

**Public Comments of Kevin Wolf, Emily Kilcrease, and Jasper Helder  
Regarding Areas and Priorities for US and EU Export Control Cooperation under  
the US-EU Trade and Technology Council**

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This paper is in response to the requests for comments from the Bureau of Industry and Security (BIS) and the Directorate General for Trade of the European Commission (DG TRADE) to help inform the work of the US-EU Trade and Technology Council (TTC) Export Control Working Group (ECWG). We are not proposing or opposing new controls on specific items, end uses, and end users. Rather, our primary purpose is to help guide and inform public discussion of the ECWG's efforts by describing:

- I. What export controls are and are not, and what basic export control terms mean;
- II. Why Annex II to the U.S.-EU TTC Inaugural Joint Statement reflects a significant evolution in the role and purpose of dual-use export controls and why equally significant changes in law and policy, particularly by EU member states, will be required to implement the additional, non-traditional types of controls referred to in the Joint Statement;
- III. What, for the sake of context, the traditional scope and purpose of US and EU member state multilateral controls has been, i.e., to regulate the proliferation of weapons of mass destruction (WMD), conventional weapons, and the commodities, software, and technologies necessary to develop, produce, or use them;
- IV. Why the US has considerably more legal authority and practice in developing and implementing controls outside traditional controls based on multilateral regime objectives;
- V. What the EU and EU member state legal authorities are for imposing controls outside the scope of the multilateral export control regimes, which are basically limited to controlling items “for reasons of public security, including the prevention of acts of terrorism, or for human rights considerations” or if within the scope of a WMD or arms embargo-related “catch-all;”
- VI. What the US would need to do to implement the types of new controls referred to in Annex II of the US-EU TTC Inaugural Joint Statement; and
- VII. What the European Commission (EC) and EU member states would need to do to implement the types of new controls referred to in Annex II of the

## US-EU TTC Inaugural Joint Statement.

BIS and DG TRADE have asked for comments about how to make the existing US and EU export control regulations, policies, and practices more transparent, efficient, effective, and convergent. In response to this request and to help achieve these objectives, **Section VIII** below sets out questions the US, the EC, and the EU member states could consider answering among themselves or publicly. The topics at issue in our list of questions can also be used as a guide for others wanting to make recommendations for specific changes to the export control regulations and policies of the US, the EU, or EU member states.

We recognize that the relevant government officials in the US, the EC, and the EU member states may be familiar with some or all the information in this comment. We nonetheless pull the information and questions together in one place for the benefit of creating a resource for interested parties in industry, think tanks, the media, academia, trade associations, commissions, and other parts of the respective governments. We have also embedded hyperlinks throughout this document to provide support for statements made and to be used as links to additional resources on the topics underlined. Until recently, export controls had not been discussed much outside a relatively small group of subject matter experts and practitioners. Our hope is that efforts such as this comment will help create a baseline of facts, citations, history, questions, issues, and informed commentary to facilitate the public discussion about how and whether export controls should be used differently than their traditional uses to address contemporary policy issues. Although this is a comment in response to a joint US-EU effort, the work product is equally useful in analyzing possible plurilateral controls and bilateral efforts involving other allied countries.

**Section IX** contains concluding remarks and information about the authors.

### I. Basic Export Control Definitions

Export controls are the rules in any country that govern:

- (i) the export, reexport, and (in-country) transfer
- (ii) of commodities, technology, software, and, in some cases, services
- (iii) to destinations, end users, and end uses
- (iv) to accomplish various national security and foreign policy objectives, including human rights objectives, or any other objective a country may set for the control.

Export controls are not financial sanctions, import controls, foreign direct investment controls, outbound investment controls, or the many other types of limitations on cross-border activities that exist or are being discussed in various policy and government circles. This comment refers to, but does not focus on, how such other types of controls could be used instead of or in connection with export controls to achieve policy objectives. The issue is, however, certainly worthy of additional commentary because

export controls are not the solution to all problems.

The US export control regulations at issue in this comment are the Export Administration Regulations (EAR). Regulation (EU) 2021/821, promulgated on October 20, 2021, governs the EU's export control regime. Each EU member state also separately implements its own export control regulations.

A "multilateral control" is one agreed to by one of the four primary multilateral export control regimes, as described in more detail in **Section III**. A "unilateral control" is one imposed only by one country outside the multilateral export control regime process. A "plurilateral control" is one agreed to and implemented together by more than one country, each using their own authorities to impose unilateral controls, outside the multilateral regime process. An "extraterritorial control" is a control of a country that applies to persons or items outside of that country.

A "list-based" control is a control on specific commodities, software, and technologies. An "end-user" control is a control on exports to specific entities, including for items that are not identified on a list. An "end-use" control is a control on exports for specific types of end uses of unlisted items to entities that are not separately listed. List-based controls, end-user controls, and end-use controls are the three legs of any export control system available to address the policy objectives of the system. They are used together to accomplish specific objectives or as alternatives to one another when one type of control will not be effective alone.

A "license" is an authorization, whether specific or general, a government issues for someone to export, reexport, or transfer a commodity, software, technology, or, in limited cases, services, to an end use, to an end user, or to a destination when the applicable law requires one. Contrary to many media reports, a "license" is not a "waiver." A license, in response to an application from an exporter, is granted if the proposed export is *consistent with or in furtherance of* the government's licensing policy. A license is denied, or conditioned, if the requested license is not consistent with the government's licensing policy. Applying for a license is, by definition, proof of a company's compliance with a government's export control laws, not evidence of an effort to evade export controls. An "exception" exists if a license would normally be required, but the specific export contemplated is described in the regulations as not requiring an individual license if the exporter can meet specific conditions.

Export controls have historically been divided between controls over commodities, software, and technologies that are either (i) bespoke for military or intelligence applications, which are referred to as "defense articles" in the US, "military list" items in the EU, and "munitions list" items elsewhere, or (ii) "dual-use" items, which are the focus of this comment. The US, the EU, and the Wassenaar Arrangement regime's definitions of "dual-use" are good summaries of what the traditional scope and purpose of export controls have been with respect to items that are not bespoke for military or intelligence applications.

- EU Regulation Article 2(1) defines “dual-use” items as “items, including software and technology, which can be used for both civil and military purposes, and includes items which can be used for the design, development, production or use of nuclear, chemical or biological weapons or their means of delivery, including all items 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 US defines a “dual-use” item as “one that has civil applications as well as terrorism and military or WMD-related applications.”
- The Wassenaar Arrangement states that “dual-use” items “to be controlled are those which are major or key elements for the indigenous development, production, use or enhancement of military capabilities,” i.e., for items on the munitions list.

Pursuant to these long-standing, foundational definitions, if an item (i.e., a commodity, software, or technology) does not somehow relate to the development, production, or use of a WMD or a conventional military item, it cannot be a “dual-use” item.

Reflecting the point below that the US has significantly more discretion in the types of items it controls for export, the US amended in 2013 its commentary about the definition to make it clear that the US also imposes controls for export of some types of “purely civilian items.” Under the EAR, the US may impose controls on dual-use items or any other items that are “subject to the EAR,” which is a jurisdictional term that the US government has the authority to amend or expand. In contrast, neither the EU nor the regime definitions of “dual-use” refer to controls over items that are exclusively civil items. The main point of this comment is that if the EC is going to advocate for, and the EU member states are going to implement, the types of new controls referred to in Annex II of the Joint Statement to address contemporary policy issues of common concern, they, too, will need to amend their regulations and core export control policies to include some “purely civilian items.”

## **II. The US-EU TTC Inaugural Joint Statement Reflects a Significant Evolution of the Role and Purpose of Dual-Use Export Controls, but Will Require Equally Significant Changes in Law and Political Will to Implement Such Controls**

### **A. Overview and General Commentary**

Tucked away in “Annex II” of the September 29, 2021 “U.S.-EU Trade and Technology Council Inaugural Joint Statement” is a “Statement on Export Control Cooperation.” It states that dual-use export controls should be used to address many current country-specific and other policy issues that go beyond the traditional objectives of the multilateral regime-based dual-use control system. (It does not, however, name any specific countries of concern.) This system, which was largely created near the end of the Cold War, is focused on stemming the proliferation of WMD (and their means of

delivery), the destabilizing accumulation of conventional weapons, and regulating the commodities, software, and technology necessary for their development, production, or use. The current multilateral system is destination-agnostic in that the regime lists of controlled items are limited to those that have inherent applications for WMD or conventional military applications. The current multilateral system also does not factor in concerns about specific countries, attempt to achieve economic objectives, or address human rights issues.

The US and the EC, however, announced in Annex II of their Joint Statement that dual-use export controls should be used, among other things, to:

- i. respond to human rights abuses (other than just with respect to cyber-surveillance items);
- ii. support a “global level playing field” and promote a “multilateral rules-based trade and security system founded on transparency, reciprocity, and fairness;”
- iii. address “legal, ethical, and political concerns” about emerging technologies;
- iv. respond to civil-military fusion policies “of certain actors;”
- v. avoid disruptions to strategic supply chains; and
- vi. respond to “technology acquisition strategies, including economic coercive measures.”

These words and objectives have been a standard part of the policy debate in the United States in recent years about what the role and purpose of export controls should be. The Joint Statement is, however, the first time that any other country or international body has cited them publicly. In other words, the Joint Statement is far more significant than generally recognized because it is the first time the EU (represented by the EC) or any other US ally has stated so explicitly and publicly since the end of the Cold War an agreement with the US that export controls should be used to achieve country-specific and other policy objectives not directly related to weapons of mass destruction or conventional military items.

Annex II of the Joint Statement is, however, only words unless and until it can be converted into actual export control regulations in EU member states and in the US. Therein lies the rub. The US already has broad statutory and regulatory authority to implement all the policy objectives in Annex II. Indeed, the US has imposed unilateral and extraterritorial controls to address, in part, many of the policy issues in Annex II. The debate in the US is, thus, whether there should be more or fewer such controls, and whether they should be unilateral, plurilateral, or multilateral. With extremely limited exceptions, however, there are not established traditions, political cultures, or legal

authorities within the EU or EU member states to impose controls on otherwise commercial commodities, software, or technologies for any reason other than the non-proliferation and conventional weapons-related objectives of the multinational regimes. The legal authority for the EU member states to use to impose export controls on specific end users and end uses for reasons unrelated to traditional proliferation-related objectives is even more limited, undefined, and untested.

Without a significant change in EU law, **the EC does not have any authority to require EU member states to adopt export controls on items not identified in the multilateral export control regimes, including for the non-traditional export control reasons set out in the Joint Statement.** Because such a change would require the agreement of all EU member states, it is not likely to happen. This conclusion is supported by the June 2021 results of the EC's efforts that began in 2016 to create significant new EU-wide authorities to impose controls to achieve human rights and anti-terrorism objectives. Consensus of the member states, however, could only be achieved with respect to considerably scaled-down controls focused on cyber surveillance items related to human rights concerns. (The new regulation is referred to as the "Recast Regulation.") Thus, from the EU side, the key to implementing in export controls the objectives in the Joint Statement that cannot be achieved through changes in the multilateral control lists will be decisions by individual member states to use their long-standing, but rarely used and undefined, authorities to impose unilateral controls:

- for "public security" reasons (Article 9);
- human rights reasons (Article 9); or
- on specific exports under "catch-all" authorities pertaining to arms embargoed destinations (Article 4).

**The EU authority to impose list-based unilateral controls for public security reasons is essentially contained within the scope of one sentence of EU Regulation Article 9 – "A Member State may prohibit or impose an authorisation requirement on the export of dual-use items not listed in Annex I for reasons of public security, including the prevention of acts of terrorism, or for human rights considerations."** Not only have such additional controls been rare, they, until September 2021, had never been coordinated on an EU level. This means that for the EU member states to use their discretionary authority to impose controls to achieve the country-specific, strategic, economic, and other non-traditional objectives in the Joint Statement, they will need to have the political will to define the term "public security" in a way to include all such objectives over purely civilian items that are not "dual-use" items, as defined in EU and regime law. They will also need to interpret the term in ways that they have not historically interpreted the term. There would not be a legal prohibition on a member state's defining "public security" in new ways to achieve such objectives, but it would be a significant departure from past practice. It will also require a member-state-by-member-state initiative by the EC and the US to achieve a critical and effective mass of aligned, plurilateral controls.

Even if such list-based efforts are successful, the member states still will not have the broad authority the US has to impose end-use and end-user controls. Member state authorities are limited to the current “catch-alls” pertaining to weapons of mass destruction or military end uses in arms embargoed destinations. Some individual member states have taken the position that they can use their own arms embargo catch-all authorities to control exports of unlisted items to specific entities in China if the items could be for a military end use. Such actions and policies, however, are not public and not widely used by EU member states.

Once past the issue of what authorities exist to take the actions described in the Joint Statement, the key to success from the US side (and also from the EU side) will be in identifying what the specific commodities, software, technology, services, end users, and end uses are that should be controlled to achieve the non-traditional export control objectives set out in the Joint Statement. Identifying the parts and components necessary to develop, produce, or operate a missile is relatively easy. Identifying the commodities, technology, and software to address “legal, ethical, and political concerns” about emerging technologies; respond to civil-military fusion policies; and respond to “technology acquisition strategies, including economic coercive measures” is amazingly difficult. Moreover, imposing unilateral or plurilateral controls on such items that are actually effective and that do not do more harm than good given the worldwide commercial availability of most such items will be even harder.

We are, of course, not suggesting that efforts to achieve novel national security and foreign policy objectives should not be attempted merely because they are hard.<sup>1</sup> Rather, as long-time practitioners in this area, our goal with this paper is to describe (i) how novel the objectives in the Joint Statement are in light of the historical purpose of export controls; (ii) why they will be much harder than it seems to implement them in actual and effective export controls; and (iii) what would need to be done to do so.

B. Specific Commentary on Why the Principles in the US-EU Joint Statement, Annex II, Go Beyond the Traditional Objectives of Dual-Use Export Controls

**Principle 1** repeats the traditional common basis for dual-use export controls, which is that they are “necessary to ensure compliance with our international obligations and commitments, in particular regarding non-proliferation of weapons of mass destruction and preventing destabilizing accumulations of conventional weapons.” In previous years, not much more than this sentence would have been written in a similar setting.

The reference in Principle 1 to the use of dual-use controls to further “respect for human

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<sup>1</sup> “We choose to go to the Moon in this decade and do the other things, not because they are easy, but because they are hard; because that goal will serve to organize and measure the best of our energies and skills, because that challenge is one that we are willing to accept, one we are unwilling to postpone, and one we intend to win, and the others, too.” —John F. Kennedy. “Dark times lie ahead of us and there will be a time when we must choose between what is easy and what is right.” —Albus Dumbledore.

rights and international humanitarian law” is, however, significant. None of the multilateral regimes contain lists of items that warrant control for human rights-related reasons. The US has clear authority to use export controls for human rights purposes, primarily through its end use and end user controls. The EU authority and practice of using export controls for human rights-related objectives is more limited. In 2021, the EU, however, implemented catch-all, end use controls on cyber-surveillance items outside the multilateral regime system to achieve human rights objectives, but has not authorized any other human-rights-specific controls.

The reference to human rights objectives in the first Principle thus forecasts a desire for expanding coordinated export controls to address additional human rights issues. Such coordination would not only be between the US and the EU, but also need to be among EU member states given the history of disagreements between EU member states on EU foreign policy issues such as EU sanctions. Under the new EU Recast Regulation, if one EU member state adds a cyber surveillance item to a national control list for human rights reasons, that additional control will be published in the EU official journal. It then depends on the discretionary authority of other EU member states’ export controls agencies to apply that same control pursuant to Article 10. Given their historic disagreements on sanctions, it remains to be seen if EU member states would be willing to accept additional controls imposed by other EU member states.

Finally, Principle 1 refers to the need to use export controls to further “joint security and foreign policy interests.” Such words and concepts are not identified in EU law or in the regime mandates as a policy basis for export controls. Also, the EU-level authority in relation to national security and foreign policy is dependent on EU member states’ agreement.

**Principle 2** includes two reasons for a multilateral approach to export controls. The first is traditional – more effectively “protecting international security” – but the second is novel – “supporting a global level-playing field.” It is novel because a foundational principle in export control decision-making in the post-Cold War multilateral regime system is “national discretion,” which means that each country makes its own determinations about whether to approve or deny licenses for regime-listed items based on its own assessment of the risks, including diversion risks, associated with the proposed export. There has not been since the Cold War COCOM system any formal method of aligning allied country licensing judgments and decisions for items that are now identified on the Wassenaar Arrangement’s dual-use list.

The Principle’s reference to the trade concept of “reciprocity” is unclear in this export control context. Is it referring to a desire to ensure that US and EU companies are not disadvantaged vis-à-vis one another as a result of US and EU export controls or individual licensing decisions? Or is it signaling a wider ambition to use export controls to respond to unfair trade practices from third countries? In either case, the issue is novel. US and EU officials should clarify the point for the sake of improving the usefulness of requested comments on the issue.



**Principle 3** is striking in that it explicitly calls out the need to consider controls on “emerging technologies.” This, of course, is the core phrase in the provisions of the Export Control Reform Act of 2018 (ECRA) described below that were created to address China-specific technology acquisition and investment policies of concern that are not addressed in the multilateral export control regime structure. The statement in Principle 3 is not an agreement to control emerging technologies merely because they are emerging. Rather, it is limited to such technologies “in the defense and security field.” Nonetheless, Annex II uses a key phrase at the center of the current US export control policy debate over what new China-specific controls to impose to address broader-than-traditional national security issues.

This principle does not refer to the need for controls on “foundational” technologies, which ECRA calls out next to the authority for controls on “emerging” technologies. No reason is given. Resolving this discrepancy will be key to any efforts to define common US and EU objectives regarding the non-traditional uses of export controls to address contemporary national security concerns. That is, should export controls also apply to what are, by definition, widely available commercial items that are non-specific building blocks for what is needed to develop and produce other items of concern or to otherwise achieve strategic or economic objectives? The answer to this question goes right to the heart of what “national security” means in the context of efforts of some countries to achieve strategic economic dominance in critical commercial technologies.

**Principle 4** refers to several aspects of China’s industrial policies that have raised national security and economic concerns, though no specific country is identified anywhere in Annex II. First, the Principle uses a core phrase at the heart of U.S. unilateral export control policies toward China, which is “civil-military fusion policies of certain actors.” This phrase refers to Chinese state policies to encourage or require the acquisition of listed and unlisted commercial technologies that could be used, even indirectly, to help modernize the Chinese military. It is not a phrase or concept that has been publicly used in multilateral statements about the purpose of dual-use export controls and is not in the EU dual-use regulation as a policy objective of its export controls.

Second, Principle 4 states that export controls should be used to respond to “economic coercive measures.” This is probably a reference to a long-standing policy concern about Chinese government and Chinese company requirements to transfer technology as a condition of getting access to the Chinese market. It could also be a reference to the June 2021 EU-US joint statement setting out a “commitment for concrete, joint collaboration to confront the threat from China’s non-market practices with respect to large civil aircraft.” In any event, it is as significant of an evolution in the publicly stated objectives for dual-use controls as is the reference to addressing civil-military fusion concerns.

Third, Principle 4 refers to the need to use export controls to address “technology acquisition strategies.” Export controls can be used in tandem with investment screening, with both playing a central role in addressing “technology acquisition

strategies.” The US framework for this complementary approach is enshrined in ECRA and its companion bill, the Foreign Investment Risk Review and Modernization Act (FIRRMA), which modernized the Committee on Foreign Investment in the United States (CFIUS). The EU has implemented a regulation that facilitates investment screening. EU level actions are limited to information exchange and non-binding EC opinions to member states, with competence for implementation of binding investment screening regimes held at the member state level. Many EU member states have, or are in the process of introducing, their own national investment screening regimes to shape their own exclusive authority. Using these regimes to address “technology acquisition strategies” effectively requires coordination among the EU member states and between the export control and foreign investment screening mechanisms.

Finally, Principle 4 states that these two strategies “challenge the objective assessment of risks” by allied export control authorities of whether items to be exported could be diverted to military-related applications. This is probably another way of saying that China and other countries of concern have made the traditional regime-based system less effective. The traditional diversion risk assessments of regime allies in deciding whether to grant or deny a license are not as effective as they once were in light of China’s and other countries’ civil-military fusion strategies, economic coercive measures, and technology acquisition policies.

**Principle 5** states that export controls should not “unduly disrupt strategic supply chains.” Although the US has some limited and wildly out-of-date “short supply” controls (such as on western red cedar and horses by sea), the US, the multilateral regimes, the EC, and the EU member states have not historically taken supply chain issues into account when deciding what should or should not be controlled. Rather, if an item was inherently of concern for proliferation- or conventional-weapons-related objectives, it should be controlled. If not, then it should not be. The controls’ impact on where items were and were not manufactured was not considered. The reference to export controls disrupting strategic supply chains could also be speaking to trade between the US and EU and the need for EU companies to be reasonably sure of their export control commitment when they chose a US based supplier. Such expectations which were significantly upset by the US expansion of the scope of extraterritorial US export controls related to Huawei in August 2020.

Separately, and relevant to the discussion in the US about whether more unilateral controls should be imposed on China, Principle 5 states that, “where appropriate and feasible,” the US should consult with the EU before imposing unilateral controls, in particular to ensure that their application is “transparent and equitable for US and EU exporters.” The EC probably asked for such a commitment from the US to address concerns about the domestic impact of unilateral and extraterritorial US export controls on stable supply chains of items, particularly semiconductors, that EU companies need. This is probably why the Annex’s list of areas for cooperation similarly states that the US should consult with the EU “prior to the introduction of controls outside the multilateral regimes, as appropriate.” Such an agreement to consult with any country before imposing a unilateral control does not require any new legislation, but it is novel.

It reflects a strong Biden-Harris Administration effort to make export controls as multilateral or, at least, coordinated with allies as possible. It, however, also does not foreclose the use of unilateral US export controls.

Principle 5 also states that the US and the EU “are of the view” that export controls “should be consistent with the applicable exceptions of the General Agreement on Tariffs and Trade.” This is likely a reference to the World Trade Organization national security exception in General Agreement on Tariffs and Trade (GATT) Article XXI. The Article XXI exception states that the nothing in the agreement shall:

- a. require any party “to furnish any information the disclosure of which it considers contrary to its essential security interests;”
- b. prevent any 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; (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; (iii) taken in time of war or other emergency in international relations;” or
- c. prevent any party “from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.”

WTO obligations and commitments have not had any impact on the development or imposition of US or EU export controls as a result of this exception. Export controls and trade policy have, as a result, evolved along completely separate policy and administration paths without influencing one another. The extent to which new export controls to be created and imposed for non-traditional reasons referred to in Annex II might motivate litigation or WTO issues in the future is too speculative to comment on now. Also, the history, application, and interpretation of the exception is much too complex to analyze or comment on here. We cite it nonetheless here for educational purposes because it is called out in Annex II. Annex II does not reference parallel exceptions that are included in the General Agreement on Trade in Services (GATS) or other WTO or free trade agreements to which the US or EU is a party.

**Principle 6** is also somewhat novel in that it explicitly calls out the need to control “particular technologies” that may be misused in ways that could lead to human rights violations. As noted in the discussion of Principle 1, both the US and the EU have existing authorities, outside of the multilateral regimes, to impose controls for human rights purposes.

The statement in Principle 6 is nonetheless striking because there are no multilateral lists of specific items that warrant control for human-rights-related reasons or standing multilateral organizations created to address human rights and export control issues.

Perhaps the commitments to work on the issue and the other plurilateral efforts described in the “Export Controls and Human Rights Initiative” documents are the beginnings of such an effort. Thus, unlike many of the topics described above, the issue is not whether there is legal authority to impose such controls. The issue is what they should be and whether they will be coordinated to be effective and to create a level playing field.

If true, the US, EU, and EU member states must next consider what additional commodities, software, and technologies should be identified and controlled by the US and EU member states. For example, should there be additional controls to address human rights concerns related to censorship or social control, surveillance, interception, restrictions on communications, monitoring or restricting access to or use of the internet, identification of individuals through facial or voice recognition or biometric indicators, and DNA sequencing? Since most of the underlying technologies have broad civil uses and are widely available, can such controls be created and implemented without harming beneficial trade in the underlying commercial technologies? Will a significant number of EU member states cooperate and impose their own domestic controls on such items? How will the EC facilitate such efforts if there are disagreements among member states as to what the proper scope of controls should be? This is an extraordinarily difficult assignment, from both a technical and a policy perspective. Nonetheless, the point of this comment is that Principle 6 is significant because it is the first time allies have publicly called for using export controls to address human rights concerns.

**Principle 7** is interesting, but not necessarily novel in its call for the US and the EU governments to work with the private sector and R&D institutions to take actions necessary to ensure compliance with export controls.

**Principle 8** contains a subtle throwback reference to “strategic” trade export control policies that existed before the current non-proliferation-focused multilateral regime-based controls, i.e., the east-west-focused Cold War “strategic” trade controls of the Coordinating Committee for Multilateral Export Controls (COCOM). These controls were not limited to items that had some inherent proliferation-related characteristics. They included destination-specific coordinated controls designed to achieve broader “strategic” objectives, including affecting the economic development of the Soviet Union and its allies and to prevent commodity scarcities in the US and its allies.

Much of the policy debate in the US pertaining to what new controls should be imposed against China implicitly are about whether export control policy should include strategic objectives, such as controlling items to delay China’s ability to achieve strategic economic dominance or technology leadership in key technology sectors of concern even if the items have no inherent proliferation-related or military-related applications. Thus, the use of the phrase “trade in strategic dual-use technologies” is an interesting development. Absent other information, it warrants further clarification regarding whether it refers to a possible broader application of export controls or is simply another reference to the “challenges” highlighted in Principle 4 related to civil military fusion

issues, economic coercion, and technology acquisition strategies. If the phrase is intended to refer to COCOM-era controls to achieve strategic economic objectives, there will be complex competency questions for the EU to resolve. Commercial trade is part of the EU's common commercial policy, an area where the EC has exclusive authority. That is, if the EC were to advocate such an approach, it could argue that the use of export controls for strategic economic objectives fall under the EU trade policy, similar to other trade regulations at the EU level that have foreign policy and security objectives, such as those pertaining to conflict diamonds, cultural goods, and drugs. EU member states, however, might object because on the grounds that export controls are national security regulations within the competence of each EU member state.

### **III. The Traditional Scope and Purpose of US and EU Member State Dual-Use Export Controls Is to Implement the Controls Agreed to by the Four Primarily Multilateral Export Control Regimes, whose Mandates Do Not Include Most of the Policy Objectives Set out in Annex II of the Joint Statement**

#### **A. Summary**

To understand precisely why the statements in Annex II about the policy issues export controls should be used to address are so novel and significant, it is important to know the scope, mandates, and limitations of the existing multilateral regimes upon which most of the EU, US, and other allied export control systems are based. In sum, for most of the post-Cold War era, the primary national security objective of US and EU member state export controls has been relatively straightforward, which is to regulate the export, reexport, and transfer of:

- i. WMD, and missiles capable of WMD delivery,
- ii. conventional military items, and
- iii. the bespoke and dual-use commodities, software, and technology required for their development, production, or use.

The lists of such items are determined by consensus in the four primary, voluntary multilateral regimes, which are the Nuclear Suppliers Group (NSG), the Australia Group (AG) (for chemical and biological-related items), the Missile Technology Control Regime (MTCR), and the Wassenaar Arrangement (WA), which covers conventional arms and dual-use items to prevent “destablising accumulations” and their acquisition by terrorists.<sup>2</sup>

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<sup>2</sup> The export control lists also take into account US and EU member state obligations to (i) UN Security Council Resolution 1540, which, inter alia, require members to refrain from providing support to non-State actors that attempt to acquire or develop WMDs (particularly for terrorist purposes); (ii) the Nuclear Non-Proliferation Treaty; the Chemical Weapons Convention; and the Biological Weapons Convention.

## B. The Four Primary Regimes for Dual-Use Items

**The NSG**, established in 1975, has 48 nuclear country members. It contributes to the non-proliferation of nuclear weapons through two sets of Guidelines—one is for nuclear-specific items and the other is for nuclear-related dual-use equipment, materials, software, and related technology. The latter identifies the 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.

**The Australia Group**, established in 1985, has 42 members. The principal objective of its participants is to use domestic export controls to ensure that certain chemicals, biological agents, and dual-use chemical and biological manufacturing facilities and equipment do not contribute to the spread of chemical and biological weapons.

**The MTCR**, established in 1987, has 35 members. It contributes to the non-proliferation of all types of missiles capable of delivering WMD through member adherence to a common export policy (the Guidelines) applied to a common list of items (the MTCR Annex). The Annex lists all key equipment, materials, software, and technology (both special-use and dual-use) needed for development, production, or use of missiles.

**The Wassenaar Arrangement**, established in 1996, has 42 members. Its origins stem from a decision of members of the Cold War era COCOM that an export control regime focused on East-West strategic trade controls was no longer the appropriate basis for export controls. Rather, as set forth in its founding documents, it was “established in order 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. Participating States will seek, through their national policies, to ensure that transfers of these items do not contribute to the development or enhancement of military capabilities which undermine these goals, and are not diverted to support such capabilities.” It was also “intended to enhance co-operation to prevent the acquisition of armaments and sensitive dual-use items for military end-uses, if the situation in a region or the behaviour of a state is, or becomes, a cause for serious concern to the Participating States.”

## C. Additional Commentary on the Scope, Mandate, and Limitations of the Wassenaar Arrangement

The Arrangement’s foundational documents state that it “will not be directed against any state or group of states and will not impede bona fide civil transactions.” Its scope was amended in 2001 to state that its members “will continue to prevent the acquisition of conventional arms and dual-use goods and technologies by terrorist groups and organisations, as well as by individual terrorists. Such efforts are an integral part of the global fight against terrorism.” Unlike the other three arrangements, the Wassenaar Arrangement does not have any form of a “no-undercut” policy. This means that the licensing decisions of the regime’s participants are based on the country’s own licensing

policy and assessment of the diversion or country-specific risks associated with the requested export.

The Wassenaar Arrangement has the following specific criteria for the types of dual-use items that should and should not be controlled:

*Dual-use goods and technologies to be controlled are those which are major or key elements for the indigenous development, production, use or enhancement of military capabilities. For selection purposes the dual-use items should also be evaluated against the following criteria:*

- *Foreign availability outside Participating States.*
- *The ability to control effectively the export of the goods.*
- *The ability to make a clear and objective specification of the item.*
- *Controlled by another regime.*

We provide this additional commentary on the scope and mandate of the Wassenaar Arrangement because, to the extent new controls referred to in Annex II are to be implemented multilaterally, the Wassenaar Arrangement would be the likely vehicle to do so.

D. Common Elements of the Four Regimes and their Implementation in US and EU Member State Export Controls

Although the regimes have different, but related, scopes, they have the following common elements:

- The commodities, software, and technologies listed in each regime's control list are destination agnostic, meaning that they are created and imposed without a reference to specific countries. Rather, the items were identified and listed because they have some inherent and identifiable relationship to the development, production, or use of a WMD or a conventional military item.<sup>3</sup> In addition, the Wassenaar Arrangement's foundational document explicitly states that the regime "will not be directed against any state or group of states and will not impede bona fide civil transactions."
- Any change to a regime's scope, purpose, or controls requires the consensus of the members of the regime. This aspect of regimes is what makes the regime process both effective and ineffective. It is effective because there is broad application of the same controls. It is ineffective or less effective because of the

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<sup>3</sup> The Wassenaar Arrangement also publishes the agreed-upon list of bespoke military items and weapons in its Munitions List, which the US implements in its US Munitions List and the EAR's 600 series of items. The US maintains comprehensive embargoes on such items destined to China and other arms embargoed countries regardless of end use or end user. EU member states have various forms of formal and informal arms embargo against China, but they are often limited to lethal weapon as opposed to all items on the munitions list or the dual-use list.

time it takes to get agreements on technology, which is evolving more quickly than ever, and because there are widely varying views among members as to what constitutes a threat to common security objectives. In addition, although China is not a Wassenaar member, the regime's membership has conflicting views about the extent to which Chinese government policies raise national security issues. Also, there are some member, such as Russia, that may take very different positions than most of the members on a variety of issues, which can make getting consensus difficult.

- Each regime's guidelines contain provisions to guide and authorize "catch-all controls." These are controls each member state should impose to control the export of items not on a control list if the exporter has been informed by its government or, in some cases, knows, that the items are intended for use in connection with the delivery of WMD (MTCR), a nuclear explosive activity (NSG), or a chemical or biological weapon activity (AG). The Wassenaar Arrangement's "catch-all" is focused on controlling unlisted dual-use items destined to a country subject to an arms embargo if for a "military end use." Each member state is entitled to adopt its own definition of "military end use."
- None of the regimes have guidelines for end-use and end-user controls unrelated to the lists of items the regime controls or the catch-all controls.

COVID permitting, the US, the EU member states, and other regime member states meet each year to discuss updates to the lists of commodities, software, and technologies relevant to each regime's mission. If all members of a regime agree to a change to the regime's list, then each member state will later implement it in its domestic export control rules. The US collects all the agreed-upon regime controls on dual-use items in the Commerce Control List (CCL), which is part of the Export Administration Regulations (EAR) and administered by the Commerce Department's Bureau of Industry and Security (BIS). Since 1994, the EU has been creating and updating an EU-level list of controlled items. As of June 2021, the EU collects and organizes the list of dual items agreed to in the regimes in Annex 1 of Regulation (EU) 2021/821, as amended on October 20, 2021. Indeed, the opening to Annex 1 states that the "list of dual-use items contained in this Annex implements internationally agreed dual-use controls including the Australia Group, the Missile Technology Control Regime (MTCR), the Nuclear Suppliers Group (NSG), the Wassenaar Arrangement and the Chemical Weapons Convention (CWC)."

The CCL does the same thing, but also includes many additional items that the US controls unilaterally. With some exceptions, they can be identified as items with a "9" in the middle of their ECCN. Each EU member state then implements these controls through its own domestic export control system.



## E. Our Main Point for this Section

Our point in providing the detail about the regimes' mandates, scopes, and limitations is to support our statements that the policy objectives in Annex II for how export controls should be used are novel. That is, none of the regimes' mandates call for using export controls to address (i) human rights issues; (ii) desires for a global level playing field; (iii) emerging technology issues as such; (iv) civil-military fusion policies of specific countries; (v) economic coercive measures; (vi) technology acquisition strategies; (vii) supply chain disruptions; or (viii) strategic trade control considerations. Thus, to implement these other objectives in actual, coordinated export control regulations, the US and the EU member states will need to use existing legal authorities in new ways or create new authorities. The following are descriptions of the US, EU, and EU member state authorities that could be used or that would need to be created to implement Annex II's objectives into regulations.

## IV. **The US has Considerably More Legal Authority than the EU to Create Export Controls for Reasons Unrelated to Traditional Non-Proliferation Objectives**

### A. Overview of ECRA's Broad Authority to Impose Export Controls

In 2018, a bipartisan Congress and the Trump Administration codified in the Export Control Reform Act (ECRA) the authority for BIS to administer the EAR to achieve traditional non-proliferation and other objectives of dual-use export controls. ECRA replaced the previous authority for the EAR, which was a 2001 Executive Order and annual presidential notices continuing the emergency need for the regulations under the authority of the International Emergency Economic Powers Act (IEEPA).

The EAR, thus, control the same lists of dual-use items agreed to by the multilateral regimes that the EU member states control. As with IEEPA,<sup>4</sup> ECRA, however, goes far beyond the authorities given to and held by the EU member states and gives BIS<sup>5</sup> the authority to impose almost<sup>6</sup> any type of unilateral control on any type of (i) commodity, software, or technology; (ii) specific end user (e.g., Entity List entities); or (iii) specific end use (e.g., military end uses) to achieve ECRA's broad policy objectives, which are described in the next section. BIS also has the authority to impose restrictions on

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<sup>4</sup> Even before ECRA, BIS had the authority to impose unilateral controls over items that warranted control for general national security or foreign policy reasons. This authority was rationalized in the "[Oy521](#)" [process BIS created in 2012](#). ECRA's emerging and foundational technology provisions described below are largely based on this process. The difference, of course, is that ECRA section 4817 expresses the will of Congress and made the effort mandatory as opposed to discretionary.

<sup>5</sup> As a result of Executive Orders, regulations, and tradition that can be described separately if needed, BIS does not make material changes to the EAR without the consent of the other three primary export control agencies at the departments of Defense, State, and Energy.

<sup>6</sup> The limitations on BIS's authority to impose unilateral controls largely pertain to items that are subject to the export control jurisdiction of another agency, particularly the State Department's regulation of defense articles. These and the other limitations are not material to the points in this paper.

activities of US persons, even when no items subject to the EAR are involved, if the activity is in support of WMD-related activities or military-intelligence end uses or military-intelligence end users. In addition, ECRA section 4813(a)(16) gives BIS the authority to “undertake any other action as is necessary to carry out [ECRA] that is not otherwise prohibited by law.” Moreover, even if there were some unforeseen limitations in ECRA, IEEPA gives the President extraordinary authority to take almost any form export control action to respond to threats from outside the United States to “the national security, foreign policy, or economy of the United States.”

Although Congress gave BIS substantial authority to impose unilateral controls, it nonetheless discouraged their use unless absolutely necessary. Specifically, Congress wrote the following in ECRA’s primary policy statement (in sections 4811(5) and (6)) that:

*Export controls should be coordinated with the multilateral export control regimes. Export controls that are multilateral are most effective, and should be tailored to focus on those core technologies and other items that are capable of being used to pose a serious national security threat to the United States and its allies.*

*Export controls applied unilaterally to items widely available from foreign sources generally are less effective in preventing end-users from acquiring those items. Application of unilateral export controls should be limited for purposes of protecting specific United States national security and foreign policy interests.*

B. ECRA’s Statement of Policy Describing the Purpose and Use of Dual-Use Export Controls

ECRA Section 4811 sets out the traditional, and still critical, purposes of US export controls. It is basically a codification of the export control policies of previous administrations and Congresses. It is what a bipartisan Congress and the Trump Administration agreed to as the purpose of US dual-use export controls in 2018 to replace a 1979 statute that had lapsed for decades because of an inability of Congresses and the administrations to reach a consensus statement of US export control policy in law. The core ECRA policy provisions are the following:

*The following is the policy of the United States:*

(1) *To use export controls only after full consideration of the impact on the economy of the United States and only to the extent necessary -- (A) to restrict the export of items which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States; and (B) to restrict the export of items if necessary to further significantly the foreign policy of the United States or to fulfill its declared*

*international obligations.*

*(2) The national security and foreign policy of the United States require that the export, reexport, and in-country transfer of items, and specific activities of United States persons, wherever located, be controlled for the following purposes:*

*(A) To control the release of items for use in—(i) the proliferation of weapons of mass destruction or of conventional weapons; (ii) the acquisition of destabilizing numbers or types of conventional weapons; (iii) acts of terrorism; (iv) military programs that could pose a threat to the security of the United States or its allies; or (v) activities undertaken specifically to cause significant interference with or disruption of critical infrastructure.*

*(B) To preserve the qualitative military superiority of the United States.*

*(C) To strengthen the United States defense industrial base.*

*(D) To carry out the foreign policy of the United States, including the protection of human rights and the promotion of democracy.*

*(E) To carry out obligations and commitments under international agreements and arrangements, including multilateral export control regimes.*

*(F) To facilitate military interoperability between the United States and its North Atlantic Treaty Organization (NATO) and other close allies.*

*(G) To ensure national security controls are tailored to focus on those core technologies and other items that are capable of being used to pose a serious national security threat to the United States.*

*(3) The national security of the United States requires that the United States maintain its leadership in the science, technology, engineering, and manufacturing sectors, including foundational technology that is essential to innovation. Such leadership requires that United States persons are competitive in global markets. The impact of the implementation of this subchapter on such leadership and competitiveness must be evaluated on an ongoing basis and applied in imposing controls under sections 4812 and 4813 of this title to avoid negatively affecting such leadership.*

*(4) The national security and foreign policy of the United States require that the United States participate in multilateral organizations and*

*agreements regarding export controls on items that are consistent with the policy of the United States, and take all the necessary steps to secure the adoption and consistent enforcement, by the governments of such countries, of export controls on items that are consistent with such policy.*

Thus, although achieving economic objectives is not, as such, a stated purpose of export controls, a bipartisan Congress and the Trump Administration agreed in the first policy provision of ECRA that export controls should be imposed “only after full consideration of the impact on the economy of the United States and only to the extent necessary.” In addition, ECRA section 4817(3) requires that the impact of ECRA’s implementation be regularly reviewed to ensure that US leadership and competitiveness in science, technology, engineering, and manufacturing sectors is not negatively affected by export controls.

As described in paragraph 10 of ECRA section 4811, “export controls complement and are a critical element of the national security policies underlying the laws and regulations governing foreign direct investment in the United States, including controlling the transfer of critical technologies to certain foreign persons.” Based on the congressional testimony and statements that were part of the effort to create and pass ECRA and the Foreign Investment Risk Review & Modernization Act (FIRRMA), this was largely referring to Chinese state policies of concern and not limited to traditional non-proliferation objectives. The last sentence of paragraph 10 is critical to understanding the authority in the United States to impose novel controls on emerging and foundational technology items outside the scope of the multilateral regimes. It states that “[t]hese efforts should be in addition to traditional efforts to modernize and update the lists of controlled items under the multilateral export control regimes.”

Congress required that such technologies be identified not only for the sake of knowing what additional export controls should exist to address non-traditional export control issues, but also to create more mandatory filings with CFIUS for non-controlling investments where such technologies could be disclosed to foreign persons as a result. This reflects the policy conclusions that (i) technology acquisitions of concern can occur in a variety of transaction types, including foreign investment transactions that would be reviewable by CFIUS; and (ii) technologies of national security and foreign policy interest will include technologies beyond those identified for traditional export control purposes under the multilateral regimes.

### C. ECRA’s Emerging and Foundational Technologies Provisions

To implement and bound such efforts “in addition to traditional” regime efforts, Congress created section 4817—the emerging and foundational technologies section. It requires the Administration to conduct a “regular, ongoing interagency process to identify emerging and foundational technologies that . . . **are essential to the national security of the United States**” and not described in any of the existing export control regimes. Congress deliberately did not define what “national security” means in this

context. It is, however, clear from the relevant congressional hearings and the context of the legislation that a primary goal of this provision was to address China-specific issues that are outside the scope of the traditional regime controls. Further scoping of what constitutes “national security” in this context was left to the discretion of the Executive Branch, presumably because the concerns would shift over time and defining national security in specific situations is a normal function of the Executive Branch.

The Trump Administration did not define what “national security” means in this context. The Biden-Harris Administration has not yet either. The US-EU Joint Statement is, however, a glimpse into what it is considering to be “national security” objectives for export controls outside the traditional non-proliferation- and conventional-military-focused objectives.

To identify such technologies, Congress required the administration to draw upon all available resources for such information, including the intelligence community, industry advisory committees, and information CFIUS received or developed as part of its review of cases. Congress made this point recognizing that the economic and technical issues associated with such technologies are unusually difficult to understand and that they evolve quickly. As good as government staff in the agencies are, they will not always have such information, particularly if it relates to novel technologies unrelated to those of proliferation concern. Thus, if BIS or any other export control agency does not have the staff or expertise to analyze or identify a particular technology, Congress has required the agency to reach out to others for help.

In order to enable the Administration to move more quickly than the multilateral system permits, but without creating counterproductive consequences, ECRA Section 4817 requires the Administration to impose unilateral controls over the identified “emerging” or “foundational” technologies so long as such efforts take into account:

*(i) the development of emerging and foundational technologies in foreign countries;*

*(ii) the effect export controls imposed pursuant to this section may have on the development of such technologies in the United States; and*

*(iii) the effectiveness of export controls imposed pursuant to this section on limiting the proliferation of emerging and foundational technologies to foreign countries.*

Thus, if a particular technology of concern is widely available outside the US, then it is not a good candidate for unilateral controls under this section. This is logical because if a particular technology that does not have a clear proliferation-related use is widely available outside the US, then imposing a control over it would not be effective. This conclusion is reflected in the second two elements of this limitation in section 4817(a)(2)(B), i.e., that if a unilateral control would harm domestic research in the technology or would not be effective, then it is also not a good candidate for a unilateral

control. If the technology nonetheless warrants control based on the standards for control in ECRA, then a traditional multilateral approach should be used.

D. Summary of How the US Uses its Authority to Impose Unilateral List-Based, End User, and End Use Controls

1. Unilateral List-Based Controls

Although Congress explicitly stated in ECRA that unilateral controls are disfavored because they tend to be “less effective,” it nonetheless codified BIS’s broad authority to impose them to implement any of ECRA’s objectives. The EAR has a long list of unilateral controls over less sensitive items controlled for “anti-terrorism” reasons. Although the history is complex, the anti-terrorism controls were, in essence, created to impose controls on exports and reexports of items not within the scope of any multilateral regime to Cuba, Iran, North Korea, and Syria. Such items are listed in the Commerce Control List as items with a “9” in their Export Control Classification Number. Items controlled for “anti-terrorism” reasons only do not generally require a license to export to the rest of the world. Beginning during the George W. Bush Administration, and expanded during the Obama and Trump administrations, however, a subset of otherwise commercial items controlled for “anti-terrorism” (such as basic semiconductors and civil aircraft parts) require a license to export if there is knowledge that they are destined to military end uses or end users in China, Russia, and other listed countries of concern. In support of US foreign policy objectives to promote human rights, the US also unilaterally controls many types of items for “crime control” reasons, such as those used for detection, law enforcement items, or torture.

2. Unilateral End-User-Based Controls

ECRA gives BIS the authority to regulate and prohibit the export, reexport, and transfer of items subject to the EAR to specific foreign entities that are “determined to be a threat the national security and foreign policy of the United States,” as these policy objectives are broadly defined in ECRA. The most widely known manifestation of this unilateral authority is the Entity List. Its creation and the evolution of its use are complicated. It imposes a license requirement on the export of any commodity, software, or technology, whether listed or unlisted (even a toothbrush), if it is “subject to the EAR” (e.g., US origin)<sup>7</sup> and a listed entity would be a party to the transaction. BIS

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<sup>7</sup>In order to help ensure compliance with the EAR, BIS has published on its website a significant amount of guidance to help one determine when foreign-made items outside the United States are and are not subject to the EAR and thus subject to the EAR’s licensing and other requirements. See, e.g., “[De Minimis and Direct Product Rules Decision Tool](#),” “[Complete List of Key Terms Used in De Minimis/Direct Product Decision Tool](#),” “[De Minimis Rules and Guidelines \(Modified on 5 November 2019\)](#),” “[Guidance on Reexports](#),” “[De Minimis and Direct Product Rule](#)” slide deck,” and “[Is your Non-US-Made Item Subject to the EAR?](#)” decision tree. But for the [foreign produced direct product rule](#) that was created in [August 2020](#), the EAR’s jurisdictional rules regarding foreign-made items were largely established in the [1970’s and 1980’s](#). Determining that a foreign-made item outside the US is not subject to the EAR is thus not a “loophole,” as often reported. The effort is literally complying with the EAR – as described in many places

also has created novel extraterritorial Entity List rules pertaining to Huawei. This “foreign produced direct product rule” subjects foreign-made commercial items such as semiconductors to the EAR’s licensing obligations if, in essence, they are produced (or tested) using US equipment or designed using US software (regardless of whether the item is made from US technology or incorporates US content) and destined to anyone if a Huawei company is a party to the transaction. The EAR has other end user-specific controls, such as the military end user rule, which imposes a licensing requirement on exports to China, Russia, and other listed countries of concern of items that otherwise would not require a license if there is knowledge they would be for a “military end use.”

### 3. Unilateral End-Use-Based Controls

ECRA also gives BIS the authority to regulate activities of US persons, regardless of the nature of the items at issue, if they pertain to nuclear explosive devices, missiles, chemical or biological weapons, maritime nuclear projects, or foreign military-intelligence services. The EAR has implemented these authorities as restrictions on activities of US persons pertaining to these specific WMD and foreign “military-intelligence” activities, even if the underlying items are not subject to the EAR. Such controls are unique to the US. A “military-intelligence end use” means the development, production, or use of a military item that is intended to support a “military intelligence end user.” A “military intelligence end user” is any intelligence organization of an armed service in Burma, Cambodia, Cuba, China, Iran, North Korea, Russia, Syria, or Venezuela. Also unique to the US, the EAR prohibits a US person from “supporting” a “military-intelligence end use.” The definition of “support” includes “performing any contract, service or employment you know may assist or benefit” such end uses.

Legislation has been proposed that would amend ECRA to provide clearer authority for the imposition of end use controls to address human rights issues when list-based or end-user-based controls would not be effective. Even without such legislation, however, BIS could rely on the plenary authority in ECRA section 4813(a)(16) to create and impose end-use-specific controls to address human rights reasons. That is, ECRA section 4811(2)(D) states that one of the purposes for US export controls is to “carry out the foreign policy of the United States, including the protection of human rights and the promotion of democracy.” ECRA section 4813(a)(16) authorizes BIS to “undertake any other action as is necessary to carry out [the provisions in ECRA] that is not otherwise prohibited by law.” In either case, such end-use-specific tools will be important for BIS to implement the human rights objectives in Principle 1 of Annex II because, with some exceptions to be listed out, the types of items commonly used to commit human rights abuses are widely available commercial items that will not, as a practical matter, be controllable using a list-based approach. Controls on exports of such unlisted items for specific *end uses* that violate human rights will thus need to be a regularly used solution. Because end use controls are, however, inherently difficult for industry to understand and implement in compliance programs, the new controls will need to be

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on BIS’s website. If the extraterritorial reach of the EAR should be amended through a change in the regulations because national security issues have evolved since the jurisdictional rules were created, then that is a separate policy issue to be considered, as referred to in Principle 5 of Annex II.

carefully crafted with a significant amount of beta testing with compliance professionals and prosecutors to make sure they will be clear, effective, and enforceable.

#### E. Further Alignment of Export Controls and Investment Screening

As described in paragraph 10 of ECRA section 4811, “export controls complement and are a critical element of the national security policies underlying the laws and regulations governing foreign direct investment in the United States, including controlling the transfer of critical technologies to certain foreign persons.” Based on the congressional testimony and statements that were part of the effort to create and pass ECRA and the Foreign Investment Risk Review & Modernization Act (FIRRMA), policy objectives included closer alignment between the two sets of authorities to address Chinese state policies of concern such as those referenced in Principle 4 of Annex II of the Pittsburgh statement.

A central way in which foreign investment screening and export controls are aligned is through a shared definition of “critical technology.” CFIUS has historically not had, and FIRRMA does not create, a stand-alone definition of “critical technology” for the purposes of implementing CFIUS authorities to review covered foreign investment transactions. Instead, “critical technology” is defined through reference to the export control system. Pre-FIRRMA, this was a technical nuance without much practical effect because it did not affect filing requirements or CFIUS jurisdiction. However, FIRRMA included new authorities that give this definition new meaning in two important ways. First, FIRRMA expands CFIUS jurisdiction to include “other investments,” i.e., non-passive, but non-controlling investments such as venture capital investments, into a prescribed set of U.S. businesses, including those that involve critical technology. Second, FIRRMA provides CFIUS with the ability to require mandatory short-form declarations for any covered transaction involving a US business and critical technology. With respect to mandatory declarations, CFIUS has taken the alignment a step further, by explicitly linking mandatory declaration requirements to export control licensing policy. While this regulatory requirement is country-agnostic, the practical effect will be to impose higher mandatory declaration requirements on transactions involving persons from countries with higher export control licensing burdens, such as China.

#### V. **The EU has Less Legal Authority than the US to Create Dual-Use Export Controls for Reasons Unrelated to Traditional Non-Proliferation Objectives**

The stated purpose of the EU dual-use export control regulation, EU Regulation 2021/821, is much shorter than ECRA’s stated purpose for US dual-use export controls. It is set out in the second “whereas” clause and states that it:

*aims to ensure that in the area of dual-use items, the Union and its Member States fully take into account all relevant considerations. Relevant considerations include international obligations and commitments, obligations under relevant sanctions, considerations of*



*national foreign and security policy including those contained in the Council Common Position 2008/944/CFSP (3), among them human rights, and considerations about intended end-use and the risk of diversion. Through this Regulation, the Union demonstrates its commitment to maintaining robust legal requirements with regard to dual-use items, as well as to strengthening the exchange of relevant information and greater transparency. With regard to cyber-surveillance items, the competent authorities of the Member States should consider in particular the risk of them being used in connection with internal repression or the commission of serious violations of human rights and international humanitarian law.*

Thus, the EU's statement of policy for why dual-use export controls exists does not include the following objectives that are in ECRA: (i) to preserve qualitative military superiority; (ii) to strengthen the defense industrial base; (iii) to facilitate military interoperability with close allies; (iv) to maintain leadership in science, technology, engineering, and manufacturing; and (v) to identify and impose controls on emerging and foundational technologies that are "essential to the national security" but that are not identified on any of the multilateral control lists.

#### A. The EU's List-Based Controls

Article 3 simply states that an authorization is required to export dual-use items listed in Annex I, which is the collection of items identified on the multilateral export control regime lists. General authorizations to ship listed items, such as within the EU, exist, but the list-based controls are tied to the lists of items identified in the multilateral regime lists.

As noted above, Article 9(1) provides flexibility for member states to **add items to their control lists for public security or human rights reasons** and states that a "Member State may prohibit or impose an authorisation requirement on the export of dual-use items not listed in Annex I for reasons of public security, including the prevention of acts of terrorism, or for human rights considerations." Article 9(2) requires a member state to notify the EC and the other member states of any such new controls. Article 10(1) states that other member states can also impose controls on such items, but whether they do so or not is dependent on the discretion of their own export controls agencies.

The member states have rarely used such authority. Past examples of EU member states applying their Article 9 authority nonetheless include Italy introducing a licensing requirement for the sale of equipment for public local area network (LAN) database centralized monitoring systems, internet, and 2G/3G services to the Syrian Telecommunications Establishment. The Netherlands used the authority to impose a licensing requirement for certain chemical exports to Iraq in 2015. Germany used the authority to add specific items to its national control list with licensing requirements for the export thereof to certain countries. Latvia used the authority to add, *inter alia*, certain covert surveillance items to its national control list. An overview of additional national control list additions can be found in the last (January 2020) Information Notice of the

EC on national implementation measures regarding the EU dual-use regulation. What all of these national measures have in common is that they apply to items that clearly are covered by the EU definition of “dual-use” items, i.e. items with civilian and military applications. The Italian example is the only example of a licensing requirement related to a specific end user.

Unlike in ECRA’s statement of policy, the EU’s export control regulation does not refer to the need to take economic considerations into account when imposing export controls. Indeed, its only reference to the economic implications of export controls in the third clause in the preamble, which states that the list of dual-use items in its Annex “needs to be updated regularly in order to ensure full compliance with international security obligations, to guarantee transparency, and to maintain the competitiveness of economic operators.”

## B. The EU’s End-Use Controls

Article 4(1) establishes the EU member states’ **catch-all authority**, and it requires a license to export unlisted items if the exporter is informed by an EU member state authority that the item would be for a WMD-related end use or for a military end use in a country subject to an arms embargo. If an exporter is aware of such end uses, it must notify the export control authorities to determine if a license is required. (These requirements are similar to the catch-all authorities in the EAR and in the laws of many other allied countries.) In 1989, the European Council announced an arms embargo against China. There is, however, no common EU position or published member state guidance on the scope and application of the embargo. Each member state is responsible for interpreting and applying it based on its own assessment of the issue. Some member states apply it only to lethal items and major weapons platforms, but do not impose requirements or deny licenses for other types of exports for military applications.

As noted above, Principle 4 in Annex II of the Joint Statement states that the US and the EU “share concerns that . . . civil-military fusion policies of certain actors undermine security interests.” Our point with this summary of EU Article 4 is that there is already a great deal of discretion and existing authority for member states to impose informal and formal license requirements for the export of unlisted dual-use items to arms embargoed countries to address the civil-military fusion policy concern in Principle 4. Even the strictest member state application of this authority is, however, much narrower in scope than the US “military end-use” controls, which apply to a subset of unilaterally controlled items if the exporter knows or is informed that the item is destined for incorporation into a military item or for an item that “supports or contributes to the operation, installation, maintenance, repair, overhaul, refurbishing, development, or production, of military items” in China, Russia, Venezuela, Burma, or Cambodia. The US also imposes a license to export any item, dual-use or otherwise, subject to the EAR of to a “military-intelligence end use” in China, Russia, or other listed countries of concern. (A “military-intelligence” end use control is a novel and new unilateral US control on activities involving the development, production, or use of military items that

are intended to support the actions of “military end users.” “Military-intelligence end users” include the intelligence organizations of the armed forces of Burma, Cambodia, China, Russia, Venezuela, Iran, North Korea, or Syria.)

C. Neither the EU nor the EU Member States Have End-User-Specific Controls

The EU does not have any direct authority to require member states to regulate exports of items that are not on a multilateral export control list to specific end users. The authority in Article 9 is specific to controlling the export of “unlisted dual-use items” through amendments to member state-level control lists and does not clearly state whether it could be used to regulate unlisted items to specific entities. Whether the EC and member states would be willing to interpret Article 9 to allow for end-user-specific controls would, however, be worthy of discussion.

By way of comparison, the authority for the US to add an entity to the Entity List is simply whether the a foreign entity or person is “reasonably believed to be involved, or to pose a significant risk of being or becoming involved, in activities contrary to the national security or foreign policy interests of the United States.” The US standard for when a non-governmental entity in China, Russia, or other specific countries of concern is a “military end user” is if there is knowledge, or the exporter is informed, that the foreign entity engages in “actions or functions [that] are intended to support ‘military end uses’” – even if the specific export in question is not for a military end use. These authorities are regularly used by the US Government and a daily part of basic export [control compliance and screening obligations for US companies](#).

If, however, EU member states wanted to impose restrictions on the export of items to specific end users, they could also use their national sanctions authority to do so. Although the EU adopts “restrictive measures” (sanctions), the EU authority is not exclusive and dependent on unanimous agreement between EU member states. Because the EU member state sanctions authority is not based on the EU dual-use regulation, and thus not subject to the EU definition of “dual-use item,” it provides a wider base than the “Article 9 authority” under EU export controls discussed above. This means that it could be used to regulate purely civilian items to specific end users. The EU constitutional question to address is whether EU member states using their national sanctions authority to impose export restrictions for items not covered by the EU “dual-use item” definition would encroach on EU trade and commercial policy authorities, which are exclusive.

**VI. What the US Would Need to Do to Implement the Types of New Controls Referred to in Annex II of US-EU TTC Inaugural Joint Statement**

The US first needs to identify what commodities, software, and technologies are not currently controlled, but would need to be controlled to accomplish the objectives set out in Annex II. If an item is within the scope of a regime’s mandate, then, presumably, the US and the EU member states would use the regular process of submissions to the

regime. The ECWG could, however, be a forum for working through in advance potential new controls on items to be considered for regime control. This could facilitate and expedite a process that historically only results in one set of amendments per year from each regime. The regime process could also be done in parallel with plurilateral efforts.

For all other items that would warrant control under the standards in Annex II but that are not within the scope of a multilateral regime, the US needs to do the hard internal work of deciding which specific commodities, software, and technologies should, for example, be controlled to (i) respond to human rights abuses; (ii) support a “global level playing field;” (iii) address “legal, ethical, and political concerns” about emerging technologies; (iv) respond to civil-military fusion policies in countries of concern; (v) avoid disruptions to strategic supply chains; and (vi) respond to “technology acquisition strategies, including economic coercive measures.” The primary agencies responsible for such work are the export control agencies at the departments of Commerce, Defense, State, and Energy. They, however, have complete authority to reach out to academia, national labs, the Intelligence Community, congressional staff, and technical advisory committees to get input. The only limitation is time and resources. Once a consensus policy decision is made on what to control, then BIS and the other agencies are responsible for writing the control in as objective of a way possible, and in a fashion consistent with the structure of the Commerce Control List, so that exporters are able to comply with it and prosecutors are able to enforce it.

Once the decision-making and drafting are done, BIS already has the authority to impose controls on such items unilaterally under the authority in ECRA and the EAR to do so. With respect to emerging and foundational technologies, BIS would also follow the standards in ECRA section 4817, which requires consideration of foreign availability and an opportunity for public comment. Finally, with respect to any unilateral controls that are extraterritorial, the US would need to decide whether to follow through on its commitment in Annex II to consult with the EC “where appropriate and feasible” before imposing them.

## **VII. What the EU and EU Member States Would Need to Do to Implement the Types of New Controls Referred to in Annex II of the US-EU TTC Inaugural Joint Statement.**

The EC does not have the authority to require member states to impose the controls that would be needed to achieve the non-traditional export control objectives described in Annex II. Rather, the member states would need to use their authorities under Article 4 (the “catch-all”) or Article 9 (“public security” or “human rights”) of EU Regulation 2021/821 to impose the controls.

As noted above, Article 4 provides member states with the ability to impose end-controls if the exporter is informed by an EU member state that the item would be for a WMD-related end use or for a military end use in a country subject to an arms embargo. The political appetite of member states to use the catch-all to implement non-traditional

export control objectives is uncertain and likely varies. Certain countries, such as the Dutch government, have recently taken the position that they can use the Article 4 catch-all authority if an item destined to China *could* be used for a military end use. In particular, Dutch authorities consider the inclusion of a Chinese entity on the US Entity List or the US Chinese Military-Industrial Complex Companies List to mean that unlisted items destined to the entity *could* be intended for military use. As a result, the Dutch government's unpublished guidance to exporters is that they should submit a "rating enquiry" to the Dutch authorities before making such an export. Consistent with Article 4(2), the Dutch government will then decide on a case-by-case basis whether it wants to impose an individual licensing requirement for the export. Finally, Article 4(3) authorizes member states to adopt specific export control laws and regulations to address the export of unlisted items to arms embargoed countries. The Dutch policies are an example of the types of actions that EU member states could take under Article 4 to address non-traditional export control objectives.

With respect to the Article 9 authority to impose controls for "public security" reasons, neither the EC nor a member state has defined what the term means. The Court of Justice of the European Union (CJEU) has, however, applied to the term in two cases and concluded that member states had vast discretion in interpreting the term. In October 1995, the court in Fritz Werner Industrie-Ausrüstungen GmbH (Werner) v. Federal Republic of Germany interpreted the term broadly when it wrote that it "is becoming increasingly less possible to look at the [public] security of a State in isolation, since it is closely linked to the security of the international community at large, and of its various components. So, the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations may affect the security of a state."

In the second case involving German criminal proceedings against Peter Leifer and others, the court wrote that "a member state may, exceptionally, adopt national measures restricting the export of dual-use goods to non-member countries on the ground that this is necessary in order to prevent the risk of a serious disturbance to its foreign relations or to the peaceful coexistence of nations which may affect the public security of a member state." (para 30). It went on to write that if "there is a threat to public security, which is a matter for the national court to consider, an obligation on a potential exporter to prove that the goods will be used exclusively for civil purposes or a refusal to issue a licence if the goods can objectively be used for military purposes can be consistent with the principle of proportionality." (para 36).

In addition, the application of member state unilateral controls for broad reasons not tied to traditional proliferation-related reasons under the authority of Article 9 is supported by the advocate-general to the CJEU's opinion in the "Werner" and "Leifer" cases.

*41. In my view it is difficult, for reasons which will appear below, to draw a hard and fast distinction between foreign policy and security policy considerations, not least because a disruption of foreign relations can have serious security implications. In any event, it is clear I think that Community law leaves Member States a large measure of freedom,*

*subject always to the application of the principle of proportionality, in both areas. In the field of restrictions on exports to third countries, Article 11 of the Export Regulation seems designed to recognize that freedom, without any need to examine too closely whether ‘public policy’ or ‘public security’ is in issue.*

*42. Moreover, the issues raised by considerations of foreign policy and security policy are, in general, not readily susceptible to judicial review, as I sought to show in my Opinion in Case C-1 20/94 Commission v Greece concerning the Greek embargo against the former Yugoslav Republic of Macedonia. Thus the scope for judicial review of strategic export controls is inevitably limited, and those limits are well illustrated by the present cases. It is not easy for this Court, or for a national court, to examine the reality of the threat posed to the security of the Federal Republic by the exportation of the goods in issue in these cases.*

The absence of a formal definition and these opinions may be sufficient for any member state to interpret the term “public security” broadly and flexibly. Thus, for example, if a member state wanted to create a list of items to be controlled unilaterally to address concerns about emerging technologies, respond to civil-military fusion policies, or help ensure secure supply chains, it could do so. The Regulation however remains focused on “dual-use items” as defined in Article 2, which could be interpreted by some to be a limit on the creativity of controls, such as those on specific end-users. In any event, once a member state decided to define the term in a way consistent with the statements in Annex II, all it would need to do would be to notify the EC of the new controls and then implement them in its domestic controls.

The issue thus is more one about political will to take such an action and changing decades of tradition and practice in EU export controls that have always been limited to achieving regime-focused objectives. It is possible that controls over items for non-traditional reasons would be challenged in a European or member state court because they would be controls over items the Regulations do not include within the definition of “dual-use” items. As the cases above indicate, however, it is highly likely that the CJEU (which has ultimate exclusive authority to interpret EU law provisions) would give great deference to the member state’s decision about what constitutes “public security.”

Article 9’s authority to impose unilateral controls for “human rights” reasons is equally broad, but we will need to address that definitional issue in a separate paper.

## VIII. Questions the US, the EC, and EU Member States Could Consider Answering to Address the Issues set out in BIS's and DG TRADE's Request for Comments and Annex II of the Joint Statement

To help inform the work of the ECWG, both BIS and DG TRADE have asked for comments about how to make the existing US and EU export control policies and practices more transparent, efficient, effective, and convergent. This includes a request for “specific and concrete examples where further convergence in US and EU export control practices and policies could enhance international security and the protection of human rights, and support a global level-playing field and joint technology development and innovation.” In response, the following are questions raised by the objectives described in Annex II of the Joint Statement and otherwise highlighted in this comment that the ECWG could consider answering to help its efforts. For the sake of others preparing more detailed recommendations for specific regulatory changes, the listing of the questions of specific regulatory discrepancies between the US and the EU systems are specific examples where further convergence in the US and the US systems would reduce unnecessary burdens and frictions to trade between the US and the EU and otherwise to level the playing field for US and EU companies. Each topic could have a paper written about the issue to explain the history, context, and possible solutions. The following is little more than a listing of topics and questions for ECWG consideration.

### A. Implementation of Annex II Non-Traditional Objectives of Export Controls

- **“Dual-Use” Issue.** To accomplish the policy goals in Annex II, will the US, the EC, and the EU member states work to develop controls over commodities, software, and technologies that do not meet the definition of “dual-use” items in either US or EU law? That is, will the ECWG work on identifying for control purely civil commodities, software, and technologies that do not also have WMD or conventional military applications but that may nonetheless be relevant to the national security and foreign policy priorities identified in Annex II?
  - If so, what legal authority exists in the EU for member states to impose such controls, i.e., on items that do not meet the definition of “dual-use” items? If none, does DG TRADE have a plan for getting or facilitating at the member state level the creation of such authority?
- **“Public Security.”** Is DG TRADE willing to define what its view of Article 9’s “public security” term means for the sake of facilitating adoption by member states of unilateral or plurilateral controls of specific items consistent with Annex II’s objectives that are outside the context of the multilateral regime process? If so, is it willing to announce an interpretation that is as broad in scope as the authorities in ECRA for imposing controls outside the scope of the multilateral regime process? If not, what would be the differences in scope?
  - In particular, is DG TRADE willing to define “public security” and is the US

willing to define its ECRA authorities to conclude that technology leadership as such in key sectors is a *per se* public security / national security issue justifying controls over items outside the regime process and regime mandates?

- **Non-Traditional Export Control Objectives.** Will BIS and DG TRADE provide more detail about and opportunities for public discussions about what specific items would be considered for new controls to address each of the non-regime-specific topics in Annex II? In addition:
  - What is meant by the comment to use export controls to support a “global level playing field?” Does this refer to getting to a point where US and EU companies would get the same result from US and EU member states with respect to license applications regardless of where it is submitted, all other facts being equal? Or does it refer to using export controls to get to level economic playing fields with respect to exports to third countries that have discriminatory trade practices? Or does the phrase refer to a plan to use export controls to prevent third countries that have discriminatory trade practices from gaining an economic advantage over US and EU companies?
  - In order to level the playing field for US and EU exporters, are the US, the EC, and EU member states willing to advocate for the adoption of “no-undercut” policies (i) in the Wassenaar Arrangement and (ii) with EU member states to use on a national basis? That is, will the parties agree that if one country would deny a license for a Wassenaar dual-use item or plurilaterally controlled item that the US and all other relevant EU member states would deny a license, all other facts being equal?
  - Are the US and the EU member states willing to coordinate on enforcement strategies, approaches, resources, and the standards for the imposition of civil and criminal penalties to further level playing fields? Given that US enforcement authorities and resources are substantially larger, will the US agree to support capacity-building efforts for EU member state enforcement authorities, such as intelligence-sharing and joint investigation efforts?
  - What are the “legal, ethical, and political” concerns about emerging technologies that warrant controls? What are the priority emerging technologies to be studied to address such concerns? Do they align with the ones BIS has announced?
  - In light of the commitment in Principle 5, will the US alter any of its existing unilateral extraterritorial controls to address the supply chain impact issues referred to in Annex II? Would DG TRADE work to facilitate adoption of similar controls by EU member states such that existing US



extraterritorial controls would be enforced equally?

- What is meant by using export controls to achieve “strategic” objectives? Are the US and the DG TRADE considering a COCOM-like policy objective for export controls where controls are imposed to achieve broader economic objectives unrelated to any inherent sensitivities or applications of particular items?
- In light of the concern about “technology acquisition strategies” in Annex II, will the US and the EC work to further align their export controls with their foreign direct investment rules, including through the identification of critical technologies relevant for each regime and common approaches to risk assessments? Specifically, will they work to align the requirements for mandatory filings for foreign investments to the extent the investment would involve critical technologies that are subject to export controls?
- **“Plurilateral” Controls.** Will the US and EU member states work to develop and impose plurilateral controls on specific items? That is, will the US and the EU member states work to impose the same controls on specific items that are not subject to regime controls? Will DG TRADE work to facilitate such efforts? Or will the countries wait to impose any agreed-upon controls only after the relevant regime agrees to list the item? (The answer would have a bearing on the type and speed of unilateral extraterritorial controls the US would likely consider.)
  - In particular, will the US share information on its efforts to identify emerging and foundational technologies essential to the national security of the United States (the standard in ECRA section 4817) that are not now subject to regime controls? And will DG TRADE work with the US to facilitate the development of plurilateral controls over such items outside the multilateral regime process? Will the US and EU member states agree to factor in the likely effectiveness of controls and the availability of comparable items outside the allied countries before agreeing to any plurilateral controls?
- **Extraterritorial Controls.** What would the EU member states need to do for the US to consider reducing the scope and reach of its extraterritorial controls for exports of dual-use items from EU member states to non-EU countries or to other EU countries? Would the EU member states work to address in their domestic export control and enforcement systems the policy concerns that motivated the US to impose extraterritorial controls over the export of US- and foreign-origin items from EU member states? For the sake of leveling the playing fields and making the export control systems more convergent, is the EU willing to facilitate the adoption and use of extraterritorial controls that are similar to the de minimis, direct product, or the foreign-produced direct product rules of the US? Would the US be willing to alter such extraterritorial rules if EU and other allied countries

adopted domestic controls that would achieve the same objectives?

- **Technology Leadership.** Are the US and the EC willing to announce that technology leadership by US and EU companies in key technology sectors should be a *per se* public security and national security objective of export controls, regardless of whether the items have any clear relationship to the development, production, or use of WMD or conventional military items? If so, what are such technology sectors? If so, would the plan be to work within the scope of the Wassenaar Arrangement's mandate to implement such new controls? Work to revise the Arrangement's mandate? Or implement such controls only through ad hoc plurilateral arrangements depending on the technology sector and the countries with material manufacturing capabilities in such sectors?
- **Human Rights-Focused Multilateral Regime.** Will the US, the EC, or EU member states agree to work to create a new multilateral organization which has as a mandate the identification of the specific types of commodities, software, technologies, and services that warrant control for human rights-related reasons?
- **Specific Items Controlled to address Human Rights Issues.** Whether through a new multilateral organization or as plurilateral controls under existing, broad US and EU authorities, will the US, the EC, and EU member states work to identify and control specific items BIS, members of Congress, and others have called out as warranting new controls for human rights reasons, such as those related to censorship or social control, surveillance, interception, restrictions on communications, monitoring or restricting access to or use of the internet, identification of individuals through facial or voice recognition or biometric indicators, and DNA sequencing? Will DG TRADE work to facilitate adoption at an EU level or with more EU member states the commitments and efforts described in the Export Controls and Human Rights Initiative launched at the Summit for Democracy? And will there be joint efforts to convert any voluntary initiatives into actual export control regulations in order to level the playing field on controls over such items?
- **End-Use and End-User Controls to Address Human Rights Issues.** Will the US, the EC, and the EU member states work together to create end-user and end-use controls to address human rights concerns when it is not practical to create lists of specific items relevant to such concerns (because, for example, the items are widely available and used for many benign end uses)? If so, will the parties agree to work with industry and prosecutors to ensure that such end-use and end-user controls are clear, enforceable, and capable of being complied with, particularly in light of complex supply chain issues?

## B. Other Annex II Issues for Enhanced US-EU Coordination

### 1. List-Based Controls

- **Alignment of License Exceptions and General Authorisations.** The EU has Union General Export Authorisations, such as [EU001](#). Member states have their national general export authorisations. The US has License Exceptions such as STA (Strategic Trade Authorization). Each is designed to reduce unnecessary licensing burden on trade in dual-use items between and among the US, the EU member states, and close allies of both. The restrictions on the use of each are extraordinarily complicated and they do not align in terms of items or countries covered by the carve-outs. Will the ECWG work to reduce the differences in scope and application between such exceptions and authorizations to facilitate trade by and among the US and EU member states? That is, will it work to develop something that is as close as possible to a general, easy-to-apply carve-out for EU-US trade in dual-use items?
  - The US has many license exceptions for which there is not a direct counterpart in member state rules. For others, there is a counterpart, but it does not always align in scope. Will the ECWG work at reducing the differences in impact as a result of such exceptions? That is, will the ECWG work to align the scope of application of License Exception LVS (limited value shipments), TSR (technology and software under restriction), RPL (replacement parts), EU003 (repair/replacement), TSU (technology and software unrestricted), and AVS (aircraft, vessels, and spacecraft)?
  - Will the US commit to maintain License Exception APR (additional permissive reexports) for shipments of items subject to the EAR from EU member states? If not, would the US identify and work to remedy the concerns it has with covered exports from EU member states?
  - Short of or before making specific changes to align US license exceptions and EU general authorizations, will BIS and DG TRADE work to develop educational and outreach materials to describe their differences in scope and application? If differences in scope (e.g., items and countries covered) are intentional, will BIS and DG TRADE explain the policy reasons for the differences in scope and application?
- **Alignment of Encryption Controls.** Would the US and the EU consider working to align with EU controls all the provisions related to Category 5, Part 2? That is, would they consider making more convergent Note 3 (the Cryptography Note) and the notes to ECCN 5A002.a? Would the US and the EU work to align, to the extent possible, License Exception ENC and EU General Export Authorization 008? Would they then agree to work to align various and different member state encryption-related general authorizations? The differences create

significant and largely unnecessary compliance burdens for companies that operate in the US and the EU. Also, they create unlevel playing fields for US and EU companies, depending on the issue.

- **Treatment of Encrypted Technology and Software.** In 2016, the US created novel regulatory provisions to (i) encourage the secure transmission of technology and software, and (ii) describe when the transmission of properly encrypted technology and software was and was not a controlled event. The EU does not have any such provisions. Would the ECWG consider working to align such provisions to advance the common security interests of both the US and the EU?
- **Definitions of Control Parameters.** The US and the EU lists of dual-use items contain multiple types of control parameters that are critical to determining when an item is and is not listed. Some are defined unilaterally and some are defined multilaterally. The primary examples include “specially designed,” “capable for use with,” “designed or modified,” and “required.” Will the ECWG work to align the US and the EU member states’ definitions of these terms so that exporters would be confident that an item controlled based on such a parameter in the US would be equally controlled (or not) in EU member states and vice versa, all other facts being equal?
- **Classification and Rating Determinations.** Would BIS, DG TRADE, and EU member states agree to share best practices and standard interpretations so that classification and rating determinations about whether an item is or is not within the scope of a control list entry would have the same result, all other facts being equal?
- **Wassenaar Timing Issues.** Are the US, the EC, and the EU member states willing to work together to convince the Wassenaar Arrangement to agree to the announcement of new controls on a rolling basis rather than waiting until December of each year to do so? Such an agreement would speed up the changes agreed to multilaterally.
- **Foreign Availability.** When considering new controls to be imposed plurilaterally or multilaterally, would the US, the EC, and the EU member states agree to factor in whether the specific items at issue are widely available outside the US and the EU before imposing controls? If so, what would be the standards and sources for such efforts? What would be the standards for when foreign availability of dual-use items would not have an impact in a determination for imposing new controls on an item?
- **Military Interoperability.** Would the US, the EC, and EU member states agree to work to advocate for changes in controls and licensing policies in order to facilitate military interoperability among NATO and other close allies? (This is a core policy requirement of ECRA.)

- **Deemed Exports and Technical Assistance.** Would the US, the EC, and the EU member states be willing to work to reduce or eliminate the disparate impact of the US deemed export (and deemed reexport) rules both within EU member states with respect to nationals of EU countries? For example, would the ECWG be willing to develop guidelines for harmonization of US deemed export and reexport rules with EU member state controls on “technical assistance?” Would the US be willing to adjust License Exception STA so that it clearly and simply applied to deemed exports and reexports to EU nationals with respect to items that are not 600-series (i.e., military) or 500-series items (i.e., space-related)?
- **“Published” Information.** Would BIS, DG TRADE, and EU member states be willing to work together to align their definitions of the types of technology and software that are *per se* excluded from export controls because they are either published or the results of fundamental research?
- **Software as a Service.** Would BIS, DG TRADE, and EU member states be willing to work together to align their rules regarding when the provision of a service through the use of software in a different country would and would not result in a controlled event?
- **Cloud Storage.** Would BIS, DG TRADE, and EU member states be willing to work together to align their policies regarding when technology and software stored in and transmitted from cloud service systems does and does not trigger export control obligations?
- **Program Authorizations.** To facilitate EU and US joint development efforts, would the US and the EC be willing to work to create a system for general authorizations of specific programs and joint projects to remove export control complexity and burden?
- **Commonly Structured Publication of Dual-Use Lists.** BIS publishes on its website the Commerce Control List with separate links for each Category. Would DG TRADE be willing to work with BIS to publish in a similar fashion its list in Annex I of Regulation (EU 2021/821)? Such an effort, although informal, would facilitate comparison of differences for both policy analysis and compliance efforts.

## 2. End-Use-Based Controls

- **Cyber-Surveillance Controls.** Will the US work to align its controls with the EU-specific Article 5 catch-all controls on unlisted “cyber-surveillance items,” which the EU defines as items “specially designed to enable to covert surveillance of natural persons by monitoring, extracting, collecting or analysing data from information and telecommunication systems?”

- **Arms Embargoes.** Will the US and EU member states work to align their licensing policies for already-listed items destined to arms embargoed destinations or other countries of concern? That is, will the US and the EU member states work to create an information-sharing or other arrangement so that a license that the US or an EU member state would deny or grant for a particular item for a specific end use in an arms embargoed country would be denied or granted by the other, all other facts being equal? As noted above, the current system is based on national discretion. For most of the types of controlled items that are exported (e.g., Wassenaar-listed items), there is not an existing no-undercut arrangement.
- **Military End Use Rules.** Are the US, the EC, and the EU member states willing to work to level the playing field between the US military end use rules and the EU member state application of their catch-all authorities to impose military end use controls?

### 3. End-User-Based Controls

- **End-User-Based Controls.** Is the EC willing to interpret “public security” or scope of EU restrictive measure (sanctions) authorities so that member states would clearly have authority to impose controls on unlisted items to specific end users? Is the EC willing to encourage member states to use the Article 4 authorities to effectively impose end-user-like controls on exports of unlisted items to arms embargoed countries if the end users are identified on US or other proscribed party lists, such as the Entity List or the Military End User list companies?

### C. Other Issues for Consideration

- **Enforcement Efforts.** Would the US and the EC be willing to work together to level the playing field with respect to investigation and prosecution of violations of US and EU export control rules? For example, would they be willing to set up a regular (as opposed to ad hoc) system of information sharing about tips, leads, and enforcement practices? Would the EU member states be willing to agree to guarantee minimum resources and other support for their export control enforcement authorities to ensure that they were at least as capable and funded, on a per capita basis, as US enforcement authorities?
- **Publishing Justifications for Controls.** Most of the US and the EU dual-use export controls exist to implement the commitments to the multilateral regimes. Except for general comments in some preambles and the EAR’s general “reason for control” structure, however, the specific policy objective of each control is not published. Public comments on possible regulatory changes and basic compliance with existing regulations would be greatly facilitated if BIS, DG TRADE, and member state export control authorities would state the reasons why each control exists. What is the national security, human rights, or other

policy issue to be addressed with respect to each such control? The creation of an informal or formal process of identifying the reasons why an existing control exists or a new control was imposed would be of immense help to the exporting and compliance communities, legislators and other policymakers, media and other commentators, and enforcement officials when making their cases. Publishing the specific policy justifications for each list-based, end-user-based, and end-use-based control would also facilitate the regular update of the controls as technologies, end users, end uses, national security threats, and foreign policy concerns change. That is, stating the reasons for controls would help prevent the controls from becoming stale, which will help ensure that they remain effective and without unnecessary collateral impacts. In other words, publishing specific justifications – i.e., with more detail than just to achieve general “national security” or “foreign policy” objectives – for each control would help the US and EU controls become more efficient, effective, and convergent. Knowing clearly the purpose of each control will also allow for better evaluation about whether the control is effective and thus does or does not need to be changed.

- **Joint Outreach.** Would BIS and DG TRADE be willing to conduct more joint outreach and training seminars for industry and academia on the similarities and differences between US and EU member state export controls rules, practices, policy objectives, obligations, and enforcement? Would BIS and member state export control officials be willing to do joint explanations of the meaning and scope of terms and controls on the regimes’ control lists?
- **Reviewing Past Export Control Reform Efforts.** The creation of the “Beyond Fortress America” publication was the last major academic review of the US dual-use export control system. Although the Obama Administration’s Export Control Reform effort was primarily focused on rationalizing defense trade issues with close allies, it nonetheless made some progress in reducing unnecessary regulatory burdens on dual-use trade with close allies. Following a 2014 communication, the EC adopted a proposal to modernize the EU export control system in 2016. Not all the recommendations of such past efforts were adopted. Are there nonetheless ideas in such past efforts that warrant re-consideration in light of the objectives set out in Annex II? In our view, there would be considerable merit for the ECWG to catalogue and review past dual-use export control ideas in order to benefit from past thinking about which new ideas should be accepted and rejected considering the current threat environment. Finally, in light of the reference to the imposition of controls to achieve strategic economic objectives, it would also be useful for the ECWG to catalogue and review the significant amount of commentary, history, and analysis of how effective or not the COCOM export control structure was.

## **IX. Disclaimers and Information About the Authors**

Mr. Wolf and Mr. Helder are partners in the international trade group of Akin Gump Strauss Hauer & Feld LLP. Mr. Wolf was the Assistant Secretary of Commerce for Export Administration (2010-2017). Mr. Helder is an expert in EU and member state export control and other international trade laws. Emily Kilcrease is Senior Fellow and Director of the Energy, Economics, and Security at the Center for a New American Security.<sup>8</sup> Ms. Kilcrease had previously served in the U.S. Government as a senior career official in multiple positions responsible for international trade policy.

Our views in this document are those of the authors alone and not written on behalf of another. We write papers on complex international trade regulatory issues for fun and for the greater good. Please let us know if we made any mistakes or missed any material points. Such information will be worked into subsequent papers and commentary on this topic.

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