Introduction to International Strategic Trade Control Regimes

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Part

1.

The WTO: general principles and exceptions

Part I outlines the overall structure and general principles of the World Trade Organisation (WTO). It focuses on provisions which establish the possibility of derogations to the general principle of free trade, within the General Agreement on Tariffs and Trade (GATT).
In this framework, Article XX of the GATT, which establishes general exceptions, will be succinctly explored, while the main part of this chapter will be devoted to the analysis of Article XXI, which sets up security exceptions.

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Part 1. CONTENT

TABLE OF BOXES

1. Creation of the World Trade Organisation (WTO)

The World Trade Organisation (WTO) came into being in 1995, but its predecessor, the General Agreement on Tariffs and Trade (GATT) was established in the wake of the Second World War. In this period, a series of elements in international relations (IR) and world economy converged as to allow the progressive liberalisation of trade. Among these elements, there was both a strong desire to avoid repeating disasters of a World War and the abandonment of isolationism by the United States (US) for a leadership role in world affairs, which fostered support around the world for a new approach to international economic cooperation.

Following this trend, at a conference in the *Palais des Nations*, in Geneva (Switzerland) representatives of 23 countries met from April to October 1947 and established the post-war world trading system, in which governments agreed the rules about the use of certain trade barriers and to negotiate tariff reductions with one another.[1]
The system was developed through a series of trade negotiations, or rounds, held under the GATT. The first rounds dealt mainly with tariff reductions, but later negotiations included other areas such as anti-dumping and non-tariff measures. The Uruguay Round (1986-1994) led to the WTO's creation.

Today, the WTO still provides a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level-playing field for all, thus contributing to economic growth and development. The WTO also provides a legal and institutional framework for the implementation and monitoring of these agreements, as well as for settling disputes arising from their interpretation and application.

1 D. A. Irwin, P. C. Mavroidis, and A. O. Sykes, *The genesis of the GATT*, Cambridge University Press, May 2009.

The WTO currently has 162 members,[2] 117 of which are developing countries or separate customs territories. WTO activities are supported by a Secretariat (located in Geneva) of some 700 staff, led by the WTO Director-General. Decisions in the WTO are generally taken by consensus of the entire membership.

The WTO agreements cover goods, services and intellectual property. They spell out the principles of liberalisation and the permitted exceptions. They include individual countries' commitments to lower customs tariffs and other trade barriers, and to open and keep open services markets. They set procedures for settling disputes. They prescribe special treatment for developing countries.

The agreements for the two largest areas (goods and services) share a common three-part outline. They start with broad principles: the *General Agreement on Tariffs and Trade* (GATT) for goods and the *General Agreement on Trade in Services* (GATS). The third area, *Trade-Related Aspects of Intellectual Property Rights* (TRIPS), also falls into this category although it has no additional parts at present. Then come extra agreements and annexes dealing with the special requirements of specific sectors or issues, such as agriculture, sanitary and phytosanitary measures, textiles and clothing, technical barriers to trade, trade-related investment measures, rules of origin, import licensing, safeguards, and plurilateral trade agreements in area such as trade civil aircraft and public procurements.
Finally, detailed and lengthy schedules (or lists) of commitments made by individual countries allow specific foreign products or service providers access to their markets.[3]

2 For an updated status of the WTO membership, please see: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. (Accessed on 13/09/2016).

3 World Trade Organisation, *Overview: a navigational guide*. Available on: https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm. (Accessed on 13/09/2016).

1.1. Main principles

Starting from the GATT's essential principle of free trade, other GATT's founding general principles are:

— General Most-Favoured-Nation Treatment Principle;
— National Treatment on Internal Taxation and Regulation (equality principle);
— Principle of General Elimination of Quantitative Restrictions;
— Principle of Non-discriminatory Administration of Quantitative Restrictions.

The General Most-Favoured-Nation Treatment Principle (MFN) establishes that, under the WTO agreements, countries cannot normally discriminate between their trading partners. If one country grants another country a favour (such as a lower customs duty rate for one of their products), the same treatment/favour shall be granted to other WTO members.
Exceptions are allowed. For example, countries can set up a free trade agreement that applies only to goods traded within the group, discriminating against goods from outside. Alternatively, they can give developing countries special access to their markets. Or a country can raise barriers against products that are considered to be traded unfairly from specific countries. As for services, countries are allowed, in limited circumstances, to discriminate. However, the agreements only permit these exceptions under strict conditions. In general, MFN means that every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners.

The National Treatment on Internal Taxation and Regulation (equality principle) is based on the idea that imported and locally-produced goods should be treated equally, at least after the foreign goods have entered the market. The same should apply to foreign and domestic services and to foreign and local trademarks, copyrights and patents. In this

sense, taxation rules and regulation in general should be the same for foreign/imported products as for national products.[4]

The Principle of General Elimination of Quantitative Restrictions prohibits quantitative restrictions on the importation or the exportation of any product. One reason for this prohibition is that quantitative restrictions are considered to have a greater protective effect than tariff measures and are more likely to distort free trade. However, the GATT provides exceptions to this fundamental principle. These exceptional rules permit the imposition of quantitative measures under limited conditions and only if they are taken on policy grounds that are justifiable under the GATT, such as critical shortages of foodstuffs (Article XI:2) and balance of payment (Article XVIII:B). As long as these exceptions are invoked formally, in accordance with GATT provisions, they cannot be criticised as unfair trade measures.[5]

Lastly, the Principle of Non-discriminatory Administration of Quantitative Restrictions stipulates that, with regard to like products, quantitative restrictions or tariff quotas on any product must be administered in a non-discriminatory manner. It also stipulates that, in administering import restrictions and tariff quotas, WTO Members shall aim to allocate shares approaching as closely as possible to that which might be expected in their absence.[6]

4 World Trade Organisation, *Principles of the trading system*. Available on: https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm#seebox. (Accessed on 13/09/2016).

5 Ministry of Economy, Trade and Industry of Japan, *Quantitative restrictions*, in "2006 Report on the WTO Inconsistency of Trade Policies by Major Trading Partners", Part 2, Chapter 3, p. 239.Available on: http://www.meti.go.jp/english/report/data/gCT9903e.html. (Accessed on 13/09/2016).

6 Idem.

1.2. GATT exceptions to General Trade Rule

Despite the GATT's general principle of free trade and the possibility to stop or control trade for economic reasons, the GATT also provides the possibility to stop or control trade for non-economic reasons. These reasons could be qualified as "political". They are established by two articles: Article XX regarding general exceptions for measures necessary to protect public morals, life and health, etc., and Article XXI regarding security exceptions.

1.2.1. Article XX: General Exceptions

Article XX establishes the possibility for Participating States to derogate to the GATT's principles by adopting national measures for the protection of:

— Public morals;
— Human, animal, plant life and health;
— Gold and silver;
— Patents, trademark and copyrights;
— Prison labour;
— National treasures of artistic, historic or archaeological value;
— Conservation of exhaustible natural resources.

It is important to bear in mind that Article XX establishes exceptions to the general principle. For this reason, it has to be limited to a number of identified and identifiable cases. In other words, the scope of each exception has to be clearly outlined, and conditions of use should be strictly defined. Moreover, in order to adopt national measures, a State has to verify that all conditions specified in the first part of the Article, called *chapeau* or opening clause, and in its second part, i.e. the list of categories, are met.

The *chapeau* or opening provision establishes general conditions that need to be met by a State to adopt national provisions whatever the category of items will be concerned:

> "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures".[7]

The conditions are formulated in a negative way, in the sense that States cannot use Article XX to stop or control trade if:
— The measures adopted in this purpose result in discrimination;
— Discrimination is arbitrary or unjustifiable in character;
— Discrimination occurs between countries where the same conditions prevail.

To better understand the conditions that must be satisfied in the opening clause, two examples are provided in the boxes below.

7 World Trade Organization, *General Agreement on Tariffs and Trade*, Article XXI, 1947. Available on: https://www.wto.org/english/docs_e/legal_e/gatt47_02_e.htm. (Accessed on 13/09/2016).

WTO case 1	**United States - Import Prohibition of Certain Shrimp and Shrimp Products, DS58, Report of 6 November 1998**

Seven species of sea turtles have been identified to date. They spend their lives at sea, where they migrate between their foraging and nesting grounds. Sea turtles have been adversely affected by human activity, especially indirectly (for instance, through incidental capture in fisheries). In early 1997, India, Malaysia, Pakistan and Thailand brought a joint complaint against a ban imposed by the US on the importation of certain shrimp and shrimp products.

The US Endangered Species Act of 1973 listed as endangered or threatened the five species of sea turtles that occur in US waters, and prohibited their "take" within the US, in its territorial sea and the high seas.

Under the act, the US required that US shrimp trawlers use "turtle excluder devices" (TEDs) in their nets when fishing in areas where there is a significant likelihood of encountering sea turtles. Section 609 of US Public Law 101–102, enacted in 1989, said that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the US unless the harvesting nation was certified to have a regulatory programme and an incidental take-rate comparable to that of the US, or that the particular fishing environment of the harvesting nation did not pose a threat to sea turtles. In practice, countries that had any of the five species of sea turtles within their jurisdiction and harvested shrimp with mechanical means, had to impose on their fishermen requirements comparable to those borne by US shrimpers if they wanted to be certified to export shrimp products to the US.

The appellate WTO dispute settlement body (DSB), in its final report, clearly condemned the US policy and measures adopted on grounds of "unjustifiable discrimination".

We scrutinize first whether Section 609 has been applied in a manner constituting "unjustifiable discrimination between countries where the same conditions prevail".

Perhaps the most conspicuous flaw in this measure's application relates to its intended and actual coercive effect on the specific policy decisions

made by foreign governments, Members of the WTO. The US measure *in its application, is, in effect, an economic embargo which requires all other exporting Members, if they wish to exercise their GATT rights, to adopt essentially the same policy (together with an approved enforcement programme) as that applied to, and enforced on, United States domestic shrimp trawlers.*

It may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory programme, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members (...).[8]

The US lost the case, not because it sought to protect the environment but because it discriminated between WTO members. It provided countries in the Western hemisphere — mainly in the Caribbean — technical and financial assistance and longer transition periods for their fishermen to start using turtle-excluder devices.

It did not give the same advantages, however, to the four Asian countries (India, Malaysia, Pakistan and Thailand) that filed the complaint with the WTO.

8 World Trade Organisation, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R of 12 October 1998 (98-0000). Available on: http://www.sice.oas.org/dispute/wto/58abr07.asp. (Accessed on 13/09/2016).

WTO case 2	**European Communities — Measures Prohibiting the Importation and Marketing of Seal Products, dispute DS400, Report of 18 June 2014**

This dispute concerns regulations of the European Union ("EU Seal Regime")[9] that prohibit the import and placing on the market of seal products.

The EU Seal Regime provides various exceptions to the prohibition when certain conditions are met, including seal products derived from hunts conducted by Inuit or indigenous communities (IC exception) and hunts conducted for marine resource management purposes (MRM exception). The panel concluded that the IC exception under the EU Seal Regime violates Article I:1 of the GATT 1994 because an advantage granted by the European Union to seal products originating from Greenland (specifically, its Inuit population) is not accorded immediately and unconditionally to the like products originating from Canada. With respect to the MRM exception, the panel found that it violates Article III:4 of the GATT 1994 because it grants imported seal products less favourable treatment than that granted to like domestic seal products. The panel also found that the IC exception and the MRM exception are not justified under Article XX(a) of the GATT 1994 ("necessary to protect public morals") because they fail to meet the requirements under the *chapeau* of Article XX ("not applied in a manner that would constitute arbitrary or unjustified discrimination where the same conditions prevail or a disguised restriction on international trade").[10] The panel additionally

9 Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products, *Official Journal of the European Union*, L 286/36 of 31 October 2009.

10 To evaluate conformity of EC's measures to the opening clause, three elements have been considered:
- Lack of willingness of the State to negotiate a compromise that reach the same objective with States concerned by the measure;
- Lack of flexibility of the rule that does not take into consideration specificities of third States;
- Lack of transparency of the decision-making process.

found that the European Union failed to make a *prima facie* case that the EU Seal Regime is justified under Article XX(b) of the GATT 1994 ("necessary to protect … animal … life or health").[11]

11 World Trade Organisation, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, dispute DS400, Report of 18 June 2014. Available on: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm. (Accessed on 13/09/2016).

Article XX is a "two-tiered mechanism" in the sense that a national measure has to satisfy two sets of conditions to be adopted: conditions imposed by the *chapeau* (as shown above) and conditions established by one of the sub-paragraphs establishing the reason to derogate to general principles (public morals, human, animal, plant life and health, etc.). In this context, to satisfy the conditions set by the sub-paragraph of reference means to analyse whether the national case falls within the scope of the definition. In the EC seal products case, for example, the EC failed to comply not only with conditions required by the *chapeau* (Article XX of the GATT) but also with the sub-paragraph invoked, Article XXb ("necessary to protect (...) animal (...) life or health").

The content of subparagraphs will be briefly explored with the aim of understanding their scope and the conditions that have to be satisfied to comply with general exceptions established in Article XX.

1.2.1.1. *Article XX(a): "Public Morals"*

Nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(a) necessary to protect public morals

The difficulty in this provision lies in the understanding of the words "necessary to" and "public morals", which is a quite subjective concept strictly linked to a specific culture or socio-political context. Generally speaking, it is possible to consider "public morals" as standards of right and wrong conduct maintained by, or on behalf of, a community or nation. However, content can vary in time and space, depending upon a range of factors including prevailing social, cultural, ethical and religious values.

The provision, in principle, leads to the possibility for a State to adopt preventive actions to prohibit/control trade items considered as contrary to the State's values, such as: sale of alcohol to minors, cigarettes, drugs, pornography and pork meat.
It could also involve the adoption of protectionist measures, such as the import's prohibition of beer, wine or cheese, to safeguard local culture or tradition.

To reduce the subjective dimension of this provision, the adoption of national measures are submitted to three conditions:

1. They should conform to opening clause conditions;
2. Measures shall be necessary in the sense that there are no reasonably available alternative and the burden of proof will be supported by the State that has adopted the measure;
3. National measures shall concern "public morals".

With regards to the third condition, there is no common understanding of the term "public morals", but it does not seem to be controversial among States. They unilaterally define and apply the concept of "public morals" in their respective territories, according to their own systems and scales of values.
Some examples include the US' ban on the importation of "obscene" pictures; Thailand's ban on the exportation of Buddha images; the US' ban on the importation of products made by convict labour, forced labour and indentured labour; Chinese measures regulating activities relating to the importation and distribution of certain publications and audio-visual entertainment products.

1.2.1.2. *Article XX(b): "Necessary to Protect Human, Animal or Plant Life or Health"*

Nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(b) necessary to protect human, animal or plant life or health;

The criteria used to interpret subparagraph XXb are almost similar to the criteria used for national measures related to public moral. They are submitted to three conditions:

1. Should conform to opening clause conditions;
2. Measures shall be necessary;
3. National measures shall concern human, animal or plant life or health.

In this context again, there is no common understanding and the reasons to adopt national measures to restrain or control trade because of concerns for human, animal or plant life or health can vary. Some examples are provided in the boxes below.

WTO case 3	**Thailand – Restriction on importation of and internal taxes on cigarettes, Report of the Panel adopted on 7 November 1990**

On 22 December 1989, the United States requested consultations with Thailand regarding restrictions on imports of and internal taxes on cigarettes maintained by the Royal Thai Government.

Thailand justified the prohibition on imports of cigarettes by the objective of public health policy which it was pursuing, namely to reduce the consumption of tobacco, which was harmful to health. It was therefore covered by Article XX(b).

The production of tobacco had not altogether been prohibited in Thailand because this might have led to production and consumption of narcotic drugs, such as opium, marijuana and kratom, which have even more harmful effects than tobacco.

Cigarette production in Thailand was a State-monopoly under the Tobacco Act because the government felt the need to have total control over such a product which, even though legal, could be extremely harmful to health. One of the main objectives of the Act was to ensure that cigarettes were produced in a quantity that was just sufficient to satisfy domestic demand, without increasing such demand.

Thailand also argued that cigarettes manufactured in the United States may be more harmful than Thai cigarettes because of unknown chemicals placed by the United States cigarette companies; partly to compensate for lower tar and nicotine levels. United States cigarette companies also used other additives which increased the health risks of smoking.

The panel recognised that:

73. (…) In agreement with the parties to the dispute and the expert from the WHO, the Panel accepted that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b). The Panel noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalization; however, for a measure to be covered by Article XX(b) it had to be "necessary".

75. The Panel concluded from the above that the import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.

81. The Panel found therefore that Thailand's practice of permitting the sale of domestic cigarettes while not permitting the importation of foreign cigarettes was an inconsistency with the General Agreement not "necessary" within the meaning of Article XX(b). [12]

12 World Trade Organisation, *Thailand – Restriction on importation of and internal taxes on cigarettes*, Report of the Panel adopted on 7 November 1990 (DS10/R - 37S/200). Available on: https://www.wto.org/english/tratop_e/dispu_e/90cigart.pdf. (Accessed on 13/09/2016).

WTO case 4	**European Communities — Measures Affecting Asbestos and Products Containing Asbestos, DS135, Report of 5 April 2001**

On 28 May 1998, Canada requested consultations with the EC in respect of measures imposed by France, in particular the Decree of 24 December 1996 on the prohibition of asbestos and products containing asbestos, including a ban on imports of such goods.

On the issue of whether the use of chrysotile-cement products poses a sufficient risk to human health to enable the measure to fall within the scope of application of the phrase "*to protect human (...) life or health*" in Article XX(b), the Panel stated that it "*considers that the evidence before it tends to show that handling chrysotile-cement products constitutes a risk to health rather than the opposite*."

On the basis of this assessment of the evidence, the Panel concluded that the EC has made a *prima facie* case for the existence of a health risk in connection with the use of chrysotile, in particular as regards lung cancer and mesothelioma in the occupational sectors downstream of production and processing as well as for the public in general in relation to chrysotile-cement products.

Thus, the Panel found that the measure falls within the category of measures embraced by Article XX(b) of the GATT 1994.

In the light of France's public health objectives as presented by the European Communities, the Panel concludes that the EC has made a *prima facie* case for the **non-existence of a reasonably available alternative** to the banning of chrysotile and chrysotile-cement products and recourse to substitute products. Canada has not rebutted the presumption established by the EC. We also consider that the EC's position is confirmed by the comments of the experts consulted in the course of this proceeding.[13]

13 World Trade Organisation, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, DS135, Report of 5 April 2001. Available on: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm. (Accessed on 13/09/2016).

1.2.1.3. *Article XX(c) "Relating to the Importations or Exportations of Gold or Silver"*

Nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(c) relating to the importations or exportations of gold or silver.

A similar reasoning is applied to the interpretation of subparagraph XXc, which, in order to be adopted by a State, shall satisfy the conditions imposed by the opening clause. Adopted measures shall also be related to import and export of gold and silver.
However, the interpretation of subparagraph XXc has never been discussed within the panel, except once when Canada adopted a retail tax on gold coins and exempted from this tax Maple Leaf gold coins struck by the Canadian Mint.

1.2.1.4. *Article XX(e)*[14] *"Products of Prison Labour "*

Nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(e) relating to the products of prison labour;

Subparagraph XXe seems to be another case of "tacit consensus" among States since the issue of products of prison labour has never been discussed in a panel. As for subparagraph XXc, the necessity dimension is not requested.

14 Article XX(d) will not be analysed because it is not relevant for this handbook. For the sake of completeness, Article XX(d) provides that:
Nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices.

1.2.1.5. *Article XX(f) "National Treasures"*

Nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

The difficulty in interpreting this provision lies in the subjective nature of "*national treasures of artistic, historic or archaeological value*". In fact, the provision does not only lack any link with a financial value, but there is no common understanding of what might be considered as a "national treasure". Furthermore, the provision does not specify if tangible as well as intangible goods are covered by the definition. Presently, no cases have been brought in front of a panel.

1.2.2. Article XXI: Security Exceptions

Article XXI of the GATT establishes five possibilities of national restrictive measures related to:
— Information;
— Actions concerning:
  – UN embargoes;
  – Nuclear materials
  – War and emergency;
  – Arms and related items.

Contrary to the general exceptions established in Article XX, Article XXI does not include an opening clause.

1.2.2.1. *Article XXI(a) Information*

Nothing in this Agreement shall be construed
(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests.

As in Article XX, most of the terms used in Article XXI have been extensively debated or defined. It is the case with "information" that has been considered indirectly once, in 1949, regarding the publication

of COCOM'[15]s list of items. At the Third Session in 1949, Czechoslovakia requested a decision under Article XXIII as to whether the US had failed to carry out its obligations under Articles I and XIII because of the 1948 US administration of its export licensing controls (both short-supply controls and new export controls instituted in 1948 discriminating between destination countries for security reasons). The US stated that its controls for security reasons applied to a narrow group of exports of goods which could be used for military purposes. The US also stated that "*the provisions of Article I would not require uniformity of formalities, as applied to different countries, in respect of restrictions imposed for security reasons*". It was also stated by one contracting party that "goods which were of a nature that could contribute to war potential" came within the exception of Article XXI. The US representative stated that (...) "*Article XXI ... provides that a contracting party shall not be required to give information which it considers contrary to its security interest – and to the security interest of other friendly countries – to reveal the names of the commodities that it considers to be most strategic*".[16]

However, the scope of "information" has never been controversial between States. It is commonly agreed that it is up to each State to define what could be included in the definition. The only condition established by the Article is an obligation for States to inform contracting parties to the fullest extent possible of trade measures taken under Article XXI (the GATT's analytical Index).

The same logic applies to the definition of "essential security interests". There is no common understanding, and it is up to each State, adopting national measures under this article, to decide what might fall into

15 The Coordinating Committee for Multilateral Export Controls (COCOM) was the first export control regime set with the intention to restrict the trade toward another group of countries. It was founded under the impulse of the United States, in 1949, in the context of the Cold War, without proper status. It was intended to prevent the export of high technology goods, such as nuclear industry items, conventional arms and dual-use goods, from NATO countries and their allies to countries of the Warsaw Pact.

16 World Trade Organization, *GATT Analytical Index*, Article XXI "Security Exceptions", p. 602. Available on: https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf. (Accessed on 13/09/2016).

this category. "*We cannot make it too tight, because we cannot prohibit measures which are needed purely for security reasons. On the other hand, we cannot make it so broad that, under the guise of security, countries will put on measures which really have a commercial purpose*" (Chairman of the Commission quoted in the GATT's Analytical Index).
States have regularly recourse to "essential security interests" to justify national measures, but it has been controversial.

During the discussion of the complaint of Czechoslovakia at the Third Session in 1949 it was stated, inter alia, that: "*Every country must be the judge in the last resort on questions relating to its own security. On the other hand, every contracting party should be cautious not to take any step which might have the effect of undermining the General Agreement*".[17]

In 1961, on the occasion of the accession of Portugal, Ghana stated that its boycott of Portuguese goods was justified under the provisions of Article XXI:(b)(iii), noting that "(...*) Under this Article each contracting party was the sole judge of what was necessary in its essential security interest. There could therefore be no objection to Ghana regarding the boycott of goods as justified by security interests. It might be observed that a country's security interests might be threatened by a potential as well as an actual danger, was therefore justified in the essential security interests of Ghana*".[18]
The Ghanaian Government's view was that the situation in Angola was a constant threat to the peace of the African continent. In their view, any action which, by bringing pressure on the Portuguese Government might lead to a lessening of this danger, was therefore justified by the essential security interests of Ghana.

In 1982, during the Falkland War, trade restrictions for non-economic reasons were adopted and applied by the EEC: "*The EEC and its member States had taken certain measures on the basis of their inherent rights, of which Article XXI of the General Agreement was a reflection. The exercise*

17 Ibid. p. 600.

18 Idem.

of these rights constituted a general exception, and required neither notification, justification nor approval, a procedure confirmed by thirty-five years of implementation of the General Agreement".[19]

The question of whether and to what extent the Contracting Parties can review the national security reasons for measures taken under Article XXI was discussed again in the GATT Council in May and July 1985 in relation to the US trade embargo against Nicaragua, which had taken effect on 7 May 1985. Nicaragua stated that "*(...) this was not a matter of national security but one of coercion". Nicaragua further stated that Article XXI could not be applied arbitrarily; there had to be some correspondence between the adopted measures and the situation giving rise to such adoption. Nicaragua stated that the text of Article XXI made clear that the Contracting Parties were competent to judge whether a situation of "war or other emergency in international relations*" existed and requested that a Panel be set up under Article XXIII:2 to examine the issue. The United States stated that its actions had been taken for national security reasons and were covered by Article XXI:(b)(iii) of the GATT and that this provision left to each contracting party to judge what action it considered necessary for the protection of its essential security interest. The terms of reference of the Panel precluded it from examining or judging the validity of the invocation of Article XXI(b)(iii) by the US. In the Panel Report on "United States - Trade Measures affecting Nicaragua", which has not been adopted, *"(...) The Panel noted that, while both parties to the dispute agreed that the United States, by imposing the embargo, had acted contrary to certain trade-facilitating provisions of the General Agreement, they disagreed on the question of whether the non-observance of these provisions was justified by Article XXI(b)(iii)*". The Panel also noted that, in the view of the United States, Article XXI applied to any action which the contracting party considered necessary for the protection of its essential security interests and that the Panel, both by the terms of Article XXI and by its mandate, was precluded from examining the validity of the United States' invocation of Article XXI.[20]

19 Idem.

20 Ibid. p.601.

1.2.2.2. *Article XXI(b) action relating to fissionable materials*

Nothing in this Agreement shall be construed
(a) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
(i) relating to ***fissionable materials*** *or the materials from which they are derived*;

This provision has two interpretations. According to the most restrictive interpretation (minimum), the provision authorises only the adoption of restrictive measures for "national security essential interest" related to nuclear "non-proliferation concerns".
Following the most comprehensive interpretation (maximum), this provision would authorise the adoption of restrictive measures for all potential nuclear trade activities in order to protect even national energy needs.

Despite very broad exceptions allowed by Article XXI for security reason, this provision concerning nuclear trade has to be analysed in the light of the very specific geopolitical context of the fifties. In 1949, the quantity of fissile material available for industrial exploitation on earth was thought as rather limited in terms of quantity and geographical location. Therefore, countries holding such reserves wanted to keep the possibility to control fissionable materials for their national strategic interest, i.e. for energy needs. This second interpretation might seem quite anachronistic and, indeed, the general trend today is to consider the first interpretation—concerning the risk of nuclear proliferation—as the most suitable interpretation of the security exception.

1.2.2.3. *Article XXI(b) action relating to weapons trade*

Nothing in this Agreement shall be construed
(a) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
(ii) relating to the ***traffic in arms****, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;*

The difficulty with the interpretation of this provision is the definition of scope, in particular of the terms "arms" and "implements of war". As an example of how the first term could be comprehensive (or arguable), it is sufficient to consider the events of the 9/11 terrorist attacks. The towers crumbled because attacked by a plane "taking off". The explosion, however, was not caused only by the crash of the aircraft but also by the explosion of its tank full of fuel. Can a plane taking off (with its tank full of fuel) be considered as a weapon?
Considering the issue of "implements of war", the debate is today on cyber-attacks, for example, through Internet monitoring and other techniques allowing to take over control of someone else's computer. Can Internet monitoring or other similar actions be considered as "implements of war"?
Once again, the lack of definition leaves room for States' interpretations.

1.2.2.4. *Article XXI(b) action in time of war or other emergency in international relations*

Nothing in this Agreement shall be construed
(a) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
(iii) taken in ***time of war or other emergency*** *in international relations;*

This provision has been regularly used by several countries. From the content of the justification for using it, it appears how "comprehensive" the understanding of "in time of war" and "emergency" can be. Some examples are given below.
In November 1991, the European Community notified the contracting parties that the EC and its Member States had decided to adopt trade

measures against Yugoslavia *"on the grounds that the situation prevailing in Yugoslavia no longer permits the preferential treatment of this country to be upheld. Therefore, as from 11 November, imports from Yugoslavia into the Community are applied m.f.n. treatment (...) These measures are taken by the European Community upon consideration of its essential security interests and based on GATT Article XXI"*.[21]

Another example is the Arab boycott against Israel, justified on the ground of the political situation (the state of war which had long prevailed in that area) of the region.
"*The history of the Arab boycott was beyond doubt related to the extraordinary circumstances to which the Middle East area had been exposed. The state of war which had long prevailed in that area necessitated the resorting to this system (...). In view of the political character of this issue, the United Arab Republic did not wish to discuss it within GATT. (...) It would not be reasonable to ask that the United Arab Republic should do business with a firm that transferred all or part of its profits from sales to the United Arab Republic to an enemy country*".[22]

Sweden used the provision in 1975 when introducing a global import quota system for certain footwear. The Swedish Government considered that the measure was taken in conformity with the spirit of Article XXI and stated that the "*decrease in domestic production has become a critical threat to the emergency planning of Sweden's economic defence as an integral part of the country's security policy. This policy necessitates the maintenance of a minimum domestic production capacity in vital industries. Such a capacity is indispensable in order to secure the provision of essential products necessary to meet basic needs in case of war or other emergency in international relations*".

Other examples of the use of the security exceptions for emergency situations are given by the United States through the adoption of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996

21 Ibid. p.604.

22 Ibid. p.602.

(Helms-Burton Act) and the Iran-Libya Sanctions Act (ILSA) of 1996 (D'Amato Act).

The purpose of the Helms-Burton Act dedicated to Cuba was to support *"the Cuban people in regaining their freedom and prosperity"* and to strengthen international sanctions against Castro's government. The Unites States adopted a first set of measures against Cuba in 1960, which was gradually extended up to a full embargo in 1963. In this sense, the Helms-Burton Act has to be interpreted not only as a way to reinforce the US embargo but also as the US attempt to convince third States to do the same (there was no UN embargo against Cuba, adopted under Chapter VII of the UN Charter (*see infra*)). As stated by the US Congress: "*The Congress hereby reaffirms section 1704(a) of the Cuban Democracy Act of 1992, which states that the President should encourage foreign countries to restrict trade and credit relations with Cuba in a manner consistent with the purposes of that Act*".[23] The policy behind the Helms-Burton Act was to establish a sort of mechanism of sanctions against States assisting Cuba: "*The Congress further urges the President to take immediate steps to apply the sanctions described in section 1704(b)(1) of that Act against countries assisting Cuba*".[24]

For the D'Amato Act, the logic was almost the same. The Act was a response to Iran's stepped-up nuclear program and its support to terrorist organisations such as Hezbollah, Hamas, and Palestine Islamic *Jihad*. The idea behind it was the establishment of sanctions that would have curbed the strategic threat from Iran by hindering its ability to modernise its key petroleum sector, which generates about 20% of Iran's GDP, but also that of third States "supporting it".

23 U.S. Code § 6032 - *Enforcement of economic embargo of Cuba*, in United States Code, 2006 Edition, Supplement 3, Title 22 - Foreign Relations and Intercourse. Available on: https://www.law.cornell.edu/uscode/text/22/6032. (Accessed on 13/09/2016).

24 Idem.

For this purpose, sanctions adopted by the US and behind the Helms-Burton Act and D'Amato Act included:

— denial of export-import bank loans, credits, or credit guarantees for US exports to the sanctioned entity;
— denial of licenses for the US export of military or militarily-useful technology to the entity;
— prohibition on US government procurement from the entity;
— restriction on imports from the entity.

This set of sanctions targeted very strategic and sensitive sectors of industry, establishing restrictions on trade of strategic and advanced technology mainly developed in and by the US.

The EU reacted by adopting Council Regulation (EC) 2271/96 of 22 November 1996 protecting against the effects of the extra-territorial application of legislation adopted by a third country and actions based thereon or resulting therefrom.[25]

25 Council/Parliament are discussing a proposal to amend/recast the Regulation: Proposal for a Regulation of the European Parliament and of the Council protecting against the effects of the extra-territorial application of legislation adopted by a third country and actions based thereon or resulting therefrom (recast) COM/2015/048 final - 2015/0027 (COD) . (Accessed on 13/09/2016).

The objective of the EU Regulation was to protect the economic and/or financial interests of natural or legal (EU) persons against the effects of the extra-territorial application of, essentially, US legislation. Some measures adopted in this direction were:

— the protection of international trade and/or movement of capital and related commercial activities between the Union and third countries;
— the protection against any court or administrative authority decision located outside the Community giving effect, directly or indirectly, to the laws listed in the Annex of the Regulation;[26]
— open access, in particular to any person being a resident in the Union and a national of a Member State;
— obligation to inform the Commission within 30 days from the date on which it obtained information that its economic and financial interests are affected by foreign legislation;
— right to recover any damage caused by the application of the laws with extraterritorial effect;
— countermeasures to be decided by the Commission or the Council.

1.2.2.5. *Article XXI(b) action related to obligations under the United Nations Charter*

Nothing in this Agreement shall be construed to
(c) prevent any contracting party from taking any action in pursuance of ***its obligations under the United Nations Charter*** *for the maintenance of* international peace and security.

26 US legislation specified in the Annex of the Regulation includes:
- National Defence Authorization Act for Fiscal Year 1993, Title XVII 'Cuban Democracy Act 1992, sections 1704 and 1706;
- Cuban Liberty and Democratic Solidarity Act of 1996;
- Iran and Libya Sanctions Act of 1996;
- 1 CFR (Code of Federal Regulations) Ch. V (7-1-95 edition) Part 515 - Cuban Assets Control Regulations, subpart B (Prohibitions), E (Licenses, Authorizations and Statements of Licensing Policy) and G (Penalties).

This provision of Article XXI (b) refers to Chapter VII of the UN Charter, which provides the framework within which the Security Council may take enforcement action. It allows the Council to "*determine the existence of any threat to the peace, breach of the peace, or act of aggression*" and to make recommendations or to resort to non-military and military action to "*maintain or restore international peace and security*".

Chapter VII of the UN Charter is the only international instrument giving legal ground to the adoption of measures to restore peace and security. Measures adopted to this end vary; they can be, for example, of economic nature, such as the adoption of embargoes, or they can be of military nature, authorising the military intervention of a group of countries in a third State causing a threat to international peace and security.
Article 39 provides the legal ground for the determination of threat to the peace, breach of the peace, or act of aggression:

> "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security".[27]

Before the Security Council can adopt enforcement measures, it has to determine the existence of any threat to the peace, breach of the peace or act of aggression. The range of situations which the Council determined as giving rise to threats to the peace includes country-specific situations such as inter- or intra-State conflicts or internal conflicts with a regional or sub-regional dimension. Furthermore, the Council identifies potential or generic threats as threats to international peace and security, such as terrorist acts, the proliferation of weapons of mass destruction or

27 United Nations, *Charter of the United Nations*, 26 June 1945, San Francisco, Article 39. Available at: https://treaties.un.org/doc/publication/ctc/uncharter.pdf. (Accessed on 13/09/2016).

the proliferation and illicit trafficking of small arms and light weapons. Article 41 establishes measures not involving the use of armed force.

> "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations".[28]

Among the most common measures not involving the use of armed force, which the Council has at its disposal to enforce its decisions, are those measures that are known as sanctions. Sanctions can be imposed on any combination of States, groups or individuals. The range of sanctions has included comprehensive economic and trade sanctions and more targeted measures such as arms embargoes, travel bans, financial or diplomatic restrictions. Apart from sanctions, Article 41 includes measures such as the creation of international tribunals (such as those for the Former Yugoslavia and Rwanda in 1993 and 1994) or the creation of a fund to pay compensation for damage resulting from an invasion.

28 Idem.

Mandatory UN embargoes*

TARGET	ENTRY INTO FORCE	SUSPENDED	LIFTED	ESTABLISHING DOCUMENT
Afghanistan (Taliban)	19 December 2000	16 January 2002		UNSCR 1333
Angola (UNITA)	15 September 1993		9 December 2002	UNSCR 864
Central African Republic	5 December 2013			UNSCR 2127
Cote d'Ivoire	15 November 2004		28 April 2016	UNSCR 1572
DRC (NGF)	28 July 2003			UNSCR 1493
Eritrea	17 May 2000		15 May 2001	UNSCR 1298
Eritrea	23 December 2009			UNSCR 1907
Ethiopia	17 May 2000		15 May 2001	UNSCR 1298
Haiti	16 June 1993	29 September 1994	29 September 1994	UNSCR 841
Iran	23 December 2006			UNSCR 1737
Iraq (NGF since 2004)	6 August 1990			UNSCR 661
ISIL, Al-Qaeda and associated individuals and entities	16 January 2002			UNSCR 1390
Lebanon (NGF)	11 August 2006			UNSCR 1701
Liberia (NGF since 2009)	19 November 1992		26 May 2016	UNSCR 788
Libya	31 March 1992	5 April 1999	12 September 2003	UNSCR 748
Libya	26 February 2011			UNSCR 1970
North Korea (DPRK)	14 October 2006			UNSCR 1718
Rwanda (NGF since 1995)	17 May 1994		10 July 2008	UNSCR 918
Sierra Leone (NGF since 1998)	8 October 1997		29 September 2010	UNSCR 1132
Somalia	23 January 1992			UNSCR 733
South Africa	4 November 1977		25 May 1994	UNSCR 418
Southern Rhodesia (Zimbabwe)	16 December 1966		21 December 1979	UNSCR 232
Sudan (Darfur region)	30 July 2004			UNSCR 1556
Taliban	16 January 2002			UNSCR 1390
Yemen (NGF)	14 April 2015			UNSCR 2216
Yugoslavia (FRY)	25 September 1991		1 October 1996	UNSCR 2216
Yugoslavia (FRY)	31 March 1998		10 September 2001	UNSCR 1160

* Source: Sipri database, Arms embargoes. Available at: http://www.sipri.org/databases/embargoes. (Accessed on 13/09/2016).

N.B. Embargoes do not concern only weapons. An embargo can be established to control arms and related materials, equipment that might be used for internal repression, and dual-use goods and technology. They can also target certain services, such as restrictions on admission of certain individuals, freezing of funds and economic resources of certain persons who constitute a threat to the peace and national reconciliation process.

Example of weapons embargo: Sudan (UNSCR 1556 (2005) reaffirmed with UNSCR 2200 (2015))*

Acting under Chapter VII of the Charter of the United Nations, (...)

7. *Decides that all states shall take the necessary measures to prevent the sale or supply, to all non-governmental entities and individuals, (...) of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, whether or not originating in their territories;*
8. *Decides that all states shall take the necessary measures to prevent any provision to the non-governmental entities and individuals identified in paragraph 7 (...) of technical training or assistance related to the provision, manufacture, maintenance or use of the items listed in paragraph 7 above;*
9. *Decides that the measures imposed by paragraphs 7 and 8 above shall not apply to:*
   - *supplies and related technical training and assistance to monitoring, verification or peace support operations, including such operations led by regional organizations, that are authorized by the United Nations or are operating with the consent of the relevant parties.*

* United Nations, UNSC Resolution 2200(2015) of 12 February 2015. Available on: http://www.un.org/press/en/2015/sc11776.doc.htm. (Accessed on 13/09/2016).

Example of WMD-related items and technology embargo: UNSCR 1718 (2006) on People's Democratic Republic of North Korea (reaffirmed with UNSCR 2094 (2013) and UNSCR 2207 (2015))

(...)

8. Decides that:

(a) All Member States shall prevent the direct or indirect supply, sale or transfer to the DPRK, through their territories or by their nationals, or using their flag vessels or aircraft, and whether or not originating in their territories, of:

(ii) All items, materials, equipment, goods and technology as set out in the lists in documents S/2006/814 (NSG trigger and dual-use lists) and S/2006/815 (MTCR list), unless within 14 days of adoption of this resolution the Committee has amended or completed their provisions also taking into account the list in document S/2006/816 (Australia Group list), as well as other items, materials, equipment, goods and technology, determined by Security Council or the Committee, which could contribute to DPRK's nuclear-related, ballistic missile-related or other weapons of mass destruction-related programmes.

* United Nations, UNSC Resolution 2207(2015) of 22 December 2015. Available on: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2207.pdf. (Accessed on 13/09/2016).

Part

2.

Free trade exceptions organised by other international legally and politically binding instruments

Part II will explore free trade exceptions organised by other international legally and politically binding instruments, covering the following categories of items:

- **Conventional Weapons;**
- **Weapons of mass destruction (WMD - including nuclear, chemical and biological weapons) and Dual-Use Items;**
- **Conflict Minerals;**
- **Diamonds;**
- **Cultural Goods.**

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Part 2. CONTENT

TABLE OF BOXES

1. Conventional Weapons

Conventional weapons are usually defined by exclusion: this category includes all kinds of weapons that are not weapons of mass destruction (WMD).
Conventional weapons are usually divided between major weapons and small weapons, but the borderline between the two sub-categories might differ according to the instrument considered.

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

1. Battle tanks (direct fire, main gun at least of 75 millimetres calibre);
2. Armoured combat vehicles;
3. Large calibre artillery systems;
4. Combat aircraft;
5. Attack helicopters;
6. Warships (torpedoes and missiles with a range of 25 km);
7. Missiles and missile launchers (missiles with a range of 25 km).

Small weapons are all kinds of weapons with a calibre under 100 mm. They are usually divided into two categories:

1. Small arms, which are weapons designed for personal use;
2. Light weapons, which are designed to be used by several persons serving as a crew.

The UN Register on Conventional Arms does not define small arms and light weapons; it only lists sub-categories of each.
Small arms include revolvers and self-loading pistols, rifles, sub-machine guns, assault rifles and light machine-guns.
Light weapons include heavy machine-guns, mortars, hand grenades, grenade launchers, portable anti-aircraft and anti-tank guns and portable missile launchers.
However, the International Small Arms Control Standards (ISACS), developed by the United Nations in collaboration with other

international partners[1], provides a glossary of terms, definitions and abbreviations. The ISACS glossary defines small arm as: "*Any man-portable lethal weapon designed for individual use that expels or launches, is designed to expel or launch, or may be readily converted to expel or launch a shot, bullet or projectile by the action of an explosive*". Two notes add that small arms include "*inter alia, revolvers and self-loading pistols, rifles and carbines, sub-machine guns, assault rifles and light machine guns, as well as their parts, components and ammunition*" and "*excludes antique small arms and their replicas*".[2]

> The ISACS glossary defines light weapons as follows: "Any man-portable lethal weapon designed for use by two or three persons serving as a crew (although some may be carried and used by a single person) that expels or launches, is designed to expel or launch, or may be readily converted to expel or launch a shot, bullet or projectile by the action of an explosive", adding that the category "includes, inter alia, heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-aircraft guns, portable anti-tank guns, recoilless rifles, portable launchers of anti- tank missile and rocket systems, portable launchers of anti-aircraft missile systems, and mortars of a calibre of less than 100 millimetres, as well as their parts, components and ammunition".[3]

Small arms and light weapons are also defined in the UN General Assembly resolution A/52/298 of 27 August 1997, where the *Report of the Panel of Governmental Experts on Small Arms,* in paras 24-26, defines them as follows: "*The small arms and light weapons which are of main concern for the purposes of the present report are those which are*

1 International Small Arms Control Standards (ISACS), *About ISACS*. Available on: http://www.smallarmsstandards.org/about-isacs.html. (Accessed on 13/09/2016).

2 International Small Arms Control Standards, *Glossary of terms, definitions and abbreviations* (ISACS 01.20, Version 1.2 of 30/06/2015). Available on: http://www.smallarmsstandards.org/isacs/0120-en.pdf. (Accessed on 13/09/2016).

3 Idem.

manufactured to military specifications for use as lethal instruments of war".[4]

Small arms and light weapons are used by all armed forces, including internal security forces, for, *inter alia*, self-protection or self-defence, close- or short-range combat, direct or indirect fire, and against tanks or aircraft at relatively short distances.
Broadly speaking, small arms are those weapons designed for personal use, and light weapons are those designed for use by several persons serving as a crew.[5]
Based on this broad definition and on an assessment of weapons actually in conflicts being dealt with by the United Nations, the weapons addressed in the present report are categorised as follows:
— Small arms
— Revolvers and self-loading pistols;
— Rifles and carbines;
— Sub -machine guns;
— Assault rifles;
— Light machine guns.
— Light weapons
— Heavy machine guns;
— Hand-held under-barrel and mounted grenade launchers;
— Portable anti-aircraft guns;
— Portable anti-tank gun;
— Recoilless rifles;
— Portable launchers of anti-tank missile and rocket systems;
— Portable launchers of anti-aircraft missile systems;
— Mortars of calibres of less than 100mm".[6]

The UN resolution A/52/298 adds that, although small arms and light weapons are designed for use by armed forces, they are also of particular

4 United Nations, UN General Assembly Resolution A/52/298 of 27 August 1997, para 24. Available on: (Accessed on 13/09/2016).

5 Ibid., para. 25.

6 Ibid., para 26.

advantage for irregular warfare or terrorist and criminal action because of a series of characteristics.[7] Especially, small weapons are portable by an individual or could be dismantled and carried by a small group. They require almost no maintenance; they can essentially last forever and can be easily hidden.
The illegitimate global trade in small arms is valued approximately around US$ 1 billion.[8]

To better understand the meaning of "illicit trade", a 1996 UN report dealing with conventional arms transfers, states that "*illicit arms trafficking is understood to cover that international trade in conventional arms which is contrary to the laws of States and/or international law*".[9] However, the term "illicit transfers" includes two overlapping categories: the grey market and the black market.

Grey market transfers are usually covert, conducted by governments, government-sponsored brokers, or other entities, that exploit loopholes or intentionally circumvent national and/or international law or policies. Grey market transfers include sales to recipient countries that have no identifiable legal government or authority (e.g. Somalia) and transfers by governments to non-State actors (i.e. rebel and insurgent groups). Besides, there are cases where governments illegally hire brokers to transfer weapons. Such transfers may be in violation of the supplier and/or recipient country's national laws or policies. They may also contravene international law.

Black market is also part of the overall illicit trade spectrum, but, contrary to the grey market, it operates beyond the scope of the

7 Ibid., paras 27-28.

8 Geopolitical Monitor, *The Illicit Trade of Small Arms*, posted on 19 January 2011. Available on: http://www.geopoliticalmonitor.com/the-illicit-trade-of-small-arms-4273/. (Accessed on 13/09/2016).

9 United Nations, *The UN General Assembly Guidelines on International Arms Transfers were an outcome of the UN Disarmament Commission's 1996 substantive session from April 22 – May 7, 1996*. Available on: http://www.cfr.org/arms-industries-and-trade/unga-guidelines-international-arms-transfers/p28082. (Accessed on 13/09/2016).

law and governments. This type of illegal arms "trafficking" takes place in clear violation of national and/or international laws and policies, and without the government's official knowledge, consent, or control. However, since substantial illegal small arms transfers could scarcely occur without some degree of government awareness, it is probable that the black market is just a small portion of a larger illicit market, both in terms of its value and the volume of transfers.[10]

The most relevant instruments, at the international level, organising the trade of conventional weapons are the following documents:
— UN Register of Conventional Arms;
— Guidelines for international arms transfers in the context of General Assembly resolution 46/36 H of 6 December 1991;
— Convention against Transnational Organized Crime;
— Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects;
— Arms Trade Treaty.

A short analysis of each of those instruments is provided in the following pages.

10 Small Arms Survey Yearbook 2001, Crime, Conflict, Corruption: *Global Illicit Small Arms Transfer*, pp. 165-166. Available on: http://www.smallarmssurvey.org/fileadmin/docs/A-Yearbook/2001/en/Small-Arms-Survey-2001-Chapter-05-EN.pdf. (Accessed on 13/09/2016).

1.1. UN Register of Conventional Arms (UNROCA)

The UN Register was created to discourage the excessive and destabilising accumulation of arms by making the quantity and type of arms transferred by States more transparent. It was widely believed that transparency could contribute to confidence-building among States by reducing the risk of misperceptions and miscalculations about the intention of States, which would likely arise in a non-transparent environment.

The Register's ability to achieve its declared aim depends on its coverage of conventional arms, the data it is able to obtain, and States' participation and will to provide information.

The Register primarily compiles transfers of the above-listed seven categories of equipment that do not, for the most part, include combat-support systems.

The General Assembly established the Register in 1991, as the outcome of an extended debate within the United Nations on conventional arms and transparency of arms transfers. The consensus, in the early 1990s, was that the Register should focus on the transfer of conventional arms that could play a significant role in offensive military operations carried out across international borders.[11]

Each year, all UN Member States are requested, on a voluntary basis, to provide UNROCA with information on the previous year's exports and imports of the seven categories of arms:

— Battle tanks;
— Armoured combat vehicles;
— Large-calibre artillery systems;
— Combat aircraft;

11 United Nations, United Nations Office for Disarmament Affairs, *UNODA Occasional Papers No. 16 April 2009, Assessing the United Nations Register of Conventional Arms*, 2009. Available on: https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/HomePage/ODAPublications/OccasionalPapers/PDF/OP16.pdf. (Accessed on 13/09/2016).

— Attack helicopters;
— Warships;
— Missiles or missile launchers.

> Each category is precisely defined, as illustrated in the following example:
> "Battle tanks (direct fire main gun at least of 75 millimetres calibre): A Tracked or wheeled or self-propelled armoury fighting vehicles, with high cross-country mobility and high level of self protection, weighting at least 16,5 metric tonnes unladen weight; with a high-muzzle-velocity direct-fire main gun of a calibre of at least 75 millimetres".[12]

States are also invited to submit information on their holdings and procurement from domestic production of major conventional weapons and, since 2006, on their imports and exports of small arms and light weapons, such as:
— Revolvers and self-loading pistols;
— Rifles and carbines;
— Sub-machine guns;
— Assault rifles;
— Light machine guns;
— Heavy machine guns;
— Hand-held under-barrel and mounted grenade launchers;
— Portable anti-tank guns;
— Recoilless rifles;
— Portable anti-tank missile launchers and rocket systems;
— Mortars of calibres less than 75 mm.

However, not all countries report every year. By 22 July 2015, the date of the annual report, only 35 out of 193 States had submitted their report.

12 For the definition of each category of conventional arms contained in the UN Register, please see: *UN Register of Conventional Arms*, The Global Reported Arms Trade, 1991. Available at: http://www.un-register.org/Background/Index.aspx. (Accessed on 13/09/2016).

Moreover, national interpretation may differ on how weapons are categorised. Another difference is the way of reporting: some countries report on the contract signing date, while others report on the transfer date, which leads to reporting in different years. In addition to continuingly low levels of participation, many of the submissions, including those of several of the most important exporters and importers, show major flaws. Cross-checks on imports and exports reported in submissions suggest that some States' submissions are incomplete or simply wrong. In other cases, States choose to report obviously redundant information or to report in a confusing manner.[13]

1.2. The Arms Trade Treaty (ATT)

The Arms Trade Treaty was opened for signature on 3 June 2013, in New York. It entered into force on 24 December 2014, following the date of the deposit of the fiftieth instrument of ratification.
Up to date, the ATT counts 130 Signatory States and 87 States Parties.[14]
The deadline for the first annual report has been established on 31 May 2016.
The objective of the ATT is to regulate the international trade in conventional weapons (large, small and light weapons) and work to prevent the diversion/illicit trade of arms, ammunition, parts and components. It seeks to establish common standards for regulating or improving the regulation of the international trade in conventional arms.
The content of the Treaty might seem quite weak, but it is the very first international treaty regulating conventional weapons' transfers.
The trade operations (transfers) controlled by the ATT are:
— Export;
— Import;
— Transit;
— Trans-shipment;
— Brokering.

13 Ibid.

14 For updates on the status of the ATT, please see: http://disarmament.un.org/treaties/t/att. (Accessed on 13/09/2016).

However, although the Treaty covers these operations, they are not defined. The Treaty does not establish either a committee to coordinate the implementation of the provisions it contains. States Parties are in charge of "*taking appropriate measures to regulate*". This formulation means that is up to States to evaluate and decide the kind of measures that should be enforced to control listed operations of conventional arms.

> For instance, Article 9 considers transit as follows:
> Transit or trans-shipment
> "Each State Party shall take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms covered under Article 2 (1) through its territory in accordance with relevant international law".[15]

As it emerges from Article 9, the terms transit and trans-shipment are not precisely defined, neither in this article nor elsewhere. It seems that the Treaty considers transit and trans-shipment operations as synonyms. However, in the common understanding, the difference between transit and trans-shipment is that in a transit operation, items are only passing through the territory of a country other than the country of destination. Moreover, there is no change of the mean of transportation, whereas, in a trans-shipment operation, the goods are stopped in a country other than the country of destination, to change the mean of transportation: (e.g. from a ship to a train, or from a plane to a truck or train).

Article 2 establishes the scope of application, which concerns the following categories of conventional weapons:
— Battle tanks;
— Armoured combat vehicles;
— Large-calibre artillery systems;
— Combat aircraft;

15 United Nations Office for Disarmament (UNODA), *Arms Trade Treaty*, 2014, Article 9. Available on:https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/2013/06/English7.pdf. (Accessed on 13/09/2016).

— Attack helicopters;
— Warships;
— Missiles and missile launchers; and
— Small arms and light weapons.

This list clearly recalls the list of the UN Register of Conventional Arms. States Parties have to "*establish and maintain a national control system, including a national control list, in order to implement the provisions of this Treaty*".[16]
In other words, the Treaty only "suggests" categories of conventional weapons to be controlled by States. However, national lists could *not cover less than the descriptions used in the United Nations Register of Conventional Arms.*[17]
The risk that differences among States Parties occur in the content of their national list of conventional weapons could not be excluded. States could adopt a more comprehensive list of items than others. To further reduce the risk of discrepancies between national lists, some groups of States could adopt a regional control list. It is the case for the EU, which had drafted a common military list even before the ATT.

Although the Treaty does not establish a verification committee in charge of controlling the implementation of the Treaty by States Parties, it introduces a "peer" review mechanism.

16 Ibid., Article 5.

17 Idem.

Article 5

"3. Each State Party is encouraged to apply the provisions of this Treaty to the broadest range of conventional arms (...).

4. Each State Party...shall provide its national control list to the Secretariat, which shall make it available to other States Parties. States Parties are encouraged to make their control lists publicly available".[18]

Article 13

"1. Each State Party shall, within the first year after entry into force of this Treaty for that State Party (...) provide an initial report to the Secretariat of measures undertaken in order to implement this Treaty, including national laws, national control lists and other regulations and administrative measures. Each State Party shall report to the Secretariat on any new measures undertaken in order to implement this Treaty, when appropriate. Reports shall be made available, and distributed to States Parties by the Secretariat.
(...)

3. Each State Party shall submit annually to the Secretariat ... a report for the preceding calendar year concerning authorized or actual exports and imports of conventional arms covered (...)
Reports shall be made available, and distributed to States Parties by the Secretariat. (...)
Reports may exclude commercially sensitive or national security information". [19]

18 Idem.

19 Ibid., Article 13.

These provisions create a sort of "peer pressure mechanism" to ensure, in the first place, that each State will not cover less than the descriptions used in the United Nations Register of Conventional Arms (Article 5). Through the reports made available to all States Parties (Article 13), they grant the possibility to States Parties to control each other.

Summary of ATT reports

Type	Initial report	Annual report	Preventing diversion report
Frequency	Once. Thereafter, only when new measures are taken, as appropriate	Annual	As appropriate
Deadline	Within one year of entry- into-force of the Treaty for that State Party	31 May every year	When deemed appropriate
Main contents	National laws, national control list. other regulations and administrative measures national points of contact	Information on authorized or actual exports and imports of weapons within the scope of the ATT	Measures proven effective in addressing the diversion of transferred conventional arms
Submit to	ATT Secretariat	ATT Secretariat	States Parties (through ATT Secretariat)
Distribution	Report shall be made available, and distributed to the States Parties by the Secretariat	Report shall be made available, and distributed to the States Parties by the Secretariat	Report shall be made available, and distributed to the States Parties by the Secretariat.

* Source: UNODA, *ATT Implementation Toolkit, Module 3, Reporting Requirements*, p. 9. Available on: https://s3.amazonaws.com/unoda-web/wp-content/uploads/2013/06/2015-12-22-module-3-Reporting.Rev1_.pdf. (Accessed on 13/09/2016).

The Treaty includes a *prohibition principle*, which prohibits export, import, transit, trans-shipment and brokering in the following cases:

— if there is violation of international obligations under measures adopted by the UN Security Council acting under Chapter VII of the Charter of the UN, in particular, arms embargos;[20]
— if there is violation of international obligations under international agreements;[21]
— if there is knowledge that the arms or items (meaning ammunition/munitions and parts and components) would be used in the commission of genocide, crimes against humanity.

Unlike the first two cases, the last case appears to be more like a criterion than a condition of supply. The risk that arms and items might contribute to genocide has to be carefully assessed by State authority, on the basis of their understanding of the situation, leaving it a certain margin of manoeuvre.

The ATT scope is broader than conventional weapons as defined by Article 2. The Treaty also intends to cover ammunition/munitions fired, launched or delivered by the conventional arms covered under Article 2(1) and parts and components where the export is in a form that provides the capability to assemble the conventional arms, covered by Article 2.
However, all items are not necessarily submitted to all types of authorisation. Exports of ammunition/munitions, parts and components have to be controlled but not necessarily their import, brokering or transit, trans-shipment.

20 There is no formal/legal need to restate the compliance with measures adopted by the UN Security Council acting under Chapter VII of the UN Charter, since these measures are legally binding for all UN Member States. However, the ATT restates this principle for political reasons, in order to strengthen the system.

21 The same political logic applies for this provision.

Article 7 establishes the *export principle*, which states that, in assessing if the export can be authorised, the exporting State shall consider the risk that the weapons might potentially:
— contribute to or undermine peace and security;
— be used to commit or facilitate a serious violation of international humanitarian law, or related to terrorism, etc.;
— be used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.

Concerning other operations, the ATT does not establish any common criteria or conditions to authorise import, transit and brokering operations. For these operations, only a requirement to control exists, as in the following case on brokering.

> Example: Article 10 Brokering
> "Each State Party shall take measures, pursuant to its national laws, to regulate brokering taking place under its jurisdiction for conventional arms covered under Article 2 (1). Such measures may include requiring brokers to register or obtain written authorization before engaging in brokering".[22]

As it emerges from the text, each State has to control brokering activities related to conventional weapons. The form of control may differ from State to State, going from a notification of brokering activity to the necessity for the broker to be registered to apply for a brokering authorisation for a dedicated operation.

Altogether, although the ATT includes all trade operations, not all operations are submitted to the same degree of control. Export control is more regulated and binding for all States Parties, while controls on other operations is up to States. This States' discretional power makes the harmonisation process more difficult to achieve and globally weakens the arms control system. However, it is worth remembering that it is

22 Ibid., Article 10.

the very first international attempt to regulate arms trade and establish common standards.

1.3. Protocol Against the Illicit Manufacturing of And Trafficking in Firearms, their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organised Crime (Firearms Protocol, May 2001)

The Firearms Protocol was adopted by UN Resolution 55/255 of 31 May 2001 at the fifty-fifth session of the General Assembly of the United Nations, and it entered into force on 3 July 2005.

The Firearms Protocol supplementing the United Nations Convention against Transnational Organised Crime (Organised Crime Convention) provides a framework for States to control and regulate licit arms and arms flows, prevent their diversion into the illegal circuit and facilitate the investigation and prosecution of related offences without hampering legitimate transfers. The Firearms Protocol aims at promoting and strengthening international cooperation and developing cohesive mechanisms to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.

By ratifying or acceding to the Firearms Protocol, States make a commitment to adopt and implement a series of crime-control measures that aim at:

— establishing as criminal offence the illicit manufacturing of and trafficking in firearms and their components;
— adopting effective control and security measures, including the disposal of firearms, to prevent their theft and diversion into the illicit circuit;

— establishing a system of government authorisations or licensing intending to ensure legitimate manufacturing of, and trafficking in, firearms;
— ensuring adequate marking, recording and tracing of firearms and efficient international cooperation for this purpose.

Specific measures include:
— the confiscation, seizure and destruction of firearms illicitly manufactured or trafficked;
— the maintenance of records for at least 10 years in order to identify and trace firearms;
— the issuance of licences for the import and export of firearms and transit authorisation prior to their actual transfers; and
— the marking of firearms permitting identification of the manufacturer of the firearm and the country and year of import.

Parties undertake to cooperate extensively at the bilateral, regional and international levels in order to achieve the Firearms Protocol's objectives including providing training and technical assistance to other Parties. Finally, Parties undertake to exchange relevant case-specific information on matters such as authorised producers, dealers, importers, exporters and carriers of firearms as well as information on organised criminal groups known to take part in the illicit manufacture and trafficking of such items.

The leading logic of the Firearms Protocol is to trace back firearms. For this purpose, the two key measures of the Protocol are the marking of firearms (Article 8) and the maintenance of record-keeping (Article 7).

Article 8 Marking of firearms
"1. For the purpose of identifying and tracing each firearm, States Parties shall:
(a) At the time of manufacture of each firearm, either require unique marking providing the name of the manufacturer, the country or place of manufacture and the serial number, or maintain any alternative unique user- friendly marking

with simple geometric symbols in combination with a numeric and/or alphanumeric code, permitting ready identification by all States of the country of manufacture;

(b) Require appropriate simple marking on each imported firearm, permitting identification of the country of import and, where possible, the year of import and enabling the competent authorities of that country to trace the firearm, and a unique marking, if the firearm does not bear such a marking. The requirements of this subparagraph need not be applied to temporary imports of firearms for verifiable lawful purposes;

(c) Ensure, at the time of transfer of a firearm from government stocks to permanent civilian use, the appropriate unique marking permitting identification by all States Parties of the transferring country.

2. States Parties shall encourage the firearms manufacturing industry to develop measures against the removal or alteration of markings".[23]

The Protocol requires States Parties to ensure appropriate markings at:
— manufacture, where the marking must uniquely identify each weapon in conjunction with other characteristics, such as make, model, type and calibre, allow anyone to determine the country of origin and permit country of origin's experts to identify the individual firearm;
— importation, where the content of such markings must enable later identification of the country of importation and, where possible, the year of importation;
— transfer from government stocks to permanent civilian use, where firearms must meet the same basic marking requirements of unique identification. If not already marked sufficiently to permit the

23 United Nations Office for Drugs and Crime (UNODC), *Protocol Against the Illicit Manufacturing of And Trafficking in Firearms, their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime*, Article 8, New York, 31 May 2001. Available on: http://www.unodc.org/unodc/en/firearms-protocol/firearmsprotocol.html. (Accessed on 13/06/2016).

identification of the transferring country by all States, the firearms must be so marked at the time of transfer.

The problem, however, arises especially for old weapons lacking a proper marking system and still in circulation, and for munitions for which there is not any requirement of marking.

Article 7 Record-keeping

"Each State Party shall ensure the maintenance, for not less than ten years, of information in relation to firearms and, where appropriate and feasible, their parts and components and ammunition that is necessary to trace and identify those firearms and, where appropriate and feasible, their parts and components and ammunition which are illicitly manufactured or trafficked and to prevent and detect such activities. Such information shall include:

(a) The appropriate markings required by article 8 of this Protocol;

(b) In cases involving international transactions in firearms, their parts and components and ammunition, the issuance and expiration dates of the appropriate licences or authorizations, the country of export, the country of import, the transit countries, where appropriate, and the final recipient and the description and quantity of the articles".[24]

While information related to firearms shall be kept for minimum 10 years, records for parts and components and ammunition are not mandatory and apply "*where appropriate and feasible*".

However, it may not be sufficient to uniquely identify a firearm in a record, as firearms of different types (e.g. a rifle and a handgun) made by the same manufacturer may carry the same serial number.

24 Ibid., Article 7.

From the control to the prohibition of certain categories of conventional weapons

The conventional weapons' mechanisms so far analysed seek to establish a control mechanism, in which trade prohibition is provided but under particular and listed circumstances.
Some other instruments, at the international level, completely prohibit the trade of some conventional weapons and, in some cases, also their production. The reason behind this total prohibition lies in side effects of these categories of conventional weapons on civilians. The prohibited categories of conventional weapons are: non-detectable fragments, landmines, booby-traps and other devices, incendiary weapons, blinding lasers and explosive remnants of war.

1.4. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (Geneva Convention of 10 October 1980)

The Convention and its annexed Protocols were adopted by the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed Excessively Injurious or to Have Indiscriminate Effects, held in Geneva from 10 to 28 September 1979 and from 15 September to 10 October 1980. The Conference was convened pursuant to General Assembly resolutions 32/152 of 19 December 1977 and 33/70 of 14 December 1978.
Up to date, the Convention counts 50 Signatory States and 121 States Parties.[25]

25 For updates on the status of the Convention, please see: http://legal.un.org/avl/ha/cprccc/cprccc.html. (Accessed on 13/09/2016).

The Convention is not prohibiting the use of specific weapons; it is an umbrella agreement that includes the different Protocols. Provisions on the prohibition or restrictions on the use of certain weapons are the object of the Protocols annexed to the Convention. According to the Convention, only States which express their consent to be bound, by at least two of these Protocols at the time of deposition of its instrument of ratification, acceptance or approval, or of accession (Article 4, paragraph 3 of the Convention) may be bound by the Convention. The Convention was open for signature by all States at the New York headquarters of the United Nations for a 12-month period beginning on 10 April 1981.

The Convention contains five Protocols:
— Protocol I concerns non-detectable fragments (1980)
— Protocol II on mines, booby traps and other devices (1980 amended 1996)
— Protocol III on incendiary weapons (1980)
— Protocol IV on blinding laser weapons (2003)
— Protocol V on explosive remnants of war (1995)

As an example of the Protocols' content, Protocol II is briefly presented below.

1.4.1. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, amended on 3 May 1996 (Protocol II to the 1980 CCW Convention as amended on 3 May 1996)

The scope of application of Protocol II is defined in Article 1, which limits the use of mines to some circumstances. On the contrary, Article 6 prohibits the use of booby-traps and other devices in all circumstances.

Article 1
"1. This Protocol relates to the use on land of the mines, booby-traps and other devices, defined herein, including mines laid to interdict beaches, waterway crossings or river crossings,

but does not apply to the use of anti-ship mines at sea or in inland waterways (...)".[26]

Article 6
"Without prejudice to the rules of international law applicable in armed conflict relating to treachery and perfidy, it is prohibited in all circumstances to use booby-traps and other devices. (...)".[27]

The Protocol also contains some provisions on trade controls which prohibit the transfer of items, the use of which is prohibited under this Protocol, and limit the trade of authorised items between States which are bound by the Protocol.

Article 8
"1. In order to promote the purposes of this Protocol, each High Contracting Party:
(a) undertakes not to transfer any mine the use of which is prohibited by this Protocol;
(b) undertakes not to transfer any mine to any recipient other than a State or a State agency authorized to receive such transfers;
(c) undertakes to exercise restraint in the transfer of any mine the use of which is restricted by this Protocol. In particular, each High Contracting Party undertakes not to transfer any anti-personnel mines to States which are not bound by this Protocol, unless the recipient State agrees to apply this Protocol; (...)".[28]

26 *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices*, amended *on 3 May 1996* (*Protocol II to the 1980 CCW Convention as amended on 3 May 1996*), Article 1, Geneva, 3 May 1996. Available on: http://www.unog.ch/80256EDD006B8954/(httpAssets)/7607D6493EAC5819C12571DE005BA57D/$file/PROTOCOL+II.pdf. (Accessed on 13/09/2016).

27 Ibid., Article 6.

28 Ibid., Article 8.

The Protocol, lacking a proper verification system, establishes report requirements on a series of listed elements, such as mine clearance and rehabilitation programmes (in case a country has mine fields to get rid of), the national legislation, etc.

> Article 13
> "4. The High Contracting Parties shall provide annual reports to the Depositary, who shall circulate them to all High Contracting Parties in advance of the Conference, on any of the following matters:
> (...)
> (b) mine clearance and rehabilitation programmes; (...)
> (d) legislation related to this Protocol;
> (e) measures taken on international technical information exchange, on international cooperation on mine clearance, and on technical cooperation and assistance; and
> (f) other relevant matters. (...)".[29]

As far as compliance is concerned, the Protocol only contains general principles. Their implementation is left to Contracting Parties. Article 14 engages Contracting Parties in adopting measures for the proper implementation of the Protocol and establishing sanctions for violations of its provisions. In particular, the Protocol calls on Contracting States to impose penal sanctions for any act that, violating the provisions of the Protocol, causes serious injury to civilians. The same article establishes a sort of internal problem-solving mechanism, engaging States in cooperating with each other and resolving any problem that may arise through bilateral cooperation and through the Secretary-General of the United Nations or other appropriate international procedures.

29 Ibid., Article 13.

Article 14

"1. Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction or control.

2. The measures envisaged in paragraph I of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, wilfully kill or cause serious injury to civilians and to bring such persons to justice (...).
(...)

4. The High Contracting Parties undertake to consult each other and to cooperate with each other bilaterally, through the Secretary-General of the United Nations or through other appropriate international procedures, to resolve any problems that may arise with regard to the interpretation and application of the provisions of this Protocol".[30]

The Convention is "completed" by two other instruments, which seek to go a step further:

— Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention);
— Convention on Cluster Munitions - CCM (Oslo Convention).

30 Ibid., Article 14.

1.5. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention)

The Convention was concluded by the Diplomatic Conference on an International Total Ban on Anti-Personnel Land Mines, in Oslo, on 18 September 1997. In accordance with its article 15, the Convention was opened for signature in Ottawa, Canada, by all States from 3 December 1997 and entered into force on 1 March 2009.
The Convention was the result of the "Ottawa Process", a freestanding process of treaty negotiation outside a United Nations-facilitated forum with the aim of outlawing anti-personnel mines. The process was so called because it was launched in Ottawa, by the Minister of Foreign Affairs of Canada, in October 1996.
Up to date, the Convention counts 133 signatory States and 162 States Parties.[31]
Among the States which are not Parties to the Ottawa Convention are: China, Egypt, India, Israel, Pakistan, Russia and the United States.
The Anti-Personnel Mine Ban Convention aims to put an end to the suffering and casualties caused by anti-personnel mines.

By ratifying the Convention, States Parties engaged themselves not to use, develop or produce, or transfer to anyone, directly or indirectly anti-personnel landmines. They also commit to destroying existing stockpiles. All anti-personnel landmines shall be destroyed within four years from the Treaty ratification (ten years for the destruction of minefields). However, the Convention was drafted to take into account the fact that some States might not be able to comply with the 10-year deadline, for example, because of the level of contamination or due available capacity and resources. For this reason, it is possible for a State Party to apply for an extension period of up to 10 years at a time.

31 For updates on the status of the Convention, please see: http://legal.un.org/avl/ha/cpusptam/cpusptam.html. (Accessed on 13/09/2016).

In fulfilling their obligations, States Parties in need may request assistance, and States Parties "*in a position to do so*" are to provide assistance (Article 6). A variety of mechanisms exists or have been established, to support these cooperation and assistance provisions.

The Convention defines a mine as "*a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle*". An anti-personnel mine is in turn defined as a "*mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons*". The definition of an anti-personnel mine is, though, qualified by the provision that "*mines designed to be detonated by the presence, proximity or contact of a vehicle, as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped*" (Article 2).

A State must destroy all anti-personnel mine stockpiles it owns or possesses or that are under its jurisdiction or control "*as soon as possible but not later than four years*" after it becomes a Party to the Anti-Personnel Mine Ban Convention (Article 4).
The term "jurisdiction" typically covers the whole sovereign territory of a State Party (even where the stockpiles may belong to another State). The term "control" may apply extra-territorially, for instance, if a State Party occupies territory belonging to another State and gains control of stockpiles of anti-personnel mines in the process. States Parties may retain and transfer some anti-personnel mines - "*the minimum number absolutely necessary*"- for the specific purposes of "*the development of and training in mine detection, mine clearance, or mine destruction techniques*". It is also permitted to transfer anti-personnel mines for the purpose of their destruction (Article 3).

States are asked to submit an initial report (Article 7) indicating the following elements:
— national implementation measures;
— total of all stockpiled anti-personnel mines owned or possessed;

— location of mined areas that contain or are suspected to contain anti-personnel mines;
— types, quantities and lot numbers of all anti-personnel mines retained or transferred for the development of and training in mine detection, mine clearance or mine destruction techniques, or transferred for of destruction. Institutions authorised by a State Party to retain or transfer anti-personnel mines must also be named.

States Parties are also required to submit an annual report to the Secretary General of the United Nations. The UN Secretary-General will then transmit the reports to all States Parties.

The annual report shall contain the following elements:
— the status of programs for the conversion or decommissioning of anti-personnel mine production facilities;
— the status of programs for the destruction of anti-personnel mines;
— the types and quantities of all anti-personnel mines destroyed after the entry into force of this Convention for that State Party.

Concerning implementation and verification, the Convention does establish a verification body or committee, but it includes some mechanisms involving UN organisation that could be seen as efficient to counter any attempt to oppose Convention principles.
Those mechanisms are based on the agreement of States Parties to consult and cooperate with each other regarding the implementation of the provisions of the Convention and to clarify, through the Secretary-General of the United Nations, any problem that might arise from the implementation of the Convention.

In case a problem arises, a State Party or a group of States may submit, via the UN Secretary-General, a request for clarification to another State Party. The State Party that receives the request for clarification shall provide to the requesting States all information which would assist in clarifying this matter. This shall be done within 28 days and through the Secretary General of the United Nations. If there is no answer or it is unsatisfactory, the requesting State(s) may submit the matter to the

UN Secretary General and ask for the convening of a special meeting (where the decision is taken by consensus and, if impossible to reach, by majority). A fact-finding mission may also be authorised in the State Party that received the request for clarification, but only with the "good will" of this State Party.

1.6. Convention on Cluster Munitions - CCM (Oslo Convention)

The Convention on Cluster Munitions (CCM) is an international treaty that addresses the humanitarian consequences and unacceptable harm to civilians caused by cluster munitions, through a categorical prohibition and a framework for action.
The Convention prohibits all use, production, transfer and stockpiling of cluster munitions. In addition, it establishes a framework for cooperation and assistance to ensure adequate care and rehabilitation to survivors and their communities, clearance of contaminated areas, risk reduction education and destruction of stockpiles.

Adopted on 30 May 2008, in Dublin (Ireland) and signed on 3-4 December 2008 in Oslo (Norway) the Convention on Cluster Munitions entered into force on 1 August 2010.
As of 1st October 2015, a total of 118 States has joined the Convention, which counts 98 States Parties and 20 Signatories.[32]
The Oslo Convention has similar structure and control mechanisms as the Ottawa Convention.

32 For updates on the status of the Convention, please see: http://www.clusterconvention.org/the-convention/convention-status/. (Accessed on 13/09/2016).

1.7. The Wassenaar Arrangement (WA): a Politically Binding Instrument

The Wassenaar Arrangement was established after the dissolution of the Coordinating Committee for Multilateral Export Controls (COCOM). COCOM was founded in 1949, in the context of the Cold War, under the impulse of the United States. It was the first export control regime created with the intention to restrict trade between two groups of countries: the NATO countries and the countries of the Warsaw Pact. In particular, the COCOM aimed at preventing the export of high technology goods, such as nuclear items, conventional arms and dual-use goods, from NATO countries to the Warsaw Pact countries.[33]

At the end of the Cold War and due to the participation of many countries from the East (the Russian Federation, the Czech Republic, Hungary, Poland, the Slovak Republic, Romania) to different export control regimes, the COCOM objectives were seen as outdated. However, Participating States considered that it should not be dismantled as long as it could constitute an interesting discussion trade control forum for countries which were adversaries in the past. It was therefore replaced by the Wassenaar Arrangement in 1994.
The WA seeks to contribute to regional and international security and stability by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilising accumulations as well as the acquisition of these items by terrorists.[34]

The objective of the WA is to complement and reinforce existing international agreements on trade controls on conventional weapons (ATT) and weapons of mass destruction (WMD) agreements (e.g. the Non-proliferation Treaty - NPT).

33 Q., Michel, S., Paile, M., Tsukanova, A., Viski, *Controlling the Trade of Dual-Use Goods: A Handbook*, P.I.E. Peter Lang, Non-Proliferation and Security No. 9, Brussels, 2013, p. 48.

34 Wassenaar Arrangement. Available at: http://www.wassenaar.org. (Accessed on 13/09/2016).

The provision of lists of items to control is a way to practically support Participating States[35] implementing international treaties on these matters. For example, the Arms Trade Treaty does not have a list of conventional weapons to control. It thus refers to the categories of the UN Register of Conventional Arms. The WA also proposes to Participating States guidelines[36] for a proper implementation of trade controls on conventional weapons and dual-use goods and technologies. In fact, the WA provides its Participating States two lists of items to control: 1) *Dual-use goods and technologies control list*, and 2) *Munitions list* (listing not only munitions but also weapons).[37]

Lists and documents are periodically reviewed to take into account technological developments and experiences gained. E.g. Public Statement by the Wassenaar Arrangement on the Arms Trade Treaty: "*The Wassenaar Arrangement has developed measures and guidelines to help states effectively implement export controls in conventional arms,*

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

36 Best practices documents supplied by the Wassenaar Arrangement and publicly available on the website are:
- Elements for Objective Analysis and Advice concerning Potentially Destabilising Accumulations of Conventional Weapons;
- Best Practice Guidelines for Exports of Small Arms and Light Weapons (SALW);
- Elements for Export Controls of Man-Portable Air Defence Systems (MANPADS);
- Elements for Effective Legislation on Arms Brokering;
- Statement of Understanding on Control of Non-Listed Dual-Use Items;
- Best Practices for Implementing Intangible Transfer of Technology Controls;
- Best Practices to Prevent Destabilising Transfers of Small Arms and Light Weapons (SALW) through Air Transport;
- Best Practice Guidelines on Internal Compliance Programmes for Dual-Use Goods and Technologies;
- Best Practice Guidelines on Subsequent Transfer (Re-Export) Controls for Conventional Weapons Systems contained in Appendix 3 to the WA Initial Elements;
- Elements for Controlling Transportation of Conventional Arms between Third Countries;
- Introduction to End User/End Use Controls for Exports of Military-List Equipment. Documents available on: http://www.wassenaar.org/best-practices/. (Accessed on 13/09/2016).

37 Control lists available on: http://www.wassenaar.org/wp-content/uploads/2015/08/WA-LIST-15-1-2015-List-of-DU-Goods-and-Technologies-and-Munitions-List.pdf. (Accessed on 13/09/2016).

including WA control lists and best practices documents, which could be adopted, as appropriate, by any State."[38]

The WA is not an international organisation, and it has no permanent structure. Representatives of Participating States meet regularly in Vienna where the Wassenaar Arrangement has established its headquarters and a small Secretariat.

The Wassenaar Arrangement Plenary is the decision-making body of the Arrangement. It is composed of representatives from all Participating States that normally meet once a year, usually in December. The position of Plenary Chair is subject to annual rotation among Participating States. All Plenary decisions are taken by consensus.

The Plenary establishes subsidiary bodies for the preparation of recommendations for Plenary decisions and calls *ad hoc* meetings for consultations on issues related to the functioning of the Wassenaar Arrangement. At present, the main Wassenaar Arrangement subsidiary bodies are the General Working Group (GWG) dealing with policy-related matters and the Experts Group (EG) addressing issues related to the lists of controlled items. Once a year, a Licensing and Enforcement Officers Meeting (LEOM) is held.[39]

Some States consider the Wassenaar Arrangement as a sort of cartel of technology suppliers. The reason for this labelling may be found in the membership criteria. To be a member of the WA, a State needs:

— to be a supplier/exporter of controlled items (arms or industrial equipment respectively);
— to have taken the Wassenaar Arrangement Control lists as references in its national export controls;
— to have non-proliferation policies and appropriate national policies in place;
— to adhere to fully effective export controls.

38 Wassenaar Arrangement, *Public Statement by the Wassenaar Arrangement on the Arms Trade Treaty (ATT)*, 3 June 2013. Available on: http://www.wassenaar.org/wp-content/uploads/2015/06/Public-Statement-by-the-Wassenaar-Arrangement-on-the-Arms-Trade-Treaty-ATT.pdf. (Accessed on 13/09/2016).

39 Wassenaar Arrangement, *About us*. Available on: http://www.wassenaar.org/about-us/. (Accessed on 13/09/2016).

However, all Participating States of the WA assess these criteria. It means that if a State vetoes the membership of a candidate State, that candidate State will not become a member of the regime. As an example, Cyprus[40] regularly applies to become a member of the regime but it is regularly refused because of Turkey's veto.
The main reason for States to join the group lies in the fact that, although the WA is "just" a politically binding instrument, it is a very powerful one. First of all, being member of the WA means to be a reliable exporter, with efficient trade control systems in place. This means not only to export more easily but also to import more easily, especially weapons and strategic technology. In other words, WA membership allows having access to technology with a very low degree of controls.

A second reason to join the group is the access to information exchanged between Participating States. Shared information concerns risks associated with transfers of conventional arms and export authorisations granted and/or denied by other States. In fact, although the WA does not have in place a no undercut mechanism, Participating States will notify the approval of a licence which has been denied by another Participating State for an essentially identical transaction during the last three years.

Differently from this system of notification of denied export licences, the no undercut mechanism aims at avoiding the "licence-shopping phenomenon", reducing the risk that an exporter, after receiving a denial for an export licence in a country, applies for a license (for the same transfer) in another country. To avoid this phenomenon, according to the no undercut mechanism, a State should deny any export license that has already been denied by another State for identical reasons (item, country of destination, etc.). However, the State remains free to finally grant the licence, but must notify its reasons to the State that denied the license.

40 It is worth noticing that all EU Member States are Participating States in the WA, except Cyprus.

2. Weapons of Mass Destruction (WMD) and Dual-use Items

The term "weapons of mass destruction" (WMD) was used for the first time by the Archbishop of Canterbury, Cosmo Gordon Lang, in 1937, following the aerial bombing of the city of Guernica (Spain), during the Civil War. Obviously, the term had not the same meaning that it has today, but the underlying concept of the massive destruction caused by advances in technology is still fully accurate.

The current meaning of WMD came with the Cold War, when the term was attributed exclusively to nuclear, biological and chemical weapons and increasingly to radiological weapons.
One way to "identify" WMD is through differentiation with conventional weapons. By opposition, this definition suggests the use of unconventional means (nuclear, biological and chemical) to inflict on mass victims.[41]

WMD are regulated by category, in international legally and politically binding instruments.
In this categorisation, it is possible to distinguish three/four categories:
— Nuclear weapons;
— Chemical weapons;
— Biological weapons;
— Missiles.[42]

Each of these categories is regulated by one or more international legally binding act(s) and an international organisation(s) issuing politically binding documents helping States to implement their international commitments.

41 Q., Michel, S., Paile, M., Tsukanova, A., Viski, 2013, pp. 15-16.

42 The control of missiles is explained by the fact that they are carriers of WMD with very far-reaching capabilities.

The specificity of WMD (with the exception of missiles) is that their trade and, for chemical and biological weapons, their possession as well, are prohibited. They belong to the category of weapons governed by a prohibition principle. Since the trade of WMD is prohibited, one could question why there is such a high number of legally and politically binding instruments regulating WMD. The answer has to be found in WMD components. Each WMD is made of different parts and technology, most of them also having one or more peaceful industrial applications that are not related to weapons. The dual-use nature of those items requires verifying the conformity of the intended use with the one declared by the exporter.

The difficulty lies in how to control what are sometimes everyday items, to make sure they will not contribute directly or indirectly to WMD research and development programs.

2.1. Nuclear Weapons

Nuclear weapons are divided into three main sub-categories.

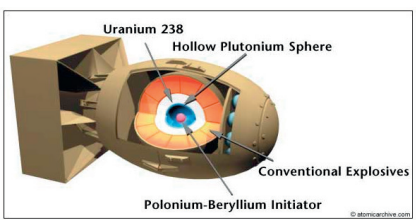
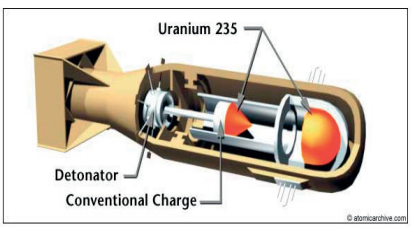
— *Fission weapons*: the energy is released by the breaking of an atom of enriched uranium (U235) or plutonium (PU239).

— An explosive nuclear chain reaction occurs when a sufficient quantity of nuclear fuel, such as uranium or plutonium, is brought together to form a critical mass.[43] The chain reaction initiates when neutrons strike the heavy uranium or plutonium nucleus which splits, releasing a tremendous amount of energy along with two or more neutrons which, in turn, split more nuclei, and so on.[44]

— The first examples of this kind of nuclear weapon are the two nuclear bombs used by the United States, at the end of World War II, against Japan: *Little Boy* (4.1 kilogrammes of highly enriched uranium, with an average enrichment of 80%) and *Fat Man* (6.2 kilogrammes of plutonium).

43 "Although two to three neutrons are produced for every fission, not all of these neutrons are available for continuing the fission reaction. If the conditions are such that the neutrons are lost at a faster rate than they are formed by fission, the chain reaction will not be self-sustaining. The point where the chain reaction can become self-sustaining is referred to as critical mass. In an atomic bomb, a mass of fissile material greater than the critical mass must be assembled instantaneously and held together for about a millionth of a second to permit the chain reaction to propagate before the bomb explodes". (Source: Atomicarchive.com, *Nuclear Fission*. Available on: http://www.atomicarchive.com/Fission/Fission1.shtml). (Accessed on 13/09/2016).

44 Ibid.

Uranium bomb *Little Boy*	**Plutonium bomb** *Fat Man*
Dropped on the Japanese city of Hiroshima on 6 August 1945	Dropped on the Japanese city of Nagasaki on 9 August 1945
	
In this gun-type device, the critical mass is achieved when a uranium projectile which is sub-critical is fired through a gun barrel at a uranium target which is also sub-critical. The resulting uranium mass comprised of both projectile and target becomes critical and the chain reaction begins.	"Fat Man" was the second plutonium, implosion-type bomb (the first was the "Gadget" detonated at the Trinity site on 16 July 1945). In the implosion-type device, a core of sub-critical plutonium is surrounded by several thousand pounds of high-explosive designed in such a way that the explosive force of the HE is directed inwards thereby crushing the plutonium core into a super-critical state.
	
The Little Boy design consisted of a gun that fired one mass of uranium 235 at another mass of uranium 235, thus creating a supercritical mass. A crucial requirement was that the pieces be brought together in a time shorter than the time between spontaneous fissions. Once the two pieces of uranium are brought together, the initiator introduces a burst of neutrons and the chain reaction begins, continuing until the energy released becomes so great that the bomb simply blows itself apart.	The initial design for the plutonium bomb was also based on using a simple gun design like the uranium bomb. But it was discovered that the plutonium contained amounts of plutonium 240, an isotope with a rapid spontaneous fission rate. This necessitated that a different type of bomb be designed because a gun-type bomb would not be fast enough to work. Before the bomb could be assembled, a few stray neutrons would have been emitted from the spontaneous fissions, and these would start a premature chain reaction, leading to a great reduction in the energy released.

— *Fusion Bomb*: fusion of heavy isotopes of hydrogen, deuterium, and tritium to release large numbers of neutrons. This kind of nuclear bomb is more powerful and efficient than a fission bomb, but it presents some difficulties. The main difficulty with the realisation of a fusion bomb is the energy required to force two atoms to fusion together because of their repulsion force. Since very high temperature is required to start the process, the fission bomb is used to overcome this difficulty. For this reason, the fusion bomb, also known as the thermonuclear bomb, has a two-stage design: a primary fission or boosted-fission component and a second fusion component.
— *Dirty bomb*: an explosive radiation dispersal device that uses a conventional weapon. In the dirty bomb, there is no nuclear explosion, the explosion being provoked by "classic" explosive spreading in the air radioactive material. A dirty bomb does not have immediate effects; its destructive (killing) effect starts to be visible after a certain amount of time that in some cases means years.

Since the first nuclear test in 1945, 2.056 nuclear tests have been conducted in the world, mainly by the United States:
— The United States conducted **1,032** tests between 1945 and 1992;
— The Soviet Union carried out **715** tests between 1949 and 1990;
— The United Kingdom carried out **45** tests between 1952 and 1991;
— France carried out **210** tests between 1960 and 1996;
— China carried out **45** tests between 1964 and 1996;
— India conducted 3 tests in 1998 (one of which is considered as a "peaceful nuclear explosion" in 1974);
— Pakistan conducted **2** tests in 1998;
— The Democratic People's Republic of Korea announced that it conducted **4** nuclear tests in 2006, 2009, 2013 and 2016.[45]

45 Data taken from the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO). Available on: https://www.ctbto.org/nuclear-testing/history-of-nuclear-testing/world-overview/. (Accessed on 14/09/2016).

2.1.1. Nuclear trade

It could be said that nuclear trade is the victim of the "original sin" since the first development of nuclear applications were devoted to the elaboration of an explosive device (the three nuclear bombs exploded during World War II).[46]
The consequence has been that nuclear energy was initially considered as a military technology rather than a civil one with large peaceful applications.
For this reason, in the nuclear trade context, the international free trade principle is overturned: free trade is the exception, while the prohibition of nuclear trade is the basic principle.

The US, which held possession nuclear weapons' monopoly at the end of World War II, adopted an absolute prohibition on nuclear trade. The US feared that, although nuclear energy could be used for peaceful applications, it could not be split from the military one.
It is in this context of "security dilemma" that the *Atomic Energy Act* (also called *McMahon Act*)[47] was adopted in July 1946, establishing a program to restrict the dissemination of information on nuclear technology, inside and outside the country.
Unfortunately, the *McMahon Act* became very soon ineffective and "obsolete" due to a series of reasons.
The first reason was its ineffectiveness in countering nuclear weapons' proliferation.

46 Aside from the two nuclear bombs used against Japan in July 1945, the US detonated a 20-kiloton atomic bomb named "Trinity" at its test site in Alamogordo, New Mexico.

47 From the name of the Senator, Brian McMahon, who sponsored the Act.

It has to be considered that the US atomic bomb was developed in the context of the so-called *Manhattan Project,* the code name of the US effort to design and develop an atomic bomb before the Nazis did.[48]
At first, the research involved only a few Universities (Columbia University, the University of Chicago and the University of California at Berkeley). It then started to spread. In December 1942, Fermi led a group of physicists to produce the first controlled nuclear chain reaction (under the direction of Stagg Field) at the University of Chicago. Nuclear facilities were built at Oak Ridge, Tennessee and Hanford, Washington. The main assembly plant was built at Los Alamos, New Mexico, where Robert Oppenheimer was in charge.
In total, the *Manhattan Project* employed over 120,000 people.[49] Although only a small privileged cadre of scientists and officials knew about the atomic bomb's development, most scientists were not from the US and, after the war, some of them flew back to their countries of origin. Considering that, it is not surprising that Russia succeeded quite soon in developing nuclear weapons in 1949, followed by the UK in 1952.

The second reason of the ineffectiveness of the *McMahon Act* (and a consequence of the first reason of failure) was that Russia was ready to share peaceful applications of nuclear technology to attract States in its political sphere. In the Cold War context, with the international community split into two main alignments, the access to nuclear technology as a source of energy was a very powerful instrument of attraction. This was particularly problematic for the US, now facing not only military but also political competition.

48 Early in 1939, the world's scientific community discovered that German physicists had learned the secrets of splitting a uranium atom. Scientists Albert Einstein, who fled Nazi persecution, and Enrico Fermi, who escaped Fascist Italy and were now living in the United States, agreed to inform the President of the US, Roosevelt, who started the *Manhattan Project* in 1941. (Source: U.S. History.com., *The Manhattan Project*. Available on: http://www.ushistory.org/us/51f.asp. (Accessed on 14/09/2016).

49 U.S. History.com., *The Manhattan Project*. Available on: http://www.ushistory.org/us/51f.asp.

The full prohibition on nuclear trade imposed by the US was also damageable from a commercial point of view. In fact, while US industries in the medical sector had no right to export nuclear-related materials, other countries did export. US industries thus faced competition not only from the Soviet Union but also from NATO members, such as Canada, France, the UK and later, Germany. These countries saw providing nuclear research reactors, fuel for these reactors, and training scientists and engineers in the new technology as the key to shaping political relationships with clients, as well as the choices that developing countries would make about what nuclear facilities to buy and where to buy them. For all these reasons (strategic, political and commercial reasons) the US, in 1953, had to reverse their prohibition policy by initiating a sharing policy through the *Atoms for Peace Plan*, presented by President Dwight D. Eisenhower at the UN General Assembly, in December 1953.

In his speech, Eisenhower warned of the dangers of nuclear weapons and the arms race, calling nuclear technology the "greatest of destructive forces".[50] He said America would share its nuclear knowledge and help the world "*to apply atomic energy to the needs of agriculture, medicine, and other peaceful activities. Its special purpose would be to provide abundant electrical energy in the power-starved areas of the world*".[51]
In a way, *Atoms for Peace* was about cooperation, but it had a very strategic aim, framed in the Cold War logic: to establish and strengthen strategic ties, especially with developing countries, by promising to share what was seen as the most modern of technologies. *Atoms for Peace* also served as a policy to build domestic support and foreign markets for US nuclear technology.

The fundamental principle was that international exchange of nuclear technologies was possible only if fissile materials were produced, transferred and used under adequate safeguards. More specifically,

50 Address by Mr. Dwight D. Eisenhower, President of the United States of America, to the 470th Plenary Meeting of the United Nations General Assembly, 8 December 1953. Available on: https://www.iaea.org/about/history/atoms-for-peace-speech. (Accessed on 14/09/2016).

51 Ibid.

the US was ready to give open access to peaceful nuclear applications in exchange for the submission by the end user of adequate safeguards assumed by the supplier State or by an international organisation. Between 1955 and 1958, the US signed more than forty nuclear cooperation agreements with many governments, including apartheid South Africa, Francisco Franco's fascist government in Spain, the Shah of Iran, Pakistan, India, Israel and many others including the European Atomic Energy Community (EURATOM).[52]

The *Atoms for Peace Plan* was the main argument to create the International Atomic Energy Agency (IAEA) that was formally established in 1957, in Vienna. One of the main tasks of the Agency was to take over from suppliers States the task of safeguarding the peaceful use of nuclear materials.

At the same time, under the initiative of the US and others Western European suppliers States, a Coordinating Committee for Multilateral Export Controls (COCOM)[53] was created to avoid that US technologies could be transferred directly or indirectly to a Warsaw Pact Member or another US sensitive country, such as China. The group was taking export decision by consensus that granted a veto power to each participant. As a consequence, the East/West division of the international scene during the Cold War was also visible in terms of nuclear technology used by different States: while all Warsaw Pact Members were using Russian technology, NATO Members used US technology.

In the Soviet Union, nuclear facilities dedicated to nuclear weapons development were also strategically located among countries members. Once the Soviet Union fell apart, discussion initiated to define who would have inherited the nuclear power status through the possession

52 Z., Mian and A., Glaser, *A frightening nuclear legacy: Early expansion of nuclear energy resulted in dangerous dispersal of fissile material and weapons proliferation — threats that persist today. Is it possible to prevent history from repeating itself*, Bulletin of the Atomic Scientists, September/October 2008, Vol. 64, No. 4, pp. 42-47. Available on: http://www.princeton.edu/~aglaser/2008aglaser_bulletin.pdf. (Accessed on 14/09/2016).

53 For more information on the COCOM, please see the Chapter on Conventional Weapons.

of nuclear weapons. If for Russia it was not questionable that it was its right, Ukraine and other States were also considering such status. For Ukraine, negotiations were opened between the US, the UK and Russia to encourage Ukraine to accept a hefty economic compensation in exchange for its nuclear "demilitarisation". Later, three memoranda called the 1994 *Budapest Memorandum*[54] were signed by the US, the UK and Russia (and later by France and China in individual statements), granting assurances (though not a military guarantee) to Kiev that in return for surrendering all former Soviet nuclear weapons, Ukraine's sovereignty and territorial integrity would be respected.[55]It was on the occasion of the accession of Ukraine to the Treaty on the Non-Proliferation of Nuclear Weapons (5 December 1994). National security assurances were also given to Belarus and Kazakhstan. On 4 December 2009, a *Joint Declaration* by the Russian Federation and the United States of America confirmed their commitment.[56] [57]

54 United Nations General Assembly and Security Council, *Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons*, Annex I to UN Document A/49/765, 19 December 1994. Available on: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N94/507/64/PDF/N9450764.pdf?OpenElement. (Accessed on 14/09/2016).

55 K., Reif, *Ukraine and the future of non-proliferation*, Bulletin of the Atomic Scientists, posted on 3 April 2014. Available on: http://thebulletin.org/ukraine-and-future-nonproliferation7021. (Accessed on 14/09/2016).

56 United Nations General Assembly and Security Council, *Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons*, Annex I to UN Document A/49/765, 19 December 1994.

57 It is quite "ironic" considering today's situation in Ukraine. Russia's annexation of Crimea in March 2014 was a clear violation of the Budapest Memorandum. Ukraine posed no threat to Russia, which could not claim to be acting in self-defence. Nor did Russia have a mandate from the UN Security Council to intervene in Ukraine. Moscow has continued to conduct a multi-faceted war against Ukraine, with support from the separatists and Russian armed forces on Ukrainian soil. In fact, Ukraine was invaded in its Eastern region by an unidentified task force that turned out to be Russian Special Forces. The invasion started in February 2014 and ended up with the annexation of Crimea to Russia, through a Crimean referendum, considered as illegal by the EU and the majority of the international community, but formally recognised by the Russian Federation. On 18 March 2014, the Russian President Vladimir Putin, after having addressed both houses of the Kremlin's legislature to discuss the secession of Crimea from Ukraine and its integration into Russia, signed the Treaty on Accession of the Republic of Crimea to Russia.

2.1.2. The Treaty on the Non-Proliferation of Nuclear Weapons (NPT)

The Treaty on the Non-Proliferation of Nuclear Weapons (NPT) was signed in 1968 and entered into force in 1970. It has been renewed in 2005 for an indefinite period.

Almost all States have ratified the Treaty except four: India, Pakistan, Israel and North Korea.[58]

It is the only international treaty that recognises the right for some States to hold WMD and in particular nuclear weapons. According to Article IX.3 of the Treaty, Russia, China, France, the United Kingdom and the US legally have the possibility to hold nuclear weapons,[59] as far as they have tested a nuclear explosive device before the 1st January 1967.

Two conditions are attached to this right. The first consists of a strong commitment to stop nuclear arms' race and to pursue in good faith nuclear disarmament. The second condition consists of a commitment to guarantee to non-nuclear-weapon-States (NNWS) NPT signatories full access to nuclear energy for peaceful purposes.

> Article II
> "Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices". [60]

58 The situation of North Korea is not very clear because it resigned from the Treaty in 2003.

59 These States are defined as nuclear-weapons States (NWS).

60 Treaty on the Non- Proliferation of Nuclear Weapons, Article II. Available on: https://www.iaea.org/sites/default/files/publications/documents/infcircs/1970/infcirc140.pdf. (Accessed on 14/09/2016).

Article VI
"Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control". [61]

Article IV
"1. Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination (...)". [62]

Nuclear trade control is regulated in Article III.2:
"1. Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article". [63]

Basically, this provision establishes two commitments to be implemented by the NPT Supplier States:
— To control the transfers to NNWS (as defined by Article IX.3) of an undefined list of items;
— To submit the export of nuclear items to the condition that fissile materials being used in the facilities where the items are to be transferred, would be subject to safeguards.

The understanding of this provision has been a bit controversial between Member States. Its scope, for instance, has been interpreted very broadly

61 Ibid., Article VI.

62 Ibid., Article IV.

63 Ibid., Article III.2.

by certain States and very restrictively by others. Therefore, to avoid the risk of unfair competition between suppliers, a common understanding appeared more than necessary. To face this concern, the Zangger Committee and the Nuclear Suppliers Group have been established.

2.1.3. The evolution of export control regimes: from control list to catch-all clauses

The COCOM was the first export control regime, established under the impulse of the US, to control the trade flow of strategic technology thus preventing the development of military capabilities (such as a nuclear bomb) in non-allied countries. This control was conducted through the need for operators to apply for an authorisation to export items listed on a so-called strategic list.
However, the COCOM was an informal organisation coordinating trade policy of a very limited number of countries.

With the entry into force of the Nuclear Non Proliferation Treaty, it appears necessary for nuclear suppliers to coordinate their understanding of provision III.2 that "*require not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards*". Unfortunately, the Treaty does not define precisely the list of items that fall under this provision.

In order to avoid the risk of diverging interpretations between suppliers States, an informal group called the Zangger Committee[64] was formed, in 1971,[65] to draft a common list of items usually known as the "trigger list". The export of listed items would have triggered a requirement by

64 The Committee was named after its first Chairman, Professor Claude Zangger.

65 The Zangger Committee was founded following the entry into force of the NPT (see *infra*), to help States Parties of the Treaty to implement and share common understanding about the interpretation of the provisions of the Treaty.

the supplier of safeguards to control that nuclear items exported would have been used only for a peaceful purpose.

Despite the Zangger Committee commitments, India succeeded in conducting its first nuclear test in 1974 and Israel seemed[66] to have succeeded in 1979, in cooperation with South Africa.[67] Such programs have been made possible partly due to the non-ratification of the NPT by certain suppliers. Therefore, those States were not constrained by Zangger Committee Guidelines. To fill up this gap, a new informal group of suppliers including non-NPT Member States (in particular China and France) was set up. This group known as the Nuclear Suppliers Group (NSG) adopted guidelines, which are rather similar to the Zangger's ones.

However, in the nineties, with the discovery of the Iraqi nuclear weapons research program, at the end of the first Gulf War, it appeared that export controls could not be limited to "especially designed" materials. The use of outdated technology and items, that are not especially designed for nuclear use but could contribute to the elaboration of nuclear weapons by proliferators, raised the need to extend the scope of control. To face this concern, in 1992, the NSG adopted a list of items that had both a nuclear as well as a non-nuclear use. The NSG was followed by the Wassenaar Arrangement[68] which, in 1996, also adopted a dual-use goods and technologies control list. For this latter, the concept of dual-use was enlarged to more than nuclear weapons-related items. For the Wassenaar Arrangement, dual-use items were any equipment and technology that

66 The detention by Israel of nuclear weapons is not confirmed/declared in official sources.

67 L., Weiss, *Flash from the past: Why an apparent Israeli nuclear test in 1979 matters today*, Bulletin of the Atomic Scientists, posted on 8 September 2015. Available on: http://thebulletin.org/flash-past-why-apparent-israeli-nuclear-test-1979-matters-today8734. (Accessed on 14/09/2016).

68 As mentioned in the Chapter on conventional weapons, COCOM was replaced by the Wassenaar Arrangement in 1994, due to the end of the Cold War and the participation to the export control regime of many countries from the East (the Russian Federation, the Czech Republic, Hungary, Poland, the Slovak Republic, Romania).

are largely used by peaceful industries but could also contribute to the elaboration of weapons.

The extension of export controls to dual-use items, however, was not sufficient to prevent the proliferation of nuclear weapons as new proliferators emerged on the international scene: North Korea and Iran.

All these years of proliferation showed that, maybe, the principle of controlling only listed items was not sufficient to prevent the risk of proliferation. It appeared necessary to focus as well on end-uses of non-listed items. Some items might not be listed, firstly due to unknown potential contribution to weapons programs. It could be the case for a new technology or items that are so broadly used by peaceful industries, that it would be almost impossible to systematically control or out-dated technology that are not considered too expensive to be developed by proliferators. However, it does not exclude the risk that certain end-users might consider to use them. Therefore, since 2004, catch-all clauses have been inserted in NSG Dual-Use Guidelines. In general terms, a catch-all clause provides the exporting State with the possibility to control also non-listed items if there is a risk that the items could be used for non-peaceful purposes.

2.1.4. United Nations Security Council Resolution (UNSCR) 1540/2004

United Nations Security Council Resolution 1540 was adopted on 28 April 2004[69] under Chapter VII of the United Nations Charter.[70]
This resolution aims to reinforce international and national instruments to counter the risk of WMD acquisition by non-State actors. It is not specifically dedicated to nuclear and nuclear-related items, but to unconventional weapons, related materials and means of delivery, in

69 UNSC Resolution 1540 has been regularly updated. The last update was done on 29 June 2012, when the Security Council adopted Resolution 2055(2012), which enlarged the Group of Experts supporting the work of the 1540 Committee to up to nine experts. For all updates, please see: http://www.un.org/en/sc/1540/.(Accessed on 14/09/2016).

70 All United Nations Security Council resolutions adopted under Chapter VII of the UN Charter are legally binding for all UN Member States.

particular for terrorist purposes. The Resolution mostly establishes two commitments for UN Member States:

1. WMD non-proliferation commitment;
2. Commitment to elaborate an appropriate national export control regime.

1. WMD non-proliferation commitment:

"1. All States shall refrain from providing any form of support to non-State actors that attempt to develop, acquire, manufacture, possess, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery".[71]

This first commitment consists in only a general principle since it does not specify how the WMD non-proliferation commitment should be implemented.

The resolution concerns WMD nuclear, chemical and biological weapons and their means of delivery, defined as: *missiles, rockets and other unmanned systems capable of delivering nuclear, chemical, or biological weapons, that are specially designed for such use.*

The resolution does not focus narrowly on terrorists but rather uses the broader concept of "non-State actor," which it defines as an *individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution.*[72]

2. Commitment to elaborate an appropriate national export control regime:

"All States, in accordance with their national procedures, shall adopt and enforce appropriate effective laws which prohibit any non-State actor to manufacture, acquire, possess, develop, transport, transfer or use nuclear, chemical or biological weapons and their means of delivery, in particular for terrorist purposes,

71 United Nations, UNSC Resolution 1540(2004) of 28 April 2004, point 1. Available on: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1540(2004). (Accessed on 14/09/2016).

72 Ibid. point 2.

> as well as attempts to engage in any of the foregoing activities, participate in them as an accomplice, assist or finance them;
> All States shall take and enforce effective measures to establish domestic controls to prevent the proliferation of WMD (...) and to this end shall:
> Establish, develop, review and maintain appropriate effective national export and trans-shipment controls over such items, including appropriate laws and regulations to control export, transit, trans-shipment and re-export and controls on providing funds and services related to such export and trans-shipment such as financing, and transporting that would contribute to proliferation, as well as establishing end-user controls; and establishing and enforcing appropriate criminal or civil penalties for violations of such export control laws and regulations(...)".[73]

This provision of the resolution remains vague about the process to implement an "effective" national export control, limiting its guidelines to a list of trade operations to be controlled (export, transit, transhipment and re-export, restrictions on financing and related services) and calling on States to establish "appropriate" criminal and civil penalties in case of violations.
The resolution does not provide a list of items to submit to export control. States have to refer to their control list which is supposed to include nuclear, chemical, biological specially designed items and related materials (dual-use items) including their means of delivery.

The effectiveness and the conformity of national export controls are not directly assessed, but a Committee has been created.[74] This "1540 Committee" is in charge of supplying assistance to Member States to help them to properly implement Resolution 1540 principles and monitoring activities. It is not a sanctioning committee, and it does not investigate or prosecute alleged violations of non-proliferation obligations. The 1540 Committee and its group of experts are committed

73 Ibid., point 3.

74 1540 Committee's mandate has been renewed until 2021.

to a "*cooperative relationship with the international community to facilitate implementation of Resolution 1540 (2004) by all States*".[75]
States are called upon to present a first report to the Committee on the implementation of the resolution. As of 1 January 2014, 171 States and the European Union have submitted first reports to the Committee.[76]

2.1.5. Nuclear Suppliers Group (NSG)

The Nuclear Suppliers Group (NSG), originally called the *London Club*,[77] is the principal informal instrument regarding the control of nuclear transfers. It was founded in 1975, in reaction to the nuclear weapon explosion by India (18 May 1974). It includes all major potential nuclear suppliers, except India, Israel and Pakistan.

The objective of the NSG is to develop a common understanding between suppliers of export control principles that each State Party shall introduce in its national export control regime.
The NSG being a politically-binding instrument, all NSG' s documents are not legally binding for States Parties and mainly consist of guidelines to help States to implement nuclear and nuclear-related materials trade control systems.
To this aim the NSG provides two sets of guidelines:
— Guidelines for Nuclear Transfers (Trigger list);
— Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Materials, Software, and Related Technology.

Each set of guidelines concerns a field of implementation linked to a control list. For this reason, the NSG provides two control lists:
1. Items that are especially designed or prepared for nuclear use (Trigger list):
   – Nuclear material;

75 1540 Committee, Security Council Committee established pursuant to Resolution 1540(2004), *Frequently Asked Questions on Resolution 1540 (2004)*. Available on: http://www.un.org/en/sc/1540/faq/facts.shtml#6.

76 Ibid. (Accessed on 14/09/2016).

77 Q., Michel, S., Paile, M., Tsukanova, A., Viski, 2013, p. 49.

- Nuclear reactors and equipment thereof, non-nuclear material for reactors;
- Plant and equipment for the reprocessing, enrichment and conversion of nuclear material and for fuel fabrication and heavy water production and;
- Technology associated with each of the above-mentioned items.

2. Nuclear-related dual-use items and technologies: items that can make a major contribution to an unsafeguarded nuclear fuel cycle or nuclear explosive activity, but which have non-nuclear uses as well (e.g. in medical devices such as X-ray, in mining, etc.).

The reason to extend the control to dual-use items is due to the discovery that the control of nuclear fissile materials was not enough to counter the risk of nuclear proliferation. The Iraqi clandestine nuclear programme provided the impetus for developing, in 1992, the Part 2 Dual-Use Guidelines, since its nuclear programme was developed thanks to the acquisition of dual-use items.[78]

To be even more comprehensive, the NSG Plenary decided to include in 2004 a "catch-all" mechanism in the NSG Guidelines "*to provide a national legal basis to control the export of nuclear related items that are not on the control lists, when such items are or may be intended for use in connection with a nuclear weapons programme*".[79]
The NSG trade control principle is that all items of the Trigger and Dual-Use lists should be submitted to national export authorisation. These authorisations should be granted under certain conditions and after considering certain criteria.
It means that all export applications will be submitted to assessment by the national authority to verify if conditions and criteria are fulfilled, before granting the export authorisation. Conditions and criteria for transfers of dual-use items and nuclear items are not similar. Trigger list items are submitted to conditions and criteria, while dual-use

78 E., Louka, *Nuclear Weapons, Justice and the Law*,

79 Nuclear Suppliers Group, History. Available on: http://www.nuclearsuppliersgroup.org/en/organisation/history. (Accessed on 14/09/2016).

items are essentially submitted to criteria. Conditions are objective elements that recipient countries have to meet in order to obtain an export authorisation from the supplier State. Criteria are subjective elements to be considered, in a case-by-case analysis, by the supplying State to grant or not an export authorisation.

An example of conditions for the transfer of dual-use items is the end-user/consignee commitments:
— a statement specifying the end-use and the end-use location of the proposed transfers;
— an assurance explicitly stating that the proposed transfer or any replica thereof will not be used in any active nuclear explosive or unsafeguarded nuclear fuel cycle activity.

Examples of conditions to be met for the transfer of nuclear items listed on the Trigger list are:
— the recipient State shall have into force the *Comprehensive Safeguards Agreement* (CSA), which is the application of safeguards on all sources and special fissionable material in its current and future peaceful activities;
— the recipient State has to submit the following four government-to-government assurances:
  – Commitment of the recipient State to explicitly exclude any use which would result in any nuclear explosive device;
  – The management of potential retransfer(s);
  – Obligation to bring into force a safeguards agreement requiring the application of safeguards on all trigger list items if the CSA should be terminated;
  – Elaboration of appropriate verification measures or a restitution of transferred and derived trigger list items if the IAEA decides that an application of IAEA safeguards is no longer possible.

An example of criteria for nuclear items listed on the Trigger list is the non-proliferation principle: suppliers should authorise the transfer only *when they are satisfied that it would not contribute to the proliferation of*

nuclear weapons or any other nuclear explosive devices[80] *or to an act of nuclear terrorism.*[81]

Finally, some examples of criteria to authorise the transfers of dual-use items are the following:
— items transferred are appropriate for the stated end-use and the stated end-use is appropriate for the end-user;
— items linked to reprocessing or enrichment facility;
— recipient State's support of nuclear non-proliferation and recipient State's compliance with its international obligations in the field of non-proliferation.

Criteria have been challenged by non-State Parties to the NSG due to their subjective dimension. Expressions such as "when they are satisfied" referring to supplier States when assessing the non-proliferation principle, leave too much discretion power to States when evaluating the fulfilment of the criteria by a recipient State.
Criticisms of some States (Pakistan in particular) also concern the so-called "Indian exception". India, which is not considered a nuclear-weapon-State in the NPT framework, is recognised under the NSG regime. In 2008, the NSG exempted India from the requirement adopted by the NSG in 1992 banning nuclear cooperation with any State that had not accepted IAEA comprehensive safeguards.[82]

India's inclusion in the NSG was particularly supported by the US, which is reluctant as for the inclusion of Pakistan (regularly applying to become

80 The difference between nuclear weapons and any other nuclear explosive device is that "nuclear explosive device" covers a wider range of instruments which are not necessarily weapons. An example is a nuclear device used in mining to make a mountain explode or used for digging.

81 Nuclear Suppliers Group, Guidelines for Nuclear Transfers, INFCIRC/254/Rev.12/Part1, 13 November 2013, p. 6. Available on: http://www.iaea.org/sites/default/files/publications/documents/infcircs/1978/infcirc254r12p1.pdf. (Accessed on 14/09/2016).

82 S., Bano, "Can India join the Nuclear Suppliers Group?", *The Diplomat*, 9 May 2015. Available on: http://thediplomat.com/2015/05/can-india-join-the-nuclear-suppliers-group/. (Accessed on 14/09/2016).

a member) and North Korea in the export control regime.[83] Although the situation might change in the future as regards the membership of Pakistan, supported by China, India remains the only exception of non-recognised nuclear-State (by the NPT) concluding nuclear agreements and transfers with other States which ratified the NPT. Eleven States have concluded nuclear agreements with India (although not all of them have effectively exported so far): Argentina, the Republic of Korea, the US, the United Kingdom, France, Russia, Canada, Japan, Kazakhstan, Mongolia and Namibia.

In exchange of the access to nuclear technology, India committed to:
— separate civilian nuclear facilities from military ones;
— conclude a Comprehensive Safeguards Agreement (CSA), including the Additional Protocol with the IAEA, for the application of safeguards to civilian nuclear facilities;
— abstain from transfers of enrichment and reprocessing technologies to States that do not have them, and support international efforts to limit their spread;
— establish a national export control system capable of securing an effective control of nuclear and nuclear-related items;
— harmonise its national export control regime with the Guidelines of the NSG (including adherence to these Guidelines);
— continue its unilateral moratorium on nuclear testing and its readiness to work towards the conclusion of a Fissile Material Cut-off Treaty (FMCT).

83 Israel, officially, did not ask for any assistance nor it applied to become a member of the NSG.

2.2. Chemical and Biological[84] Weapons

Although chemicals had been used as tools of war for thousands of years (e.g. poisoned arrows, boiling tar, arsenic smoke and noxious fumes, etc.), modern chemical weapons first appeared on the battlefields of World War I. During World War I, chlorine and phosgene gases were released from canisters on the battlefield and dispersed by the wind. The first large-scale attack with chlorine gas occurred, on 22 April 1915, at Ieper, in Belgium.
It is estimated that, by the end of World War I, 124,000 tonnes of chemical agents had been expended, which caused about 1,300,000 casualties including 90,000 deaths.[85]

Chemical weapons can be gaseous, liquid or solid substances, with direct toxic effects on human beings, animals and plants. In general terms, a chemical weapon is a toxic chemical contained in a delivery system. The term chemical weapon, as defined by the Organisation for the Prohibition of Chemical Weapons (OPCW), is applied to any toxic chemical or its precursor that can cause death, injury, temporary incapacitation or sensory irritation through its chemical action. Munitions or other delivery devices designed to deliver chemical weapons, whether filled or unfilled, are also considered as weapons.[86]

84 Trade controls for the non proliferation of biological weapons follow the same logic as for chemical weapons. The Biological Weapons Convention (BWC) opened for signature in 1972 and entered into force three years later. The BWC does not explicitly ban the use of biological weapons, which are already banned by the Geneva Protocol, but the prohibitions it contains and the requirement that states parties destroy any stockpiles accumulated before accession, amount to an effective ban on use. The BWC also prohibits states parties from assisting other countries to acquire biological weapons, directly or indirectly. Further, it requires states parties to facilitate technical and scientific cooperation in the use of biotechnology for peaceful purposes. The last review conference was held in Geneva in November 2016.

85 Organisation for the Prohibition of Chemical Weapons (OPCW), *Brief history of chemical weapons use*. Available on: https://www.opcw.org/about-chemical-weapons/history-of-cw-use/. (Accessed on 14/09/2016).

86 Ibid.

Chemical weapons are usually categorised according to their effects:
— blister: sulphur mustard, lewisite, nitrogen mustard, mustard-lewisite, phosgene-oxime;
— affect the nerves: VX, Sarin, Soman, tabun, novichole agents;
— cause choking: chlorine, phosgene, diphosgene, chloropicrin;
— affect the blood: herygem, cyanide, cyanogen chloride;
— for riot control: tear agent 2 (SN gas), tear agent O (CS gas), psychedelic agent 3 (BZ).

The problem in controlling chemicals is that they are widely used in industry and have very widespread civil uses. For example, toxic chemicals are employed as basic raw material or as anti-neoplastic agents, which prevent the multiplication of cells, or as fumigants, herbicides or insecticides.

Chemical weapons have been largely used across time all over the world by States and more recently, by non-State actors. For example, Spain used them against the Rif rebels in Spanish Morocco in 1922-1927, Italy used mustard gas against Ethiopians during its invasion of Abyssinia in 1936, the United States used tear gas and four types of defoliant in Vietnam between 1962 and 1970, Egypt used chemical weapons against Yemen between 1963 and 1967, the Soviet Union used Yellow Rain (trichothecene mycotoxins) in Laos and Kampuchea between 1975 and 1983, Iraq also used mustard gas during the war against Iran and against Kurds, in 1995 a sarin gas attack by the *Aum Shinrikyo* was organised in the Tokyo Subway[87] [88] and, finally, Syrian used chemicals during the civil war (2013).
Chemical weapons have been the first WMD to be banned by an international convention, the *1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating Poisonous or Others gases, and of Bacteriological Methods of Warfare*. However, the 1925 Geneva Protocol

87 Q., Michel, S., Paile, M., Tsukanova, A., Viski, 2013, pp. 19-20.

88 The World Post, *20 years ago, a shadowy cult poisoned the Tokyo Subway*. Posted on 20 March 2015. Available on: http://www.huffingtonpost.com/2015/03/20/tokyo-subway-sarin-attack_n_6896754.html. (Accessed on 14/09/2016).

only prohibits the use of chemical weapons, but it does not outlaw their production.
Facing the use of chemical weapons during the war between the Islamic Republic of Iran and Iraq, the UN Security Council adopted, on 26 August 1988, the Resolution 620, under Chapter VII of the UN Charter.

The first purpose was to condemn the use of chemical weapons, which violates obligations under the 1925 Geneva Protocol. However, the objective was also to go further than the 1925 Geneva Protocol by prohibiting the production and supply of chemical weapons.
For this reason, the resolution called on States to establish or strengthen control on the export of chemical products used as chemical weapons. As stated in the resolution:

> "3. Calls upon all States to continue to apply, to establish or to strengthen strict control of the export of chemical products serving for the production of chemical weapons, in particular to parties to a conflict, when it is established or when there is substantial reason to believe that they have used chemical weapons in violation of international obligations (...)".

This resolution was the first legally-binding instrument that, at the international level, called on States to establish trade controls on chemical products that could be used as WMD. An international treaty prohibiting the production and complete use of chemical weapons only came in 1993, with the adoption of the Chemical Weapons Convention (CWC).

2.2.1. Convention on the Prohibition of the Development, Production, Stockpiling and the Use of Chemical weapons and on their Destruction (Chemical Weapons Convention - CWC)

The Chemical Weapons Convention (CWC) was adopted by the Conference on Disarmament in Geneva on 3 September 1992 and opened for signature in Paris, on 13 January 1993. It entered into force on 29 April 1997.

The CWC is almost universal; three States only have neither signed nor ratified (Egypt, North Korea and South Sudan).[89]
The CWC is the first disarmament agreement negotiated within a multilateral framework that provides for the elimination of an entire category of Weapons of Mass Destruction under universally-applied international control. There is no exception for this complete prohibition.

Article 1 contains the general obligations for States Parties:

"1. Each State Party to this Convention undertakes never under any circumstances:
   (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
   (b) To use chemical weapons;
   (c) To engage in any military preparations to use chemical weapons;
   (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.
2. Each State Party undertakes **to destroy** chemical weapons it owns or **possesses**, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.
3. Each State Party undertakes to destroy all chemical weapons it **abandoned** on the territory of another State Party, in accordance with the provisions of this Convention.
4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

89 Angola was the last one to become State Party to the CWC, with its ratification on 16 September 2015.

5. Each State Party undertakes not to use riot control agents as a method of warfare".[90]

The scope is the broadest possible, with a prohibition not only to produce, develop, acquire, use and transfer chemical weapons, but also to destroy existing stocks and production facilities. States Parties are bound to destroy not only their own stocks and production facilities on their territory, but also chemical weapons "*abandoned on the territory of another State*" and production facilities placed "*in any place under its jurisdiction or control*".
This provision of complete destruction of existing stocks of chemical weapons is unique in the WMD field.

In order to implement the Convention, each State Party shall submit an initial report on the existence of chemical weapons and production facilities on its territory, their quantity and their location. Each State shall also supply information about "abandoned" chemical weapons and production facilities (on its territory by other States and/or of its property on other States' territory).

The Convention establishes an organism in charge of the implementation of the CWC, the Organisation for the Prohibition of Chemical Weapons (OPCW). The OPCW was created with the aim of achieving the objective of the Convention and in particular to conduct verification activities in States Parties. On the basis of annual reports on relevant chemicals and facilities that each State Party shall submit to the OPCW, the Organisation ensures a credible, transparent regime to verify the destruction of chemical weapons.

From the entry into force of the CWC (April 1997) until October 2015, the OPCW has conducted 6,194 inspections on the territory of 86 States Parties, including 2,989 inspections of chemical weapon-related

90 Organization for the Prohibition of Chemical Weapons (OPCW), *Convention on the Prohibition of the Development, Production, Stockpiling and the Use of Chemical Weapons and on their Destruction*, Geneva, 3 September 1992, Article 1. Available on: https://www.opcw.org/fileadmin/OPCW/CWC/CWC_en.pdf. (Accessed on 14/09/2016).

sites. 8,612 chemical weapon-related sites have been inspected out of a total of 88 declared. All of the declared chemical weapons stockpiles have been inventoried and verified. 180 initial declarations have been received. All of the declared chemical weapons production facilities (CWPFs)[91] have been deactivated. All are subject to a verification regime of unprecedented stringency. 90 of the 97 CWPFs declared to the OPCW have been either destroyed (67) or converted for peaceful purposes (23). Fourteen States Parties have declared CWPFs: Bosnia and Herzegovina, China, France, India, the Islamic Republic of Iran, Iraq, Japan, Libya, the Russian Federation, Serbia, the Syrian Arab Republic, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and another State Party, referred to as a "A State Party" in OPCW-communications, which is South Korea.[92]As for trade regulation, Article VI establishes principles for the trade of chemical products:

"a. Each State Party has the right, subject to the provisions of this Convention, to develop, produce, otherwise acquire, retain, transfer and use toxic chemicals and their precursors for purposes not prohibited under this Convention.

b. Each State Party shall adopt the necessary measures to ensure that toxic chemicals and their precursors are only developed, produced, otherwise acquired, retained,

91 Article II, point 8 of the Chemical Weapons Convention defines chemical weapons facilities as: "(...) *any equipment, as well as any building housing such equipment, that was designed, constructed or used at any time since 1 January 1946:*
(i) As part of the stage in the production of chemicals ("final technological stage") where the material flows would contain, when the equipment is in operation:
(1) Any chemical listed in Schedule 1 in the Annex on Chemicals; or
(2) Any other chemical that has no use, above 1 tonne per year on the territory of a State Party or in any other place under the jurisdiction or control of a State Party, for purposes not prohibited under this Convention, but can be used for chemical weapons purposes; or
(ii) For filling chemical weapons, including, inter alia, the filling of chemicals listed in Schedule 1 into munitions, devices or bulk storage containers; the filling of chemicals into containers that form part of assembled binary munitions and devices or into chemical submunitions that form part of assembled unitary munitions and devices, and the loading of the containers and chemical submunitions into the respective munitions and devices; (...)".

92 Organization for the Prohibition of Chemical Weapons, *Publications, Facts and Figures: Chemical Weapons Destruction Under Way*. Available on: https://www.opcw.org/news-publications/publications/facts-and-figures/. (Accessed on 14/09/2016).

> transferred, or used within its territory or in any other place under its jurisdiction or control for purposes not prohibited under this Convention. To this end, and in order to verify that activities are in accordance with obligations under this Convention, each State Party shall subject toxic chemicals and their precursors listed in Schedules 1, 2 and 3 of the Annex on Chemicals, facilities related to such chemicals, and other facilities as specified in the Verification Annex, that are located on its territory or in any other place under its jurisdiction or control, to verification measures as provided in the Verification Annex. (...)".[93]

Basically, the article states that States Parties have the right to use and transfer chemical products as long as these are not used for purposes prohibited under the Convention. In order to ensure the proper use of chemical products, States shall subject toxic chemicals and their precursors (listed in schedules 1, 2 and 3) to verification measures (conducted by the independent OPCW).
Chemical products are divided into categories, reflecting their degree of proliferation risk and civil application:

— Schedule 1 chemicals and precursors pose a "high risk" to the Convention and are rarely used for peaceful purposes. States Parties may not store these chemicals except in small quantities for research, medical, pharmaceutical, or defensive use. Many Schedule 1 chemicals have been stockpiled as chemical weapons.
— Schedule 2 chemicals are toxic chemicals that pose a "significant risk" to the Convention and are precursors to the production of Schedule 1 or Schedule 2 chemicals. These chemicals are not produced in large quantities for commercial or other peaceful purposes.

93 Chemical Weapons Convention, Article VI.

— Schedule 3 chemicals are usually produced in large quantities for purposes not prohibited by the CWC but still pose a risk to the Convention. Some of these chemicals have been stockpiled as chemical weapons.[94]

According to the annual report of the OPCW, in total, between the entry into force of the Convention and 31 December 2014, the OPCW verified the destruction of:
— Category 1: 61,444.607 MTs, or 87.16% of the declared amount;
— Category 2: 1,156.833 MTs, or 56.94% of the declared amount;
— Category 3: 417,825 items, or 100% of the declared amount.

Five States Parties declared chemical weapons at the end of the review period: Iraq, Libya, the Russian Federation, the Syrian Arab Republic and the United States of America.[95]

2.2.2. Focus on Syria: implementation of the CWC

In early December 2012, after report of allegation of use of chemicals weapons in Syria, the OPCW-Director-General addressed a letter to the Syrian Foreign Minister in which he urged the Syrian Government to sign and ratify the Chemical Weapons Convention. He also recalled the fact that, as a Party to the 1925 Geneva Protocol, Syria has accepted the legal obligation to respect the universally endorsed norm against the use of chemical weapons.

On 13 September 2013, a UN investigation confirmed that chemical weapons had been used in the on-going conflict between the parties in Syria. The day after (14 September 2013), Syria deposited its instrument

94 Arms Control Association, *The Chemical Weapons Convention (CWC) at a Glance*. Updated on October 2015. Available on: https://www.armscontrol.org/factsheets/cwcglance. (Accessed on 14/09/2016).

95 OPCW, *Report of the OPCW on the Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction in 2014*, Twentieth Session, 30 November – 4 December 2015, C-20/4 of 2 December 2015. Available on: https://www.opcw.org/fileadmin/OPCW/CSP/C-20/en/c2004_e_.pdf. (Accessed on 14/09/2016).

of accession to the CWC under the aegis of the United Nations. On 27 September 2013, the OPCW Executive Council issued the official decision stating that the CWC would have entered into force for Syria on 14 October 2013, and called on the State to submit a full declaration on its chemical weapons program.

The OPWC plan, unanimously adopted by UNSCR 2118 for the destruction of Syria's chemical weapons material and equipment established that:
— all chemical weapons material and equipment would be destroyed in the first half of 2014;
— and that OPCW inspections would begin by 1 October 2013.

However, the problem for the implementation of the Syrian plan was that it was too risky to set up a destruction facility in Syria, in the middle of an ongoing and violent conflict.
The OPCW, the UN and the US proceeded then to inquire if any Mediterranean or European countries might be willing to receive the chemicals and have them destroyed on their territory. However, no country responded positively to the request, most States arguing that environmental and regulatory requirements would have inhibited meeting the tight timeline established by the OPCW and the framework agreement.

Finally, the OPCW-approved plan for destruction involved transporting all chemicals from more than 20 sites to the port of Latakia in North-western Syria and transferring them onto two cargo vessels.
Once the ships had received all of Syria's declared chemicals, they would have delivered the more dangerous ("Priority 1") chemicals to the US ship (*MV Cape Ray*) for on-board neutralisation in the Mediterranean Sea and the less dangerous ("Priority 2") precursor chemicals to land-based incinerators in Finland, the UK, and the US.

By 20 October 2014, 100% (1,047 metric tons) of "Category 1" chemicals and 89% (232 metric tons) of "Category 2" chemicals had been destroyed; a total of 98% safely eliminated in less than a year of demilitarisation operations. Moreover, it was the first time that an entire

arsenal of a category of weapons of mass destruction was removed from a country experiencing a state of internal armed conflict.

Multinational mission overseen by the UN Security Council and OPCW to destroy Syria's declared chemicals stockpile.*

Syria is moving its chemical materials to Latakia (2), where they are being loaded on to a Danish ship and taken to Gioia Tauro in Italy (3). There they will be loaded on to the MV Cape Ray and destroyed at sea (4).

* Source: P., F., Walker, "Syrian Chemical Weapons Destruction: Taking Stock and Looking Ahead", *Arms Control Association*. Posted on December 2014. Available on: http://www.armscontrol.org/ACT/2014_12/Features/Syrian-Chemical-Weapons-Destruction-Taking-Stock-And-Looking-Ahead.

Because the *Cape Ray* was never allowed into Syrian territorial waters, it needed a Mediterranean port where it could receive the chemicals.

2.2.3. The Australia Group (AG)

The Australia Group (AG) is an international export control regime aiming at limiting the risk of proliferation of chemical and biological weapons, as well as their use for terrorism.

It was created following the findings of the special investigatory mission sent by the UN Secretary-General to Iraq, in April 1984, that Iran had been using chemical weapons during the Iran-Iraq War, violating the 1925 Geneva Protocol[96] and that at least some of the precursor chemicals

96 Q., Michel, S., Paile, M., Tsukanova, A., Viski, 2013, p. 58.

and materials for its CW program had been sourced through legitimate trade channels.[97] The event put the international community in front of the evidence that it was necessary to establish trade controls on some chemical and biological products and to adopt some common standards. For this reason, the main aim of the AG is:

> "To use licensing measures to ensure that exports of certain chemicals, biological agents, and dual-use chemical and biological manufacturing facilities and equipment, do not contribute to the spread of CBW. The Group achieves this by harmonising participating countries' national export licensing measures. The Group's activities are especially important given that the international chemical and biotechnology industries are a target for proliferators as a source of materials for CBW programs".[98]

The AG is an informal forum gathering 42 Participating States,[99] which are *manufacturer, exporter or trans-shipper of AG controlled items*. It is a politically-binding instrument complementing international legally-binding instruments, such as the Chemical Weapons Convention and the Biological and Toxin Weapons Convention (BWC - in force since 1975) and helping Participating States to implement them. As it happened for the control of nuclear items within the Nuclear Suppliers Group and the Wassenaar Arrangement, the scope of the AG became broader as to include dual-use chemical and biological-related items.
To help Participating States to implement their national trade control systems and to comply with international treaties, the AG allows for exchange of information and instruments to harmonise national trade control systems, such as guidelines and control lists.

97 The Australia Group, *The Origins of the Australia Group*. Available on: http://www.australiagroup.net/en/origins.html. (Accessed on 14/09/2016).

98 The Australia Group, *Objectives of the Group*. Available on: http://www.australiagroup.net/en/objectives.html. (Accessed on 14/09/2016).

99 To consult the list of Participating States, please see: The Australia Group, AG Participants. Available on: http://www.australiagroup.net/en/participants.html. (Accessed on 14/09/2016).

The *Guidelines for Transfers of Sensitive Chemical or Biological Items*, adopted in June 2002, give States a guide for a better implementation of their national control systems. For example, the Guidelines establish a list of non-exhaustive criteria to take into account the export authorisation decision-making process. Some examples of criteria to be assessed by States' national competent authorities are:

> "(...)
> b. The capabilities and objectives of the chemical and biological activities of the recipient State;
> c. The significance of the transfer in terms of (1) the appropriateness of the stated end-use, including any relevant assurances submitted by the recipient state or end-user, and (2) the potential development of CBW;
> d. The role of distributors, brokers or other intermediaries in the transfer, including, where appropriate, their ability to provide an authenticated end-user certificate (...) as well as the credibility of assurances that the item will reach the stated end-user;
> e. The assessment of the end-use of the transfer, including whether a transfer has been previously denied to the end-user, whether the end-user has diverted for unauthorized purposes (...)".[100]

The AG also adopted lists of items to define the scope of control:
— Chemical Weapons Precursors;
— Dual-use chemical manufacturing facilities and equipment and related technology and software;
— Dual-use biological equipment and related technology and software;
— Human and Animal Pathogens and Toxins;
— Plant pathogens.

100 The Australia Group, *Guidelines for Transfers of Sensitive Chemical or Biological Items*. Available on: http://www.australiagroup.net/en/guidelines.html. (Accessed on 14/09/2016).

Complementarily to the list of items, the AG defines operations that will be submitted to control. These cover tangible and intangible exportations and brokering activities, while transit and importations activities are not considered by the regime.
The AG also provides Participating States with the possibility of applying catch-all clauses. A two-level catch-all clause system is established:

— an authorisation for the transfer of non-listed items where the exporter is informed by the competent authorities of the Participant State, in which it is established that the items in question may be intended, in their entirety or part, for use in connection with chemical or biological weapons activities;
— if the exporter is aware that non-listed items are intended to contribute to such activities, it must notify the authorities mentioned above, which will decide whether or not it is expedient to make the concerned export subject to authorisation.

Moreover, Participating States are encouraged to share information on these measures on a regular basis and to exchange information on catch-all denials.

The AG also includes the no undercut principle, which means that, in accordance with the Group's agreed procedures, a license for an export that is essentially identical to one denied by another AG participant will only be granted after consultations with that participant, provided it has not expired or been rescinded. Essentially identical is defined as being the same biological agent or chemical or, in the case of dual-use equipment, equipment which has the same or similar specifications and performance sold to the same consignee. The terms of the Group's "no undercut policy" do not apply to denials of items under national catch-all provisions.[101]

101 *Australia Group Agrees New CBW Export Control Measures*, The Acronym Institute for Disarmament Diplomacy, June 6 2002. Available on: http://www.acronym.org.uk/old/archive/docs/0206/doc09.htm. (Accessed on 14/09/2016).

3. Conflict Minerals

"Conflict minerals" are also subject to some trade controls. However, compared to previously analysed items, such as conventional weapons and WMD, their control is quite recent, partial and regulated by a different trade control principle, mainly based on a due-diligence strategy for industries and a system of certification.
This chapter will introduce the issue of conflict minerals and will analyse the regulation framework at three levels: international (UN and OECD), regional (International Conference on the Great Lakes Region) and national (United States' regulation – since trade controls on conflict minerals were a US initiative).

3.1. What are conflict minerals? The 3TG

The international community has broadly recognised the role of natural resources in initiating, intensifying and sustaining conflict and, on a case-by-case basis, has identified this role as a threat to international peace and security.

Conflict minerals are minerals which are mined in geographical areas that are facing armed conflict and human rights abuses. Initially, Eastern provinces of the Democratic Republic of the Congo (DRC) were specifically targeted. Four minerals are concerned, usually grouped under the acronym 3TG:
— Tantalum (columbite-tantalite);
— Tin (cassiterite);
— Tungsten (wolframite);
— Gold.

Conflict minerals are usually defined as:

> "Natural resources whose systematic exploitation and trade in a context of conflict contribute to, benefit from, or result in the commission of serious violations of human rights, violations of

international humanitarian law or violations amounting to crimes under international law".[102]

The trade control of the so-called "conflict minerals" was a US initiative. In 2010, US President Obama signed the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (DFA), where Section 1502 of the DFA (see *infra*) addresses the international trade and use of Conflict Minerals, having the following scope:

"A. columbite-tantalite (coltan), cassiterite, gold, wolframite, or their derivatives; or
B. any other mineral or its derivatives determined by the Secretary of State to be financing conflict in the Democratic Republic of the Congo or an adjoining country".[103]

It seems that three main factors can explain the US initiative to regulate conflict minerals' trade:
1. The international and NGOs pressure;
2. The Corporate Social Responsibility pressure;
3. The US hegemony worldwide.

1. The international and NGOs pressure:
The war in Eastern Congo began in the early 1990s, and it is still going on. This conflict is notorious for serious violations of human rights, including violence against women and the use of child soldiers. In response to such violence, the *Enough Project* was launched in 2007 to develop American constituency to both prevent and end conflict in Africa.
Enough and other activist groups working on DRC pressured the US in issuing a law to regulate conflict minerals (specifically to exhort

102 M., T., Cicero, *The Sinews of war: eliminating the trade in conflict resources*, Global Witness November 2006. Available on: https://www.globalwitness.org/sites/default/files/import/the_sinews_of_war.pdf. (Accessed on 14/09/2016).

103 Section 1502 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 2010. Available on: https://www.sec.gov/about/laws/wallstreetreform-cpa.pdf. (Accessed on 14/09/2016).

companies to be more transparent and responsible in their mineral sourcing). Another important pressure came from *Global Witness*, an international NGO established in 1993 that works to break the links between natural resource exploitation, conflict, poverty, corruption, and human rights abuses worldwide.

As regards international pressure, the UNSC resolutions played an important role in shaping the Congolese crisis and the illegal exploitation of natural resources as "*a serious threat to regional peace and security*" (S/PRST/1998/26) and in reminding States of their International Humanitarian Law (IHL) obligations. So, even if the UN did not address the conflict minerals issue directly (it only happened with the UN Due Diligence Guidelines in 2010) by making the link between illegal exploitation of natural resources and armed conflict, it raised the issue to the international level and, more than that, to international security concern, a field in which the US prefers to exercise primacy.

2. Corporate Social Responsibility

Over the past two decades, companies started to recognise the impossibility to do business without taking care of human rights principles. Eventually, the rise of the Corporate Social Responsibility no longer places States as the only guarantors of the International Humanitarian Law and pushes corporations to campaign for the protection of human rights. The US smartly welcomed this international trend by delivering Section 1502 of the DFA (the Conflict Minerals Bill) as "*a new kind of mechanism to compel corporations to play a role in protecting human rights*".

3. US Hegemony worldwide

Assuming this backdrop, if the US had been merely pushed from the noble purposes of addressing the issue of conflict minerals as an international humanitarian concern, they would not have placed the bill in the Dodd-Frank Act, an ostensibly financial regulatory reform. In the same vein, the SEC would not have been the only authority for the implementation of the Conflict Minerals Law (it has not the institutional competence).

The bottom line is that the US adopted the Conflict Minerals Law, with international, diplomatic and human rights-oriented goals, in order to "save their international face" as the hegemony of the world that "take care" of the international concerns affecting the whole planet (*name-and-shame* dynamic). Actually, the US structured the Bill with some "imperfections" that caused the so-called "unintended consequences" of Section 1502 and, consequently, the partial inaction of the Conflict Minerals Law. On the one hand, the American strategy was to issue a sort of "one-size-fits all" law by exercising its extraterritoriality jurisdiction. On the other hand, by putting all the liability on the SEC, the US has managed to attribute all the inefficiencies of Section 1502 on the "implementation-side" (the SEC), which contrasted with the noble intent of the Congress to definitively stop all human rights abuses and violence in the DRC.

The US law only covers only conflict minerals coming from a predefined list of countries: DRC and the adjoining countries, i.e. Angola, Burundi, Central African Republic, Congo Republic, Rwanda, Sudan, Tanzania, Uganda and Zambia.

Countries covered under Section 1502 of the Dodd-Franck Act

The need to regulate trade in conflict minerals as described and originating from the above-mentioned paragraph is justified by the US Congress on the basis that these minerals were contributing to financing conflict and acts of violence in the region:

> "It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein".[104]

104 Section 1502 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 2010.

3.2. Regulation at the international level: the United Nations and the OECD

The rationale at the basis of international efforts to control the trade of conflict minerals is to break the link between the illegal exploitation of natural resources and the financing of armed conflicts. The instrument to reach the objective is the promotion of a sustainable and responsible way of sourcing, through the practice of due-diligence (see *infra*) by operators.

Despite trade control on conflict minerals is a recent US initiative and the US trade control system constitutes, basically, the only example, the UN Security Council already expressed its concern in 2000 about the illegal exploitation of DRC's natural resources:

> "Reaffirming also the sovereignty of the Democratic Republic of the Congo over its natural resources, and noting with concern reports of the illegal exploitation of the country's assets and the potential consequences of these actions on security conditions and the continuation of hostilities, (...)".[105]

At the beginning, the main focus of the UN Security Council was not on conflict minerals as such; instead, UNSC resolutions focused on the control of the flow of weapons, establishing arms' embargoes on the DRC.[106] Over the years, UNSC arms' embargoes were extended to the entire DRC territory, under the form of targeted sanctions.[107]

105 United Nations, UN Security Council, *Resolution 1291 (2000) Adopted by the Security Council at its 4104th meeting, on 24 February 2000*, 24 February 2000, S/RES/1291 (2000). Available on: http://www.refworld.org/docid/3b00f24d30.html. (Accessed on 14/09/2016).

106 See, for example, UNSCR 1457 (2003), UNSCR 1493 (2003), UNSCR 1533 (2004)

107 See UNSC resolutions: 1596(2005), 1649(2005), 1698(2006), 1768(2007), 1771(2007), 1799(2008).

UNSCR 1533 (2004) established a Committee of the Security Council (the 1533 Committee) to oversee the weapons' embargo and a Group of Experts (GoE) to assist the Committee by monitoring the implementation of embargoes. In this regard, the Group of Experts played a major role in providing "*extensive evidence proving the linkage between the mismanagement of mineral concessions and diversions of natural resources for the financing of arms-embargo violations*".[108] The GoE's reports showed how the most important sources of revenue raised by the *FDLR* (*Forces Démocratiques de Libération du Rwanda*) stem from its involvement in the illegal exploitation of natural resources (trade of gold, cassiterite, coltan, wolframite and other minerals in North and South Kivu).

The report highlighted that the 3T (cassiterite, coltan and wolframite) were officially exported through companies based all over the world (Austria, Belgium, Canada, China, Hong Kong, India, Malaysia, Thailand, Rwanda, South Africa, Switzerland, the Netherlands, the Russian Federation, the United Arab Emirates, the United Kingdom of Great Britain and Northern Ireland).
Therefore, the GoE recommended that the Committee "*urge Member States to take appropriate measures to ensure that exporters and consumers of Congolese mineral products under their jurisdiction conduct due diligence on their suppliers and not accept verbal assurances from buyers regarding the origin of their product*".[109]

Following GoE's reports, conflict minerals started to attract the attention of the UN Security Council, which, in its resolution 1857 of 2008, extended targeted sanctions to "*Individuals or entities supporting the illegal armed groups in the eastern part of the Democratic Republic of the Congo through illicit trade of natural resources*".[110] The UNSCR 1857(2008) also encouraged States to "*take measures, as they deem appropriate, to ensure that importers, processing industries and consumers*

108 United Nations, *Report of the Group of Experts of 18 July 2006* (S/2006/525).

109 United Nations, *Report of the Group of Experts of 10 December 2008*, (S/2008/773).

110 United Nations, UNSC Resolution 1857(2008) of 22 December 2008.

of Congolese mineral products under their jurisdiction exercise due diligence on their suppliers and on the origin of the minerals they purchase."

It was the first time that the concept of due-diligence entered the Security Council's language.
In 2010, the GoE set out the Guidelines for the exercise of due-diligence "*by importers, processing industries and consumers of mineral products from the Democratic Republic of the Congo. To this end, the Group consulted concerned Member States, regional and international forums, commercial entities and civil society organizations, also drawing on its own investigations into the linkage between the exploitation of natural resources and the financing of armed groups*".[111]

The UN Due-Diligence Guidelines (UN DD Guidelines) established a five-steps strategy:
— Strengthening company management systems;
— Identifying and assessing supply chain risks;
— Designing and implementing strategies to respond to identified risks;
— Conducting independent audits; and
— Publicly disclosing supply chain due diligence and findings.[112]

Despite the fact that UN DD Guidelines do not have a direct legal force, they create an indirect pressure mechanism on companies to comply with the Guidelines. Furthermore, the UNSCR 1952 authorises the Sanctions Committee to consider designating a company for sanctions on the basis of whether DD has been exercised or not.

Another set of guidelines on due-diligence has been published by the OECD in 2011 (a second edition came out in 2012): *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*.

111 United Nations, *Report of the Group of Experts of 29 November 2010* (S/2010/596).

112 Further information on the UN DD Guidelines can be found on: http://www.un.org/News/dh/infocus/drc/Consolidated_guidelines.pdf. (Accessed on 14/09/2016).

The OECD Guidance is the first example of a collaborative government-backed multi-stakeholder initiative on responsible supply chain management of minerals from conflict-affected areas. In fact, it is the result of a collaborative initiative among governments, international organisations, industry and civil society.
Its objectives are:

— "To help companies respect human rights and avoid contributing to conflict through their mineral sourcing practices;
— To cultivate transparent mineral supply chains and sustainable corporate engagement in the mineral sector with a view to enabling countries to benefit from their mineral resources and preventing the extraction and trade of minerals from becoming a source of conflict, human rights abuses, and insecurity.
— To help companies ensure they observe international law and comply with domestic laws, including those governing the illicit trade in minerals and United Nations sanctions".[113]

The OECD Guidance is not legally binding, but it reflects the common position and political commitment of OECD members and non-members adherents.
It provides a framework for detailed due diligence as a basis for responsible global supply chain management. It also serves as a common reference for all suppliers and other stakeholders in the mineral supply chain and any industry-driven schemes.

113 Organisation for Economic Cooperation and Development (OECD), *OECD Due Diligence Guidance for responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 2013, Foreword, p. 3. Available on: http://www.oecd.org/corporate/mne/GuidanceEdition2.pdf. (Accessed on 14/09/2016).

United Nations Due-Diligence Guidelines vs OECD Guidance		
	UN DD Guidelines	**OECD Guidance**
Legal force	Binding	Voluntary and non-binding
Scope	To strengthen the linkage between armed conflict and illegal exploitation of minerals and to maintain the peace and security in the region through good governance and transparency	Respect human rights and avoid contributing to conflict through mineral practices
Geographical scope	DRC (almost exclusively the Eastern part)	Conflict-affected and high-risk areas

3.3. Regulation at the regional level: the International Conference on the Great Lakes Region (ICGLR)

The International Conference on the Great Lakes Region was founded in 2000. It is an informal forum gathering 12 African countries: Angola, Burundi, Central African Republic, Democratic Republic of Congo, Kenya, Republic of Congo, Republic of South Sudan, Rwanda, Sudan, Tanzania, Uganda and Zambia.
The ICRLR provides a sort of regional standard setting to deal with the illegal exploitation of natural resources.

In the framework of the *Pact on Security, Stability and Development in the Great Lakes Region*, adopted in 2006, the *Protocol Against the Illegal Exploitation of Natural Resources* was adopted with a legally-binding value. In the Protocol, States Parties "*agree to put in place regional rules and mechanisms for combating the illegal exploitation of natural resources which constitute a violation of the States' right of permanent*

sovereignty over their natural resources and which represent a serious source of insecurity, instability, tension and conflicts".[114]

One of the instruments put in place by States Parties to combat the illegal exploitation of natural resources is the Regional Certification Mechanism (RCM). The RCM is a regional tracking and certification system for tin, tantalum, tungsten, and gold, meeting standards set out in a certification manual. It includes mineral tracking from the mine site to export, and regional mineral tracking. The RCM framework in individual ICGLR Member States includes (1) mine site inspections by the national mining authority; (2) adequate chain of custody management (subject to independent evaluation); (3) mineral export shipment certification (via a national certification unit), and (4) data management and exchange with the ICGLR Secretariat.[115]

Despite the fact that the export certification became mandatory since December 2012, the system is not yet fully operational.
DRC and Rwanda issued first ICGLR certificates for export shipments in July 2013 and October 2013[116] respectively. Rwanda Natural Resources Authority (RNRA) set 31st December 2015 as a deadline for mineral exporters across Rwanda to stop buying from uncertified mine sites and for all and every exporting company to be equipped with the Rwanda-

114 *Protocol Against the Illegal Exploitation of Natural Resources,* December 2006, Article 9. Available on: https://www.lse.ac.uk/collections/law/projects/greatlakes/2.%20Democracy%20and%20Good%20Governance/2c.%20Protocols/Protocol.IENR.30.11.%2006%20-%20En,%20final%20revised.pdf. (Accessed on 14/09/2016).

115 BGR Mineral Certification, *The Regional Certification Mechanism of ICGLR*. Available on: http://www.bgr.bund.de/EN/Themen/Min_rohstoffe/CTC/Concept_MC/RCM-Mechanism/RCM_mechanism_node_en.html. (Accessed on 14/09/2016).

116 Republic of Rwanda, *Rwanda issues the 1st ICGLR mineral export certificate to boost mining sector*, 06.11.2013. Available on: http://www.gov.rw/newsdetails2/?tx_ttnews%5Btt_news%5D=750&cHash=dfb64aac8208c022a5f483f49f3e96f0. (Accessed on 14/09/2016).

ICGLR certificate to accompany their mineral shipments towards outside the country.[117]

The Protocol contributed to the acknowledgement that the illegal exploitation of natural resources must be addressed as a trans-boundary problem rather than being confined exclusively to the realms of the domestic. It also recognises the importance of sharing responsibility between the private and public sectors.

The Protocol also provided the legal basis for the implementation of the ICGLR's *Regional Initiative on Natural Resources* (RINR), a comprehensive approach made of six tools to address the issue of illegal exploitation of natural resources:
— Regional certification mechanism;
— Harmonisation of national legislation;
— Regional database on mineral flows;
— Formalisation of the artisanal mining sector;
— Promotion of the EITI (Extractive Industries Transparency Initiative);
— Whistle-blowing mechanism.

The implementation process proceeds slowly, but some steps have been taken. For example, a certification manual has been developed and approved by the 11 Heads of State. It provides a practical guide for the implementation of the Regional Certification Mechanism.[118]
A Regional Steering Committee, comprising technical experts from all ICGLR Member States, has been charged with the steering of all activities within the Initiative.

117 Republic of Rwanda, *New details, 31st January 2016: Deadline for mineral exporters to export without Rwanda-ICGLR certificate*. Available on: http://rnra.rw/index.php?id=51&tx_ttnews%5Btt_news%5D=293&cHash=c9554fc4d4364e4254b8c080d921e09c. (Accessed on 14/09/2016).

118 The ICGLR Regional Certification Mechanism Manual is available on: http://www.oecd.org/investment/mne/49111368.pdf. (Accessed on 14/09/2016).

In 2010, the ICGLR Secretariat carried out a legal review/compatibility analysis of national laws in ICGLR Member States, as a first step in the process of domesticating of the Protocol in Member States. These outcomes were circulated and presented within the Member States whereupon some progress on harmonisation was recorded. A draft model legislation entitled *The prevention and Suppression of the Illegal Exploitation of Minerals in the Great Lakes Region Act*, known as *Model Law*, was prepared. The draft Model Law was subsequently harmonised with OECD Due Diligence Guidance and agreed upon on an ICGLR-OECD joint regional workshop on Due Diligence for responsible mineral supply chain in November 2011. Finally, the Model Law has focused on the following aspects of the Protocol:

— Conflict minerals (3T and Gold);
— OECD Due diligence;
— Regional Certification.[119]

Lastly, a test version of a database, which has already started to gather data on the production and exports of selected natural resources, has been activated.

Although the RINR has no legally-binding force, it still creates a pressure mechanism on industries and stakeholders to exercise due-diligence and to promote a responsible way of sourcing minerals.

119 *ICGLR Model Law RINR: Prevention and Suppression of the Illegal Exploitation of Minerals in the Great Lakes Region*, a publication of the Conference Secretariat of the International Conference on the Great Lakes Region with support from the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, July 2012.

3.4. Regulation at the national level: Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

The *Dodd-Frank Wall Street Reform and Consumer Protection Act* or Dodd-Frank Act (DFA) was signed in July 2010 by US President Obama. The Act concerns banking regulations and other measures addressing the regulation of financial institutions. It enacts a financial regulatory reform in response to the 2008 financial crisis and establishes a competent authority in charge of its implementation: the Securities and Exchange Commission (SEC). The part of the Act that directly deals with conflict minerals is Section 1502.

> Prologue of Section 1502:
> "It is the sense of Congress that the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein, warranting the provisions of section 13(p) of the Securities Exchange Act of 1934, as added by subsection (b) International, diplomatic, and human rights-oriented goals".

It is important to stress that while the DFA has a national financial aim, Section 1502 has international, diplomatic and human rights-oriented goals, not always compatible with the financial regulation framework established by the DFA. The results of this "contradiction" are some unintended consequences (see *infra*).

Section 1502 is a disclosure requirement. It includes a requirement that companies using gold, tin, tungsten and tantalum make efforts to determine if those materials came from the Democratic Republic

of Congo (DRC) or an adjoining country and, if so, to carry out a "due diligence" review of their supply chain to determine whether their mineral purchases are funding armed groups in Eastern DRC. The US Securities and Exchange Commission (SEC) issued the *final rule* implementing Section 1502 in August 2012. The rule requires companies to report publicly on their due diligence and to have their reports independently audited. The initial reporting period started in January 2013.[120]

Section 1502 is applicable to all SEC "issuers" (including foreign issuers) that manufacture or contract to manufacture products where "*conflict minerals are necessary to the functionality or production*" of the product. The industries most likely to be affected include electronics and communications, aerospace, automotive, jewellery and industrial products.[121]

The disclosure requirement is a three-step procedure:
1) An issuer needs to determine whether its manufactured products contain conflict minerals that subject it to the requirements of Dodd–Frank Section 1502: if the conflict minerals are not necessary, the issuer will not be required to take any action, make any disclosures or submit any reports. If, however, they are necessary and in the supply chain, the issuer must move to Step 2.

2) An issuer needs to determine whether its necessary conflict minerals originated in the Covered Countries: issuers using necessary conflict minerals are required to conduct a "reasonable country of origin inquiry" (RCOI) regarding these conflict minerals.

120 Implementation of US Dodd-Frank Act rule on conflict minerals: Commentaries, guidance, company actions, Business & Human Rights Resources Centre. Available on: http://business-humanrights.org/en/conflict-peace/conflict-minerals/implementation-of-us-dodd-frank-act-rule-on-conflict-minerals-commentaries-guidance-company-actions.

121 *Dodd–Frank Section 1502 and the SEC's final rule, Conflict minerals: what you need to know about the new disclosure and reporting requirements and how Ernst & Young can help you*, Ernst & Young Assurance, Tax, Transactions, Advisory, 2012, EYGM Limited, p. 1. Available on: http://www.ey.com/Publication/vwLUAssets/EY_CnflictMinerals/$FILE/EY_ConflictMinerals.pdf. (Accessed on 14/09/2016).

An issuer that determines that its conflict minerals did not originate in the Covered Countries has to provide an annual special disclosure report and to briefly describe the RCOI used in reaching its determination. Such issuers do not have to move onto Step 3. If, however, based on its RCOI, the issuer knows — or has reason to believe — that it has used necessary conflict minerals that originated in the Covered Countries, it must move onto Step 3.

3) An issuer with necessary conflict minerals from Covered Countries needs to conduct due diligence, and potentially provide a Conflict Minerals Report: the due diligence must be based on a nationally or internationally recognized due diligence framework (e.g. the due diligence guidance approved by the OECD: *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*).
The goal of this due diligence is to determine whether the issuer's minerals are "DRC conflict free (i.e. whether they directly or indirectly financed or benefited armed groups in the Covered Countries).[122]

The Conflict Minerals Report that has to be filled, if the issuer determines that its conflict minerals are from Covered Countries, must include the following information:
1. The country of origin of those conflict minerals;
2. Any efforts made to determine the mine or location of origin with the greatest possible specificity;
3. The facilities used to process those conflict minerals, such as the smelter or refinery through which the issuer's minerals pass;
4. A description of any products that are not "DRC conflict free".[123]

Moreover, an issuer must obtain an independent private sector audit of its Conflict Minerals Report and include a statement about it in the report.
If an issuer is unable to determine whether their products are conflict free, the issuer is allowed to define its products as " DCR conflict

122 Ibid., pp. 3-5.

123 Ibid., p. 6.

undeterminable" for a transitional period (two years for large companies and four years for small companies). In this case, an independent private sector audit of the Conflict Minerals Report will not be required.[124]
As mentioned above, given the non-specific legislative framework to regulate the issue of conflict minerals, some unintended consequences are caused by the implementation of Section 1502.

The first unintended consequence is the *cost of compliance*. It turned out that complying with the SEC rule is hugely expensive for the US companies. The SEC, which is the only national competent authority for the enforcement of Section 1502, cannot mandate or stop the trade of conflict minerals, nor sanction non-compliance to Section 1502. The most effective instrument to push companies towards compliance is an indirect pressure mechanism operated by various stakeholders and in particular NGOs, pressuring on companies to meet their obligations under the law.

A second consequence is the *reputational risk*. Section 1502 boosts companies to be "responsible" by means of disclosure requirements, which, being available on companies' websites, constitute an incentive for issuers to respect the law. Corporate actors comply with the conflict minerals obligations in order "to save their faces". Since the law requires companies to declare, on their websites, if certain products are "not found to be DRC conflict free", it implicitly means that those issuers are, in a way, contributing to fuel the violence and HR abuses in the DRC. For this reason, it is possible to consider the US regulation on conflict minerals as a sort of "naming and shaming legislation".

A third consequence caused by Section 1502 is the *de facto* embargo imposed against Congolese minerals. In fact, companies might rather prefer not to undertake the requirements mandated by the conflict minerals law, and boycott Congolese minerals.

124 Ibid., p. 7.

A further and linked consequence has been a *market distortion*. By restricting the effective US business ability to obtain minerals from the DRC and Covered Countries, Section 1502 has opened the door for other investors, which can benefit from the unintended consequences of the conflict minerals Bill. In particular, this gave Chinese firms a virtual monopoly on some Congolese minerals.

3.5. The National Normative Framework: the example of the DRC

The DRC has regulated the minerals sector through legislation. However, existing instruments have not been adequately implemented by the State.

It is important to also stress the fact that in the country, the rule of law is quite weak, and the country registers a very high level of corruption. In 2015, the country ranked 147th of the 168 countries assessed by the Transparency International's Corruption Perceptions Index (CPI), [125] scoring 22 on a scale of 0 (highly corrupt) to 100 (highly clean).[126]These findings are consistent with the World Bank's 2012 Worldwide Governance Indicators where the DRC performs poorly on the six assessed dimensions of governance, scoring below 7 (on a 0 to 100 scale) in all categories.[127]

The 2002 Mining Code is the primary legal instrument governing mining activities in the DRC and sets out the framework within which responsibilities for the mining sector are allocated between the different actors involved. The code grants the President full authority to enact mining regulations to implement its provisions; decisions over mining

125 The Corruption Perceptions Index ranks countries/territories based on how corrupt a country's public sector is perceived to be. It is a composite index, drawing on corruption-related data from expert and business surveys carried out by a variety of independent and reputable institutions.

126 Transparency International, *Corruption by country/territory*, 2015. Available on: https://www.transparency.org/country/#COD_DataResearch. (Accessed on 14/09/2016).

127 Transparency International, Overview of corruption and anti-corruption in the Democratic republic of Congo (DRC), 2014. Available on: http://www.redd-monitor.org/wp-content/uploads/2015/05/Country_Profile_DRC_2014.pdf. (Accessed on 14/09/2016).

rights are vested in the office of the Minister of Mines. Lawful authority to trade in minerals derived from artisanal production requires a licence from the Ministry; and, at the production level, artisanal mining permits are granted by the Mining Ministry's provincial representatives. In theory, the sector is regulated by a State agency (the Small-scale Mining Assistance and Training Service - SAESSCAM). In practice, however, the government's inability to establish a meaningful presence in remote mining locations, compounded by the inefficiency of the bureaucracy, has meant that local customary authorities continue to play a parallel role in the granting of land tenure and mining rights.[128]

In September 2010, the Congolese government adopted a ban, called "Kabila's ban" (from the name of the DRC's President adopting it), on all exploitation and export of minerals from North Kivu, South Kivu and Maniema provinces. While the aim of the decree was to halt all illegal exploitation of minerals by the "mafia-like networks" within FARDC,[129] the ban did precisely the opposite by providing an opportunity for renegade elements of FARDC to consolidate their control over the mines in the regions subject to the ban. Moreover, those who suffered the greatest harm were the very many artisanal miners and their families whose sole source of income was linked to the mining sector.[130]

128 J., Stearns, "General Conclusions", in J., Cuvelier (ed.), *The Complexity of Resource Governance in a Context of State Fragility,* International Alert, 2010, pp. 70–71, in Loiuse Arimatsu and Hemi Mistry, *Conflict Minerals: The Search for a Normative Framework*, International Law Programme Paper IL PP 2012/01, Chatham House, September 2012, p. 28. Available on: https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/0912pparimatsu_mistry.pdf. (Accessed on 14/09/2016).

129 FARDC: *Forces Armées de la République Démocratique du Congo* (armed forces of the DRC).

130 Loiuse Arimatsu and Hemi Mistry, *Conflict Minerals: The Search for a Normative Framework*, International Law Programme Paper IL PP 2012/01, Chatham House, September 2012, p. 29.

From 2011, a series of governmental decrees has been adopted to resolve the conflict minerals issue:

— May 2011: public disclosure of mineral contracts;
— June 2011: mandatory 3TG and gold certification;
— September 2011: compliance with UN and OECD Due Diligence frameworks;
— February 2012: transposition of the ICGLR Regional Certification Mechanism into domestic law.

In general, however, measures and laws have been ineffective. In November 2012, the UNGoE reported that regulatory and enforcement action in the DRC had so far resulted in an overall decrease of mineral exports from the east of the DRC and in a rise in mineral smuggling, notably of gold, to neighbouring countries. Not only the Dodd-Frank Act has produced a number of unintended consequences, especially of an adverse nature for mining communities in the Eastern provinces, but also the export ban announced by President Kabila, in September 2010, clearly had a devastating effect on the livelihood of those reliant on the sector.

A normative framework governing conflict minerals is still emerging, but there has been considerable progress at international, regional and domestic levels. The responsibilities of States (whether acting collectively or individually), of individuals and of corporations in addressing conflict minerals are more clearly defined. Through State practice, new norms are emerging, as with due diligence.

3.6. EU initiatives

The EU does not have a trade control system in place for conflict minerals. However, a proposal exists: *COM (2014) 111: Proposal for a regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas*.[131] As set out in Article 1 of the proposal:

> "This Regulation sets up a Union system for supply chain due diligence self-certification in order to curtail opportunities for armed groups and security forces to trade in tin, tantalum and tungsten, their ores, and gold. It is designed to provide transparency and certainty as regards the supply practices of importers, smelters and refiners sourcing from conflict-affected and high-risk areas.
> 2. This Regulation lays down the supply chain due diligence obligations of Union importers who choose to be self-certified as responsible importers of minerals or metals containing or consisting of tin, tantalum, tungsten and gold, as set out in Annex I".[132]

Differing from existing instruments, such as UNSC resolutions and US measures, the EU initiative would have a wider geographical scope, without limiting the scope of application to the DRC and surrounding countries.

131 European Commission, COM (2014) 111: Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas, Brussels, 5.3.2014 COM(2014) 111final 2014/0059 (COD)). Available on: http://eur-lex.europa.eu/procedure/EN/2014_59. (Accessed on 14/09/2016).

132 Idem.

4. Diamonds

Diamonds trade controls follow a logic similar to conflict minerals, except that for diamonds, States (not only the private sector) are monitoring the process. The necessity to submit diamonds to control came from the political will to avoid this trade to contribute to the financing of armed conflicts, especially in Africa.

The economic importance of diamonds for the world economy is rather small, and the number of actors involved is limited. Leading diamonds mining countries are located in the North (Russia and Canada) and in Africa (Botswana, Congo, Zimbabwe, Angola, South Africa, Namibia, Sierra Leone). Importers of raw diamonds are essentially established in Antwerp, Mumbai, Tel Aviv, New York, China, Thailand and Johannesburg.[133]

Diamonds are used in jewellery (due to their rarity and beautiful appearance) and in the industry (due to their unique molecular properties).[134] In terms of quantity, about 30% of diamonds are of gem quality and are distributed to experts for cutting, polishing and jewellery manufacture. The remaining 70% are sold for industrial applications including cutting, drilling, grinding and polishing.[135]

Diamonds have been used throughout history as a symbol of emotions, such as love, affection and commitment. They are often given to celebrate special occasions. In many cultures, diamonds are considered to be the ultimate jewel.[136] The symbolic value of diamonds has largely

133 *The diamonds industry fact sheet*, World Diamond Council, 2007. Available on: https://www.worlddiamondcouncil.org/download/resources/documents/Fact%20Sheet%20(The%20Diamond%20Industry).pdf.

134 Diamonds are the hardest natural material known to man and the most efficient heat conducting material, which also expands very little when subjected to high temperatures, unlike most other conducting materials. They are resistant to most acids and alkalis.

135 *The diamonds industry fact sheet*, World Diamond Council, 2007.

136 Ibid.

contributed to the motivation to control its trade and to break the link with armed conflicts in Africa and the nickname of "blood diamonds". The first UNSC resolution to address the issue was UNSCR 1306 (2000) on the situation in Sierra Leone. In this resolution, the Security Council, declaring the situation in Sierra Leone as a threat to international peace and security, expresses its concern:

> " (...) At the role played by the illicit trade in diamonds in fuelling the conflict in Sierra Leone, and at reports that such diamonds transit neighbouring countries, including the territory of Liberia, (...).
> Emphasizing that the legitimate diamond trade is of great economic importance for many States (...)"and acting under Chapter VII of the UN Charter, decides that all States "shall take the necessary measures to prohibit the direct or indirect import of all rough diamonds from Sierra Leone to their territory".[137]

4.1. The Kimberley Process (KP)

One of the difficulties in implementing the resolution was the identification of rough diamonds coming from the targeted region. The only possibility was through the creation of a tracking system from the mine to the final user. Therefore, an informal instrument, called the Kimberley Process (KP), organising a certificate scheme involving all participants of the supply chain and guaranteeing the origin of diamonds was established.

The Kimberley Process is a certification system (KPCS) that prevents diamonds from an area of conflict entering the legitimate diamond supply chain. The KPSC ensures that only rough diamonds accompanied by a government-issued certificate can be imported and exported,

137 United Nations Security Council Resolution 1306(2000) on the situation in Sierra Leone, S/RES/1306 (2000) of 5 July 2000. Available on: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/517/01/PDF/N0051701.pdf?OpenElement. (Accessed on 16/09/2016).

assuring that the diamonds are not coming from conflict zones. Within this process, States commit themselves to import and export only KPSC rough diamonds.

The KP has 54 participants, representing 81 countries. The European Union and its Member States count as a single participant, represented by the European Commission.[138]
The KP also includes non-State Observers, which play an active role in monitoring the effectiveness of the certification scheme and provide technical and administrative expertise. The Observers of the KP are the World Diamond Council (WDC), which represents the international diamond industry and NGO, African Diamonds producers Associations (ADPA), Civil Society Coalition and Diamond Development Initiative (DDI).[139]
On the KP official website, it is affirmed that KP members account for approximately 99.8% of the global production of rough diamonds.[140]

The KPCS was established with the aim of avoiding the use of the so-called "conflict diamonds", but the definition of "conflict diamonds" used in the KPCS core document is rather vague:

> "CONFLICT DIAMONDS means rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognised in United Nations General Assembly (UNGA) Resolution".[141]

138 The European Commission acts in the name of the EU and its 28 Member States because of a matter of competence —trade being an EU exclusive competence—and also because it is an informal instrument, excluding the possibility to adopt any legally binding acts.

139 Kimberley Process, *About KP Participants and Observers*. Available on: http://www.kimberleyprocess.com/en/observers. (Accessed on 16/09/2016).

140 Ibid.

141 *Kimberley Process Certification Scheme*, Section I Definitions, p. 3. Available on: http://www.kimberleyprocess.com/en/kpcs-core-document. (Accessed on 16/09/2016).

In other words, the definition of "conflict diamonds" relies on UN resolutions.
It is interesting to note that the KPCS has been formally recognised and supported by the UN, via UNSC resolution 1459/2003:

> "1. Strongly supports the Kimberley Process Certification Scheme, (...) a valuable contribution against trafficking in conflict diamonds and looks forward to its implementation and strongly encourages the participants to further resolve outstanding issues;
> (...)
> 3. Stresses that the widest possible participation in the Kimberley Process Certification Scheme is essential and should be encouraged and facilitated and urges all Member States to actively participate in the Scheme".[142]

Compared to other trade control systems, the regulation of diamonds has followed a logic inverse to the one followed by most of international trade control regimes: instead of having the creation of a legally-binding regime followed by a politically-binding instrument stating the need to establish some trade controls, the KPCS originates as an informal trade control instrument, recognised only after its creation by legally-binding instruments such as UNSC resolutions.
Over time, the scope of the KPSC has been extended by UNSC resolutions. The first resolution concerned Sierra Leone (UNSCR 1306 (2000)), but in 2001, it was extended to Liberia (UNSCR 1343), in 2005 to Côte d'Ivoire (UNSCR 1643) and in 2014 to Central African Republic (UNSCR 2134).

142 United Nations, United Nations Security Council Resolution 1459(2003), S/RES/1459 (2003) of 28 January 2003. Available on: http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1459(2003. (Accessed on 16/09/2016).

4.1.1. The implementation of the KPCS

Trade control on diamonds is implemented through a certification scheme (KPCS) entailing extensive requirements on its members to enable them to certify shipments of rough diamonds as conflict-free and prevent conflict diamonds from entering the legitimate trade. These requirements basically concern:

— the establishment of national legislation and institution (e.g. a competent national authority) to ensure the implementation of the KPCS;
— the establishment of export, import and internal controls;
— the commitment to transparency and exchange of statistical data.

Participants can only trade with participants who have also met the minimum requirements of the scheme. The minimum requirements are that each certificate should bear the title "Kimberley Process Certificate" and the following statement: "*The rough diamonds in this shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme for rough diamonds*". It also has to indicate the country of origin for shipment of parcels[143] of unmixed (i.e. from the same) origin[144] (meaning that if the country of origin is the same for diamonds in the package, it has to be indicated), and a unique numbering with the Alpha 2 country code, according to ISO 3166-1.
In other terms, the certificate is a formal document attached to the shipment that confirms the content and the origin of the diamonds.[145]

Other optional elements contained in the certificate concern: the characteristics of a certificate (for example: form, additional data or security elements), quality characteristics of the rough diamonds in the shipment and the authentication of the certificate by the importing authority. The KPCS also provides some optional procedures on how

143 The KPCS defines the term "parcel" as one or more diamonds that are packed together and that are not individualised.

144 The KPSC defines "parcel of mixed origin" as a parcel that contains rough diamonds from two or more countries of origin, mixed together.

145 It is not surprising that there are as many models of the certificate as many countries.

rough diamonds may be shipped in transparent security bags and that the unique certificate number may be replicated on the container.

It is worth noticing that the whole system is based on confidence between the actors involved in the process. In the case of non-compliance, a country may be suspended, following the decision of KP participating States, which may also decide on the same country's resumption. It is a peer pressure mechanism. An example is the Central African Republic's (CAR) suspension from the KPCS. Due to the conflict situation affecting CAR and the impossibility of legitimate authority to control diamonds' mines, Participating States decided to temporary suspend CAR from the KPCS on the basis that the presence of CAR in the KPCS would undermine efforts to curb the trade in conflict diamonds, which are used to finance conflicts and civil wars. This decision was published on 23 May 2013 on the KP website:[146]

146 Kimberley Process Certification Scheme, *Administrative Decision on Central African Republic*, 2013. Available on: http://www.kimberleyprocess.com/en/2013-administrative-decision-central-african-republic-0. (Accessed on 16/09/2016).

23 May 2013

Dear KP Family

ADMINISTRATIVE DECISION ON THE CENTRAL AFRICAN REPUBLIC [TEMPORARY SUSPENSION]

Further to the Enhanced Vigilance Notice dated 18/04/2013 as well as the previous KP Chair notice regarding confirmation in writing whether or not to approve the enclosed Administrative Decision on the Central African Republic (CAR) [Temporary Suspension] with the 10/05/2013 as the deadline for the submission of the votes, I am writing to inform you of the outcome of the written procedure.

According to the Administration decision on the rules and criteria for Applying the KP Written Procedure (2011) as per Administrative Decision on the Central African Republic [Temporary Suspension], I wish to inform you that the requirements for approval by written procedure have been met.

Having received the required number of votes and no written objections, you are hereby informed that the requirements for approval by written procedure have been met to endorse temporary suspension of Central African Republic with immediate effect until the Decision and the situation in the CAR are to be reviewed by the Working Group on Monitoring, in consultation with other working bodies, at the Inter-sessional meeting of the KPCS taking place in Kimberley, South Africa, from 4-7 June 2013.

I wish to thank all the participants for taking time in voting for the temporary suspension of the Central African Republic.

Yours sincerely

Ambassador Welile Nhlapo
Kimberley Process CHAIR

10 Years of stemming the flow of conflict diamonds.

The same procedure was applied for CAR resumption, following the adoption of the "Administrative Decision on Resumption of Exports of Rough Diamonds from the Central African Republic" and re-admitting CAR within the KPCS: *"Based upon progress made to date by the CAR, Participants and Observers reached an understanding that CAR may commence exports of rough diamonds".*[147]

The KP presents some limitations, notably its narrow definition of what "conflict diamonds" are, which includes only areas under the control of non-State actors or out of control of State authority. However, the violation of human rights by a State is not an element considered at all by the process to suspend diamonds transfers.

Another shortcoming of the system is that since the KP is basically a peer pressure mechanism based on mutual confidence, the accountability of States is fundamental. In this framework, how to face a situation where it is a KP participant who breaks the rules? The issue is quite problematic as well as realistic, especially for countries ravaged by corruption. One example is the export of rough diamonds accompanied by a regular certificate, except that diamonds are not from the certificate issuing country but from another country, following an illegal import of rough diamonds.

147 *Administrative Decision on Resumption of Exports of Rough Diamonds from the Central African Republic*, 23 May 2013. Available on: http://www.kimberleyprocess.com/en/system/files/documents/administrative_decision_and_annex_on_resumption_of_exports_from_the_central_african_republic.pdf. (Accessed on 16/09/2016).

4.2. National implementation: US example

In 2003, the US President George W. Bush signed the *Clean Diamonds Trade Act* (CDTA), which provides the legal framework under which the United States implements the Kimberley Process Certification Scheme (KPCS). The CDTA is further implemented by Executive Order 13312 (July 29, 2003).

The Executive Order 13312 of July 29, 2003, prohibits:
— the importation into, or exportation from, the United States on or after July 30, 2003, of any rough diamond from whatever source, unless the rough diamond has been controlled through the KPCS;
— any transaction by a United States person anywhere, or any transaction that occurs in whole or in part within the United States, that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions outlined in this section; and
— any conspiracy formed to violate any of the prohibitions of this section.

The aim is to curb trade in rough diamonds that funds rebels' activities in Africa. The basic principle is the prohibition on export and import of any rough diamonds not controlled by the KPCS. The US legislation provides some exceptions to this principle (a waiver mechanism decided by the US President):
— if such country is taking effective steps to implement the KPCS;
— as a matter of national interest of the US (the so-called "safety clause").

Section 8 of the CDTA provides civil penalties, fines, or imprisonment for violators.
Competent national authorities are also established, as well as a Kimberley Process Implementation Coordinating Committee.

5. Cultural Goods

International instruments regulating the trade of cultural goods are:
— 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (UNESCO);
— 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

5.1. 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property

The *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* was created, in 1970, to address the increasing number of thefts both in museums and at archaeological sites, particularly in Southern countries. These objects, fraudulently imported and/or of unidentified origin, ended up in private collectors' hands and, sometimes, in official institutions.

The Convention entered into force on 24 April 1972 for the three States that had deposited their respective instruments on or before 24 January 1972. With respect to any other State, the Convention enters into force three months after the deposit of its instrument of ratification, acceptance or accession.
To date, the 1970 Convention has been ratified by 131 Member States of the UNESCO, including many culture-rich countries as well as former hubs of illicit traffic.[148]

148 UNESCO, *Illicit Trafficking of Cultural Property*, States Parties. Available on: http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/states-parties/. (Accessed on 16/09/2016).

The UNESCO Convention was set up in this framework, with the aim of preventing the illicit trade of cultural goods.
Concerning the scope, the Convention adopts a two-steps mechanism. In the first step, the term "Cultural property" is defined:

> "(...) Property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:
> (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest;
> (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist and to events of national importance;
> (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ;
> (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
> (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
> (f) objects of ethnological interest;
> (g) property of artistic interest, such as:
> – pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
> – original works of statuary art and sculpture in any material;
> – original engravings, prints and lithographs;
> – original artistic assemblages and montages in any material;
> (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
> (i) postage, revenue and similar stamps, singly or in collections;
> (j) archives, including sound, photographic and cinematographic archives;

(k) articles of furniture more than one hundred years old and old musical instruments".[149]

As it appears from the Article, the scope of the "cultural heritage" category (then subject to the provisions of the Convention) is very broad. Additionally, States Parties have to define what is considered, within the cultural property, to be part of their cultural heritage.
For this reason, the sub-category of "National cultural heritage" is defined:

"The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State:
(a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals or stateless persons resident within such territory;
(b) cultural property found within the national territory;
(c) cultural property acquired by archaeological, ethnological or natural science missions, with the consent of the competent authorities of the country of origin of such property;
(d) cultural property which has been the subject of a freely agreed exchange;
(e) cultural property received as a gift or purchased legally with the consent of the competent authorities of the country of origin of such property".[150]

The aim of this Article is to help States in identifying, within their cultural property, what might be their national cultural heritage and

149 UNESCO, *UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, 14 November 1970*, Paris, Article 1. Available on: http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/text-of-the-convention/. (Accessed on 16/09/2016).

150 Ibid. Article 4.

therefore, what is subject to the provisions of the Convention. A special status and a higher protection are provided for what is considered as "national treasure".
As stated in Article 13(d):

> "The States Parties to this Convention also undertake, consistent with the laws of each State:
> (...)
> (d) to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported".[151]

The concept of "national treasure", underlying the Convention, means that this category of items cannot be traded at all. Since borrowing is possible (e.g. between museums for exhibitions reasons), "trading" is here to be understood as "selling".

The Convention does not establish an international regime, but it is up to States Parties to establish the *modus operandi* to implement the provisions of the Convention. In particular, States Parties are called to establish a competent national authority and to adopt legislative procedures and the necessary secondary acts to implement the provisions of the Convention.

> As stated in Article 12 of the Convention:
> "The States Parties to this Convention shall respect the cultural heritage within the territories for the international relations of which they are responsible, and shall take all appropriate measures to prohibit and prevent the illicit import, export and transfer of ownership of cultural property in such territories".[152]

151 Ibid. Article 13(d).

152 Ibid. Article 12.

Basically, the Convention calls States Parties to fight the illicit trade of cultural goods by establishing three types of mechanism:
— preventive measures;
— restitution provisions;
— the establishment of an international cooperation framework.

Preventive measures include inventories, export certificates, monitoring trade, imposition of penal or administrative sanctions and educational campaigns.
It is up to States Parties to establish such measures and to implement them.
Restitution provisions are provided by some articles of the Convention. For example, according to Article 7 (b) (ii), States Parties undertake, at the request of the State Party of "origin", to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States involved, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title over that property. More indirectly and subject to domestic legislation, Article 13 of the Convention also provides other provisions on restitution and cooperation.
The Article, in fact, invites States Parties to:

"(...)
- to prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property;
- to ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner;
- to admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners;
- to recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported".

The establishment of international cooperation is based on the idea of strengthening cooperation among and between States Parties. In cases where cultural patrimony is in jeopardy from pillage, Article 9 provides a possibility for more specific undertakings, such as carrying out the necessary concrete measures, including the establishment of export and import controls:[153]

> "(...) The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State".

5.2. 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects

The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organisation.[154] UNIDROIT was asked by the UNESCO to develop the *Convention on Stolen or Illegally Exported Cultural Objects* as a complementary instrument to the 1970 Convention.

153 UNESCO, *Illicit Trafficking of Cultural Property*, UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970. Available on: http://www.unesco.org/new/en/culture/themes/illicit-trafficking-of-cultural-property/1970-convention/. (Accessed on 16/09/2016).

154 The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental Organisation with its seat in the Villa Aldobrandini in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and, in particular, commercial law between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives. More information is available on: http://www.unidroit.org/about-unidroit/overview. (Accessed on 16/09/2016).

For this reason, the aim of the 1995 Convention was to create a uniform treatment for the restitution of stolen or illegally exported cultural objects and to allow restitution claims to be processed directly through national courts. It covers all stolen cultural objects, thus covering more than inventoried and declared ones, and stipulates that all cultural property must be returned.

The Convention was signed in Rome, on 24 June 1995. It entered into force on 1 July 1998, and it counts 37 Contracting States.[155]

The Convention defines clandestinely-excavated objects and specifies that illegally-excavated objects are considered as stolen. It also sets out a time frame within which private owners or States can apply for restitution of their objects: 50 years and within 3 years of knowledge of the location of the object and identification of its possessor.

The most important provision in the entire Convention is Article 3(1), which enshrines the principle that the possessor of a cultural object that has been stolen must return it whatever the circumstances. The return of an object after it has been illegally exported is subject to one condition: it must be proved to impair significantly the preservation of scientific information or that the cultural object in question is "of significant cultural importance". Requests for its return may only be made by the State where the object was illegally exported.[156]
However, a compensation mechanism is established if the possessor of the stolen object was in good faith when the cultural object subject to a restitution claim was acquired. Criteria for the establishment of diligence include circumstances of acquisition, the character of the involved parties, the price paid and the consultation of a register of stolen cultural objects.

155 For the complete list of Contracting States, please see on: http://www.unidroit.org/status-cp. (Accessed on 16/09/2016).

156 Note that the Convention considers an object that was removed under a temporary export permit for an exhibition and not returned in accordance with the terms thereof as having been illegally exported.

> As stated in Article 4(1) of the Convention:
> "(1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object".

One of the limits of the Convention is its non-retroactive effects (non-retroactivity clause, Article 10). In fact, the Convention will apply solely to cultural objects stolen after the Convention entered into force in the State where the request was brought, as well as to objects illegally exported after the entry into force of the Convention in the requesting State and of the State where the request was brought. However, paragraph 3 specifies that the Convention "does not in any way legitimise any illegal transaction of whatever which has taken place before the entry into force of this Convention" and does not "limit any right of a State or other person to make a claim under remedies available outside the framework" of the Convention.

Part

3.

Regional rules and policies Legally and Politically Binding Acts: the European Union

The European Union (EU) is the only example of an international organisation that has the competence to rule trade at the regional level by adopting legally binding acts for its Member States.
Part III will explore basic principles of EU Common Commercial Policy (CCP) and its trade exceptions in the following categories of items:

- **Conventional Weapons;**
- **Dual-Use Items;**
- **Conflict Minerals;**
- **Diamonds;**
- **Cultural Goods;**
- **Torture-related Items.**

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Part 3. CONTENT

TABLE OF BOXES

1. EU Common Commercial Policy (CCP)

The general principles of the EU common commercial policy (CCP) are laid down in Article 207 of the Treaty on the Functioning of the European Union (TFEU).[1]

> "1. The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action. (...).
> 3. Where agreements with one or more third countries or international organisations need to be negotiated and concluded, Article 218 shall apply, subject to the special provisions of this Article".[2]

The CCP implies a uniform conduct of trade relations with third countries, which means a common customs tariff, common import and export regimes, same rules regulating direct foreign investments and common tools and measures to protect trade (such as those to be taken

1 European Union, Consolidated versions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) - Consolidated version of the Treaty on European Union - Protocols - Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, *Official Journal* C 326, 26/10/2012 P. 0001 – 0390. Available on: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A12012M%2FTXT. (Accessed on 16/09/2016).

2 Article 207 TFEU.

in the event of dumping or subsidies). Finally, the Treaty establishes a EU competence for the conclusion of trade agreements.

The last sentence of paragraph 1 "*The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action*" links the common commercial policy to the principles and objectives of the Union's external action.
Principles and objectives of the Union's external action are stated in Article 21 of the Treaty on the European Union (TEU):

> "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law. (...)".[3]

The link between common commercial policy and Article 21 of the TEU means that the EU, while conducting CCP has to take into account and implement principles and objectives stated in Article 21. A practical example is the inclusion of clauses, e.g. human rights clause and/or WMD non-proliferation clause, in agreements negotiated with third countries. The inclusion of the human rights clause would consist in the implementation of the principle of "*the universality and indivisibility of human rights and fundamental freedoms*" stated in Article 21 of the TEU and, for WMD non-proliferation policy, the "*respect for the principles of the United Nations Charter and international law*".

3 Article 21 TEU.

Another dimension to keep in mind, when considering common commercial policy, is that it is an EU exclusive competence, as stated in Article 3 of the TFEU:

> "1. The Union shall have exclusive competence in the following areas:
> customs union;
> (...)
> (e) common commercial policy".[4]

A EU exclusive competence induces that Member States could only adopt acts if they have been empowered to do so. The situation is similar regarding the possibility to negotiate and adopt international trade agreements.[5]
However, if Member States could not individually rule their commercial policy, as Council members, nothing could be decided without the agreement of the majority of them. The common commercial policy has to follow the ordinary legislative procedure, as stated in paragraph 2 of Article 207 of the TFEU:

> "2. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy".[6]

4 Article 3 TFEU.

5 The EU exclusive competence in concluding international agreements in areas of EU exclusive competence is the result of the "implicit power theory" or "principle of parallelism of competences". It means that an implicit competence in external matters (in this case the conclusion of international agreements) derives from an explicit competence in internal matters (common commercial policy). In other words, where the Treaties assign explicit powers to the Union in a particular area (e.g. CCP), the EU must also have similar powers to conclude agreements with non-Community countries in the same field.

6 Article 207 TFEU.

This ordinary legislative procedure is also called co-decision procedure[7] as long as it gives the same weight to the European Parliament and the Council when deciding on legislative proposals coming from the Commission, which holds the right of initiative.

1.1. EU Trade Restrictions for Economic Reasons

The EU external trade general principle is free trade, as it is for all WTO's members.

Exceptions to this principle, and therefore trade restrictions, are defined by a set of regulations and decisions, adopted at the EU level. Common rules for exports and imports are established, namely by *Council Regulation (EC) No1061/2009 of 19 October 2009 establishing common rules for exports*[8] and *Council Regulation (EC) no 260/2009 of 26 February 2009 on the common rules for imports* (codified version)[9] and *Council Regulation (EC) No 625/2009 of 7 July 2009 on common rules for imports from certain third countries* (codified version),[10] which provides special measures for the following third countries due to particular features of their economic system: Armenia, Azerbaijan, Belarus, Kazakhstan, North Korea, Russia, Tajikistan, Turkmenistan,

7 The co-decision procedure was introduced by the Maastricht Treaty on European Union (1992), and extended and made more effective by the Amsterdam Treaty (1999). With the Lisbon Treaty that took effect on 1 December 2009, the renamed ordinary legislative procedure became the main legislative procedure of the EU's decision-making system.

8 European Union, *Council Regulation (EC) No1061/2009 of 19 October 2009 establishing common rules for exports,* OJ L 291 of 7/11/2009, p.1 (as codified by Regulation (EU) 2015/479 of the European Parliament and of the Council on common rules for exports (codification), OJ L 83/34 of 27/03/2015).

9 European Union, *Council Regulation (EC) no 260/2009 of 26 February 2009 on the common rules for imports* (codified version), OJ L 84, 31.3.2009, p. 1–17 (as codified by Regulation (EU) 2015/478 of the European Parliament and of the Council of 11 March 2015 on common rules for imports (codification), OJ L 83/16 of 27/03/2015).

10 European Union, *Council Regulation (EC) No 625/2009 of 7 July 2009 on common rules for imports from certain third countries* (codified version), OJ L 185/1 of 17/07/2009. Available on: http://trade.ec.europa.eu/doclib/docs/2009/august/tradoc_144178.codified.en.L185-2009.pdf. (Accessed on 16/09/2016).

Uzbekistan, and Vietnam. These regulations organise trade principles in general. They do not establish any provision concerning sensitive trade and trade restrictions for political reasons.

As regards exports, Regulation 1061/2009 essentially establishes a safeguards mechanism allowing Member States to alert the Commission when they consider that protective measures might be necessary to face unusual developments on the market concerning any product, whether industrial or agricultural. Consultations shall take place in the following days within an advisory committee consisting of representatives of each Member State with a representative of the Commission as Chairman. It has to deal with the different aspects of the economic and commercial situation as regards the product in question and potential measures to be set up. For example, the Commission may propose to the Council to adopt measures to prevent a critical situation from arising due to a shortage of essential products.

When Community interests call for immediate action, the Commission may render the export of a product subject to export authorisation.[11] As for imports regime, a four-phased trade-monitoring procedure has been set up:

1. *Information and consultation procedure:* EU countries must inform the Commission if import trends suggest the need for surveillance or safeguard measures. Consultations may be held either at the request of a EU country or on the initiative of the Commission. They take place within an advisory committee made up of representatives of each EU country with a representative of the Commission as chairman. These consultations primarily examine the conditions of import, the economic and commercial situation and the measures, if any, that need to be taken.
2. *Investigation procedure:* when, after consultations, it is apparent that there is sufficient evidence to justify the initiation of an investigation,

11 European Union, *Council Regulation 1061/2009 of 19 October 2009 establishing common rules for exports*, OJ L291/1 of 7/11/2009, Article 6.

the Commission initiates an investigation. The investigation seeks to determine whether imports of the product in question are causing or threatening to cause serious injury to the concerned EU producers. Within the framework of the investigation, the Commission examines:

- the volume of imports;
- the price of imports;
- the consequent impact on EU producers;
- other factors which are causing or may have caused injury to the concerned EU producers.

At the end of the investigation, the Commission submits a report to the advisory committee and, depending on the conclusion of its investigations, either terminates the investigation or decides to implement surveillance or safeguard measures.

3. *Surveillance measures:* the decision to introduce surveillance measures is normally taken by the Commission. Such surveillance may involve retrospective checks of imports (statistical surveillance) or prior checks. In the latter case, products under prior surveillance may only be put into free circulation within the EU on production of an import document issued by EU Member States, which is valid throughout the EU. Each month, EU countries must inform the Commission of the import documents that were issued (in cases of prior surveillance) and the imports received (in cases of prior and retrospective surveillance).

4. *Safeguard measures:* safeguard measures may be applied where products are imported into the EU in such greatly increased quantities and/or on such terms or conditions as to cause, or threaten to cause, serious injury to EU producers. The Commission may change the period of validity of the import documents issued in respect of surveillance or establish an import authorisation procedure and, in particular, a quota system for imports.

These measures are taken by the Commission or by the Council.
The duration of safeguard measures may not, in principle, exceed four years, unless they are extended under the same conditions as the initial

measures were adopted. Under no circumstances may the duration of the measures exceed eight years.[12]

The EU has at its disposal a series of trade defence instruments, in accordance with EU and WTO law, to ensure that fair competition, without distortions, is maintained between domestic and foreign producers.
To guarantee the defence of trade, the Commission has three main types of trade defence instruments at its disposal:

1. *Anti-dumping:* dumping occurs when manufacturers from a non-EU country sell goods within the EU below the sales prices of their domestic market or below the cost of production.
   If the Commission can establish, through an investigation, that this is happening, it may correct any damage to EU companies by imposing anti-dumping measures.
   Typically, these are duties on imports of the product from the country in question.
   They can last up to 6 months (provisional measures) or, if the Commission decides to make them longer, 5 years.

2. *Anti-subsidy:* subsidisation occurs when a non-EU government provides financial assistance to companies to produce or export goods.
   The Commission is allowed to counteract any trade-distorting effect of these subsidies on the EU market, after an investigation into whether the subsidy is unfair and injurious to EU companies. The counter-measures are duties on imports of the subsidised products.
   They can last up to 4 months (provisional measures) or, if the Commission decides to make them longer, 5 years.

12 European Union, *Council Regulation (EC) No 260/2009 of 26 February 2009 on the common rules for imports,* OJ L 84/1 of 31/3/2009. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Ar11002. (Accessed on 16/09/2016).

Example of anti-subsidy and anti-dumping measures

Commission Regulation (EU) No 570/2010 of 29 June 2010 making imports of wireless wide area networking (WWAN) modems originating in the People's Republic of China subject to registration[*]

(1) The Commission has received a request (...) to make imports of wireless wide area networking (WWAN) modems originating in the People's republic of China subject to registration.

(3) Having received a complaint from Option NV (hereinafter "the applicant") the Commission determined that there is sufficient evidence to justify initiation of a proceeding and therefore (...) the initiation of an anti-dumping proceeding concerning imports of wireless wide area networking (WWAN) modems originating in the People's Republic of China.

(9) As regards dumping, the Commission has at its disposal sufficient prima facie evidence that imports of the product concerned originating in the People's Republic of China are being dumped, and that the exporters practice dumping (...).

(10) As regards injury, the Commission has at its disposal sufficient prima facie evidence that the exporters' dumping practices are causing material injury or would cause material injury.

(14) In the light of the above, the Commission has concluded that the applicant's request contains sufficient evidence to make imports of the product concerned subject to registration (...).

(16) (...) imports of the product concerned should be made subject to registration in order to ensure that, should the investigation result in findings leading to the imposition of anti-dumping duties, those duties, can, if the necessary conditions are fulfilled, be levied retroactively (...).

(14) By two letters of 26 October 2010 to the Commission, Option NV withdrew its anti-dumping and anti-subsidy complaints** concerning imports of WWAN modems originating in the PRC. The reason for the withdrawal of the complaints was that Option NV had entered into a cooperation agreement with an exporting producer in the PRC.

* European Union, *Commission Regulation (EU) No 570/2010 of 29 June 2010 making imports of wireless wide area networking (WWAN) modems originating in the People's Republic of China subject to registration*, OJ L 58/36 of 03/03/2011.
** On 2 August 2010, the Commission also received a complaint concerning the alleged injurious subsidisation into the Union of imports of WWAN modems originating in the PRC, with subsequent request for registration of imports. On this basis, the Commission also initiated an anti-subsidy proceeding concerning imports into the Union of WWAN modems originating in the PRC.

3. *Safeguards:* differently from subsidies and dumping, safeguards are not taken to address unfair trade practices. Rather, they are concerned with imports of a certain product that increase so suddenly and sharply that EU producers cannot reasonably be expected to adapt immediately to the new trade situation. In such cases, WTO and therefore EU rules allow for short-term measures to regulate the imports, giving EU companies temporary relief and time to adapt. Such measures usually apply to imports of the product from all non-EU countries. Provisional safeguard measures may last up to 200 days and *definitive* measures up to 4 years. When they exceed 3 years, they must be reviewed at mid-term and can be extended up to 8 years in total.

Example of safeguard measures

Commission Regulation (EC) No 1447/2004 of 13 August 2004 imposing provisional safeguard measures against imports of farmed salmon[*]

(1) On 6 February 2004,[**] Ireland and the United Kingdom informed the Commission that trends in imports of farmed Atlantic salmon appeared to call for safeguard measures (...).

(91) A preliminary determination has been made that critical circumstances exist in which delay would cause damage to the Community producers which it would be difficult to repair. They have suffered a serious decline, notably in live fish stocks, unit prices, profitability and ROCE as a result of increased low-priced imports of the product concerned.

(97) Therefore, bearing in mind the precarious economic situation of the Community producers as a result of the large losses which they have sustained, and the continuing threat posed by exporting producers, it is considered that there exists a critical situation in which any delay in the adoption of provisional safeguard measures would cause damage which it would be difficult to repair. It is therefore concluded that provisional safeguard measures should be adopted without delay.

(98) The preliminary analysis of the findings of the investigation confirms the existence of a critical situation and the need for provisional safeguard measures in order to prevent further injury to the Community producers which it would be difficult to remedy.

(108) The provisional measures should not last more than 200 days. The measures should enter into force on 15 August 2004 and should remain in force for 176 days unless definitive measures are imposed or the investigation is terminated without measures before that time.

*Commission Regulation (EC) No 206/2005 of 4 February 2005 imposing definitive safeguard measures against imports of farmed salmon****

(77) In the current case, the most important injurious effect of increased imports was the large financial losses to the Community producers.

(114) The definitive measures should not last more than four years including the period of the provisional measures. The measures should enter into force on 6 February 2005 and should remain in force until 13 August 2008.

* European Union, *Commission Regulation (EC) No 1447/2004 of 13 August 2004 imposing provisional safeguard measures against imports of farmed salmon*, OJ L 267/3 of 14/08/2004.
** Notice of initiation of a safeguard investigation under Council Regulations (EC) Nos 3285/94 and 519/94 concerning imports of farmed salmon, (2004/C 58/04).
*** European Union, *Commission Regulation (EC) No 206/2005 of 4 February 2005 imposing definitive safeguard measures against imports of farmed salmon*, OJ L 33/8 of 05/02/2005.

The Commission has a central role in implementing trade-monitoring and defensive measures. It is up to the Commission to examine evidence provided by complainants and decide whether to launch investigations or review existing measures and conduct investigations. Moreover, the Commission has the final word (after consulting the trade defence committee composed of representatives of EU Member States) on if and how to act/react. For example, on whether to impose or not provisional and definitive trade defence measures, to accept or reject undertakings, to grant refunds and to terminate, amend or extend the measures.[13]

13 The European Commission, DG Trade, *Introduction to Trade Defence Policy*, April 2013. Available on: http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_151014.pdf. (Accessed on 16/09/2016).

1.2. Trade Restrictions for Non-Economic Reasons

General provisions establishing conditions for trade restrictions for non-economic reasons are established by Article 36 of the TFEU:

> "The provisions of Articles 34 and 35[14] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States".[15]

Article 36 of the TFEU recalls Articles XX and XXI of the GATT Agreement, i.e. exceptions to the general principle of free trade for non-economic reasons.
Basically, the Treaty establishes the possibility to control trade for non-economic reasons in the listed areas (public morality, public policy or public security, etc.). However, the last provision of Article 36 TFEU seems to exclude this possibility of adopting restrictive trade measures between Member States.

This Article is rather unclear. In fact, while the first paragraph seems to establish the possibility for the EU to control trade (as trade is a EU competence), the second paragraph seems to attribute the competence to Member States, providing that while they can adopt measures to control trade for the listed reasons, they cannot adopt these measures

14 Article 34 TFEU: *Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.* Article 35 TFEU: *Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States.*

15 Article 36 TFEU.

as to restrict trade between them. It would mean that trade restrictions could be adopted towards third States, but this would imply that Member States could adopt trade control measures unilaterally.

The issue is that, while trade is a EU exclusive competence (common commercial policy), trade control measures adopted for political reasons are also a matter of foreign policy. Although foreign policy is mostly a Member States competence, they have agreed to coordinate their understanding and actions within the Common Foreign and Security Policy (CFSP) established by Chapter 2 of Title V of the TEU. The CFSP is an intergovernmental structure where decisions are proposed by the High Representative and adopted by the Council of Ministers. Those decisions are usually implemented by Member States.

When trade restrictive measures are considered against a State, e.g. to implement a UNSCR, the Council usually consider the adoption of two instruments: one CFSP decision for the foreign policy consideration and one EU Regulation to define trade restrictive measures. The legal basis to deal with trade restrictive measures is Article 215 TFEU:

> "1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.
> 2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

> 3. The acts referred to in this Article shall include necessary provisions on legal safeguards".[16]

Article 215 of the TFEU establishes the possibility to adopt restrictive measures (economic sanctions). The power of initiative is held by the Commission, jointly with the High Representative of CFSP, and the Council adopts the decision by qualified majority.
On the other side, the legal basis to deal with foreign policy elements is Article 29 of the TEU:

> "The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions".[17]

This provision is to be read together with Articles 30 and 31 of the TEU establishing the procedure and conditions to adopt Council decisions (which is the legal instrument to implement CFSP decisions). Basically, the procedure to adopt a Council decision is that the power of initiative is held by the High Representative of CFSP and the decision is adopted by the Council.

16 Article 215 TFEU.

17 Article 29 TEU.

An example of implementation of this double mechanism is restrictive measures adopted against the Democratic People's Republic of Korea. In order to implement established restrictive measures, two legal acts are necessary:

— Council Common Position[18] 2006/795/CFSP of 20 November 2006 concerning restrictive measures against the Democratic People's Republic of Korea;[19] (implementing the foreign policy elements);
— Council Regulation 329/2007of 27 March 2007 concerning restrictive measures against the Democratic People's Republic of Korea[20] (implementing trade elements).
— Council Common Position 2006/795/CFSP of 20 November 2006:
"(3) (...) The Council also stated that it would fully implement the provisions of all relevant UNSC Resolutions[21] and notably those of UNSCR 1695 (2006) and UNSCR 1718 (2006). (...).
(12) Action by the Community is needed in order to implement certain measures, (...)".

18 Before the entry into force of the Lisbon Treaty, common positions were the legal instrument to implement CFSP decisions. Since the entry into force of the Lisbon Treaty, CFSP legal acts are Council decisions.

19 European Union, *Council Common Position 2006/795/CFSP of 20 November 2006 concerning restrictive measures against the Democratic People's Republic of Korea*, OJ L 322/32 of 22/11/2006. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006E0795. (Accessed on 16/09/2016).

20 European Union, *Council Regulation (EC) No 329/2007 of 27 March 2007 concerning restrictive measures against the Democratic People's Republic of Korea*, OJ L 88, 29.3.2007, p. 1–11. Available on: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32007R0329. (Accessed on 16/09/2016).

21 Please note that very often EU restrictive measures are adopted following UN resolutions adopted under Chapter VII of the UN Charter. In very rare cases the EU "independently" adopts restrictive measures. The most common reason of the adoption of "independent" EU restrictive measures is the veto imposed by one or more permanent member State(s) in the Security Council against the adoption of such measures (See, for example, EU restrictive measures against Ukraine).

Council Regulation 329/2007 of 27 March 2006:

"(2) Common Position 2006/795/CFSP provides for the implementation of the restrictive measures set out in Resolution 1718 (2006) and notably for a ban on exports of goods and technology which could contribute to North Korea's nuclear-related, (...) a ban on exports of luxury goods to North Korea, as well as the freezing of funds and economic resources (...).

(3) These measures fall within the scope of the Treaty establishing the European Community and, therefore, notably with a view to ensuring their uniform application by economic operators in all Member States, Community legislation is necessary in order to implement them as far as the Community is concerned".

As it appears from the text of the Council Regulation, EU legislation is needed to implement the Council Decision, since the imposition of an economic embargo is a trade restriction falling within the EU exclusive competence on common commercial policy.[22]

1.3. An exception within an exception: Article 346 of the TFEU

Article 346 of the TFEU establishes the possibility for Member States, despite any other provision in the Treaties, to adopt measures that it "*considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material*". It means that if Member States are willing to adopt measures to protect their essential security interests, especially if connected with arms production and arms trade, they have the possibility to do it.

22 It is worth noticing that the adoption of unilateral embargoes on the side of one or more Member State(s) could also cause internal market distortions (within the EU internal market) with negative consequences on competition law.

"1. The provisions of the Treaties shall not preclude the application of the following rules:
(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;
(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.
2. The Council may, acting unanimously on a proposal from the Commission, make changes to the list, which it drew up on 15 April 1958, of the products to which the provisions of paragraph 1(b) apply".[23]

Article 346 of the TFEU recalls the GATT security exceptions established by Article XXI, i.e., trade restrictions for security reasons. However, this provision could not be considered as a weapons trade general exception to EU treaties.
Commercial policy and restrictions on trade remain a EU policy. Member States only have the possibility to adopt specific and, in principle, temporary measures dealing with weapons.
However, Member States have always understood and considered this provision as excluding the regulation of arms production and arms trade from the EU law.

23 Article 346 TFEU.

Consequently, trade exceptions are EU competences but:
— with one exception for trade restrictions for political reasons, which is a "mixed" competence (Article 215 of the TFEU and Article 29 of the TEU);
— within this exception for political reasons, there would be the exception for weapons, which is considered by member States as their exclusive competence, out of the Treaty.

However, even if the understanding is not commonly shared, Member States may not adopt measures if there is a risk of affecting the "*conditions of competition in the internal market regarding products which are not intended for specifically military purposes*". This means that, items that are not "specifically designed" for military purposes cannot fall within the weapons exception and remain subject to EU law. That is clearly the case for dual-use items as the EU Court of Justice has regularly confirmed.
This interpretation of Article 346 of the TFEU also means that as regards arms trade restrictions, there will be only one instrument adopted by the Council and not two.

The problem, in practical terms, is that since EU restrictive measures are very often implementing measures decided at the level of the UN Security Council and could include, but are not always limited to, conventional weapons, the EU will need two legal acts implementing UN Security Council resolutions: a Council decision implementing arms embargo and a Council regulation implementing embargoes related to other categories of items targeted by the resolution (e.g. luxury goods, dual-use items, etc.). This is illustrated in the following example where restrictive measures against Myanmar/Burma concern conventional weapons and related services (implemented through Council Decision 2013/184/CFSP) and equipment which might be used for internal repression (implemented by Council Regulation (EC) No 401/2013.

Council Decision 2013/184/CFSP of 22 April 2013 concerning restrictive measures against Myanmar/Burma:[24]

Article 1

"1. The sale, supply, transfer or export of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment and spare parts for the aforementioned, as well as equipment which might be used for internal repression, to Myanmar/Burma ... shall be prohibited (...).

2. It shall be prohibited:

(a) to provide technical assistance, brokering services and other services related to military activities and to the provision, manufacture, maintenance and use of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, as well as equipment which might be used for internal repression, directly or indirectly to any natural or legal person, entity or body in, or for use in Myanmar/Burma;

(b) to provide financing or financial assistance related to military activities, including in particular grants, loans and export credit insurance for any sale, supply, transfer or export of arms and related materiel, as well as equipment ...;

(c) to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the prohibitions referred to in point (a) or (b)".

24 European Union, *Council Decision (CFSP) 2015/666 of 28 April 2015 amending Decision 2013/184/CFSP concerning restrictive measures against Myanmar/Burma*, OJ L 110, 29.4.2015, p. 14–14. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015D0666. (Accessed on 16/09/2016).

Council Regulation (EC) No 401/2013 of 2 May 2013 concerning restrictive measures with respect to Myanmar/Burma:[25]

> Article 2
> "It shall be prohibited to sell, supply, transfer or export, directly or indirectly, equipment which might be used for internal repression as listed in Annex I, whether or not originating in the Union, to any natural or legal person, entity or body in, or for use in Myanmar/Burma".
>
> Article 3
> "1. It shall be prohibited to:
> (a) to provide technical assistance related to military activities and to the provision, manufacture, maintenance and use of arms and related materiel of all types, including weapons and ammunition, military vehicles and equipment...
> (b) to provide financing or financial assistance related to military activities, including, in particular, grants, loans and export credit insurance for any sale, supply, (...)
> 2. It shall be prohibited:
> (a) to provide technical assistance related to the equipment which might be used for internal repression ...
> (b) to provide financing or financial assistance related to the equipment listed in Annex I, (...)
> 3. It shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent the prohibitions referred to in paragraphs 1 and 2".

25 European Union, *Council Regulation (EU) No 401/2013 of 2 May 2013 concerning restrictive measures in respect of Myanmar/Burma and repealing Regulation (EC) No 194/2008*, OJ L 121, 3.5.2013, p. 1–7. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0401. (Accessed on 16/09/2016).

It is not to exclude the possibility to have in a few years a decision by the European Court of Justice stating that the interpretation of Article 346 of the TFEU is not conforming to the Treaty and that trade related to conventional weapons is a EU competence, excluding the possibility for Member States to adopt trade measures unilaterally.

2. The EU Weapons Trade Control System

In principle, international trade controls on conventional weapons by the EU shall be part of the EU common commercial policy as defined by articles 206 and 207 of the TFEU. However, the majority of Member States have always considered that weapons trade was falling under the exception of article 346 of the TFEU, which they considered as the legal ground to settle the Member State exclusive competence. Due to this extensive interpretation, the adoption of EU legislation has never been possible and Member States have unilaterally adopted any measures *as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material*.[26] However, to counter the risk of EU inconsistency, Member States have agreed to coordinate their policy within the Council by adopting common criteria and procedure for arms export.

This coordination started in 1998 when the Council reached political agreement on the EU Code of Conduct on Arms Exports, which lays down common criteria for arms exports.[27]

Presently, EU arms trade controls are ruled by two main instruments:
— Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment;
— Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering.

26 Article 346 TFEU.

27 It shall be noted that several non-EU countries have officially aligned themselves with the criteria and principles of the Code: Bosnia and Herzegovina, Canada, Croatia, the Former Yugoslav Republic of Macedonia, Iceland and Norway. (Source: Q., Michel, *The European Union Export Control Regime of Arms: Comment of the Legislation: article-by article*, August 2015, p. 5. Available on: http://www.esu.ulg.ac.be/file/20151116163752_Vademecum-weaponsrev5.pdf. Accessed on 26/09/2016).

However, given the legal value of these instruments (today replaced by Council decisions), it is not possible to talk about EU law *stricto sensu* for three main reasons. Firstly, the adopted acts are Council common positions/decisions that are intergovernmental cooperation instruments (established by Article 25 TEU). Secondly, these acts have to be transposed/implemented by Member States into their national legislations. Finally, an inappropriate transposition into Member States' national law cannot be examined by the European Court of Justice.

Since the entry into force of the Arms Trade Treaty on 24 December 2014, EU trade controls on conventional weapons might also consist in the implementation of an international commitment.

2.1. Council Common Position 2008/944/CFSP

As stated in the Council Common Position 2008/944/CFSP *Member States are determined to set high* ***common standards*** *which shall be* ***regarded as the minimum*** *for the management of, and restraint in, transfers of military technology and equipment by all Member States, and to strengthen the exchange of relevant information with a view to achieving greater transparency.*[28]

In order to reach the objective of setting (minimum) common standards, Council Common Position 2008/944/CFSP essentially establishes the adoption of a list of military items, called Common Military List (CML), subject to trade restrictions and sets criteria to assess export licence applications. Trade operations covered by this Common Position go further than export, also including brokering activities, transit/transhipment operations and intangible transfers (software and technology).

28 European Union, Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, paragraph 3, OJ L 335/99 of 13/12/2008. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008E0944. (Accessed on 26/09/2016).

As stated in Article 1:

"1. Each Member State shall assess the export licence applications made to it for items on the EU Common Military List mentioned in Article 12 on a case-by-case basis against the criteria of Article 2.

2. The export licence applications as mentioned in paragraph 1 shall include:
   - applications for licences for **physical exports**, including those for the purpose of licensed production of military equipment in third countries,
   - applications for **brokering** licences,
   - applications for '**transit**' or '**transhipment**' licences,
   - applications for licences for any **intangible transfers** of software and technology by means such as electronic media, fax or telephone.

Member States' legislation shall indicate in which case an export licence is required with respect to these applications".

The "**export licence**" is a formal authorisation issued by the national licensing authority to export or transfer military equipment on a temporary or definitive basis. It covers both intra- and extra- EU transfers.

Brokering activities are here to be understood as activities of persons and entities:

— negotiating or arranging transactions that may involve the transfer of items on the EU Common Military List from a third country to any other third country; or

— who buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country.

Before the entry into force of the Common Position 2008/944/CFSP, the main EU legislation for brokering issues was the Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering. Currently, several provisions of the Council Common Position 2003/468/CFSP, in particular, these on information sharing,

remain applicable but should be read in light of the Common Position 2008/944/CFSP.[29]

As for **transit and transhipment**, the Common Position does not define these terms, which are sometimes used as synonyms to indicate the same operation.

Still, transit and transhipment do not refer to the same operation. In fact, while transit usually indicates the movements in which the goods (military equipment) merely pass through the territory of a Member State, transhipment is a transit involving the physical operation of unloading goods from the importing means of transport (e.g. aircraft) followed by a reloading (generally) onto another exporting means of transport (e.g. a train). In this regard, transhipment should be understood as a part of a transit operation.

Concerning the license for **intangible transfers**, it should be noted that the export authorisation for an item listed covers the minimum technology necessary for the installation, operation, maintenance and repair of the items supplied. It also provides operating instructions and some basic specifications. An everyday parallel could be a technical manual supplied with a television or washing machine. If such technology is exported apart, it will require an authorisation.

Before granting an authorisation, Member States' national competent authorities have to assess the export license applications against the eight criteria listed in Article 2, which could be summarised as follows:

— Respect for the *international obligations* and commitments of Member States, in particular, the *sanctions adopted* by the UN Security Council or the EU, agreements on non-proliferation and other subjects, as well as other international obligations;[30]
— Respect for *human rights* in the country of final destination as well as respect by that country of *international humanitarian law*;

29 Q., Michel, August 2015, p. 5.

30 The main purpose of Criterion 1 is to ensure that sanctions decided by international regimes are respected.

— *The internal situation* in the country of final destination, as a function of the existence of *tensions or armed conflicts*;[31]
— Preservation of *regional peace, security and stability*;[32]
— The *national security* of the member states and territories whose external relations are under the responsibility of a Member State, as well as that of friendly and allied countries;[33]
— Behaviour of the buyer country towards the international community, in particular, its *attitude to terrorism*, the nature of its alliances and respect for international law;[34]
— Existence of a *risk* that the *military technology or equipment will be diverted* within the buyer country or re-exported under undesirable conditions.
— Compatibility of the exports of military technology or equipment with the technical and economic capacity of the recipient country, taking into account the desirability that states should meet their legitimate security and defence needs with the least diversion of human and economic resources for armaments (*Sustainable development of the recipient country*).[35]

31 Member States shall deny an export licence for military technology or equipment which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.

32 Member States shall deny an export licence if there is a clear risk that the intended recipient would use the military technology or equipment to be exported aggressively against another country or to assert by force a territorial claim.

33 Unlike the other seven criteria, which draw Member States' attention to a particular aspect of the country of destination deemed to be source of risk, Criterion 5 requires the Member States to carry out an analysis focused on a parameter specific to them: their national security and that of friends, allies and other Member States. (Source: Q., Michel, August 2015, p. 29).

34 This criterion essentially focuses on current and past record of the recipient country with regard to its attitude to terrorism and international organised crime, the nature of its alliances, its respect for international commitment and law, concerning, in particular, the non-use of force, International Humanitarian Law and WMD non-proliferation, arms control disarmament. (Source: Q., Michel, August 2015, p. 32).

35 Criterion 8 is only expected to apply when the stated end-user is a government or a public sector entity, because it is only in respect of these end-users that the possibility of diverting scarce resources from social and other spending could occur. (Source: Q., Michel, August 2015, p. 40).

Article 4 of Council Common Position 2008/944/CFSP establishes the no undercut mechanism which commits a Member State to consult, before granting an authorisation, another Member State that has already denied an authorisation for an essentially identical transaction. As stated in Article 4:

> "Member States shall circulate details of applications for export licences which have been denied in accordance with the criteria of this Common Position together with an explanation of why the licence has been denied. Before any Member State grants a licence which has been denied by another Member State or States for an essentially identical transaction within the last three years, it shall first consult the Member State or States which issued the denial(s). If following consultations, the Member State nevertheless decides to grant a licence, it shall notify the Member State or States issuing the denial(s), giving a detailed explanation of its reasoning".

The result of the consultation between Member States is not legally binding, in the sense that the Member State can decide to grant the authorisation anyway. If it decides to issue the authorisation, it has to notify the Member State that has previously denied the authorisation and explain its decision. This obligation to inform and publicise the reasons for denials acts as a political deterrent and constrains Member States to carefully weigh the pros and cons.

The no undercut principle is an essential element of the EU, as well as in any other regional or international export control system. It lies in the need to counter the risk of "licence shopping" by operators. This mechanism consists of an assessment by an exporter of the different national trade control systems and policies, to apply for a licence in the one where he/she has the best chance to obtain the authorisation. Another step to take for a competent authority before granting an export authorisation is to check the *end-user certificate*. This is a document, supplied by the exporter to the competent authority, containing information about the end-user, the end-use and the final destination of the goods and technologies. Information includes, for example:

exporter's details (name, address and business name, etc.), end-user's details (address and business name, etc.), description of the goods being exported (type, characteristics), or reference to the contract concluded with the authorities of the country of final destination, quantity and/or value of the exported goods, etc. As stated in Article 5:

> "Export licences shall be granted only on the basis of reliable prior knowledge of end use in the country of final destination. This will generally require a thoroughly checked **end-user certificate** or appropriate documentation and/or some form of official authorisation issued by the country of final destination. When assessing applications for licences to export military technology or equipment for the purposes of production in third countries, Member States shall in particular take account of the potential use of the finished product in the country of production and of the risk that the finished product might be diverted or exported to an undesirable end user".

However, competent authorities might require supplementary elements to be included in the end-user certificate, such as a clause prohibiting re-export, full details on the intermediary or a commitment by the final consignee to provide the exporting State with a *Delivery Verification certificate* upon request. This last one is a type of post-shipment verification allowing to confirm that the items have been effectively delivered. However, it does not guarantee that the declared end-use will be respected or that the items will not be re-exported afterwards.[36] A specific information exchange system between the EU and third countries, aligned with the Common Position, is also in place since 2012.[37]

36 Q., Michel, S., Paile, M., Tsukanova, A., Viski, 2013, p. 117.

37 Third countries aligned with Council Common Position are: Albania, Bosnia and Herzegovina, Canada, the former Yugoslav Republic of Macedonia, Iceland, Montenegro and Norway.

Council Common Position 2008/944/CFSP establishes a transparency mechanism through the circulation of annual reports between Member States.

According to Article 8, each Member State shall circulate to the other Member States an annual report on its exports of military technology and equipment, as well as on the implementation of the Common Position. Based on Member States' national reports, a EU public report is produced and make publicly available via a publication in the Official Journal.[38]

2.2. Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering

As stated in its Article 1, the objective of Council Common Position 2003/468/CFSP[39] is to control arms brokering in order to avoid circumvention of UN, EU or OSCE embargoes on arms exports, as well as of the Criteria set out in the *European Union Code of Conduct on Arms Exports*.[40]

The Common Position calls on Member states to establish a legal framework in order to regulate brokering activities on their territory and on brokers of their nationality:

38 *Sixteenth Annual Report according to Article 8(2) of Council Common Position 2008/944/CFSP defining common rules governing control of exports of military technology and equipment*, OJ C 103/1 of 27/03/2015. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOC_2015_103_R_0001. (Accessed on 26/09/2016).

39 European Union, Council Common Position 2003/468/CFSP of 23 June 2003 on the control of arms brokering, OJ L 156 of 25/06/2003. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32003E0468. (Accessed on 26/09/2016).

40 For the list of Member States implementing Council Common Position 2003/468/CFSP, please see: Q., Michel, *The European Union Export Control Regime of Arms: Comment of the Legislation: article-by article*, August 2015, Table 1. Available on: http://www.esu.ulg.ac.be/file/20151116163752_Vademecum-weaponsrev5.pdf. (Accessed on 26/09/2016).

Article 2

"1. Member States will take all the necessary measures to control brokering activities taking place within their territory. Member States are also encouraged to consider controlling brokering activities outside of their territory carried out by brokers of their nationality resident or established in their territory.
2. Member States will also establish a clear legal framework for lawful brokering activities.

(...)".

Article 3 establishes the requirement of a licence or written authorisation for brokering activities. The authorisation should be granted by the competent authorities of the Member State where brokering activities take place and, where required by national legislation, where the broker is resident or established.
Moreover, Member States are required to keep records for at least 10 years of all persons and entities which have obtained a licence.
The Common Position allows Member States to constrain brokers to obtain an authorisation to exercise their activities, as well as establish a register of arms brokers. However, the registration or authorisation to act as a broker would not replace the requirement to obtain an authorisation for controlled transactions.

Finally, Article 5 calls upon Member States to establish a system of exchange of information among themselves, as well as with third States, as appropriate.
Information exchanged, according to Common Position 2003/468/CFSP should include the following areas:

— Legislation;
— Registered brokers (if applicable);
— Records of brokers;
— Denials of registering applications (if applicable) and licensing applications.

3. Dual-use items within the EU

Trade controls on dual-use goods and technology started to be set up by international export control regimes dealing with WMD non-proliferation concerns, at the beginning of the nineties. However, despite the fact that the term "dual-use" is widely used by international export control regimes, it has not been defined and its scope and understanding vary from an export control regime to another.
Given the lack of a shared and common definition of dual-use items, the only possibility to compare the scope of the regimes is to refer to their control lists.
In the EU, the instruments ruling the control of dual-use items are:

— *Council Regulation 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items*;
— *Council Joint Action of 22 June 2000 (2000/0401/CFSP) concerning the control of technical assistance related to certain military end-uses.*

Council Regulation 428/2009 is the main legal instrument. Although it is a Regulation, it has been drafted more like a Directive. The EU regime established by Council Regulation 428/2009 essentially intends to harmonise Member States' national practices. It does not substitute for national export control regimes.

3.1. Items covered by Council Regulation 428/2009

Council Regulation 428/2009, contrary to the majority of international export control regimes, defines dual-use items article 2(1) as:

> "For the purposes of this Regulation:
> 1. 'dual-use items' shall mean items, including software and technology, which can be used for both civil and military purposes, and shall include all goods which can be used for both

non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices; (...)".

The definition of dual-use items used by this Regulation attempts to mix two different understandings of the term. The first considers items that could have military and non-military purposes (i.e. the Wassenaar Arrangement, Australia Group and MTCR definitions) and the second includes items that could have nuclear and non-nuclear purposes (i.e. the NSG definition).[41] More precisely, the EU definition covers dual-use items which can be used for both civil and military purposes and items *"that can be employed for both non-explosive uses and assisting in any way in the manufacture of nuclear weapons or other nuclear explosive devices"*.

All dual-use items subject to trade controls in the EU are listed in Annex I to Council Regulation 428/2009 that is divided into 10 categories:
— Category 0: Nuclear materials, facilities and equipment
— Category 1: Special materials and related equipment
— Category 2: Materials processing
— Category 3: Electronics
— Category 4: Computers
— Category 5: Telecommunications and "information security"
— Category 6: Sensors and lasers
— Category 7: Navigation and avionics
— Category 8: Marine
— Category 9: Aerospace and propulsion

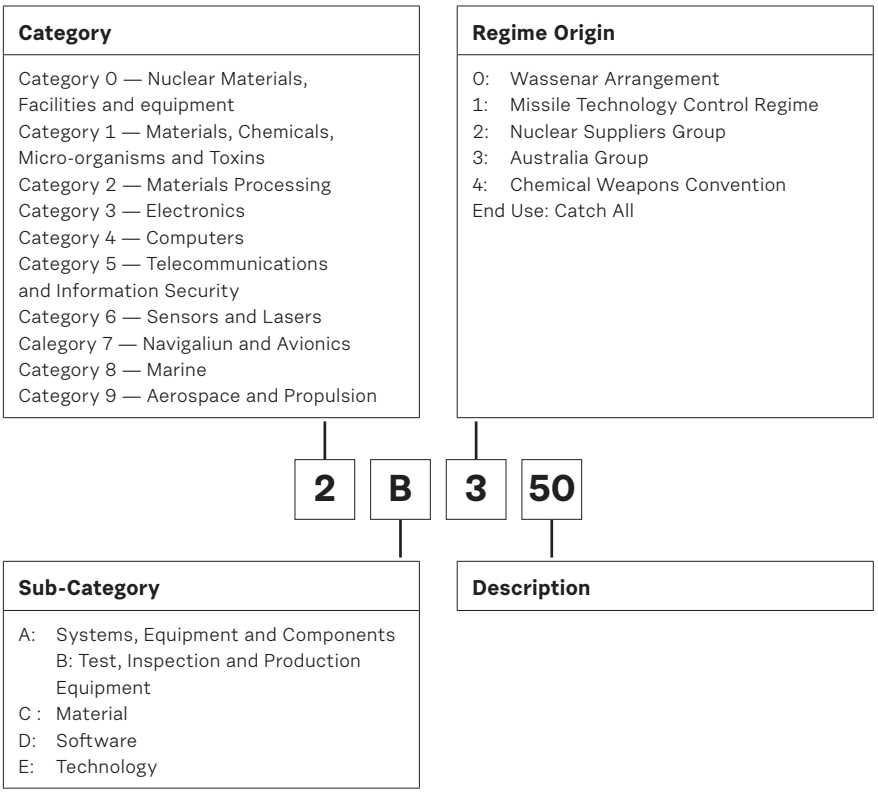
The list of items contained in Annex I is the first international compilation of the control lists of five international export control regimes: the Wassenaar Arrangement, the Missile Technology Control Regime (MTCR), the Nuclear Suppliers' Group (NSG), the Australia Group and the Chemical Weapons Convention (CWC). However, some EU Member States are not members of all the regimes: Cyprus is not a member of the Wassenaar Arrangement and Cyprus, Estonia, Latvia,

41 Q., Michel, S., Paile, M., Tsukanova, A., Viski, 2013, p. 17.

Lithuania, Malta, Slovenia, Slovakia and Romania are not members of the MTCR.

Each dual-use listed item has an alphanumeric code (as in the example below) indicating the category (as listed above), the sub-category (A: Systems, Equipment and Components; B: Test, Inspection and Production Equipment; C: Material; D: Software; E: Technology), the corresponding international export control regime (0:WA; 1: MTCR; 2: NSG; 3: AG; 4: CWC) and a final number indicating the description of the item.

Structure of EU Control List as included in Regulation 428/2009*



* Source: European Parliament Workshop on Dual-use export control, Directorate-General for External Policies, Policy Department, p.17, October 2015 – PE 535.000. Available on: http://www.europarl.europa.eu/RegData/etudes/STUD/2015/535000/EXPO_STU(2015)535000_EN.pdf. (Accessed on 26/09/2016).

The list of items is reviewed and updated annually. It is done by a Commission Regulation on the basis of a delegation granted by the Council and the Parliament.

In fact, Regulation 599/2014[42] introduced new provisions, notably concerning the power granted to the Commission to adopt delegated acts to modify and update the lists of items and countries covered by the Regulation. Previously, the annual update was done by the Council and the European Parliament under the normal legislative procedure (which takes around a year).
Power has also been granted to the Commission to remove destinations from the scope of UGEAs, if such destinations become subject to an arms embargo.
Finally, Regulation 599/2014 lays down the procedure allowing the Commission to adopt delegated acts and the Council and European Parliament to object, oppose or even revoke the delegated power.

As for Annex I to Regulation 428/2009, it has been amended by:
— Council Regulation (EC) No 388/2012;[43]
— Commission Delegated Regulation No 1382/2014;[44]
— Commission Delegated Regulation (EU) 2015/2420.[45]

42 European Union, Regulation (EU) No 599/2014 of the European Parliament and of the Council of 16 April 2014 amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ L 173/79 of 12/06/2014.

43 European Union, Regulation (EU) No 388/2012 of the European Parliament and of the Council of 19 April 2012 amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ L 129/12 of 16/05/2012.

44 European Union, Commission Delegated Regulation (EU) No 1382/2014 of 22 October 2014 amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ L 371/1 of 30/12/2014.

45 European Union, Commission Delegated Regulation (EU) (EU) 2015/2420 of 12 October 2015 amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual use items, OJ L 340/1 of 24/12/2015.

Finally, Commission Delegated Regulation of 12 September 2016[46] inserts changes to the control lists adopted by the international non-proliferation regimes and export control arrangements in 2015, thus modifying Annexes I, IIa to IIg and Annex IV.

An export authorisation is required for all items listed in Annex I. However, the Regulation also establishes the possibility for Member States to control non-listed items. This mechanism, called catch-all clause, was set up in order to face the rapid progression of technology as well as to circumvent the proliferators' endeavours to procure dual-use items with technical specifications just below the controlled ones. Article 4 of Council Regulation 428/2009 establishes three types of catch-all clauses, two of which are compulsory for Member States' competent authorities.
The first catch-all clause allows Member States' competent authorities to require an export authorisation for non-listed items "*when they have informed*" the exporter that these items could contribute to one of the three potential proliferation risks detailed in the Regulation (e.g. a potential contribution to the elaboration of chemical, biological or nuclear weapons; a potential military use in a country subject to an arms embargo; and a potential incorporation in military items that have been previously illegally exported).

The second catch-all clause extends the non-proliferation responsibility to exporters by constraining them to inform their competent authorities "*when they are aware*" that the dual-use items, which they intend to export, could contribute to the elaboration of a WMD or might have a military end-use. In this case, the competent authority will assess the necessity to submit or not the export to previous authorisation.

46 European Union, Commission Delegated Regulation of 12.9.2016 amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, Brussels, 12.9.2016 C(2016) 5707 final. Available on: http://trade.ec.europa.eu/doclib/docs/2016/september/tradoc_154948.pdf. (Accessed on 26/09/2016).

The third catch-all clause is optional and it is also known as the "suspicion clause". It allows Member States to require to exporters to inform not only when they are aware but also "*when they have ground for suspecting*" that the dual-use items which they intend to export might contribute to the elaboration of WMD or military items listed in the EU Military List.[47] The responsibility of appreciating the risk, and not only the possibility of diversion as imposed by paragraph 4, lays on the exporter. If an exporter, intentionally or by negligence, omits to apply for an export authorisation, his or her responsibility could be engaged and administrative and/or criminal sanctions could be applied.[48]
The following Member States have introduced such clause in their national export control regime: Austria, Belgium (Walloon Region and Flemish Region), Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, Hungary, Ireland, Luxembourg, Malta, Poland, Slovakia, Spain and the United Kingdom.[49]
A sort of fourth catch-all clause is contained in Article 8, which enables Member States to prohibit the export of non-listed items or to submit them for authorisation "*for reasons of public security* or *human rights considerations*".[50]

47 Q., Michel, S., Paile, M., Tsukanova, A., Viski, 2013, p. 70.

48 Q., Michel, January 2016, (DUV5Rev5), p. 39.

49 Idem.

50 For example, on 19 September 2012, Italy notified the imposition of a specific national authorisation requirement on the export to Syria of certain telecommunication items not listed in Annex I for reasons of public security and human rights considerations.

3.2. Operations covered by Council Regulation 428/2009

Council Regulation 428/2009 considers two different types of transfer:
— Dual-use items transferred to an end-user established outside of the EU and covering the following trade operations: export, external transit and brokering activities;
— Dual-use items transferred to an end-user established in another Member State, i.e. intra-EU trade movements.

It is worth noting that imports operations are not ruled by the Regulation, although import authorisations could be required unilaterally by a Member State. However, the unilateral requirement of an import authorisation would be a counterproductive measure, since transfer of dual use within its common market is, for most of listed items, not submit to authorisations and items could be then imported into another Member State not applying this kind of import authorisation.

Dual-use items transferred to an end-user established outside of the EU

3.2.1. Exportation

Exportation is an export or re-export as defined by the Community Customs Code (article 161, 182).

Article 161 of the Community Customs Code

"1. The export procedure shall allow Community goods to leave the customs territory of the Community. Exportation shall entail the application of exit formalities including commercial policy measures and, where appropriate, export duties.

2. With the exception of goods placed under the outward processing procedure or a transit procedure pursuant to Article 163, and without prejudice to Article 164, all Community goods intended for export shall be placed under the export procedure.

3. Goods dispatched to Heligoland shall not be considered to be exports from the customs territory of the Community.

4. The case in which and the conditions under which goods leaving the customs territory of the Community are not subject to an export declaration shall be determined in accordance with the committee procedure.

5. The export declaration must be lodged at the customs office responsible for supervising the place where the exporter is established or where the goods are packed or loaded for export shipment. Derogations shall be determined in accordance with the committee procedure."

* European Union, Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, p. 1). This Article becomes the Articles 176, 177 and 178 of the modernised Customs Code. The Title VIII Goods taken out of the custom territory of the Union of the Union Custom Code includes the previous provisions of article 162.

Article 182 of the Community Customs Code

"1. Non-Community goods may be:
- Re-exported from the customs territory of the Community;
- Destroyed;
- Abandoned to the exchequer where national legislation makes provision to that effect.

2. Re-exportation shall, where appropriate, involve application of the formalities laid down for goods leaving, including commercial policy measures.
Cases in which non-Community goods may be placed under a suspensive arrangement with a view to non-application of commercial policy measures on exportation may be determined in accordance with the committee procedure.

3. Save in cases determined in accordance with the committee procedure, destruction shall be the subject of prior notification of the customs authorities. The customs authorities shall prohibit re-exportation should the formalities or measures referred to in the first subparagraph of paragraph 2 so provide. Where goods placed under an economic customs procedure when on Community customs territory are intended for re-exportation, a customs declaration within the meaning of Articles 59 to 78 shall be lodged. In such cases, Article 161(4) and (5) shall apply.

Abandonment shall be put into effect in accordance with national provisions.

4. Destruction or abandonment shall not entail any expense for the exchequer.

5. Any waste or scrap resulting from destruction shall be assigned a customs-approved treatment or use prescribed for non-Community goods.

It shall remain under customs supervision until the time laid down in Article 37(2)."

* European Union, Council Regulation (EEC) No. 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ L 302, 19.10.1992, p. 1). This Article becomes Articles 127, 168 and 179 of the modernised Customs Code. The Title VIII Goods taken out of the custom territory of the Union of the Union Custom Code includes the previous provisions of article 182.

Export operations also include:
— transmission of software by intangible means to a destination outside the European Community;
— uploading and downloading from a website from a third country;
— oral transmission of technology when the technology is described over the telephone.

The definition of export is strictly linked to the definition of "exporter", which is essential to determine the Member State which will have to consider the export application and which might issue the authorisation.

Article 2(3) of Council Regulation 428/2009defines the exporter as:

"Any natural or legal person or partnership:

(i) on whose behalf an export declaration is made, that is to say the person who, at the time when the declaration is accepted, holds the contract with the consignee in the third country and has the power for determining the sending of the item out of the customs territory of the Community. If no export contract has been concluded or if the holder of the contract does not act on its own behalf, the exporter shall mean the person who has the power for determining the sending of the item out of the customs territory of the Community;

(ii) which decides to transmit or make available software or technology by electronic media including by fax, telephone, electronic mail or by any other electronic means to a destination outside the Community".

Thus, the main elements designating an exporter are:

— Natural or legal person or partnership on whose behalf an export declaration is made;
— (the one who) holds the contract with the consignee;[51]
— If there is no export contract, it is the person who has the power to determine the sending of the item out of the customs territory of the Community;
— (the one who) decides to transmit or make available software or technology by any other electronic means to a destination outside the Community.

51 The term consignee has to be understood as the first recipient of items in the country of final destination. This may be where the export remains (in which case the consignee will be the end-user), but not necessarily. The consignee can be an authorised distributor, associated company, agent or anyone else. (Source: Q., Michel, *Vademecum dedicated to the European Union Dual-Use Items Export Control Regime: Comment of the Legislation*, January 2016, (DUV5Rev5), p. 23).

3.2.2. External transit (possibility to control)

Transit is defined in Article 2(7) as *a transport of non-Community dual-use items entering and passing through the customs territory of the Community with a destination outside the Community.*

Due to the principle of free movement of goods and technology within the European Union, a transfer of dual-use items between two Member States passing through a third one will not be considered as a transit operation under the Regulation.

It is up to Member States, individually, to submit transit operations to authorisations. The Regulation allows Member States to prohibit or impose, in individual cases, a transit authorisation for items listed in Annex I if there is a risk that items could contribute to WMD proliferation. Transit controls could also be extended by Member States, individually, to non-listed items and to dual-use items intended for military end-use or for countries under embargo.

Since the decision to establish transit controls is up to Member States individually, the authorisation/prohibition established by one Member State has a limited territorial validity, in the sense that the authorisation/prohibition is valid only for the Member State which has decided or issued the transit authorisation or prohibition.

3.2.3. Brokering (possibility to control)

Article 5 organises the control of the brokering activities. This provision concerns transactions between two (or more) third countries organised by an entity/person established within the EU.[52]

Brokering services are defined by the Regulation as:

— the negotiation or arrangement of transactions for the purchase, sale or supply of dual-use items from a third country to any other third country; or

— the selling or buying of dual-use items that are located in third countries for their transfer to another third country.

52 Q., Michel, January 2016, (DUV5Rev5), p. 52.

The Regulation explicitly excludes ancillary services[53] from the definition of brokering services.
The authorisation for brokering services is granted by Member States and is valid throughout the EU. However, the authorisation is required only if:

— the *broker has been informed,* by the competent authorities of the Member State in which he is resident or established, that the items in question are or may be intended for the development of WMD or other explosive devices, or missiles capable of delivering such weapons;
— the *broker is aware* that the listed items are or may be intended for the development of WMD or other explosive devices, or missiles capable of delivering such weapons.

Member States also have the possibility to extend an authorisation requirement for brokering services to non-listed items and to dual-use items for military end-use or countries under embargo.

3.2.4. Dual-use items transferred to an end-user established in another Member State, i.e. intra-EU trade movements

Despite the principle of free movement of goods and technology within the European Union, [54] a limited number of dual-use items, listed in Annex IV (which is a subset of Annex I) are subject to restrictions regarding intra-EU transfers for security reasons,[55] as ruled by Article 22 of the Regulation.
For this list of items, an authorisation will be required, and the authorities responsible for granting an authorisation would be defined by

53 Ancillary services are transportation, financial services, insurance or re-insurance, or general advertising or promotion.

54 Dual-use items listed in Annex IV are considered as more sensitive in terms of potential contribution to the elaboration of weapons of mass destruction.

55 Although the term "transfer" is usually used for trade operations in general, Regulation 428/2009 uses the term "transfer" when it refers to intra-EU controls of dual-use items and the term "export" with regard to transactions consisting in Community goods exports outside the EU.

the geographical location of the item and not by the "exporter definition" (given that the transaction is not an export).[56]
Moreover, Article 22(2) grants the possibility for Member States to impose, under certain conditions, an authorisation requirement for the transfer of dual-use items if, at the time of transfer, the operator knows that the final destination of the items would be located outside the EU.[57]

3.3. Common understandings of authorisations

Export authorisations are granted by Member States' competent authorities. Authorisations granted by one Member State are valid throughout the EU (principle of mutual recognition of authorisations). Council Regulation 428/2009 as amended by Regulation (EU) No 1232/2011[58] established six EU General Export Authorisation. These authorisations, directly granted by the Regulation, are valid for all exporters established on the EU Custom territory.
These EU General authorisations cover:

— EUGEA No EU001 on export of certain dual-use items (listed in the EUGEA) to certain countries listed (Australia, Canada, Japan, New Zealand, Norway, Switzerland and the USA).
— EUGEA No EU002 on export of certain dual-use items to certain countries (Argentina, Croatia, Iceland, South Africa, South Korea and Turkey)
— EUGEA No EU003 for export after repair/replacement
— EUGEA No EU004 for temporary export for exhibition or fair
— EUGEA No EU005 for telecommunications
— EUGEA No EU006 for chemicals.

56 Q., Michel, January 2016, (DUV5Rev5), p. 129.

57 Q., Michel, S., Paile, M., Tsukanova, A., Viski, 2013, p. 103.

58 European Union, Regulation (EU) No 1232/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, OJ L 326/26 of 08/12/2011. Available on: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:326:0026:0044:EN:PDF.

Aside from this type of authorisations granted directly by the EU, for all other exports for which an authorisation is required, the authorisation is granted by the competent authorities of the Member State where the exporter is established.

There are three types of authorisations granted by national competent authorities. Their difference lies in the number and nature of potential recipients and countries of destination along with the end-use:

— General authorisation: it might be used by all national exporters, and it allows them to export several types of dual-use items to several recipients located in pre-determined countries of destination;
— Global authorisation: it authorises exports of a number of different types of dual-use items to different recipients located in various countries of destination;
— Individual authorisation: enables the exporter to deliver a specific quantity of dual-use items to a specific end-user located in a specific country of destination.

General authorisations (called National General Export Authorisations – NGEA) are the least restrictive, contrary to individual authorisations, which are also called the "one shot" authorisations and have a validity that varies from one to two years. As for global authorisations, these are also called "open authorisations". Their validity is longer than the validity period of an individual authorisation. However, there is no rule.[59]

It is worth noticing that documents' formats (individual and global authorisations model, end-user certificate, etc.) may vary from a Member State to another, but a harmonisation process has started.
In order to grant or not an authorisation, Member States assess their decisions on the basis of two types of considerations, which are conditions and criteria.
Conditions are objective elements that recipient countries have to meet to obtain an export authorisation from the supplier. Those elements

59 Q., Michel, S., Paile, M., Tsukanova, A., Viski, 2013, pp. 106-107.

can be a ratification of a treaty, a conclusion of a safeguards system or a submission of an end-user certificate.
Criteria are subjective elements to be considered by the supplier State, through a case-by-case analysis, in order to authorise or not a transfer. Criteria can be an internal situation in the country of final destination, the existence of tensions or armed conflicts and a risk that the recipient country would use the proposed export aggressively against another country or to assert by force its territorial claim.

Article 12 of Regulation 428/2009 establishes a non-exhaustive list of criteria to be taken into consideration by Member States' competent authorities while assessing an opportunity to grant or not an export authorisation. This includes four main elements:
— commitments and obligations taken by Member States in the relevant international non-proliferation regimes;
— obligations under sanctions imposed by the CFSP, OSCE or a binding resolution of the UN Security Council;
— consideration of national foreign and security policies, including those covered by the European Union Code of Conduct on Arms Exports;
— consideration of intended end-use and risk of diversion.

4. Minerals within the EU

When referring to "conflict minerals", the international community usually refers to four minerals grouped under the acronym of 3TG: tantalum (columbite-tantalite), tin (cassiterite); tungsten (wolframite) and gold. Their systematic exploitation and trade, in a context of conflict, contribute to the commission of serious violations of human rights, international humanitarian law or violations amounting to crimes under international law.
It is also worth remembering that the regulation of trade in conflict minerals was initiated by the US in 2008.

4.1. Why Should the EU Regulate Conflict Minerals?

For the EU, two elements to adopt a mechanism in the line of the one adopted by the US have been tabled. Firstly, the EU is a major destination for many of the minerals that risk being linked to the financing of conflict and human rights abuses. In 2013, the EU accounted for about 16% of worldwide imports of the 3TG in their raw forms. These global imports are worth around €123 billion.[60]
Secondly, the EU is the second largest importer of mobile phones and laptops in the world (both products contain 3TG) and three of the world's top five importers are in the EU.[61]
Basically, at the origin of the EU initiatives to regulate conflict minerals trade, there is a commercial reason, considering the large quantity of material involved, and a political reason, taking into consideration the "moral aspect" of trading/using items contributing to violations of human rights and international law.

60 NGO Coalition, *Briefing on EU Regulation on responsible mineral sourcing: implementing the Parliament's proposed due diligence system*, p. 2, October 2015. Available on www.globalwitness.org.

61 Ibid.

The option of simply prohibiting the import of these conflict minerals could have a negative business effect: if the EU does not purchase them, other countries, less concerned by their origin, might buy them. In this situation, the EU would face an economic loss and stronger economic competitors (e.g. China, if it decides to buy these conflict minerals). A EU regulation of the conflict minerals trade should then balance economic interests with human rights concerns.

In this sense, the EU looked on how one of its biggest economic competitors faced the issue: the US legislation. This last one does not prohibit the import of conflict minerals. Section 1502 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* is basically a disclosure requirement. It includes a requirement that companies using gold, tin, tungsten and tantalum make efforts to determine if those materials came from the Democratic Republic of Congo (DRC) or an adjoining country and, if so, to carry out a "due diligence" review of their supply chain to determine whether their mineral purchases are funding armed groups in Eastern DRC. More than a control mechanism, the US one is an information mechanism, informing users on the possibility that their items (e.g. computers, cell phones, etc.) might contain some conflict minerals.

4.2. EU Regulation of Trade in Conflict Minerals

At the present stage, there is no EU regulation on conflict minerals in force, but there is a Commission's proposal largely inspired from the US system. The EU Commission's proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of

tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas.[62]
It is worth noticing that this proposal is in the framework of common commercial policy, which means that for this proposal to be adopted, the co-decision procedure will apply.
It means that the Council and the European Parliament will have to decide upon the proposal of the Commission.

The main objective of the Commission's proposal is to reduce the financing of armed groups and security forces through mineral proceeds in conflict-affected and high-risk areas. The principle to reach this objective is to encourage EU operators importing minerals and metals to comply with a self-certification mechanism.
The structure of the Commission's proposal is the following:
— importers of minerals or metals listed by the Regulation could conduct a self-certification as responsible importer by adhering to the supply chain due diligence obligations (set out in the Regulation, in Article 3);
— responsible importers obligations concern: "Management system", "Risk management", "Third party audit", and "Disclosure" (Articles 4, 5, 6 and 7);
— ex-post checks to be carried out by Member State competent authorities to ensure whether self-certified responsible importers comply with the obligations set out in Articles 4, 5, 6, and 7.
— cooperation between the competent authorities concerning the sharing and exchange of information.

62 European Union, EU Commission proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas, Brussels, 5.3.2014 COM(2014) 111final 2014/0059 (COD). Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014PC0111. (Accessed on 26/09/2016).

4.3. Commission's Proposal and European Parliament's Amendments

At its first reading, the Commission's proposal has been amended by the European Parliament (in 2015) and is presently considered by the Council.[63]

The main differences concern three areas: 1) the legal force of the regulation, 2) the scope, 3) and the review clause.

As regards the legal force, while the Commission proposed a voluntary system on the US model, the European Parliament pushes for a mandatory system. The different vision of the two institutions on the legal force of the instrument is linked to their different understanding of the scope. The Commission, in order to balance political objectives, such as the respect of human rights, with economic ones, considers the scope to be limited to the reduction of financing of armed groups by means of controlling trade of minerals from conflict regions. Differently, the EP contemplates a mechanism which eliminates such financing. Finally, the Commission and the EP do not share the same view about the review clause, that is to say, the regular period at which the regulation should be revised. The Commission, attributing a "minor" role to the mechanism, proposes a review period three years after the entering into force of the Regulation and, after that, every six years. The EP, more concerned by the issue, proposes a first review two years after the date of application of the Regulation and every three years thereafter.

Further to these divergences, the EP proposed to add obligations for downstream companies, through a verification system by third parties and by establishing a list of responsible importers.

63 European Union, Amendments adopted by the European Parliament on 20 May 2015 on the proposal for a regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas (COM(2014)0111 – C7-0092/2014 – 2014/0059(COD)). Available on: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2015-0204+0+DOC+XML+V0//EN. (Accessed on 26/09/2016).

The differences of view between the Commission and the EP are summarised in the table below.

Comparison between the Commission' s legislative proposal and the European Parliament's proposal

	Commission	EP
Legal force	Voluntary system	Mandatory system
Scope	To reduce the financing of armed groups by means of controlling trade of minerals from conflict regions.	To eliminate the financing of armed groups by means of controlling trade of minerals from conflict regions.
Strengthened review clause	No later than three years after entering into force and every six years thereafter.	Two years after the date of application of this Regulation and every three years thereafter.

4.4. The EU Mechanism *versus* the US Mechanism

The table below compares the EU's proposal with the US legislation in force.

The main differences between the two mechanisms are:

— the scope, if we consider the EP's proposal (having as objective the elimination of financing of armed groups by means of controlling trade of minerals), but not if we consider the Commission's one, which is on the same line as the US' one to reduce the financing of armed groups.

— the geographical scope since the US system is focused on DRC and a list of "covered countries", while the EU does not establish a specific target, using the general wording of "conflict-affected and risk areas".

— penalties are envisaged by the EU regulation while there are none in the US legislation.

— The competent authorities in charge of the implementation are various and operate at different levels for the EU mechanism, while the US can count on a single entity: the SEC, for obvious reasons of "State organisation".

Comparison table between the EU legislative proposal and the US legislation

	US	EU
Purpose	To curtail human rights abuses and violence in the DRC.	To eliminate the financing of armed groups by means of controlling trade of minerals from conflict regions.
Geographical scope	The law focuses on the DRC and the 'Covered Countries'.	The regulation addresses all conflict-affected and risk areas.
Due-diligence	OECD Guidance à an example of Due Diligence international scheme	OECD Guidance à the mandatory reference scheme.
Competent authorities for implementation	SEC	- The European Commission + a Committee established under Art.13; - The Member States competent authorities (Art. 9); - Ex-post checks mechanisms carried out by MS competent authorities (Art. 10).
Penalties	Not envisaged	Regulated by Art.14: "Rules applicable to infringement".

5. Diamonds in the EU

The European Union does not have a dedicated system to control diamonds trade flow. It has adhered to and implemented the international mechanism of the Kimberley Process Certification Scheme (KPCS).
The KPCS is a certification mechanism that prevents rough diamonds from an area of conflict from entering the legitimate diamond supply chain. The KPSC ensures that only rough diamonds accompanied by a government-issued certificate can be traded. Within this process, States commit themselves to import and export only KPSC (thus "certified") rough diamonds.

The legal instrument implementing the Kimberley Process within the EU is Council Regulation (EC) No 2368/2002 of 20 December 2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds.[64]

Basic principles of the EU trade in diamonds are:
— the free movement of diamonds within the EU (given the customs union);
— the import prohibition of diamonds unless certified by a Kimberley Participating State;
— the export prohibition in case diamonds leaving the EU customs territory are not certified by a competent authority.

As long as diamonds do not fall under the exception of Article 352 of the TFEU, their trade is part of the Common Commercial Policy. For this reason, the European Union, in the Kimberley Process, defends

64 European Union, Council Regulation (EC) No 2368/2002 of 20 December 2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds, OJ L 358/28 of 31/12/2002. Available on: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:358:0028:0048:EN:PDF. (Accessed on 26/09/2016).

and represents the interest of its Member States and has one voice in the different Working Groups and Committees of this organisation.

As explained in the Guidelines on Trading with the European Union (EU) dedicated to the Kimberley Process:[65]

> "(The EU) is a single market and an economic and customs union. For most international trade matters, including for the purposes of the Kimberley Process Certification Scheme (KPCS), the European Union is considered as one entity without internal borders.
> One set of rules applies for the twenty-eight customs administrations of the Member States for import or export transactions at the external borders of the single market".

Regulation 2368/2002 provides that the import of rough diamonds into the Union, and the export of rough diamonds from the Union, are prohibited unless the conditions set out in Article 3 (for imports), or Article 11 (for exports) are fulfilled. In the case the conditions set out by the Regulation, for import and export, are not fulfilled, the competent authorities have to detain the shipment. The detained shipment cannot, therefore, be released or sent back to the country of provenance, in the case of incoming shipments.[66]
Within the EU, the import regime applicable to diamonds is established by Articles 3 to 10 of the dedicated Regulation. As stated in Article 3:

> "The import of rough diamonds into the Community shall be prohibited unless all of the following conditions are fulfilled:
> (a) the rough diamonds are accompanied by a certificate validated by the competent authority of a participant;

65 European Union, *Guidelines on Trading with the European Union (EU): A practical guide for Kimberley Process Participants and companies involved in trade in rough diamonds with the EU*, September 2015. Available on: http://eeas.europa.eu/blood_diamonds/docs/guidelines-on-trading-with-the-european-community-012015_en.pdf. (Accessed on 26/09/2016).

66 Ibid.

(b) the rough diamonds are contained in tamper-resistant containers, and the seals applied at export by that participant are not broken;
(c) the certificate clearly identifies the consignment to which it refers".

Importers or economic operators can freely choose a point of entry at an external border of the EU for the import of rough diamonds. However, every import of rough diamonds must first be verified by a Union authority. Acceptance of a customs declaration for release for free circulation of rough diamonds within the EU can only happen after the containers and certificates have been verified by a Union authority.

Concerning competent authority, contrary to other EU trade control systems (dual-use items, weapons) for trade in diamonds, competent authorities do not act in the name of the Member States in which these are established but act in the name of the EU. The Regulation refers to these authorities as "Union Authority", defined as *a competent authority designated by a Member State and listed in Annex III*. Therefore, it means that they are competent for any transaction occurring in and out of the EU without considering the location of the operator. Currently, there are Union Authorities in Anvers (BE), London (UK), Idar-Oberstein (DE), Prague (CZ), Bucharest (RO) and Sofia (BG), and Lisbon (PT).[67]

Union Authorities are in charge of the verification of the import certificate accompanying diamonds entering the EU customs territory. The same authorities are in charge of delivering export certificates for diamonds leaving the EU customs territory.
However, their role is limited to the verification of factual elements. There are no political considerations at stake for the Union Authorities

67 European Union, European Commission Implementing Regulation (EU) 2016/91 of 26 January 2016 amending Council Regulation (EC) 2368/2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds, OJ L 19/28 of 27/01/2016. Available on: http://eur-lex.europa.eu/eli/reg_impl/2016/91/oj. (Accessed on 26/09/2016).

when issuing or not an export certification or checking an import certification;; it is essentially a technical analysis.

As for exports, rules are laid down in Articles 11 to 16. The main condition is that *the rough diamonds are accompanied by a corresponding Community certificate issued and validated by a Community authority*.[68]
As explained in the EU Guidelines, to obtain an EU Kimberley Process certificate for export, the exporter must first provide conclusive documentary evidence that the diamonds to be exported were legally imported into the Union. Before issuing an EU certificate, the Union authority may decide to physically inspect the contents of the consignment in order to verify that the conditions laid down in Council Regulation (EC) No 2368/2002 have been met.
Within the validity period of the KP Certificate, economic operators are in principle free to choose when and where customs formalities and the actual export from the Union are to take place. Verification of the actual export of the shipment is undertaken by control of import receipts from the receiving participant.
The Union Authorities in London, Lisbon and Idar-Oberstein systematically send advance notice of shipments by e-mail to the importing authorities of participants. These contain information on the carat weight, value, country of origin or provenance, exporter, importer and the serial number of the Certificate. The Union Authority in Antwerp sends this information to all Participants that have made a request. The Union Authorities in Prague and Sofia systematically send advance notice of shipments by e-mail containing information on the serial number of the Certificate and date of its issue to the importing authorities of participants.[69]

68 Article 11 of Council Regulation (EC) No 2368/2002.

69 European Union, *Guidelines on Trading with the European Union (EU): A practical guide for Kimberley Process Participants and companies involved in trade in rough diamonds with the EU*, September 2015.

Movement of rough diamond imports and exports in the EU* **

* Ibid., p. 9.
** The graph represents indicative diamonds flows.

In case of violations, Article 27 of Council Regulation (EC) No 2368/2002 provides that it is up to Member States to determine sanctions in their national law or regulations for infringements of the Regulation:

> Article 27
> "Each Member State shall determine the sanctions to be imposed where the provisions of this Regulation are infringed. Such sanctions shall be effective, proportionate and dissuasive and shall be capable of preventing those responsible for the infringement from obtaining any economic benefit from their action.
> (...)".[70]

Chapter IV of Council Regulation (EC) No 2368/2002 is dedicated to "Industry Self-Regulation". The chapter sets out requirements for the establishment of a system of warranties and industry self-regulation by organisations representing traders in rough diamonds, and it provides a "fast track" procedure for organisations applying a system of warranties and industry self-regulation. This procedure involves the granting of a privilege in the form of a "fast track" issuance of KP certificates to companies subject to considerable responsibilities as members of industry bodies.
Companies willing to have access to the "fast track" mechanism have to provide conclusive evidence to the European Commission that they have adopted rules and regulations obliging the organisations and their members to respect specific principles and procedures set out in Article 17 of the Regulation.

The main requirements are:
— to sell only diamonds purchased from legitimate sources in compliance with the Kimberley Process Certification Scheme;
— to guarantee that, from their knowledge and/or written warranties provided by the suppliers of rough diamonds, the rough diamonds sold are not conflict diamonds;
— not to buy rough diamonds from suspect or unknown sources of supply and/or rough diamonds originating in non-participants of the KP certification scheme;

70 Council Regulation (EC) No 2368/2002 of 20 December 2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds, OJ L 358/28 of 31/12/2002.

— not to knowingly buy, sell or assist others in buying or selling conflict diamonds;
— to create and maintain records of invoices received from suppliers and issued to customers for at least three years, and
— to instruct an independent auditor to certify that these records have been created and maintained accurately.

The Commission, after assessment, shall list in Annex V of Council Regulation (EC) No 2368/2002 each organisation that fulfils the listed requirements. Names and other relevant particulars of the members of the listed organisations are notified by the Commission to all Union Authorities.[71]

Overview of the EU rough diamonds import and export during the last 5 years*

Status on Tuesday 26th April 2016						
	Import			Export		
Period	Volume, cts	Value, US$	US $/ cts	Volume, cts	Value, US$	US $/ cts
2015	104,127,431.79	11,797,350,557.27	113.30	96,755,232.93	11,534,524,860.95	119.21
2014	118,975,484.41	15,804,352,936.35	132.84	116,017,784.75	15,701,889,450.18	135.34
2013	131,271,728.57	17,426,206,589.44	132.75	128,085,667.73	17,610,295,651.80	137.49
2012	124,820,892.52	16,784,721,818.01	134.47	126,822,181.43	17,813,702,085.36	140.46
2011	133,780,871.29	18,565,208,387.54	138.77	129,488,440.22	18,542,148,946.01	143.20

* Source: European Union, Kimberley Process Certification Scheme, EU Annual report 2015. Available on: https://www.kimberleyprocess.com/fr/system/files/documents/eu_kp_annual_report_2015_final.pdf. (Accessed on 28/09/2016).

71 *Guidelines on Trading with the European Union (EU): A practical guide for Kimberley Process Participants and companies involved in trade in rough diamonds with the EU*, September 2015.

Overview of KP certificates issued by other KPCS Participants and sent to EU Community authorities in 2015*

Participant	KPC Count
Angola	10
Armenia	6
Australia	65
Belarus	30
Botswana	896
Brazil	7
cambodia	9
cameroon	4
canada	94
China, People's Republic of	432
Chinese Taipei	7
Congo, Democratic Republic of	306
Cote D'ivoire	2
Ghana	10
Guinea	50
Guyana	31
India	1,133
Israel	1,688
Japan	83
Korea, Republic of	24
Lesotho	19
Liberia	20
Mauritius	20
Mexico	3
Namibia	46
Russian Federation	1,168
Sierra Leone	69
Singapore	204
South Africa	462
Sri Lanka	122
Switzerland	223
Tanzania	10
Thailand	179
Togo	1
United Arab Emirates	2,387
United States of America	385
Vietnam	54
Zimbabwe	9
TOTAL	**10,268**

* Idem.

6. Cultural Goods in the EU

As explained in chapter 7, Article 36 of the TFEU establishes conditions for trade restrictions for non-economic reasons, recalling Articles XX and XXI of the GATT Agreement, i.e. exceptions to the general principle of free trade for non-economic reasons.
Among the reasons for which trade can be restrained, Article 36 of the TFEU lists *the protection of national treasures possessing artistic, historic or archaeological value.*
It is on this basis that a Council Regulation[72] and a Directive[73] were issued to regulate, respectively, the export of cultural goods and the return of cultural objects unlawfully removed from the territory of a Member State.

6.1. Council Regulation on the export of cultural goods

Trade control of cultural goods is essentially ruled by the EU. The system is based on the principle that trade of cultural goods has to be free except for certain items that are considered as part of a cultural inheritage of a country. The reason to monitor the trade of those items lies not in the need to counter the risk of weapons proliferation or terrorism's financing but rather in the necessity to avoid the dispersion of certain cultural goods that have artistic, historical or archaeological value.

Given the free movement of goods within the EU customs territory control could only be conducted on items leaving or entering the EU

72 European Union, *Council Regulation 116/2009 of 18 December 2008 on the export of cultural goods*, OJ L 39 of 10.2.2009, p. 1–7. Available on: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32009R0116. (Accessed on 16/09/2016).

73 European Union, *Directive 2014/60/EU of the European Parliament and the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State and amending Regulation (EU) No 1024/2012* (Recast), OJ L 159 of 28.5.2014, p. 1–10. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0060. (Accessed on 16/09/2016).

customs territory. Therefore, Council Regulation 116/2009 ensures that uniform controls are carried out by Member States on cultural goods leaving the EU. Transit and import transactions are presently taken into consideration by the Regulation.

The Regulation establishes the necessity to apply for an authorisation to export certain cultural goods that are listed in Annex I outside of the EU customs territory. It is divided in 15 categories (archaeological objects, photographs, sculpture, means of transport, maps, books, archives, etc.).[74] Export authorisations are granted by the Member States competent authority where the item is located and are valid throughout the EU. For example, to export to the US a Greek cultural object located in Belgium, it is the Belgian authority that will have to issue the authorisation, and not the Greek authority.

In addition, each Member State has to define a list of cultural items that are part of their national treasure and for which exports are prohibited.

As an example, in Belgium, the protection of cultural goods considered as part of the national treasure is a Communities' competence, which means that there are three different competent authorities in Belgium, according to the community of reference: *Communauté française* (French-speaking Community), *Vlaamse Gemeenschap* (Flemish-speaking Community) and *Deutschsprachige Gemeinschaft* (German-speaking Community).[75]
For the French-speaking Community, the DG Culture, General Service *Patrimoine* is in charge of listing cultural goods and issuing export authorisations. Listed goods for the Belgian French-speaking

74 For the complete list, please see: European Union, *Council Regulation 116/2009 of 18 December 2008 on the export of cultural goods*, OJ L 39 of 10.2.2009, p. 1–7. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32009R0116. (Accessed on 16/09/2016).

75 The list of Member States' competent authorities is contained in the *Note from Member States: List of authorities empowered to issue export licences for cultural goods, published in accordance with Article 3(2) of Council Regulation (EC) No 116/2009*, (2014/C 74/02). Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0311(01)&from=EN. (Accessed on 16/09/2016).

Community are divided into fifteen categories. Some examples are shown in the boxes below.[76]

Examples of Belgian national treasure

BEAUX-ARTS/ PEINTURE	
Le Massacre des Innocents, Louis Finson 1615 Eglise Sainte-Begge d'Andenne Classement le 26/03/2.010	MB 28/09/2010
Paysage avec la Parabole du Bon Samaritain, Henri Bles milieu XVIe s. Musée provincial des Arts anciens du Namurois à Namur Classement le 26/03/2010	MB 28/09/2010
Saint Jérôme dans, un paysage, Lambert van Noort et Henri Bles, milieu XVIe s. Musée provincial des Arts anciens du Namurois à Namur Classement le 26/03/2010	MB 28/09/2010
La Vierge à l'Enfant avec donatrice et Marie Madeleine, Maître à la Vue de Sainte Gudule XVe siècle Musée dit Grand Curtius à Liège Classement le 26/03/2010	MB 28/09/2010
Le Couronnement de la Vierge, Gérard de Lairesse 1663 (ca) Eglise Notre Dame de Dieupart à Aywaille Classement le 26/04/2010	MB 26/10/2010
Les sept joies de Marie, Pierre Pourbus et/ou L. Blondeel vers 1545-50 Cathédrale Notre Dame de Tournai Classement le 09/06/2010	MB 26/10/2010

76 Fédération Wallonie-Bruxelles, Patrimoine culturel, Liste des biens classés. Available on: http://www.patrimoineculturel.cfwb.be/index.php?id=7248. (Accessed on 16/09/2016).

BEAUX-ARTS / AUTRES TECHNIQUES PICTURALES	
Femme au bonnet, Vincent Van Gogh janvier 1883 Beaux-Arts liège (BAL) Classement le 26/03/2010	M.B 28/09/2010
Fonds du paysagiste liégeois Gilles-François Closson milieu XIXe siècle Beaux-Arts Liège (BAL) Classement le 26/03/2010	MB 28/09/2010
Album d'Arenberg, Lambert Lombard XVIe siècle Beaux-Arts Liège (BAL) Classement le 23/10/2010	MB 08/02/2011
Album dit de Clérembault, Lambert Lombard XVIe siècle Beaux-Arts Liège (BAL) Classement le 23/11/2010	MB 08/02/2011
Pornokratès, Félicien Rops 1878 Musée Félicien Rops de Namur Classement le 23/11/2010	MB 08/02/2011

ARCHÉOLOGIE	
Sarcophage de Chrodoara vers 730 (période mérovingienne) Eglise Sainte-Ode et Saint-George d'Amay (découvert en 1977) Classement le 12/02/2010	MB 27/04/2010
Chaland en bois de Pommeroeul 271 ap. J-C. Pommeroeul (découverte en 1975 lors du percement du canal Hensies-Pommeroeul) Espace Gallo-Romain d'Ath Classement le 12/02/2010	MB 27/04/2010
Moissonneuse des Trévires entre 190 à 210 ap-J-C. Montauban-sous-Buzenol (découverte en 1958) Musée gaumais de Virton Classement le 26/03/2010	MB 28/09/2010
Bronzes d'Angleur formant un ensemble de vingt pièces constitutives du décor d'un autel et d'une fontaine dédiés à Mithra fin du 2e s./ première moitié du 3e s. ap. J.-c. Angleur (découverts en 1882) Musée dit Grand Curtius à Liège Classement le 08/02/2011	MB 09/03/2011
Ensemble du mobilier funéraire du tumulus de Penteville comprenant 72 objets entre le Ier s. (plusieurs objets) et le dernier tiers du IIe s. (enfouissement des objets) Penteville Musée d'archéologie de Namur Classement le 16/01/2012	MB 13/03/2012
Tombe à char de la tombelle III de Warmifontaine comprenant 11 pièces vers la seconde moitié du Ve siècle avant J.-c. Warmifontaine (Grapfontaine, Neufchâteau) Musée des Celtes, Libramont Classement le 20/ 02/2012	MB 09/05/2012
Dédicace des Arlonnais à Apollon 2e siècle ap. J.-C. (180-200 ap. J.-C.) Musée archéologique d 'Arlon Classement le 14/05/2012	MB 11/07/2012
Crâne d'enfant néandertalien d'Engis II comprenant 10 éléments Paléolithique moyen, Moustérien Les Awirs/ Flémalle Université de Liège, Liège Classement le 14/05/2012	MB 11/07/2012

The system of export authorisations established by the Regulation has essentially two objectives. Firstly, to check whether a cultural object is part of a national treasure of one of the EU Member States and secondly if it has not been stolen and/or unlawfully located (imported) on the EU territory. Therefore, an authorisation will only be denied if one of this two objectives are concerned.

Data from 2000 to 2011 on the implementation of the EU cultural goods export control regime show that there are essentially three EU exporters: the UK (45%), Italy (26%) and France (15%). Since 2004, with the adhesion of new Member States, only 1% of EU cultural goods export authorisations have been issued by these new Member States; the majority being by Croatia (46%).

In terms of number, 16117 authorisations have been granted in 2000 and 18176 in 2010 (with the highest rate in 2007 with 21557 export authorisations).
Authorisations denials are rather rare (only 0.3% of all the licences issued) and are mostly due to incomplete applications or items that are part of a national treasure in the Member State concerned.[77]

The Commission's report of 2015, covering the period 1 January 2011 – 31 December 2013, highlights an increased number of standard licenses issued by Member States: from 21.498 in 2011 to 24.564 in 2013 (+ 14%). During this period (2011-2013), the export of cultural goods remains largely concentrated in Italy with 37-40% and in the United Kingdom with 33-36% of the share. These two Member States are followed

77 European Union, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods*, 1 January 2000 - 31 December 2010. Brussels, 27.6.2011 COM(2011) 382 final. Available on: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0382:FIN:EN:PDF. (Accessed on 16/09/2016).

by: France (12-13%), Germany (4-5%), Austria (2-3%), Spain (1-3%), Portugal, the Netherlands and Belgium (1% each).[78]

In addition to the EU Regulation 116/2009, the Council may adopt cultural items restrictive measures concerning certain States. As an example, Council Common Position 2003/495/CFSP[79] (as amended) established a prohibition on trade in or transfer of Iraqi cultural objects. As stated in Article 3 of the Common Position:

> "All appropriate steps will be taken to facilitate the safe return to Iraqi institutions of Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific, and religious importance illegally removed from the Iraq National Museum, the National Library, and other locations in Iraq since the adoption of Security Council Resolution 661 (1990), including by establishing a prohibition on trade in or transfer of such items and items with respect to which reasonable suspicion exists that they have been illegally removed".

With this aim, Article 3 of Council Regulation (EU) 1210/2003[80] imposed the following restrictive measures:

78 European Union, *Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of Council Regulation (EC) No 116/2009 of 18 December 2008 on the export of cultural goods, 1 January 2011 – 31 December 2013*, Brussels, 1.4.2015 COM(2015) 144 final. Available on: http://eur-lex.europa.eu/resource.html?uri=cellar:29af03a2-d856-11e4-9de8-01aa75ed71a1.0013.03/DOC_1&format=PDF. (Accessed on 16/09/2016).

79 European Union, *Council Common Position 2003/495/CFSP of 7 July 2003 on Iraq and repealing Common Positions 96/741/CFSP and 2002/599/CFSP*, OJ L 169/72 of 08/07/2003. Available on: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:169:0072:0073:EN:PDF. (Accessed on 16/09/2016).

80 European Union, *Council Regulation (EU) 1210/2003 of 7 July 2003 concerning certain specific restrictions on economic and financial relations with Iraq and repealing Regulation (EC) No 2465/96*, OJ L 169/6 of 08/07/2003. Available on: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:169:0006:0023:En:PDF. (Accessed on 16/09/2016).

"The following shall be prohibited:
(a) the import of or the introduction into the territory of the Community of,
(b) the export of or removal from the territory of the Community of, and
(c) the dealing in, Iraqi cultural property and other items of archaeological, historical, cultural, rare scientific and religious importance including those items listed in Annex II, if they have been illegally removed from locations in Iraq (...)".

The same mechanism was adopted against Syria. Article 11c of Council Regulation (EU) 1332/2013 concerning restrictive measures given the situation in Syria[81] prohibited:

"(...) to import, export, transfer, or provide brokering services related to the import, export or transfer of, Syrian cultural property goods and other goods of archaeological, historical, cultural, rare scientific or religious importance, including those listed in Annex XI, where there are reasonable grounds to suspect that the goods have been removed from Syria without the consent of their legitimate owner or have been removed in breach of Syrian law or international law (...).
(...) in particular if the goods form an integral part of either the public collections listed in the inventories of the conservation collections of Syrian museums, archives or libraries, or the inventories of Syrian religious institutions.
2. The prohibition in paragraph1shall not apply if it is demonstrated that:
(a) the goods were exported from Syria prior to 9 May 2011; or

81 European Union, *Council Regulation (EU) 1332/2013 of 13 December 2013 concerning restrictive measures in view of the situation in Syria*, OJ L 335/3 of 14/12/2013. Available on: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:335:0003:0007:EN:PDF. (Accessed on 16/09/2016).

(b) the goods are being safely returned to their legitimate owners in Syria".

It is interesting to note that, in nine years that passed between the restrictive measures on Iraqi items (2003) and the restrictive measures on Syrian items (2012), the system became more and more comprehensive. The controls went from a "simple" import/export prohibition principle, to a prohibition principle including several operations, such as brokering activities, transfer and "related services". Moreover, the inclusion of the sentence "*where there are reasonable grounds to suspect that (...)*" inserts a further dimension of control on the side of the "user" who has to check that the item, even if bought legally, has not arrived on the market illegally. This share/shift of responsibility from the State (competent authority) to the "common" user is a growing trend in trade control mechanisms.

6.2. Directive on the return of cultural objects unlawfully removed

Finally, *Directive 2014/60/EU of the European Parliament and the Council of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State* established procedures enabling Member States to secure the return to their territory of cultural objects which are classified as national treasures within the meaning of Article 36 of the TFEU and, in general, any cultural object classified or defined by a Member State under national legislation or administrative procedures as a national treasure possessing artistic, historic or archaeological value within the meaning of Article 36 of the TFEU.

Member States should facilitate the return of cultural objects to the Member State from whose territory those objects have been unlawfully removed regardless of the date of accession of that Member State, and should ensure that the return of such objects does not give rise to unreasonable costs.

The Directive creates the framework for increased administrative cooperation between Member States. With this aim, central authorities are required to cooperate efficiently with each other and to exchange information relating to unlawfully removed cultural objects through the use of the Internal Market Information System -"IMI" (Article 5 of the Directive).

7. Torture-Related Items

Trade controls on torture-related goods is a specificity of the European Union' system, in the sense that there are no international regimes, formal or informal, establishing and/or regulating trade controls for torture-related items.

The EU's commitment to stop and to abolish capital punishment or torture or other cruel, inhuman or degrading treatment is reflected in the *Charter of Fundamental Rights of the European Union*, annexed to the Lisbon Treaty. Article 3 of the Charter states specifically that *everyone has the right to life* and no *one shall be condemned to the death penalty, or executed*. Article 4 of the Charter, stated that: *No one shall be subjected to torture or to inhuman or degrading treatment or punishment*.[82]

EU measures to prevent capital punishment or torture or other cruel, inhuman or degrading treatment go further than a simple prohibition principle, including the prohibition to remove, expel or extradite any person coming from a State where there is a risk that this person will be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. As stated in Article 19(2) of the Charter of Fundamental Rights of the EU, concerning the protection in the event of removal, expulsion or extradition and prohibition collective expulsions:

> "2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment".[83]

82 European Union, *Charter of Fundamental Rights of the European Union*, Article 4, OJ, C 83/391 of 30/03/2010. Available on: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0389:0403:en:PDF. (Accessed on 26/09/2016).

83 Ibid. Article 19.

7.1. Council Regulation (EC) No 1236/2005 and Regulation (EU) 2016/2134

Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment was established to prevent the trade in certain torture-related goods.[84]

Council Regulation (EC) No 1236/2005 distinguishes two categories of torture-related goods:

— Goods which have no practical use other than for the purposes of capital punishment, torture and other cruel, inhuman or degrading treatment or punishment (listed in Annex II);

— Goods that could be used for the purpose of torture and other cruel, inhuman or degrading treatment or punishment (listed in Annex III).

84 European Union, Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment was established to prevent the trade in certain torture-related goods, OJ L 200/1 of 30/07/2005. Available on: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:200:0001:0019:EN:PDF. (Accessed on 26/09/2016).

Goods which Have No Practical Use Other than for the Purposes of Capital Punishment, Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Listed in Annex II)	
CN code	Description
	1. Goods designed for the execution of human beings, as follows:
ex4421 90 98	1.1. Gallows and guillotines
ex 8208 90 00	
ex 8543 89 95	1.2. Electric chairs for the purpose of execution of human beings
ex94017900	
ex 9401 80 00	
ex 9402 10 00	
ex 9402 90 00	
ex 9406 00 38	1.3. Air-tight vaults, made of e.g. steel and glass, designed for the purpose of exerution of human beings by the administration of a lethal gas or substance
ex 9406 00 80	
ex84138190	1.4. Automatic drug injection systems designed for the purpose of execution of human beings by the administration of a lethal chemical substance
ex 9018 90 50	
ex 9018 90 60	
ex 9018 90 85	
	2. Goods designed for restraining human beings, as foDows:
ex 8543 89 95	2.1. Electric-shock belts designed for restraining hum.an beings by the administration of electric shocks having a no-load voltage exceeding 10 000 V

Goods that Could Be Used for the Purpose of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Listed in Annex III)	
CN code	Description
	1. Goods designed for restraining human beings, as follows:
ex 9401 61 00	1.1. Restraint chairs and shackle boards
ex 9401 69 00	Note:
ex 9401 71 00	This item does not control restraint chairs designed for disabled persons.
ex 9401 79 00	
ex 9402 90 00	
ex 9403 20 91	
ex 9403 20 99	
ex 9403 50 00	
ex 9403 70 90	
ex 9403 80 00	
ex 7326 90 98	1.2. Leg-irons, gang-chains, shackles and individual cuffs or shackle bracelets
ex83015000	Note:
ex 3926 90 99	This item does not control 'ordinal)' handruffs'. Ordinal)' handruffs are handcuffs which have an overall dimension including chain, measured from the outer edge of one cuff to the outer edge of the other cuff, between 150 and 280 mm when locked and have not been modified to cause physical pain or suffering.
ex 7326 90 98	1.3. Thumb-cuffs and thumb-screws, including serrated thumb-cuffs
	2. Portable devices designed for the purpose of riot control or self-protection, as follows:
ex85438995 ex 9304 00 00	2.1. Portable electric shock devices, including but not limited to, electric shock batons, electric shock shields, stun guns and electric shock dart guns having a no-load voltage exceeding 10 000 V
	Notes:
	1. This item does nor control electric shock belts as described in item 2.1 of Annex II.

	2. This item does not control individual electronic shock devices when accompanying their user for the user's own personal protection.
	3. Substances for the purpose of riot control or self-protection and related portable dissemination equipment, as foUows:
ex8424 20 00 ex 9304 00 00	3.1. Portable devices for the purpose of riot control or self-protection by the administration or dissemination of an incapacitating chemical substance
	Note:
	This item does nor control individual portable devices, even if containing a chemical substance, when accompanying their user for the user's own personal protection.
ex 2924 29 95	3.2. Pelargonic add vanillylamide (PAY A) (CAS 2444-46-4)
ex 2939 99 00	3.3. Oleoresin capsirum (00 (CAS 8023-77-6)

Imports and exports of the first category of goods are prohibited. Principles applying to the first category of items, listed in Annex II are laid down in Chapter II of Council Regulation (EC) No 1236/2005. The export prohibition for goods listed in Annex II is stated in Article 3:

> "1. Any export of goods which have no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, listed in Annex II, shall be prohibited, irrespective of the origin of such equipment. The supply of technical assistance related to goods listed in Annex II, whether for consideration or not, from the customs territory of the Community, to any person, entity or body in a third country shall be prohibited.
> 2. By way of derogation from paragraph 1, the competent authority may authorise an export of goods listed in Annex II, and the supply of related technical assistance, if it is demonstrated that, in the country to which the goods will be exported, such goods will be used for the exclusive purpose

> of public display in a museum in view of their historic significance".[85]

As it emerges from the first paragraph, the export principle includes goods and technical assistance related to goods. However, paragraph 2 establishes an exception to the export principle for goods and related technical assistance, in case of public display in a museum. In this case, the goods can be exported, following an authorisation of the competent authority of the State where the items are located. The export authorisation is issued, however, only if the importing State provides evidence of the end-use of the torture-related items, strictly limited to public display in museums.

The import prohibition principle, stated in Article 4, follows the same logic: the first paragraph establishes the import prohibition for torture-related goods and related technical assistance, while paragraph 2 provides the possibility of an exception in case of public display in museums:

> "1. Any import of goods listed in Annex II shall be prohibited, irrespective of the origin of such goods. The acceptance by a person, entity or body in the customs territory of the Community of technical assistance related to goods listed in Annex II, supplied from a third country, whether for consideration or not, by any person, entity or body shall be prohibited.
> 2. By way of derogation from paragraph 1, the competent authority may authorise an import of goods listed in Annex II, and the supply of related technical assistance, if it is demonstrated that, in the Member State of destination, such goods will be used for the exclusive purpose of public display in a museum in view of its historic significance".[86]

85 Ibid. Article 3.

86 Ibid. Article 4.

Chapter III of Council Regulation (EC) No 1236/2005 establishes principles for the second category of items: torture-related goods that could be used for the purpose of torture and other cruel, inhuman or degrading treatment or punishment and listed in Annex III. This items can have both legitimate and non-legitimate uses, a characteristic they have in common with dual-use items controlled by Regulation (EC) 428/2009.

Article 5 establishes the requirement of an export authorisation for items listed in Annex III. However, an export authorisation is not required for goods which only pass through the EU customs territory.[87] An export authorisation is not required either for goods which are used by military or civil personnel of a Member State, if such personnel is taking part in an EU or UN peace-keeping or crisis management operation in the third country. In both cases of export authorisation exemption (in case of goods listed in Annex IV and goods used for peace keeping or crisis management operation) Customs or other relevant authorities keep the right to verify if the conditions to exempt from the export authorisation are met. Moreover, the time during which the verification is taking place, no export can take place.

> Article 5
> "1. For any export of goods that could be used for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, listed in Annex III, an authorisation shall be required, irrespective of the origin of such goods. However no authorisation shall be required for goods which only pass through the customs territory of the Community, namely those which are not assigned a customs-approved treatment or use other than the external transit procedure within Article 91 of Regulation (EEC) No 2913/92, including

87 Please note that the same principle applies for territories belonging to Member States and listed in Annex IV to Council Regulation (EC) No 1236/2005. For these territories, an export authorisation is not required. Listed territories are: Greenland (Denmark); New Caledonia and Dependencies, French Polynesia French Southern and Antarctic Territories, Wallis and Futuna Islands, Mayotte, St Pierre and Miquelon (France); Büsingen (Germany).

storage of non-Community goods in a free zone of control type I or a free warehouse.

2. Paragraph 1 shall not apply to exports to those territories of Member States which are both listed in Annex IV and are not part of the customs territory of the Community, provided that the goods are used by an authority in charge of law enforcement in both the country or territory of destination and the metropolitan part of the Member State to which that territory belongs. Customs or other relevant authorities shall have the right to verify whether this condition is met and may decide that, pending such verification, the export shall not take place.
3. Paragraph 1 shall not apply to exports to third countries, provided that the goods are used by military or civil personnel of a Member State, if such personnel is taking part in an EU or UN peace keeping or crisis management operation in the third country concerned or in an operation based on agreements between Member States and third countries in the field of defence. Customs and other relevant authorities shall have the right to verify whether this condition is met. Pending such verification, the export shall not take place".[88]

It should be noted that for goods that could be used for the purpose of torture and other cruel, inhuman or degrading treatment or punishment (listed in Annex III), there is not an import and/or transit authorisation requirement.

As established in Article 6, export authorisations for items listed in Annex III are granted by national competent authorities on the basis of some criteria to consider.
When deciding if granting an export authorisation, the authority has to take into account the following elements:
— Available international court judgements;

88 Council Regulation (EC) No 1236/2005, Article 5.

— Findings of the competent bodies of the UN, the Council of Europe the EU and other relevant bodies;
— Other relevant information, including available national court judgements, reports or other information prepared by civil society organisations and information on restrictions on exports of goods listed in Annexes II and III applied by the country of destination;
— All relevant considerations, including in particular, whether an application for authorisation of an essentially identical export has been dismissed by another Member State in the preceding three years.

On the other side, an export authorisation shall not be granted when *there are reasonable grounds to believe that goods listed in Annex III might be used for torture or other cruel, inhuman or degrading treatment or punishment, including judicial corporal punishment, by a law enforcement authority or any natural or legal person in a third country.*

It is important to stress that the granting or denial of an export authorisation of items listed in Annex III is a political assessment done by each Member State, through its national competent authority. In other words, differently from other trade control mechanisms (see, for example diamonds), as regard torture-related goods, there is a large margin of appreciation of the political risk by national authorities.

On 23 November 2016 the Council adopted an amending Regulation concerning goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. The legislative path started in January 2014, by means of the Commission's Proposal for a Regulation amending the Regulation (EC) No. 1236/2005. Finally, on 13 December 2016, *Regulation (EU) 2016/2134 of the European Parliament and of the Council of 23 November 2016 amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or*

degrading treatment or punishment has been published on the *Official Journal of the European Union*.[89]

The Regulation was amended with the primary aim to prevent EU exports from contributing to human rights violations in third countries. For this reason, the definitions of "torture" and "other cruel, inhuman or degrading treatment or punishment" are strengthened by adding the following statement: "*capital punishment is not deemed a lawful penalty under any circumstances*".
The subject matter scope of the Regulation is broadened establishing rules governing the supply of brokering services, technical assistance, training and advertising relating to the goods contemplated.
Import and export operations of items listed in Annex II are strengthened by establishing a total ban, while Regulation (EC) No. 1236/2005 included the possibility of derogation for export of goods listed in Annex II, and the supply of related technical assistance, if it was demonstrated that such goods were used for the exclusive purpose of public display in a museum in view of their historic significance. This derogation was taken off also by virtue of the inclusion, in the new Regulation, of a prohibition principle for transit, training, trade fairs and advertising of items listed in Annex II. Furthermore, an article has been added (Article 4f) allowing Member States to adopt or maintain national measures in order to restrict also ancillary services related to items listed in Annex II.
A prohibition of transit is included also for items listed in Annex III (goods that could be used for torture or capital punishment but which also have legitimate applications), but only if anyone empowered by the Regulation, knows that such goods are intended to be used for torture or other cruel, inhuman or degrading treatment or punishment in a third country.

89 Regulation (EU) 2016/2134 of the European Parliament and of the Council of 23 November 2016 amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, *Official Journal of the European Union,* OJ L 338/1 of 13/12/2016. Available on: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016R2134.

In line with the objective of preventing EU exports from contributing to human rights violations in third countries, an entire chapter has been added (Chapter IIIa) dealing with "*goods that could be used for the purpose of capital punishment and have been approved or actually used for capital punishment by one or more third countries that have not abolished capital punishment*". This chapter targets essentially medicinal products that could be used for lethal injection. For goods targeted by this chapter, the following provisions have been added:
export authorisation requirement, criteria for granting export authorisations, prohibition of transit and authorisation requirement for certain services.
Regulation 2016/2134 provides the possibility for customs authorities to detain items listed in Annexes II, III or IIIa, if no authorisation has been granted.

As for authorisations, Article 6 has been modified as to establish the criteria for granting export authorisations also in the light of considerations regarding the intended end-use and the risk of diversion. Authorisation requirement is establish also for brokering services and the supply of technical assistance for items listed in Annex III.
The new Regulation reorganises the types of authorisations and related issuing authorities, as well as the validity period and related administrative procedures. For example, the Regulation facilitates the issuing of General Export Authorisation for exports to countries that have abolished capital punishment for all crimes and confirmed that abolition through an international commitment.
The following table sums up the types of authorisations, the annex to the Regulation in which these are contained and the issuing authority.

Types of Authorisations for trading Anti-torture-related goods		
Type of authorisation	**Annex**	**Issuing Authority**
Union General Export Authorisation	IIIb	Regulation
Individual export authorisation	II, III, IIIa	Member States (MS) where the exporter is resident or established
Global export authorisation	III, IIIa	MS where the exporter is resident or established
Transit authorisation	II	MS, according to annex I, where the legal or natural person or body transporting goods is established
Imports authorisation	II	MS competent authority, annex I, where the museum is established.
Supply of technical assistance authorisation	II III, IIIa	MS competent authority, annex I, where the supplier is resident, established or the museum is established. MS competent authority, annex I, where the supplier is resident or established.
Brokering services authorisation	III, IIIa	MS competent authority, annex I, where the broker is resident or established.

Finally, Regulation 2016/2134 empowers the Commission to adopt delegated acts to amend annexes to the Regulation.
A paragraph is inserted in article 13 for the Commission to provide an annual report (publicly available) on the exchange of information between Member States' authorities and the Commission.

Article 15b is added to establish an urgency procedure that would be triggered if new goods enter the market or if there is a clear and immediate risk that those goods will be used for purposes that entail human rights abuses within the meaning of the Regulation.

Articles 15c and 15d are respectively added to introduce an Anti-Torture Coordination Group (which will serve as a platform for Member State's experts and the Commission to exchange information on administrative practices as well as a forum to discuss matters of interpretation, developments and implementation of the Regulation) and a review mechanism.

7.2. The Impact of the EU Trade Control System of Torture-Related Goods

The European Union, by virtue of its numerous chemical industries, has always been a privileged partner of the United States in the supply of medical drugs and chemical substances. In particular, some medical drugs exported by EU industries to the US were used to execute death penalties, usually through lethal injection, in US States still practicing capital punishment.

In fact, US States in which the death penalty remains[90] are abided by US law to follow the protocol of the preferred method of execution, which since 1976 has been lethal injection. [91]
Until 2009, most States used a 3-drug combination for lethal injections. The first drug puts the inmate into deep sleep, commonly known as an anesthetic (usually sodium thiopental, until pentobarbital was introduced at the end of 2010), the second paralyzes the muscles to

90 US States with death penalty, as of 1 July 2015: Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, Wyoming. (Source: Death Penalty Information Center. Available on: http://www.deathpenaltyinfo.org/states-and-without-death-penalty). (Accessed on 26/09/2016).

91 Nico Willson, *Could An EU Ban On execution Drugs End Capital Punishment In the U.S.?*, XPat Nation, 14 May 2015. Available on: http://xpatnation.com/could-an-eu-ban-on-execution-drugs-end-capital-punishment-in-the-u-s/. (Accessed on 26/09/2016).

prevent convulsions (pancuronium bromide - a paralytic agent, also called Pavulon) and the third stops the heart (potassium chloride).[92] In 2011, the EU strengthened export controls on torture-related goods. On 20 December 2011, Commission implementing Regulation (EU) No 1352/2011[93] was adopted, modifying Annexes II and III of Council Regulation (EC) No 1236/2005. In particular, products which could be used for the execution of human beings by means of lethal injection have been added in Annex III and, among these, there are sodium thiopental and pentobarbital.

EU restrictions on these substances, caused drug shortages in US Corrections Departments and different methods and protocols started to spread to overcome the *de facto* ban imposed by the EU on products that could be used in lethal injections (e.g. one drug,[94] the use of pentobarbital,[95]

92 Death Penalty Information Center, *State by State Lethal Injection*. Available on: http://www.deathpenaltyinfo.org/states-and-without-death-penalty). (Accessed on 26/09/2016).

93 Commission implementing Regulation (EU) No 1352/2011 of 20 December 2011 amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, OJ L 338/31 of 20/12/2011. Available on: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:338:0031:0034:EN:PDF. (Accessed on 26/09/2016).

94 Eight states have used a single-drug method for executions--a lethal dose of an anaesthetic (Arizona, Georgia, Idaho, Missouri, Ohio, South Dakota, Texas, and Washington). Six other states have announced plans to use a one-drug protocol, but have not carried out such an execution (Arkansas, California, Kentucky, Louisiana, North Carolina, and Tennessee). (Source: Death Penalty Information Center, State by State Lethal Injection. Available on: http://www.deathpenaltyinfo.org/state-lethal-injection). (Accessed on 26/09/2016).

95 Fourteen states have used **pentobarbital** in executions: Alabama, Arizona, Delaware, Florida, Georgia, Idaho, Mississippi, Missouri, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and Virginia. Five additional states plan to use pentobarbital: Kentucky, Louisiana, Montana, North Carolina, and Tennessee. Colorado includes pentobarbital as a backup drug in its lethal injection procedure. (Source: Death Penalty Information Center, State by State Lethal Injection. Available on: http://www.deathpenaltyinfo.org/state-lethal-injection).

propofol,[96] midazolam,[97] compounding pharmacies,[98] alternative methods).[99]

96 One state had planned to use **propofol (Diprivan),** in a single-drug protocol, but has since revised its lethal injection procedure: Missouri. (Source: Death Penalty Information Center, State by State Lethal Injection. Available on: http://www.deathpenaltyinfo.org/state-lethal-injection). (Accessed on 26/09/2016).

97 Two states have used **midazolam** as the first drug in a three-drug protocol: Florida and Oklahoma. Oklahoma's use of midazolam was botched, and the inmate, Clayton Lockett, died after the procedure was halted. Two states have used midazolam in a two-drug protocol: Ohio and Arizona. Both of their executions in 2014 were prolonged, accompanied by the inmate's gasping. Three states have proposed using midazolam in a two-drug protocol: Louisiana, Kentucky, and Oklahoma. Two states have proposed using midazolam in a three-drug protocol: Alabama and Virginia. Some states have proposed multiple protocols. Missouri administered midazolam to inmates as a sedative before the official execution protocol began. (Source: Death Penalty Information Center, State by State Lethal Injection. Available on: http://www.deathpenaltyinfo.org/state-lethal-injection). (Accessed on 26/09/2016).

98 Ten states have either used or intend to use compounding pharmacies to obtain their drugs for lethal injection. **South Dakota** carried out 2 executions in October 2012, obtaining drugs from compounders. **Missouri** first used pentobarbital from a compounding pharmacy in the November 20, 2013 execution of Joseph Franklin. **Texas** first used pentobarbital from a compounding pharmacy in the execution of Michael Yowell on October 9, 2013. **Georgia** used drugs from an unnamed compounding pharmacy for an execution on June 17, 2014. **Ohio** announced plans to obtain drugs from compounding pharmacies in October, 2013. In March, 2014, **Mississippi** announced plans to use pentobarbital from a compounding pharmacy. Documents released in January, 2014, show that **Louisiana** had contacted a compounding pharmacy regarding execution drugs, but it is unclear whether the drugs were obtained there. **Pennsylvania** may have obtained drugs from a compounder, but has not used them. **Colorado** sent out inquiries to compounding pharmacies for lethal injection drugs, but all executions are on hold. **Oklahoma** may use drugs from compounding pharmacies, if it can obtain them. **Virginia** first used compounded pentobarbital obtained through the Texas Department of Criminal Justice in the execution of Alfredo Prieto on October 1, 2015. (Source: Death Penalty Information Center, State by State Lethal Injection. Available on: http://www.deathpenaltyinfo.org/state-lethal-injection). (Accessed on 26/09/2016).

99 Three states have recently passed laws allowing for alternative execution methods if lethal injection drugs are unavailable. **Oklahoma**'s law, which becomes effective in November 2015, will allow for the use of nitrogen gas asphyxiation. **Tennessee** allows for the use of the electric chair. **Utah** allows the firing squad to be used if the state cannot obtain lethal injection drugs 30 days before an execution. In **federal** executions, the method is determined by the state in which the sentencing took place. All 3 of the federal executions in the modern era have been by lethal injection carried out in a federal facility in Indiana. Apparently, a 3-drug combination was used, though prison officials did not reveal the exact ingredients. (Source: Death Penalty Information Center, State by State Lethal Injection. Available on: http://www.deathpenaltyinfo.org/state-lethal-injection). (Accessed on 26/09/2016).

However, new methods have not always been very successful and have raised many debates, especially given the high level of suffering inflicted to prisoners condemned to death penalty.[100]
In October 2015, the Death Penalty Information Center reported that Ohio has postponed all executions until at least 2017 because the State has been unable to obtain lethal injection drugs and that Oklahoma has delayed executions indefinitely for a review of lethal injection protocols, after the State obtained the wrong third drug for its three-drug protocol.[101]

Products which Could Be Used for the Execution of Human Beings by Means of Lethal Injections (Introduced in Annex III by Commission Implementing Regulation (EU) No 1352/2011)

CN code	Description
ex 2933 53 90 [(a) to (f)] ex 2933 59 95 [(g) and (h)]	4. Products which could be used for the execution of human beings by means of lethal injection, as follows: 4.1. Short and intennediate acting barbiturate anaesthetic agents including, but not linlited to: (a) amobarbital (CAS RN 57-43-2 (b) amobarbital sodium salt (CAS RN 64-43-7) (c) pentobarbital (CAS RN 76-74-4) (d) pentobarbital sodium salt (CAS 57-33-0) (e) secobarbital (CAS RN 76-73-3 (f) secobarbital sodium salt (CAS RN 309-43-3) (g) thiopental (CAS RN 76-75-5) (h) thiopental sodium salt (CAS RN 71-73-8), also known as thiopentone sodium Note: This item also controls products containing one of the anaesthetic agents listed under short or intennediate acting barbiturate anaesthetic agents.'

It is interesting to notice that the new Regulation includes most of the amendments proposed by the European Parliament to the initial Commission's proposal.
Some divergences, in fact, appeared.

100 See, for example, the case of Dennis McGuire, executed in the State of Ohio on 19 January 2014.

101 Death Penalty Information Center, *Lethal injections news*. Available on: http://www.deathpenaltyinfo.org/death-penalty-flux. (Accessed on 26/09/2016).

The following table sums up the main differences.

Differences Between Commission's Proposal and European Parliament's One		
	Commission's Proposal	**EP's Proposal**
Definition of brokering services	Explicitly excludes ancillary services.	Includes ancillary services.
Transit authorisation for goods listed in Annexes III and IIIa	Explicitly excluded.	Included in the proposal.
Provisions proposals		To include provisions: - The prohibition of transit for goods listed in Annex II through the EU custom territory; - The prohibition of commercial marketing and promotion for the purpose of transfer of products listed in Annex II; - The introduction of a targeted end-use clause, allowing the prohibition or suspension of security- related goods not listed in Annexes II and III (a catch- all clause); - Stricter conditions prohibiting a supplier of technical assistance from providing assistance for goods listed in Annex III and Annex IIIa.
Information sharing and information access	It does not contain a provision for the information to be accessible to any relevant independent oversight body.	It increases transparency by making information accessible upon request, to a relevant independent oversight body.
Transparency and efficiency	The review mechanism only initiates if the chairman (either on his or her own initiative or at the request of a representative of a Member State) asks the Commission to exa mine a specific question, therefore, there is not an obligation of review and report.	To establish: - A structured review and report mechanism that "obliges" the Commission to review, every three years, the implementation of the Regulation and to report to the EP and the Council; - Coordination Group (in order to assist the implementation of the Regulation).
Amendments to the annexes		It adds some items, making the annexes more comprehensive.

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