual-use items. While multilateralism is a multi-faceted concept, its significance should be more than the mere congregation of multiple actors. As Odermatt articulated, it pertains to "commitment to certain values, including the involvement of international institutions, the respect for certain global norms and international law".[5] Complexity arises when actors resort to a unilateral approach by claiming at the same time that it would, in substance, contribute to the realisation of the values or norms that a multilateral regime is expected to honour. Multilateralism in the field of dual-use export control is not immune to such an intricate relationship between, on the one hand, loyalty to multilateral regimes, and, on the other hand, adherence to values and norms.

The paper will begin with a brief explanation of the concept of dual-use export control (Sect. 2). While export control entails restrictions contrary to some of the principles of the WTO agreements, the WTO regime's apologetic "security exceptions" provide a flexible basis for each member to justify its own export control practices (Sect. 3). While the exceptions constitute "possibly a very big loophole"[6] in the multilateral trade regime, the Wassenaar Arrangement and other multilateral export control regimes have provided foreseeability in the possibly unpredictable field of trade control (Sect. 4). A type of multilateralism represented by the Wassenaar Arrangement is subject to various challenges, however. The initiatives to circumvent the Wassenaar Arrangement emanate, not only from the invocation of broad "national security" narratives which further stretch the security exceptions. The challenges have also been brought based on "human rights" narratives, from which the Wassenaar Arrangement has ostensibly distanced itself due to its military focus. This paper sheds light on these dual challenges based on security and human rights. It does so, in particular, by analysing legislative changes on export controls over digital and emerging technologies (Sect. 5).

2 Dual-Use Export Control: Concept and Frameworks

2.1 Concept of Dual-Use Items

Before discussing export controls through the lens of multilateralism, it is necessary to briefly explain the concept of "dual-use" export control, which is the focus of this

[5] Odermatt (2020), p. 50.

[6] Second Session of the Preparatory Committee of the UN Conference on Trade and Employment, Thirty-Third Meeting of Commission, UN Doc. E/PC/T/A/PV/33, 24 July 1947, p. 19 (Dr. Speekenbrink of the Netherlands).

paper. The concept of a dual-use item has been primarily understood through the duality of civilian and military purposes for which the item can serve. The basic concept is most clearly articulated by the EU's dual-use regulation adopted in 2009. According to Article 2(1) of Council Regulation (EC) No 428/2009, dual-use items are defined as items "which can be used for both civil and military purposes".[7]

Whether or not we are aware of it, a variety of materials that sustain our daily lives can be used for military purposes. To provide one specific example, sodium fluoride is one of such dual-use chemicals which have been prevalently used. The chemical material can serve for the production of toothpaste and, at the same time, as a precursor for the nerve agent sarin, a chemical weapon. This is why the export of sodium fluoride became controversial in connection to the use of sarin against civilians in the Ghouta area of Damascus on 21 August 2013.[8] After the incident, it was revealed that the UK government had granted licences in January 2012 to allow the export of sodium fluoride and another chemical to Syria.[9] In the media, the UK government met criticism for authorising the export of potentially harmful chemical materials to Syria[10]—despite the lack of credible evidence of a link between the particular use of the sarin in Syria and the exported materials. The controversy already revealed the inherently precarious nature of dual-use export control, both in terms of assessing risks in advance based upon available information, and tracing post-export misuse of the exported items by trading partners.

2.2 Legal Frameworks for Dual-Use Export Control

As illustrated by the definition of "dual-use" items, the field of law is an extension of the trade control of military items and it has been led by concerns over the military use of materials, goods, and technologies. At the international level, the international transfer of dual-use items is therefore intertwined with a set of international treaties concerning the non-proliferation of weapons of mass destruction (i.e. biological, chemical, and nuclear weapons): namely, the 1972 Biological and Toxin Weapons

[7]Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ 2009 L134/1, Article 2(1). On the concept of dual-use items, see Kanetake (2018).

[8]United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic: Final Report, UN Doc. A/68/663–S/2013/735, 13 December 2013, paras. 109–110.

[9]Letter to the Chair of the Committees from the Rt Hon Vince Cable MP, Secretary of State for Business, Innovation and Skills, 6 September 2012, in: UK House of Commons, Committees on Arms Export Controls, First Joint Report of the Business, Innovation and Skills, Defence, Foreign Affairs and International Development Committees of Session 2013–14, Vol III, 17 June 2013, p. 90.

[10]See, e.g., Milmo C, McSmith A, Kumar N, Revealed: UK Government Let British Company Export Nerve Gas Chemicals to Syria, Independent, 2 September 2013, http://www.independent.co.uk/news/uk/politics/revealed-uk-government-let-british-company-export-nerve-gas-chemicals-to-syria-8793642.html (last accessed 15 November 2020).

Convention (BTWC),[11] the 1993 Chemical Weapons Convention (CWC),[12] and the 1968 Treaty on the Non-Proliferation of Nuclear Weapons (NPT).[13]

These treaties have similar provisions concerning export control. Under Article III of the 1972 BTWC, for instance, states parties are prohibited from transferring "any of the agents, toxins, weapons, equipment or means of delivery" prohibited by the Convention. Cross-border transfer is forbidden to "any recipient whatsoever",[14] including not only to other states parties, but also to non-party states, international organisations, private entities, or individuals.[15] Likewise, the transfer of chemical materials is regulated by the 1993 CWC, whose implementation is monitored by the Organization for the Prohibition of Chemical Weapons (OPCW). Article VI(2) of the CWC serves as a general legal basis for chemical export control,[16] according to which states parties are required to ensure that toxic chemicals and their precursors are transferred only "for purposes not prohibited under this Convention". The CWC comes with the specific list of controlled toxic chemicals and their precursors, which are divided into three categories ("Schedules") depending on their applicability to chemical weapons and their commercial usage. The CWC prohibits the transfer of chemicals listed under Schedules 1 and 2 to non-parties[17] and limits the purposes for which these chemicals are transferred to another state party.[18] With regard to the chemicals listed under Schedule 3, the CWC requires end user certificates for exports to non-parties.[19] Finally, when it comes to nuclear export controls, Article III.2 of the 1968 NPT obliges states not to transfer non-nuclear-weapons states "equipment or material especially designed or prepared for the processing, use or production of special fissionable material" unless such material is subject to the safeguards of the International Atomic Energy Agency (IAEA).[20]

While the treaties on biological, chemical, and nuclear weapons respectively envisage export control on sensitive materials, these conventions, apart from the

[11]Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 10 April 1972, 1015 UNTS 163 (entered into force 26 March 1975).

[12]Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993, 1974 UNTS 45 (entered into force 29 April 1997).

[13]Treaty on the Non-proliferation of Nuclear Weapons, 1 July 1968 (entered into force 5 March 1970), 729 UNTS 161.

[14]BTWC, Article III.

[15]Goldblat (1997), p. 255.

[16]Krutzsch et al. (2014), p. 190.

[17]CWC, Verification Annex, Part VI(A), (B) (Schedule 1 chemicals) and Part VII(C) (Schedule 2 chemicals).

[18]CWC, Verification Annex, Part VI(A), (B) (Schedule 1 chemicals) and Part VII(C) (Schedule 2 chemicals).

[19]CWC, Verification Annex, Part VIII(C) (Schedule 3 chemicals).

[20]NPT, Article III.2.

CWC, lack a catalogue of specific materials, products, or technologies subject to export control. The treaty regimes have thus been supplemented in greater detail by a series of non-treaty international regimes which furnish and update the "lists" of controlled items.[21] One of such regimes is the Australia Group, which was established in 1985 in view of harmonising export control measures on chemical and biological weapons and related dual-use items.[22] As for nuclear export controls, the Nuclear Suppliers Group (NSG), formed in 1975, maintains guidelines containing the list of nuclear-related dual-use items subject to export control by participating governments.[23] Since 1971, the Zangger Committee also provides the understandings and lists for nuclear export controls.[24] On top of these domain-specific regimes, the Wassenaar Arrangement was established in 1996 as a post-Cold War alternative to replace the Western bloc's export control regime, the Coordinating Committee for Multilateral Export Control (COCOM).[25] As noted in the introductory section of this paper, the Wassenaar Arrangement furnishes a lengthy list of items subject to export control, encompassing both conventional arms and dual-use goods and technologies.

On the basis of these treaties and international (non-treaty) regimes, each state formulates its own export control laws at the domestic level. Within the EU, dual-use export control forms the EU's Common Commercial Policy (CCP) and has been regulated foremost by Council regulations. Council Regulation (EC) No 428/2009 of 5 May 2009 has been the relevant framework since August 2009, which has direct effect in the EU.[26] As of November 2020, Council Regulation No 428/2009 remains the applicable legal framework in the EU. However, Council Regulation No 428/2009 has been reviewed since 2013, as will be discussed further in Sect. 5.2 of this paper. After several years of deliberation, on 9 November 2020, the Council and European Parliament finally reached a provisional political agreement on a revised dual-use regulation,[27] which should pave the way for the adoption of a new framework to replace Regulation No 428/2009.

What matters for the purpose of this paper is the fact that the EU's export control has been intertwined with international regimes. According to Council Regulation (EC) No 1334/2000 of 22 June 2000, a predecessor of Regulation No 428/2009, the list of dual-use items subject to export control "implements internationally agreed dual-use controls", including the Wassenaar Arrangement, the Missile Technology

[21]For an overview, see, e.g., Anthony and Zanders (1998); Achilleas (2017), pp. 11–13.

[22]Ali (2001), p. 50.

[23]Nuclear Supplies Group, Guidelines, https://www.nuclearsuppliersgroup.org/en/guidelines (last accessed 15 November 2020).

[24]Joyner (2009), pp. 27–30.

[25]Dursht (1997), p. 1098.

[26]Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ 2009 L134/1.

[27]Council of the EU, New rules on trade of dual-use items agreed, Press release, 9 November 2020, https://www.consilium.europa.eu/en/press/press-releases/2020/11/09/new-rules-on-trade-of-dual-use-items-agreed/ (last accessed 15 November 2020).

Control Regime (MTCR), the Nuclear Suppliers' Group, the Australia Group, and the CWC.[28] The same idea that the EU's export control "implements" internationally agreed controls is reiterated in Regulation No 428/2009.[29] While EU Member States can add their own national control lists, the EU's regional framework is based upon the assumption that the EU's legal framework should build upon multilateral export control regimes.

3 Unilateralism Within the Multilateral Trade Regime

3.1 The Security Exception

Export control, when applied, by definition imposes restrictions on international trade in goods and services. In this sense, as noted in the introduction of this paper, export control is one of the fields of law that counterbalance a core tenet of international trade agreements that reduce or eliminate trade barriers. Export controls can readily undermine the principle of most-favoured-nation treatment[30] and a general duty to minimise the incidence and complexity of import and export formalities[31] under the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). It is reasonable to be wary of the fact that export controls can frustrate the basic tenet of the WTO regime, which, despite various setbacks,[32] has served as a key vehicle for facilitating international trade through a set of common rules.

The crux is, however, that the WTO agreements themselves have explicitly embraced the exceptions in such a manner that each member can flexibly justify its own export controls without the need for international coordination. This is most salient in the case of "security exceptions" under Article XXI of the GATT. While the GATT also accommodates a set of "general exceptions" under Article XX which can serve to justify trade-restrictive measures, security exceptions "afford greater discretion to governments than general exceptions".[33] This is also implied by the fact that the WTO panel appears to have treated GATT's security exception as a

[28]Council Regulation (EC) No 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology, OJ 2000 L159/1, Annex I.

[29]Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ 2009 L134/1, Annex I.

[30]Article I GATT; Article II GATS.

[31]Article VIII(1)(c) GATT; Achilleas (2017), p. 10.

[32]For instance, on the US government's non-cooperative stance towards WTO dispute settlement since 2016, see, e.g., Petersmann (2019).

[33]Henckels (2020), p. 561.

permission as opposed to a defence with which to preclude wrongfulness on the part of a member.[34]

Article XXI of the GATT envisages three groups of instances for invoking security exceptions.[35] A member may invoke such exceptions for denying information disclosure (Article XXI(a)) or implementing the obligations under the UN Charter (Article XXI(c)). The most expansive and controversial is however the reliance upon Article XXI(b), under which a member may take "*any* action which *it* considers necessary for the protection of *its* essential security interests" (emphasis added).

The flexible and expansive nature of the essential security exception is already evident from the wording of Article XXI(b). According to the provision quoted above, "nothing" in the agreement shall be construed to prevent any contracting party from taking "*any* action" which "*it*" (i.e. the party) considers necessary for protecting "*its*" essential security interests—as long as the action meets one of the broad conditions laid down in Article XXI(b) (emphasis added). It appears undeniable that the terms of Article XXI(b) are destined to allow ample space for each member's own self-serving interpretation without the need for regulatory harmonisation.

3.2 Deferential Review

Due to the aforementioned apologetic wording of Article XXI(b) of the GATT, it may be fair to observe that the WTO trade regime accommodated an element of unilateralism *within* its own multilateral legal framework from its outset. The characterisation of the security exception as an expression of unilateralism (as embraced by the multilateral framework) is connected to the long-standing debate[36] as to whether the security exception may be "unreviewable"[37] by adjudicators.

Since the inception of the GATT, the US government is one of several states that have continued to maintain the idea that the security exception is self-judging and non-justiciable beyond the scrutiny of the WTO's dispute settlement. At the stage of negotiating the provisions of the 1947 GATT provisions, concerns were understandably levelled regarding the impact of security exceptions on the effectiveness of the multilateral agreement. During the negotiation of July 1947, the Dutch delegation expressed its difficulty in defining the security exception and labelled it as "possibly

[34] Henckels (2020), p. 570; WTO Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019, para. 7.108.

[35] See Swaak-Goldman (1996).

[36] Among voluminous literature, see, e.g., Hahn (1990), Swaak-Goldman (1996) and Alford (2011).

[37] Alford (2011), p. 698.

a very big loophole in the whole Charter".[38] The US' delegation argued in defence, that the relevant provisions were drafted in such a manner that they would limit the circumstances under which members could invoke the security exceptions.[39] At the same time, the US delegation made it clear that the treaty preserved a member's ability to "determine for itself ... what its security interests are".[40] On various occasions, the US government indeed claimed that the security exceptions are self-judging *and* unreviewable. For instance, in June 2018, in the context of *US – Steel and Aluminium Products (EU)*, the US observed that issues of national security were "not susceptible to review or capable of resolution by WTO dispute settlement".[41] In the same vein, the United Arab Emirates argued that there was "clear language" in the WTO agreements that excludes national security matters from the WTO's adjudication.[42] The United Arab Emirates' position was endorsed by Bahrain, Saudi Arabia, and Egypt.[43]

The occasion to test the possibility for external scrutiny has arrived as part of the WTO panel's ruling in April 2019 on the *Russia – Measures Concerning Traffic in Transit* case.[44] This was the "first instance"[45] in which a WTO panel provided its interpretation of security exceptions under Article XXI of the GATT 1994. The case was brought by Ukraine to challenge the transit restrictions imposed by Russia between 2014 and 2018. The Ukrainian claim was responded to by the Russian reliance upon the security exception under Article XXI(b)(iii), which necessitated the panel to interpret its scope. Article XXI(b)(iii) allows a member to take any action for its essential security interests if the action is "(iii) taken in time of war or other emergency in international relations". Russia—accompanied by the US—has claimed that Article XXI(b)(iii) was "self-judging" and therefore not justiciable before the WTO panel.[46]

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[38]Second Session of the Preparatory Committee of the UN Conference on Trade and Employment, Thirty-Third Meeting of Commission, UN Doc. E/PC/T/A/PV/33, 24 July 1947, p. 19 (Dr. Speekenbrink of the Netherlands).

[39]Second Session of the Preparatory Committee of the UN Conference on Trade and Employment, Thirty-Third Meeting of Commission, UN Doc. E/PC/T/A/PV/33, 24 July 1947, pp. 20–21 (Mr. J.-M. Leddy of the US).

[40]Second Session of the Preparatory Committee of the UN Conference on Trade and Employment, Thirty-Third Meeting of Commission, UN Doc. E/PC/T/A/PV/33, 24 July 1947, p. 20 (Mr. J.-M. Leddy of the US).

[41]*United States – Certain Measures on Steel and Aluminium Products*, Communication from the United States (dated 11 June 2018), WT/DS548/13, 6 July 2018.

[42]WTO, Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 23 October 2017*, WT/DSB/M/403, 20 February 2018, para. 4.4.

[43]WTO, Dispute Settlement Body, *Minutes of Meeting Held in the Centre William Rappard on 23 October 2017*, WT/DSB/M/403, 20 February 2018, paras. 4.5–4.7.

[44]Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019. For analysis, see, e.g., Voon (2020).

[45]Hartmann (2019), p. 899.

[46]Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019, paras. 7.57 (Russia), 7.51–7.52 (US).

In response to the claim of non-justiciability, the WTO panel, in its April 2019 report, managed to preserve its own role in scrutinising the WTO-compatibility of restrictive measures taken on the basis of a member's essential security. The WTO panel has done so by claiming the need for objectivity and external scrutiny concerning the interpretation of the requirements under the three subparagraphs of Article XXI(b) of the GATT.[47] As noted above, Russia invoked one of such conditions under Article XXI(b)(iii), according to which a member may take restrictive measures "in time of war or other emergency in international relations". The panel gave its interpretation of the requirement and observed that political or economic differences among WTO members would not in themselves constitute an "emergency in international relations" under subparagraph (iii).[48] According to the panel, the emergencies may not arise unless such political or economic differences give rise to "particular types of interests" for the member,[49] namely, "defence and military interests" or the "maintenance of law and public order interests".[50] The panel therefore made it clear that the wider political or economic conflicts cannot by themselves serve to justify the reliance upon an "emergency in international relations" under subparagraph (iii) of Article XXI(b).

At the same time, in its April 2019 report, the need for objectivity mentioned above was counterbalanced by the WTO panel's approach to the interpretation of the following two aspects of Article XXI: namely, to determine what constitutes a member's essential security interests, and to decide how such interests are connected to the restrictive measures. In short, the panel accepted the fact that it is left to each WTO member to define "its essential security interests".[51] What is still applicable is the general obligation of good faith, which means that members cannot use the exceptions in order to circumvent the obligation.[52] The obligation of good faith should also govern the determination of the connection between a member's security interests and the restrictive measures. According to the WTO panel, the measures must "meet a minimum requirement of plausibility" in connection to the claimed essential security interests.[53]

[47]Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019, paras. 7.62–7.82, 7.100–7.101.

[48]Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019, para. 7.75.

[49]Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019, para. 7.76.

[50]Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019, para. 7.75.

[51]Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019, para. 7.131.

[52]Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019, paras. 7.132–7.133.

[53]Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS512/R, 5 April 2019, para. 7.138.

Overall, in the *Russia – Traffic in Transit* case, the WTO panel, while retaining a possibility for review, ultimately permitted each member to exercise broad discretion. It is true that the interpretation of the emergency in international relations was subject to substantive scrutiny.[54] The panel's plausibility test (applied for the assessment of the connection between the restrictive measures and security interests) could be understood as one form of "reasonableness" review which is less deferential than a mere self-judging clause.[55] Nevertheless, as Lapa pointed out, the plausibility test was construed as a "very relaxed requirement".[56] In addition, the interpretation of essential security interests is left to each member (and is thus self-judging), which also reduces the practical relevance of the good faith principle. While the *Russia – Traffic in Transit* case is one of the few available instances in which the panel interpreted security exceptions, future jurisprudence cannot be separated from the fact that the security exception is a "highly sensitive"[57] dimension of the trade regime. While external scrutiny may prevent the possibility of members effectively circumventing WTO rules by invoking the security exception, the stringent scrutiny may invite political backlash from powerful states.[58]

4 Multilateralism Within Export Controls

Given the broad discretion states enjoy in the interpretation of the security exception, the Dutch delegation's aforementioned concern in 1947 appears convincing, in that the exception can potentially create a large loophole.[59] However, in practice, despite the broad permission given to states, according to Alford's analysis published in 2011, the exception "has worked reasonably well" inasmuch as states acted under the assumption that it should be used in good faith.[60] Needless to say, there must be a wide range of economic, political, and legal considerations that may have sustained prudence in the conduct of states. It is not the purpose of this paper to provide any comprehensive account regarding states' self-restraint in imposing trade restrictions.

As far as regularly applied export controls are concerned, however, one of the factors we should not overlook is the presence of multilateral export control regimes. Participating states are expected to work through the export control regimes that serve as a focal point for regulatory harmonisation and information exchange. The

[54] Lapa (2020), p. 25.

[55] See Lapa (2020), p. 25; Pauwelyn (2020), pp. 90, 106.

[56] Lapa (2020), p. 25.

[57] Voon (2019), p. 45.

[58] Chen (2017).

[59] Second Session of the Preparatory Committee of the UN Conference on Trade and Employment, Thirty-Third Meeting of Commission, UN Doc. E/PC/T/A/PV/33, 24 July 1947, p. 19 (Dr. Speekenbrink of the Netherlands).

[60] Alford (2011), p. 758.

presence of such regimes helps shape *national* security interests through the lens of *regional and international* security concerns, and arguably sustains the incentive to limit unilateral paths in imposing export controls. In fact, the US government has long advocated the international export control regimes and requested that other countries adopt the international lists at the domestic level.[61]

Among various export control regimes, an international focal point for dual-use export controls has been the Wassenaar Arrangement established in 1996, which aims at contributing to "regional and international security and stability".[62] It builds upon COCOM, an informal multilateral export control mechanism embedded in the climate of the Cold War. COCOM drew up the list of specific items subject to export controls as a method of facilitating regulatory harmonisation.[63] COCOM's control list was justified based on the military capabilities of certain technologies and other items.[64] The importance of COCOM was explicitly recognised in the 1979 Export Administration Act in the US. The 1979 Act required the US President to negotiate with COCOM participating governments in a view of maintaining the common list of controlled items.[65] The 1979 Act's reference to COCOM was in recognition of the need for greater multilateral cooperation,[66] reflecting, in turn, "the obsolescence of unilateral controls" in view of the diversification of suppliers in globalised economy.[67]

While COCOM was a Western bloc's cooperative regime embedded in the Cold War, its informal and "list-based" methods provided the model for the post-Cold War international export control regimes aimed at harmonising domestic export controls.[68] The control lists are indeed central to multilateral regulatory harmonisation. According to the "Initial Elements" of the Wassenaar Arrangement, which articulate its basic objectives and procedures, participating states "will control all items" set forth in the Arrangement's own control lists of dual-use items and munitions.[69] While licensing decisions are ultimately in the hands of each participating state, Wassenaar members exchange information on their licensing decisions.[70] As the US Department of State's senior advisor observed in 2000, the

[61]Whang (2019), p. 579.

[62]The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Initial Elements, 11 July 1996, Section I.1.

[63]Whang (2019), pp. 585–586.

[64]Whang (2019), pp. 585–587.

[65]Export Administration Act of 1979, Public Law 96-72, 50 U.S.C. app. 2404, Sec. 5(i).

[66]Donovan (1981), p. 101.

[67]Donovan (1981), p. 101.

[68]Whang (2019), p. 584.

[69]The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Initial Elements, 11 July 1996, Section III.1.

[70]United States Senate, 106th Congress, Second Session, Hearing before the Committee on Governmental Affairs, Wassenaar Arrangement and the Future of Multilateral Export Controls, S. Hrg. 106-613 (12 April 2000), p. 6 (Hon. John D. Holum, Senior Advisor for Arms Control and International Security, US Department of State).

Wassenaar Arrangement provides a "venue in which governments can consider collectively the implications of various transfers of their international and regional security interests".[71] Through the formulation of the control lists and the exchange of information regarding license denials, the Wassenaar Arrangement and other multilateral export control regimes provide certain stability and foreseeability in decentralised export control practices.

5 Return of Unilateralism with a Universalistic Twist?

As discussed in previous sections, the security exception under the WTO's multilateral trade regime allows broad discretion to members to instigate trade-restrictive measures. Such an exception clearly serves as one of the primary legal bases for justifying export control policies.[72] Despite the possibility that the trade regime allows for a unilateral path, multilateral regulatory coordination has been achieved through the presence of export controls regimes, at least with regard to the types of materials and technologies subject to trade restrictions.

Needless to say, many challenges still persist for multilateral export control regimes. One of such challenges has arisen in the context of the export control of digital and other emerging technologies. Their speed of development casts doubt on the relevance of multilateral export control regimes. In fact, in the US and EU, attempts have been made to impose autonomous export controls on technological fronts—albeit, interestingly, through different narratives. In the US, since 2018, national security approaches have dominated its export control policies on emerging technologies (Sect. 5.1). By contrast, the EU has employed rather universalistic human rights languages in discussing whether the EU ought to impose an autonomous export control on digital surveillance technologies (Sect. 5.2).

5.1 US' Export Controls Act: Departure from Military-Based Rationale

5.1.1 Export Controls Act of 2018

During the US administration under President Trump, the country's export controls framework made an important turn by, in essence, altering a justification for applying export controls. In August 2018, President Trump signed a piece of

[71] United States Senate, 106th Congress, Second Session, Hearing before the Committee on Governmental Affairs, Wassenaar Arrangement and the Future of Multilateral Export Controls, S. Hrg. 106-613 (12 April 2000), p. 6 (Hon. John D. Holum, Senior Advisor for Arms Control and International Security, US Department of State).

[72] Achilleas (2017), pp. 10–11.

legislation, called the John S. McCain National Defense Authorization Act for Fiscal Year 2019,[73] which contains the Export Controls Reform Act of 2018 (ECRA).[74] For the sake of this paper, one of the relevant parts of the ECRA is the Export Controls Act of 2018.[75] The ECRA repealed the Export Administration Act of 1979[76] which had already expired in 1994 yet continued, in effect, under the International Emergency Economic Powers Act and relevant executive orders.[77]

In a nutshell, from the wording of the legislation, the ECRA could potentially frustrate the delicate interdependence between the WTO's trade regime and multilateral export control arrangements.[78] As Whang argued, the ECRA could have a "long-lasting influence" on international export regimes and the rationale of export controls.[79] This is because the ECRA explicitly integrated domestic economic policy considerations into national security-based export controls.[80] The crux is that this conceptual expansion simultaneously facilitates the possibilities for the US to apply unilateral export controls without seeking consensus at multilateral export control fora.[81]

Under the ECRA of 2018, export controls are characterised as a mechanism for the US to safeguard its "national security" and further its "foreign policy".[82] The concept of "national security" is inherently an elusive one, but it is important to highlight the fact that the concept has been linked to the *military* capabilities of other states. Under the ECRA, export controls can be applied if they are necessary to restrict the export of items that "would make a significant contribution" to other

[73]John S. McCain National Defense Authorization Act for Fiscal Year 2019, Public Law 115-232 (13 August 2018).

[74]Export Control Reform Act, Public Law 115-232, 50 U.S.C. 4801.

[75]Export Controls Act of 2018, Public Law 115-232, 50 U.S.C. 4801, 132 Stat. 2209, Section 1751 et seq.

[76]Export Controls Act of 2018, Section 1766(a); Export Administration Act of 1979, Public Law 96-72, 50 U.S.C. app. 2401.

[77]International Emergency Economic Powers Act, 50 U.S.C. 1701; US Presidential Executive Order 12929, 19 August 1994; An Act to Provide for Increased Penalties for Violations of the Export Administration Act of 1979, and for Other Purposes, Public Law 106-508, 13 November 2000 (for the reauthorisation of the 1979 Act until 20 August 2001); US Presidential Executive Order 13222, 17 August 2001.

[78]See, however, Sect. 5.2.1 below regarding the US' continuous engagement with the Wassenaar Arrangement.

[79]Whang (2019), p. 579.

[80]Whang (2019), pp. 579–599.

[81]Whang (2019), pp. 579–599.

[82]Export Controls Act of 2018, Section 1752(1). In general, the US export controls have rested broadly on three rationales: to prevent domestic shortage in commodities; to safeguard the US' national security; and to further its foreign policy: Donovan (1981), pp. 79–82; Fergusson IF, The Export Administration Act: evolution, provisions, and debate, Congressional Research Service (CRS) Report for Congress, 15 July 2009, p. 2. Among these rationales, national security and foreign policy controls have primarily guided the US' export controls.

countries' "*military* potential" which would prove "detrimental to the national security" of the US.[83]

The ECRA's military-based national security builds on the longstanding legislative development of US export controls, which aimed at limiting the presidential authority to invoke national security for the imposition of export controls. Under the Export Control Act of 1949,[84] one of the overall objectives of export controls was to "exercise the necessary vigilance over exports from the standpoint of their significance to the national security".[85] This broad formulation of national security was circumscribed by the 1962 amendment of the Export Control Act of 1949. Under the 1962 amendment, the invocation of such controls is based upon the president's determination that relevant export "makes a significant contribution to the *military or economic* potential" of other countries, "which would prove detrimental to the national security and welfare" of the US.[86] The Export Administration Act of 1969 marked one of the turning points in that the Act shifted its focus to liberalising US trade and restricting unwarranted restrictions on it.[87] The 1969 Act begins with its commitment to encourage international trade and justified national security controls on the basis that exports would "make a significant contribution to the *military* potential" of other countries in such a manner that it would be detrimental to US national security.[88] In other words, under the 1969 Act, national security controls were linked to *military* potentials.

The Export Administration Act of 1979 further deleted the "economic" part. According to the 1979 Act, national security-based export controls concern whether the exports of items would make a significant contribution to the "*military* potential" of other countries.[89] The 1979 Act also came with the provision that highlighted the importance of international cooperation. The 1979 Act made it explicit that the US must apply controls "to the maximum extent possible in cooperation with all nations" and facilitate "uniform export control policy" among states with which the US has defence treaty commitments.[90] The 1979 Act also placed a greater emphasis on controlling technologies or know-how, and not only on the controls on end-products.[91] One of national security controls under the 1979 Act pertained to

[83]Export Controls Act of 2018, Section 1752(1)(A) (emphasis added).

[84]Export Control Act of 1949, 63 Stat. 7.

[85]Export Control Act of 1949, 63 Stat. 7, Section 2(c).

[86]An Act to Provide for Continuation of Authority for Regulation of Exports, and for Other Purposes, Public Law 87-515, 1 July 1962, Section 4 (amending Sec. 3(a) of the Export Control Act of 1949) (emphasis added).

[87]Dvorin (1980), p. 183; Overly (1985), p. 429.

[88]Export Administration Act of 1969, Public Law 91-184, Section 3(1) (emphasis added).

[89]Export Administration Act of 1979, Public Law 96-72, 50 U.S.C. app. 2402, Section 3(2)(A) (emphasis added).

[90]Export Administration Act of 1979, Public Law 96-72, 50 U.S.C. app. 2402, Section 3(3).

[91]Donovan (1981), p. 97.

"critical technologies".[92] Yet such controls over technologies were still construed as "*military* critical technologies"[93] on the basis of a significant advantage that the technologies would accord to a military system of other countries.[94]

Overall, the series of legislative developments demonstrates that the US export controls have been situated as the "economic arm of the *military*-related national security strategy".[95] In principle, as noted above, the 2018 ECRA's definition of national security remains to be based on the 1979 Export Administration Act. Under the 2018 ECRA, export controls should be used where it is necessary to restrict the export of items "which would make a significant contribution to the *military* potential" of other countries.[96] At the same time, the 2018 ECRA marked a clear departure from its predecessor in terms of its apparently stretched construction of "national security". Under the 2018 ECRA, "national security" is understood as requiring the maintenance of the US' global-level "leadership in the science, technology, engineering, and manufacturing sectors" including, *inter alia*, "foundational technology that is essential to innovation".[97] By stretching the interpretation of national security, and by making it less connected to military risks, the ECRA appears to have provided a further justification for the US' unilateral paths and departure from international multilateral export control regimes.[98]

5.1.2 National Security-Based Controls on Emerging Technologies

The greater integration of domestic economic policy considerations into the US' national security controls is most visible with regard to the ECRA's regulation over so-called "emerging" technologies. Under Section 1758 of the ECRA, the US President is required to take steps to identify "emerging and foundational technologies" that are "essential to the national security" of the US.[99] The specification of such technologies is left to the Bureau of Industry and Security (BIS) of the US Department of Commerce, which, on 19 November 2018, published the list of the 14 broad categories of emerging technology.[100] The categories of technology range broadly from biotechnology to microprocessor technology, robotics, artificial intelligence (AI) and machine learning technology, and advanced surveillance technologies. Some of these technologies can be deeply prevalent in society, which

[92]Export Administration Act of 1979, Public Law 96-72, 50 U.S.C. app. 2404, Section 5(a)(3).

[93]Export Administration Act of 1979, Public Law 96-72, 50 U.S.C. app. 2404, Section 5(d).

[94]Export Administration Act of 1979, Public Law 96-72, 50 U.S.C. app. 2404, Section 5(d)(2).

[95]Whang (2019), p. 581 (emphasis added).

[96]Export Controls Act of 2018, 50 U.S.C. 4811, Section 1752(1)(A) (emphasis added).

[97]Export Controls Act of 2018, 50 U.S.C. 4811, Section 1752(3).

[98]Whang (2019).

[99]Export Controls Act of 2018, 50 U.S.C. 4817, Section 1758(a)(1).

[100]US Department of Commerce, Bureau of Industry and Security, 'Review of Controls for Certain Emerging Technologies' (Advance Notice of Proposed Rulemaking, ANPRM), 83 FR 58201, 19 November 2018.

complicates the discussions on precisely which technologies ought to be subject to export controls.[101] By publishing the list of these categories, the BIS sought public comment regarding the identification of much more specific emerging technologies subject to national security controls.

As of October 2020, the US introduced control over certain "emerging technologies", although the measures were not strictly under Section 1758 of the ECRA. For example, on 6 January 2020, the BIS issued the first interim rule to impose a license requirement for the export of a specific item: software specially designed to automate the analysis of geospatial imagery.[102] On 17 June 2020, the BIS designated the three additional items after the Australia Group, one of the multilateral export control regimes, had decided to add them to its control lists.[103] On 5 October 2020, the BIS further issued the final rule for the implementation of export controls on emerging technologies in order to add six emerging technologies that were deemed essential to the US' national security.[104] Included in the listed technologies were, for instance, digital forensics tools, which circumvent authentication or authorisation mechanisms and extract raw data from a computer or communication device, and surveillance software specifically designed for use by law enforcement to analyse the content of communications.[105]

In short, the ECRA allowed a wide range of technologies to be added to the catalogue of the US' export control under the broad and flexible category of "emerging technologies" that are essential to US national security. While the ECRA in principle paves the way for the US' unilateral paths, it is noteworthy that the US has, in practice, worked through existing multilateral export control regimes. The items added in June 2020 were precisely to "implement" the prior decisions made through the Australia Group. Likewise, the October 2020 addition was based on the changes agreed on at the meeting of the Wassenaar Arrangement in December 2019. The concept of "national security" under the ECRA is, in practice, presented as if it is diffused into the wider "regional and international security and stability" that the Wassenaar Arrangement is supposed to safeguard.[106] Therefore, these

[101] Dekker and Okano-Heijmans (2020), pp. 54–55.

[102] US Department of Commerce, Bureau of Industry and Security, Addition of Software Specially Designed To Automate the Analysis of Geospatial Imagery to the Export Control Classification Number 0Y521 Series, 85 FR 459, 6 January 2020.

[103] US Department of Commerce, Bureau of Industry and Security, Implementation of the February 2020 Australia Group Intersessional Decisions: Addition of Certain Rigid-Walled, Single-Use Cultivation Chambers and Precursor Chemicals to the Commerce Control List, 85 FR 36483, 17 June 2020.

[104] US Department of Commerce, Bureau of Industry and Security, Implementation of Certain New Controls on Emerging Technologies Agreed at Wassenaar Arrangement 2019 Plenary, 85 FR 62583, 5 October 2020.

[105] US Department of Commerce, Bureau of Industry and Security, Implementation of Certain New Controls on Emerging Technologies Agreed at Wassenaar Arrangement 2019 Plenary, 85 FR 62583, 5 October 2020.

[106] US Department of Commerce, Bureau of Industry and Security, Implementation of Certain New Controls on Emerging Technologies Agreed at Wassenaar Arrangement 2019 Plenary, 85 FR 62583, 5 October 2020.

developments seem to suggest the US government's continued willingness to act *through* multilateral regimes—instead of opting for unilateral control without multilateral consensus.

5.2 *Revising the EU's Dual-Use Regulation: Human Rights Perspectives*

5.2.1 The Proposed Autonomous Export Control on Cyber Surveillance

As noted above, the US has stretched its national security controls under the ECRA and created a possibility for unilateral export controls—although the US has, in practice, continued to work through multilateral export control regimes. On the other side of the Atlantic, the EU has also engaged in debates about whether and to what extent it should impose autonomous export control. It is noteworthy, however, that the debates within the EU have been generated, not necessarily from the security perspectives, but from human rights narratives with which to regulate technological exports.[107]

While there is nothing novel in the EU employing human rights as a normative ground for restricting the export of sensitive items,[108] a fresh political momentum was built in response to the use of surveillance technologies during and in the aftermath of the Arab Spring (2010–2012). Political controversies pertained to a series of allegations that EU-based companies sold surveillance technologies and provided technical assistance to the governments which experienced the popular uprising and monitored dissidents during and in the aftermath of the Arab Spring movement.[109] The controversies invited responses from the European Parliament which, in the resolution of September 2015, observed that the EU's standards, particularly the EU Charter of Fundamental Rights (CFR), "should prevail" in the assessment of dual-use technologies used in ways that may restrict human rights.[110] The parliamentary calls have been translated into a concrete proposal in the pursuit of the so-called "modernization"[111] of the EU's export control. In September 2016, the European Commission submitted a proposal to recast and replace Council

[107] See further Kanetake (2019, 2020).

[108] Kanetake (2019), pp. 5–6.

[109] Wagner (2012); Privacy International, Open Season: Building Syria's Surveillance State, December 2016.

[110] European Parliament, Human rights and technology: the impact of intrusion and surveillance systems on human rights in third countries (2014/2232(INI)), P8_TA(2015)0288, 8 September 2015, para. 39.

[111] European Commission, Communication from the Commission to the Council and the European Parliament: the review of export control policy: ensuring security and competitiveness in a changing world, COM (2014) 244 final, 24 April 2014, p. 2.

Regulation No 428/2009,[112] aiming, at least in part, to provide an "effective response to threats for human rights resulting from their uncontrolled export".[113] Particular emphasis was placed on respect for the right to privacy, freedom of expression and freedom of association.[114]

The September 2016 proposal gives rise to a wide range of discussion points.[115] What is most relevant for the sake of this paper is the proposal to introduce the EU's "autonomous list"[116] to be added to a catalogue of items subject to export control. Under Annex I of Council Regulation No 428/2009, dual-use items have been categorised into ten groups, from "Category 0" to "Category 9". The Commission's September 2016 proposal launched a new group of controlled items as "Category 10" in order to regulate certain "cyber surveillance technology".[117] Under this new autonomous category, the proposal listed items which had, at the time of the proposal, not yet been regulated by the Wassenaar Arrangement. The creation of the new category is intertwined with the Commission's suggestion to "revise the definition of dual-use items".[118] The September 2016 proposal therefore went beyond the military-focused understanding of dual-use items and proposed to include, within the stretched concept of dual-use items, "cyber-surveillance technology which can be used for the commission of serious violations of human rights or international humanitarian law".[119]

The greater integration of human rights considerations into the EU's dual-use regulation is part of the EU's overall constitutional mandate to be pursued in its external relations. Given that the EU's dual-use regulation forms an integral part of the EU's CCP, the EU's law and policies on dual-use export control ought to be carried out "in the context of the principles and objectives of the Union's external action", as envisaged by Article 207 TFEU.[120] One of these principles, referred to in Article 21(1) TEU, pertains to "the universality and indivisibility of human rights and fundamental freedoms".

[112]European Commission, Proposal for a Regulation of the European Parliament and of the Council Setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast), COM(2016) 616 final, 28 September 2016, Article 2(1).

[113]European Commission Proposal of 28 September 2016, p. 6.

[114]European Commission Proposal of 28 September 2016, p. 6.

[115]See further Kanetake (2019, 2020).

[116]European Commission Proposal of 28 September 2016, p. 9.

[117]European Commission, Annexes to the Proposal for a Regulation of the European Parliament and of the Council Setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast), COM(2016) 616 final, Annexes 1–6, 28 September 2016, pp. 243–244, Annex I, Category 10.

[118]European Commission, Proposal for a Regulation of the European Parliament and of the Council Setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items (recast), COM(2016) 616 final, 28 September 2016, p. 12, recital para 6.

[119]European Commission Proposal of 28 September 2016, Article 2(1)(b).

[120]On these general external objectives, see, e.g., Cremona (2017), pp. 10–15.

Not surprisingly, the Commission's September 2016 proposal was welcomed by several leading human rights non-governmental organisations (NGOs) in that the proposal gave an important recognition to the human rights responsibilities of states and businesses.[121] Yet, the EU's autonomous approach invited a great deal of resistance from some of the industry associations as well as many EU Member States. One of the frequently raised concerns was the need for multilateral coordination through existing export control regimes. For example, DIGITALEUROPE, which represents the digital technology industry in Europe, made it clear in February 2017 that a "unilateral viewpoint must be avoided" and that the newly proposed "category 10 should not [be] added without being aligned with Wassenaar".[122] Likewise, in its December 2019 statement, the European Semiconductor Industry Association (ESIA), reiterated that it favours an "internationally aligned approach" which "contributes to strengthening the global level playing field". On this basis, ESIA recommended the "elimination of the unilateral EU listing".[123]

Contestations also came from EU Member States' authorities. In their leaked working paper dated 29 January 2018, eleven EU Member States expressed their clear dissent from the Commission's proposal.[124] The working paper, drafted primarily by Germany and France, stressed the fact that the EU "does not work in isolation" in dual-use controls. The EU should instead continue working through international export control regimes as a global "level-playing field".[125] Likewise, in another working paper dated 15 May 2018, nine EU Member States opposed the introduction of the EU's "unilateral measures"[126] and favoured working through

[121]Shared Statement on the Update of the EU Dual-Use Regulation, May 2017, https://www.accessnow.org/cms/assets/uploads/2017/05/NGO_Sharedstatement_dualuse_May2017.pdf (last accessed 15 November 2020), p. 2.

[122]DIGITALEUROPE, European Commission Proposed Recast of the European Export Control Regime: Making the Rules Fit for the Digital World, 24 February 2017, https://www.digitaleurope.org/resources/european-commission-proposed-recast-of-the-european-export-control-regime/ (last accessed 15 November 2020), pp. 5, 8.

[123]European Semiconductor Industry Association, Comments in Support of the Trilogue Negotiations on the Recast of the Dual-Use Regulation, 10 December 2019, https://www.eusemiconductors.eu/sites/default/files/191210_ESIAComments_Dual-UseRegRecast.pdf (last visited 15 November 2020), p. 4.

[124]Working paper: EU export control—recast of Regulation 428/2009, WK 1019/2018 INIT, 29 January 2018, https://www.euractiv.com/wp-content/uploads/sites/2/2018/02/11_member_states_dual-use.pdf (last accessed 15 November 2020). The document was prepared on behalf of the Croatian, Czech, French, German, Italian, Polish, Portuguese, Romanian, Slovak, Slovenian, and Spanish delegations.

[125]Working paper: EU export control—recast of Regulation 428/2009, WK 1019/2018 INIT, 29 January 2018, https://www.euractiv.com/wp-content/uploads/sites/2/2018/02/11_member_states_dual-use.pdf (last accessed 15 November 2020), p. 1.

[126]Working paper: paper for discussion—for adoption of an improved EU export control regulation 428/2009 and for cyber surveillance controls promoting human rights and international humanitarian law globally, WK 5755/2018 INIT, 15 May 2018, https://www.euractiv.com/wp-content/uploads/sites/2/2018/06/nine-countries-paper-on-dual-use.pdf (last accessed 15 November 2020),

international export control regimes.[127] The Council's negotiating mandate released in June 2019 further reiterated the importance of regulatory harmonisation with international regimes.[128]

5.2.2 November 2020 Draft Text

After several years of deliberation, on 9 November 2020, a provisional political agreement was reached between the Council and European Parliament.[129] An informal version of the text of the regulation which would repeal Council Regulation No 428/2009 was published on 18 November 2020.[130] While the text gives rise to a number of issues to be discussed, it is important to note, for the sake of the present analysis, that the text clearly places a greater emphasis upon multilateralism in this field.

In line with the political deliberation surrounding the recast process, the informal draft text of November 2020 explicitly acknowledged human rights risks associated with the export of cyber surveillance items. One of the most relevant provisions is Article 4a of the draft text regarding a so-called "catch-all" control. It is a residual mechanism to allow authorities to exert export control over items which are not specifically listed in Annex I of the EU's dual-use regulation. According to Article 4a(2), for instance, if an exporter is "aware" according to its "due diligence findings" that non-listed cyber-surveillance items are "intended, in their entirety or in part" for use in connection with internal repression or the commission of serious violations of international human rights and international humanitarian law, the exporter "shall notify the competent authority" which "shall decide whether or not to make the export concerned subject to authorisation". The draft regulation therefore anticipates that exporters themselves will conduct human rights due diligence.[131]

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pp. 1–2. The Working Paper was prepared on behalf of the Czech Republic, Cyprus, Estonia, Finland, Ireland, Italy, Poland, Sweden, and the United Kingdom.

[127] Working paper: paper for discussion—for adoption of an improved EU export control regulation 428/2009 and for cyber surveillance controls promoting human rights and international humanitarian law globally, WK 5755/2018 INIT, 15 May 2018, https://www.euractiv.com/wp-content/uploads/sites/2/2018/06/nine-countries-paper-on-dual-use.pdf (last accessed 15 November 2020), pp. 2–4.

[128] Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council Setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast): mandate for negotiations with the European Parliament, 5 June 2019.

[129] Council of the EU, New rules on trade of dual-use items agreed, Press release, 9 November 2020, https://www.consilium.europa.eu/en/press/press-releases/2020/11/09/new-rules-on-trade-of-dual-use-items-agreed/ (last accessed 15 November 2020).

[130] Council of the EU, Proposal for a Regulation of the European Parliament and of the Council setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), Confirmation of the final compromise text with a view to agreement, 13 November 2020.

[131] On human rights due diligence and export controls, see further Kanetake (2020), pp. 70–76.

At the same time, the explicit reference to cyber surveillance items in the catch-all control does not necessarily mean that the draft endorsed the EU's unilateral approach when it comes to the identification of controlled items. According to the draft text of November 2020, in responding to "serious misuse of existing technologies, or to new risks associated with emerging technologies", Member States' coordinated responses should be followed by "initiatives to introduce equivalent controls at the multilateral level".[132] The list of controlled items "should be in conformity with the obligations and commitments" under treaties and multilateral export control regimes.[133] The draft text reiterated the point that Member States and the Commission "should enhance their contribution to the activities of multilateral export control regimes" so that these arrangements, as a multilateral level playing field, would serve "as a model for international best practice and a global basis".[134] The draft text for the regulation thus obliges the Commission and EU Member States to maintain dialogues with third countries "with a view to promoting the global convergence of controls".[135]

Overall, it is fair to say that the processes of revising the EU's dual-use regulation has resulted in the explicit commitment to multilateralism in this field, while acknowledging, at the same time, the unique role of the EU in proactively altering international export control regimes. Regardless of the final outcomes of the EU's legislative process, the process of revising the EU's regulation provided a crucial opportunity for the EU to decide precisely how it takes part in multilateral regimes while pursuing the materialisation of its principles and objectives in external relations.

While this paper focused on particular aspects of the US and EU's export controls, it is by no means the intention of this paper to reduce the US's approach to national security narratives, in comparison to the EU's emphasis on human rights narratives. For instance, the US has taken one of the first steps in developing guidance for applying human rights due diligence to export control. On 30 September 2020, the US Department of State released its human rights due diligence guidance to assist US companies that export products or services with surveillance capabilities. In the guidance, the US government made it clear that US businesses were "encouraged to integrate human rights due diligence into compliance programs, including *export compliance programs*",[136] in line with the UN's

[132]Council of the EU, Confirmation of the final compromise text with a view to agreement, 13 November 2020, Recital para. 6 (original emphasis omitted).

[133]Council of the EU, Confirmation of the final compromise text with a view to agreement, 13 November 2020, Recital para. 18 (original emphasis omitted).

[134]Council of the EU, Confirmation of the final compromise text with a view to agreement, 13 November 2020, Recital para. 29 (original emphasis omitted).

[135]Council of the EU, Confirmation of the final compromise text with a view to agreement, 13 November 2020, Article 27(1) (original emphasis omitted).

[136]US Department of State, Guidance on Implementing the *UN Guiding Principles* for Transactions Linked to Foreign Government End-Users for Products or Services with Surveillance Capabilities, 30 September 2020, https://www.state.gov/release-of-u-s-department-of-state-guidance-on-

Guiding Principles on Business and Human Rights (UNGPs).[137] It remains to be seen how the underlying narratives that shape the framework of dual-use export control would converge across both sides of the Atlantic, especially with regard to their technological export control policies.

6 Conclusion

International trade law and export control laws can be mutually interdependent when it comes to the preservation and development of multilateralism. This is paradoxical, given the fact that export control can, almost by definition, go against some of the basic principles of the WTO trade agreements. Even though export control could frustrate some of the tenets of the multilateral trade regime, the WTO agreements accommodate broad discretion on the part of governments to impose export controls for the sake of each member's essential security. While the WTO panel in the *Russia – Traffic in Transit* case in 2019 made it clear that the invocation of the security exception would not be immune from the panel's scrutiny, the panel left it up to each member's good faith in deciding what constitutes its essential security interests.

Certain regulatory harmonisation has still been achieved, however, outside the WTO regime, through the presence of multilateral export control regimes. They devise the catalogues of materials, products, and technologies subject to export control and, more importantly, serve as a forum through which regulatory officials exchange their licensing practices. Needless to say, the level of regulatory harmonisation arranged through the Wassenaar Arrangement and other export control regimes is limited in nature. Ultimately, it is for each participating state to decide whether to allow the transfer of controlled items in specific circumstances. Moreover, while the Wassenaar Arrangement provides the lengthy list of controlled items, the arrangement is not meant to designate specific destinations or entities that should be considered sensitive and thus require export authorisation. Despite various limitations, however, the Wassenaar Arrangement and other export control regimes create the expectation that participating states should act through these regimes in order for export control to be effective.

The incentives to act through multilateral regimes have not been lost in the US and the EU, despite various attempts that paved the way for unilateral or autonomous export control. In the US, the national security-based export controls have been applied for emerging and foundational technologies, but the US continued working

implementing-the-un-guiding-principles-for-transactions-linked-to-foreign-government-end-users-for-products-or-services-with-surveillance-capabilities/ (last accessed 15 November 2020), p. 1 (emphasis added).

[137]United Nations, Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework, HR/PUB/11/04, 2011.

through the Australia Group and the Wassenaar Arrangement. In the EU, the review of Council Regulation No 428/2009 since 2013 has led, in September 2016, to the Commission's proposal, which marked the watershed in strengthening human rights considerations in the framework of the EU's dual-use regulation, apparently at the expense of multilateral regulatory harmonisation. In the end, the November 2020 draft, based upon the provisional political agreement between the Council and the European Parliament, created the possibility for the EU's autonomous controls but stressed, at the same time, the importance of multilateral export control regimes as a path through which the EU should promote its export control priorities.

Despite various indications to support multilateralism in export controls, international export control regimes have long been subject to criticisms, precisely because of a particular type of multilateralism that they represent. As noted at the beginning of this paper, multilateralism should entail more than the mere aggregation of multiple states and involve commitment to certain values. In this sense, the rationale of the Wassenaar Arrangement discussed in this paper lies in the reduction of military risks that undermine regional and international security and stability. This remains to be a "laudable and necessary objective",[138] as David Kaye, the Human Rights Council's Special Rapporteur on the freedom of opinion and expression, rather cynically stated. At the same time, the Special Rapporteur was critical of the role of the Wassenaar Arrangement, in that, despite the important role that export control can play in regulating surveillance trade, the Wassenaar Arrangement is "ill-suited" to addressing human rights violations caused by the cross-border transfer of surveillance tools.[139] Should the EU pursue its human rights considerations in its external action, including dual-use export control, the EU cannot avoid engaging with Wassenaar members in altering its narrative, potentially, in the long run, towards more rights-based approaches to the construction of regional and international security.

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[139]UN Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Surveillance and Human Rights, UN Doc. A/HRC/41/35, 28 May 2019, para. 34.

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