

Strategic Trade Controls as a Foreign Policy Tool in Strategic Competition: Implications of a Shift Beyond Global Nonproliferation Goals

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Abstract

Over the past decades, strategic trade controls (STC) have undergone significant transformations, with end-use and end-users emerging as primary risk factors in export risk assessment amidst strategic competition. This evolution signifies a paradigm shift from the traditional global nonproliferation goal of STC, which primarily targets non-state actors as stipulated in United Nations Security Council Resolution 1540, towards leveraging STC as an instrument for advancing specific states' national security and foreign policy objectives. This paper delineates three predominant trends characterizing the utilization of end-use/r-based controls by states. Furthermore, it explores the ramifications of these trends for national foreign policy interests and the universality of nonproliferation at the international level.

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Keywords

Strategic trade controls, export controls, nonproliferation, United Nations Security Council Resolution 1540, strategic competition, catch-all controls, 73 FR 49311, military end-use/r controls, Entity List, sanctions on Russia, cybersurveillance, European Union, Export Administration Regulations (EAR), Regulation 821/2021

Background

Economic power, together with military might, is a significant foreign policy instrument in international relations. Economic measures, such as export controls and sanctions, have been convenient alternative tools to military action in advancing states' foreign policy goals.² For instance, as the Cold War emerged, Western Bloc countries established the Coordinating Committee for Multilateral Export Controls (COCOM) in order to diminish the Eastern Bloc's military potential by curtailing transfers of sensitive technologies to states comprising the latter.³ In other words, the export control measures adopted by Western Bloc countries during the Cold War reflected their broader foreign policy objective as they were designed to maintain military superiority *vis-à-vis* the Eastern Bloc for eventual dominance in the international system.

Beyond operating within (or outside of) blocs or regimes, states are capable of aligning their foreign policy goals across the entire international system, when faced with a common enemy that threatens their status as agents of international politics. In this case, states can resort to economic instruments against non-state actors claiming the right to sovereignty or attempting to decentralize the existing international order. For instance, after the September 11 attacks in 2001, Permanent Members of the United Nations Security Council (UNSC) made concerted efforts to encourage states to adopt export control measures to prevent non-state actors from acquiring capabilities of Weapons of Mass Destruction (WMD), which led to the adoption of United Nations Security Council resolution (UNSCR) 1540 in 2004.⁴

During the debates at the UN that accompanied the resolution, a few states expressed concerns about the inadequacy of adopting the draft of UNSCR 1540 at the UNSC. For example, Pakistan claimed that the UNSC is not a representative body of the international community, hence it is not entitled to legislative authority for issues that can be separately addressed by nonproliferation-related institutions.⁵ Moreover, implementation and enforcement of the draft resolution could indiscriminately result in coercive actions against state actors instead of the primary target of the draft resolution, non-state actors. Nevertheless, UNSCR 1540 was unanimously adopted by the Security Council as states understood that it was intended to support a largely noncontroversial goal of eliminating threats of acquisition of WMD by non-state actors, with statements of select Security Council members noting a "sense of urgency"

2 Edward Hallett Carr, "Chapter 8: Power in International Politics," in *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (New York: Perennial, 2001), p. 132.

3 John H. Henshaw, "The Origins of COCOM: Lessons for Contemporary Proliferation Control Regimes," Stimson Center, May 1993.

4 UN Security Council, Security Council Resolution 1540 (2004), April 28, 2004, S/RES/1540 (2004).

5 UN Security Council, 4950th Meeting, April 22, 2004, S/PV.4950, <<https://www.securitycouncilreport.org/un-documents/document/1540-spv-4950.php>>.

following the September 11, 2001 attacks.⁶ Subsequent extensions of the mandate of the 1540 Committee established by the Resolution, particularly through UNSCR 1977 adopted in 2011, have institutionalized among UN member states the association of strategic trade controls – a key component of the Resolution, per its Operative Paragraph 3(d) – with this specific nonproliferation goal.⁷

Since the adoption of UNSCR 1540, practitioners responsible for strategic trade control policy and its implementation in national contexts have positioned the associated regulatory bodies – those responsible for licensing, outreach, and enforcement -- as serving broader global nonproliferation purposes by minimizing risks of diversion of exported items toward WMD applications by any recipients, including non-state actors. A trade regulatory regime typically operates at the national level by introducing interests from various stakeholders.

From a legal standpoint, regulatory bodies must maintain “effective independence” to carry out their functions without undue influence from other governmental bodies.⁸ This independence is crucial, especially when conflicting interests could hinder the regulator’s ability to fulfill its duties. However, in many countries, a trade regulatory body is placed within the trade ministry – an organization that promotes economic interests -- and its decision-making process involves inputs from other organizations, such as ministries responsible for foreign affairs and national defense. For instance, the U.S. dual-use trade regulatory body, the Bureau of Industry and Security (BIS) is established under the Department of Commerce, and its decision-making process for export licenses involves inter-agency coordination, encompassing inputs from the Departments of States, Energy, and Defense.

“Effective independence” does not necessarily mean that a regulatory body should be structurally separated from or completely immune from legitimate inputs of other governmental bodies.⁹ Specific to the goal of WMD nonproliferation, an inter-agency coordination process instead helps a trade regulator assess potential proliferation risks of transactions in question by introducing views on risks residing in the diplomatic and military dimensions. However, the inclusive nature of the decision-making process in an STC system also opens the possibility for perceived or actual influence from other agencies with competing interests over certain transactions, such as concerns about economic relations with particular states, imperative foreign policy needs, or military competition. When considered in the strict context of UNSCR 1540-specific requirements, if interests not directly related to WMD nonproliferation impact the “effective independence” of the STC regulatory body, the priority of the state’s 1540-focused nonproliferation obligations could be altered in the decision-making process.

In the recent global environment of great power competition, specific countries and regions, such as the United States and the European Union, have been adapting select STC regulatory mechanisms previously associated with WMD nonproliferation such as catch-all controls to accommodate other strategic and foreign policy drivers. Presently, these drivers primarily surround the actions of other states, perceived to be strategic competitors or adversaries,

6 Ibid

7 Security Council Resolution 1977, United Nations, S/RES/1977(2011), April 20, 2011, <<http://unscr.com/en/resolutions/1977>>.

8 Carlton Stoiber et al., “Chapter 2: The Regulatory Body,” in *Handbook on Nuclear Law: Implementing Legislation* (Vienna: International Atomic Energy Agency, 2010), pp. 25-26, <<https://www.iaea.org/publications/8374/handbook-on-nuclear-law-implementing-legislation>>.

9 Ibid.

rather than non-state actors as addressed by UNSCR 1540. It is of course a state's sovereign right to decide how to optimize global nonproliferation interests, as represented by the goal of UNSCR 1540, with its foreign policy interests in exercising trade regulatory functions. However, advancing UNSCR 1540 implementation universally across UN member states could be impacted and potentially weakened, as the STC mechanisms now being affected by this development have traditionally been promoted internationally – often by the same states and regions currently altering them -- as best practices associated with the resolution's nonproliferation-focused objectives.

This study explores this development through an examination of three cases involving changes in end-use/r-based controls and catch-all controls within the legal-regulatory frameworks of the United States and the European Union (EU). Implications of this development are then discussed, followed by a set of considerations suggested for states promoting STC best practices in the context of continuing advancement of UNSCR 1540 and its broader nonproliferation objectives.

Trends in STC End-use/r Control Frameworks: Three Cases

As a part of the national STC licensing system, a state establishes jurisdiction over items by allowing its national authority to place items with potential proliferation applications on national control lists. Any cross-border movements of listed goods trigger export license considerations. In the context of UNSCR 1540 and its specific nonproliferation objectives, when conducting a risk assessment of intended exports, a national authority takes into account at least three main factors: WMD potential inherent in the items to be exported, risks of diversion for proliferation purposes by the end-user, and legitimacy of the end-use. Meanwhile, some states restrict cross-border transactions even when they do not involve listed goods, via catch-all controls, to prevent proliferators from diverting non-listed items for WMD purposes. Unlike item-based controls, a risk assessment for catch-all controls is based on more contextual judgments specific to an individual transaction, mainly by considering end-uses or end-users involved rather than proliferation risks inherently associated with the item being exported.¹⁰

As foreign policy interests beyond nonproliferation objectives have emerged as another essential element in STCs for select jurisdictions, including the U.S. and the European Union, there are at least three trends in the calibration of risk factors within trade control frameworks. First, a state expands the scope of catch-all controls to cover not only entities and individuals of proliferation concern but also those deemed detrimental to national interests. Second, a state establishes a prominent end-user-based control regime to restrict the trade of a particular set of items with entities of foreign policy and military concerns. Third, states introduce a rule to restrain exports of items with potential for end-uses related to a specific foreign policy concern.

Case examples of each of these three trends – all of which notably predate the expansion of STCs by the U.S. and European Union in response to the war in Ukraine -- are examined in this section, setting a framework for discussion of more current developments and their implications.

10 Richard Cupitt, "Legal Authorities for an Effective Export Control System," United States Department of State, October 2004, <<https://2009-2017.state.gov/strategictrade/documents/organization/162001.pdf>>.

Table 1. Comparison of frameworks for end-use and end-user controls in the context of convergence between foreign policy interests and global nonproliferation objectives

	Trend 1	Trend 2	Trend 3
Authorization Scheme	End-user controls	Combination of end-user and end-use controls	End-use controls
Target Item	Any items, including non-listed items	Listed items related to foreign policy or national security concerns	Non-listed items with a potential of specific end-uses of foreign policy concerns
Target End-user	Listed entities and individuals of WMD and foreign policy concerns	Listed military end-users and related government entities	Any individuals and entities
Target End-use	A broad range of end-uses harmful to national interests	End-uses related to broad foreign policy and national security concerns	End-uses posing a specific policy concern
Example	U.S. Entity List	U.S. Military End-use/r Controls	EU cyber-surveillance end-use controls

Case 1: The Entity List of the United States

Many international legal and political instruments highlight catch-all controls as an important best practice in multilateral nonproliferation efforts. In 1996, members of the Australia Group (AG) began to discuss catch-all controls at its plenary session.¹¹ In 2003, the Wassenaar Arrangement (WA) adopted the “Statement of Understanding on Control of Non-Listed Dual-Use Items” in which the Participating States pledged to control exports of non-listed items to destinations under binding and non-binding arms embargoes if there is a risk of diversion for military end-use.¹² Moreover, Operative Paragraph 3(d) of UNSCR 1540 requires UN Member States to establish end-user-based controls to thwart proliferation efforts by non-state actors.¹³

11 “BIS Annual Report – FY 1996,” Bureau of Industry and Security (BIS), April 2014, <<https://www.bis.doc.gov/index.php/documents/policy-guidance/930-bis-annual-report-fy-1996/>>.

12 “Wassenaar Arrangement – Statement of Understanding on Control of Non-Listed Dual-Use Items”, Wassenaar Arrangement document uploaded on the website of the Stockholm International Peace Research Institute (SIPRI), <<https://www.sipri.org/node/2857>>.

13 UN Security Council, Security Council Resolution 1540 (2004), April 28, 2004, S/RES/1540 (2004).

In the case of the United States, contemporary catch-all controls have been a part of the U.S. export control system since the 1990s. In 1991, the U.S. launched the Enhanced Proliferation Control Initiative (EPCI) to strengthen the controls over transactions with potential proliferation risks of chemical and biological weapons and missiles. According to the EPCI rules, an exporter should have obtained approval from the U.S. Department of Commerce if they were informed by the agency or had knowledge that an intended export of any item would contribute to WMD proliferation (inclusive of missiles as delivery systems).¹⁴

To enhance the implementation of catch-all controls, the U.S. created in 1997 a list of end-users, called the Entity List, that played an informative function in determining license requirements. The Entity List, in this early iteration, identified foreign individuals and entities known to engage in WMD proliferation activities, mainly covering those from Israel, India, China, Russia, and Pakistan. Any transactions involving entities listed on the Entity List necessitated export license requirements for exporters, regardless of whether the item being exported was on the Commerce Control List (CCL). Around this time, the main factors for the Department of Commerce to consider in its decision-making process for export authorization were WMD nonproliferation-related elements, such as a stated end-use, the significance of an item for proliferation purposes, and the nonproliferation track record of the destination.¹⁵

Since the middle of the 2000s, U.S. foreign policy and national security interests have begun to emerge in this domain traditionally associated with WMD nonproliferation-focused controls. Specifically, the BIS issued a rule, “Authorization To Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States” (73 FR 49311) in August 2008.¹⁶ 73 FR 49311 expands the scope of catch-all controls from a nonproliferation focus to broader U.S. foreign policy objectives by revising criteria used to guide adding an entity to the Entity List to include the entity’s involvement in activities detrimental to U.S. national security and foreign policy interests, based on “specific and articulable facts.”¹⁷ Since then, an inter-agency process for making a decision on any changes to the Entity List, called the End-User Review Committee (ERC), has included representatives from government offices serving broad U.S. foreign policy interests, such as the Departments

14 “BIS Annual Report – FY 1996,” Bureau of Industry and Security (BIS), April 2014, <<https://www.bis.doc.gov/index.php/documents/policy-guidance/930-bis-annual-report-fy-1996/>>.

15 “BIS Annual Report – FY 1997,” Bureau of Industry and Security (BIS), April 2014, <<https://www.bis.doc.gov/index.php/documents/policy-guidance/929-bis-annual-report-fy-1997/file>>.

16 “Authorization To Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States,” 73 FR 49311, Federal Register, August 21, 2008, <<https://www.federalregister.gov/documents/2008/08/21/E8-19102/authorization-to-impose-license-requirements-for-exports-or-reexports-to-entities-acting-contrary-to>>.

17 Part 744.11 (b), the Export Administration Regulations of the United States, Bureau of Industry and Security (BIS), November 17, 2023, <<https://www.bis.doc.gov/index.php/documents/regulations-docs/2343-part-744-control-policy-end-user-and-end-use-based-2/file>>.

of State, Defense, and Energy with potential extension to Treasury.^{18,19,20}

The introduction of the new rule, 73 FR 49311, was met with resistance from U.S. industry due to concerns about a potential adverse impact on the national economy. For example, according to a report from the Department of in 2015, a U.S. company operating in the biometric sector voiced concerns that foreign policy-based export controls, especially potential restrictions on biometric devices and equipment to China, could potentially stifle growth in the sector. The company argued that the policy was not substantiated by evidence linking these items to crime control or human rights abuses in China.²¹ However, the U.S. government maintained that the foreign policy benefits derived from the new rule outweighed the potential economic cost to the U.S. industries.²²

In addition, the U.S. government concluded in 2008 that the potential adverse impact of 73 FR 49311 on the U.S. economy was not significant. According to the Congressional Review Act (CRA), a U.S. federal agency should submit a report on their rule-making activities to the U.S. Congress before the proposed rule can take effect.²³ The report should identify whether the proposed rule is a “major” rule against which the economic criterion, “an annual effect on the economy of \$100 million or more,” is applied.²⁴ The Office of Management and Budget (OMB), responsible for such determination, did not categorize 73 FR 49311 as a “major” rule.²⁵

Meanwhile, the U.S. government finds at least three benefits from implementing this adjustment to the Entity List, including trade facilitation, legal flexibility, and user convenience. First, the rule enabled the U.S. to advance its national security and foreign policy interests without disrupting legitimate trade. Instead of imposing a broad country-wide license requirement, the government could still facilitate trade with countries where entities and individuals of concern are located. For example, Suzhou Keda Technology, based in South Korea, has been on the

18 “Authorization To Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States,” 73 FR 49311, Federal Register, August 21, 2008, <<https://www.federalregister.gov/documents/2008/08/21/E8-19102/authorization-to-impose-license-requirements-for-exports-or-reexports-to-entities-acting-contrary-to>>.

19 “Control Policy: End-User and End-Use Based,” 744.16 (d), Export Administration Regulations, November 17, 2023, <<https://www.bis.doc.gov/index.php/documents/regulations-docs/2343-part-744-control-policy-end-user-and-end-use-based-2/file>>.

20 “Licensing Best Practices: EAR License Application Processing and Issuance,” Presentation material by the U.S. Department of Commerce, 2017, <<https://www.bis.doc.gov/index.php/documents/update-2017/2129-what-are-they-thinking-the-interagency-licensing-process-best-practices-bis-mr/file>>.

21 “2015 Report on Foreign Policy-Based Export Controls,” U.S. Department of Commerce, 2015, <<https://www.bis.doc.gov/index.php/documents/pdfs/1285-bis-foreign-policy-report-2015-1/file>>.

22 Ibid.

23 “The Congressional Review Act (CRA): Frequently Asked Questions,” Congressional Research Service, November 12, 2021, <<https://sgp.fas.org/crs/misc/R43992.pdf>>.

24 “Summary of the Congressional Review Act,” U.S. Environmental Protection Agency, <<https://www.epa.gov/laws-regulations/summary-congressional-review-act>>.

25 “Authorization To Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States,” 73 FR 49311, Federal Register, August 21, 2008, <<https://www.federalregister.gov/documents/2008/08/21/E8-19102/authorization-to-impose-license-requirements-for-exports-or-reexports-to-entities-acting-contrary-to>>.

U.S. Entity List for its suspected involvement in human rights abuses in Xinjiang, China, since July 2021.²⁶ Nevertheless, the U.S. categorizes South Korea as a Group B destination to which less restrictive controls are applied for the trade of a particular set of items.^{27,28}

Second, 73 FR 49311 has simplified the rule-making process by removing the need to issue general orders to impose restrictions on entities outside the nonproliferation domain. Prior to issuing 73 FR 49311, BIS had to undergo *ad hoc* legal procedures to issue general orders to make parties of national security concern subject to the EAR. For example, BIS issued General Order 3 to impose restrictions on entities potentially involved in terrorism in September 2006. Those entities include Mayrow General Trading and its related entities involved in procuring electronic components for improvised explosive devices (IEDs) that were eventually used against the U.S.-led forces in Iraq and Afghanistan.²⁹ Since the U.S. Export Administration Regulations (EAR) specify “supporting persons engaged in acts of terror” as an illustrative example contrary to U.S. national security and foreign policy interests, Mayrow-like cases no longer require BIS to issue additional general orders to impose restrictions on entities of concern.³⁰ As General Order 3 was no longer needed due to 73 FR 49311, the Order was rescinded in September 2008.³¹

Lastly, 73 FR 49311 enabled BIS to consolidate the multiple lists of entities of concern into a single list to enhance public capacity to identify export license requirements. Without a broader set of criteria, BIS had to place entities harming U.S. national security and foreign policy interests on a separate list, Supplement No. 1 to part 736, from the Entity List. 73 FR 49311 allowed BIS to incorporate 115 entities on Supplement No. 1 to part 736 into the Entity List.³² As a single consolidated list, the Entity List, could provide exporters operating within U.S. Department of Commerce BIS jurisdiction with the convenience of screening end-users against

26 “Addition of Certain Entities to the Entity List; Revision of Existing Entry on the Entity List; Removal of Entity From the Unverified List; and Addition of Entity to the Military End-User (MEU) List,” 86 FR 36496, Federal Register, July 21, 2021, <<https://www.federalregister.gov/documents/2021/07/12/2021-14656/addition-of-certain-entities-to-the-entity-list-revision-of-existing-entry-on-the-entity-list>>.

27 “Supplement No. 4 to Part 744 - Entity List,” Export Administration Regulation (EAR), Bureau of Industry and Security (BIS), May 19, 2023, <<https://www.bis.doc.gov/index.php/documents/regulations-docs/2347-744-supp-4-6/file>>.

28 “Supplement No. 1 to Part 740,” Export Administration Regulation (EAR), Bureau of Industry and Security (BIS), September 2022, <<https://bis.doc.gov/index.php/documents/regulation-docs/2255-supplement-no-1-to-part-740-country-groups-1/file>>.

29 “Addition of Certain Persons to the Entity List; Removal of General Order From the Export Administration Regulations (EAR),” 73 FR 54499, Federal Register, September 22, 2008, <<https://www.federalregister.gov/documents/2008/09/22/E8-22088/addition-of-certain-persons-to-the-entity-list-removal-of-general-order-from-the-export>>.

30 “Control Policy: End-User and End-Use Based,” 744.16 (d), Export Administration Regulations, November 17, 2023, <<https://www.bis.doc.gov/index.php/documents/regulations-docs/2343-part-744-control-policy-end-user-and-end-use-based-2/file>>.

31 “Addition of Certain Persons to the Entity List; Removal of General Order From the Export Administration Regulations (EAR),” 73 FR 54499, Federal Register, September 22, 2008, <<https://www.federalregister.gov/documents/2008/09/22/E8-22088/addition-of-certain-persons-to-the-entity-list-removal-of-general-order-from-the-export>>.

32 Ibid.

one BIS-administered list as opposed to multiple lists.³³

In September 2009, BIS expanded the scope of controlled activities applicable to the Entity List by issuing 74 FR 35797. Before this rule, the trade restrictions on parties on the Entity List had only been applied to export and re-export transactions. The new rule expanded the scope of controls by subjecting transfer (in-country) to the EAR. According to part 734.16 of the EAR, transfer (in-country) means “a change in end-use and end-user of an item within the same foreign country.”³⁴ By expanding the scope of controlled activities involving parties identified on the Entity List, the U.S. government could have a wider window to review transactions involving entities of concern, which advances the U.S. government’s foreign policy interests by reducing risks of diversion of any U.S. items to entities of concern.³⁵

Since the 2010s, the implementation of end-user-based controls by the U.S. has featured highly adjustable and calibrated configurations reflecting foreign policy objectives, and actual enforcement cases and state-level trends in end-user-based export license denials confirm that they are not merely theoretical constructs. The case of listing the Chinese telecommunication company ZTE on the Entity List and then adjusting the scope of licensing requirements and license exceptions amidst an emerging trade dispute and deepening strategic competition exemplifies such trends.³⁶ The ZTE case shows how the U.S. operated the end-user controls to change the company’s behavior by utilizing temporary general licenses and denial orders in conjunction with the Entity List.

Specifically, the U.S. government had begun investigations into the allegations that ZTE made significant amounts of exports of the U.S.-origin telecommunication items to North Korea and Iran and placed ZTE on the Entity List in March 2013.³⁷ As per ZTE’s request to delist them from the Entity List, BIS issued a temporary general license specific to ZTE that suspended the effect of the license requirements pertaining to transactions involving parties on the Entity List.³⁸ The U.S. government stated that it is within its discretion to determine renewing the

33 “Authorization To Impose License Requirements for Exports or Reexports to Entities Acting Contrary to the National Security or Foreign Policy Interests of the United States,” 73 FR 49311, Federal Register, August 21, 2008, <<https://www.federalregister.gov/documents/2008/08/21/E8-19102/authorization-to-impose-license-requirements-for-exports-or-reexports-to-entities-acting-contrary-to>>.

34 “Control Policy: End-User and End-Use Based,” 74.16 (d), Export Administration Regulations, November 17, 2023, <<https://www.bis.doc.gov/index.php/documents/regulations-docs/2343-part-744-control-policy-end-user-and-end-use-based-2/file>>.

35 “Revisions to Certain End-User Controls Under the Export Administration Regulations; Clarification Regarding License Requirements for Transfers (in-country) to Persons Listed on the Entity List,” 74 FR 45990, Federal Register, September 8, 2009, <<https://www.federalregister.gov/documents/2009/09/08/E9-21367/revisions-to-certain-end-user-controls-under-the-export-administration-regulations-clarification>>.

36 “China’s ZTE May be First Major Casualty of Trade War with U.S.,” *The Guardian*, May 10, 2018.

37 “Additions to the Entity List,” 81 FR 12004, Federal Register, March 8, 2016, <<https://www.federalregister.gov/documents/2016/03/08/2016-05104/additions-to-the-entity-list>>. Although the investigation focused on alleged diversion to North Korea and Iran, notably the addition of ZTE to the Entity List referenced Part 744.11, which is reserved for entities “acting contrary to the national security or foreign policy interests of the United States,” as opposed to the WMD nonproliferation-specific Parts 744.2, 744.3 and 744.4.

38 “Temporary General License,” 81 FR 15633, Federal Register, March 24, 2016, <<https://www.federalregister.gov/documents/2016/03/24/2016-06689/temporary-general-license>>.

license, contingent on ZTE's subsequent behavior.³⁹

In March 2016, ZTE pled guilty and concluded a settlement agreement with BIS in which the company agreed to a total of USD \$1.1 billion dollars combining civil and criminal penalties and a seven-year probationary period.⁴⁰ During the probationary period, ZTE had to conduct active compliance activities, while the BIS suspended the denial of export privileges to ZTE in return.⁴¹ The ERC of BIS decided to remove ZTE from the Entity List on March 29, 2017, given ZTE's cooperation with the settlement.⁴²

However, in 2018 BIS learned that ZTE failed to meet its compliance requirements by paying bonuses to the employees involved in the illegal transactions instead of subjecting them to disciplinary actions during the probationary period.⁴³ As a result, ZTE lost its export privileges and access to items subject to the EAR as BIS placed ZTE on the Denied Persons List in April 2018.^{44,45} The failure to comply with the settlement by ZTE led to another settlement agreement with the U.S. government. The Superseding Settlement Order issued in June 2018 imposed an additional USD \$1.5 billion dollars on ZTE as civil penalties and required ZTE to maintain a Special Compliance Coordinator (SCC) operated in coordination with the BIS with an extended probation period of ten years. BIS eventually delisted ZTE from the Denied Persons List following the settlement.⁴⁶

BIS describes the period of FY 2018-20 as active years when they utilized the Entity List as an essential tool to maintain U.S. national security and foreign policy interests.^{47,48,49} In addition to ZTE, there were a number of Chinese entities newly added to the Entity List during a period of heightened strategic and military competition as well as trade disputes with China. For

39 Ibid

40 83 FR 17644, Federal Register, April 23, 2018, <<https://www.federalregister.gov/documents/2018/04/23/2018-08354/in-the-matter-of-zhongxing-telecommunications-equipment-corporation-zte-plaza-keji-road-south>>.

41 "BIS Annual Report – FY 2017," Bureau of Industry and Security (BIS), <<https://www.bis.doc.gov/index.php/documents/policy-guidance/2366-bis-annual-report-fy-2017/file>>.

42 "Removal of Certain Persons From the Entity List; Addition of a Person to the Entity List; and EAR Conforming Change," 82 FR 15458, Federal Register, March 29, 2017, <<https://www.federalregister.gov/documents/2017/03/29/2017-06227/removal-of-certain-persons-from-the-entity-list-addition-of-a-person-to-the-entity-list-and-ear>>.

43 "BIS Annual Report – FY 2018," Bureau of Industry and Security (BIS), <<https://www.bis.doc.gov/index.php/documents/pdfs/2401-2018-bis-annual-report/file>>.

44 "General Prohibitions," Part 736.3 (a)(2), Export Administration Regulations, November 17, 2023, <<https://www.bis.doc.gov/index.php/documents/regulation-docs/413-part-736-general-prohibitions/file>>.

45 "BIS Annual Report – FY 2018," Bureau of Industry and Security (BIS), <<https://www.bis.doc.gov/index.php/documents/pdfs/2401-2018-bis-annual-report/file>>.

46 Ibid

47 "BIS Annual Report – FY 2019," Bureau of Industry and Security (BIS), <<https://www.bis.doc.gov/index.php/documents/pdfs/2540-bis-annual-report-2019/file>>.

48 "BIS Annual Report – FY 2020," Bureau of Industry and Security (BIS), <<https://www.bis.doc.gov/index.php/documents/pdfs/2711-2020-bis-annual-report-final/file>>.

49 "BIS Annual Report – FY 2018," Bureau of Industry and Security (BIS), <<https://www.bis.doc.gov/index.php/documents/pdfs/2401-2018-bis-annual-report/file>>.

example, BIS listed Huawei Technologies and its 114 non-U.S. affiliates on the Entity List upon 13 counts of U.S. law violations in FY 2019, followed by an additional 38 Huawei-related parties listed in FY 2020.^{50,51} According to BIS, the ZTE case illustrates the U.S. government's intent to establish a precedent to promote compliance with U.S. regulations and rectify the behaviors of the concerned entity.⁵² This suggests how the U.S. has been adapting what was initially a nonproliferation-focused STC mechanism supporting informed catch-all to serve a broader array of foreign policy objectives, based on the particulars of the entity, its behavior, and policy concerns behind the entity's listing on the Entity List in recent years.

Case 2: Military End-Use and End-User Controls of the United States

In 2007, the U.S. government stated its national policy to facilitate legitimate civilian trade with China while preventing U.S. items from contributing to the PRC's military capabilities. Toward that end, BIS issued 72 FR 33646 to introduce a new export authorization scheme focusing on military end-use within the regulatory framework for dual-use export controls. The rule's intent is to make certain groups of items subject to military end-use controls, ensure that importers in China do not divert those items for military purposes, and facilitate legitimate trade with China.⁵³

In terms of target items, there are two sets of items affected by 72 FR 33646. First, the rule requires export authorization from BIS for the export of any items listed on the CCL for national security (NS) reasons. If exports of those items contribute to the PRC's military capabilities, BIS will deny such exports. In addition, BIS set a new license requirement for items under 31 export control classification categories that had been eligible to be exported to China without a license prior to the adoption of the new rule. An export license is required if an exporter knows or has a reason to know the intended export of such items to China would be destined for military end-uses.⁵⁴

Second, 72 FR 33646 introduces a requirement for obtaining an End-User Certificate (EUC) from the Ministry of Commerce of China (MOFCOM) to ensure no diversion toward military ends while facilitating trade with China. The EUC requirement supports the implementation of an understanding on end-use verification agreed upon between the U.S. and China in 2004. BIS initially proposed USD \$5,000 as a threshold amount that requires an EUC in 2006. However, after receiving public comments, BIS decided to raise the proposed amount to USD \$50,000 to minimize the potential increase in cases subject to the end-use verification agreement so that

50 "BIS Annual Report – FY 2019", Bureau of Industry and Security (BIS), <<https://www.bis.doc.gov/index.php/documents/pdfs/2540-bis-annual-report-2019/file>>.

51 "BIS Annual Report – FY 2020", Bureau of Industry and Security (BIS), <<https://www.bis.doc.gov/index.php/documents/pdfs/2711-2020-bis-annual-report-final/file>>.

52 "BIS Annual Report – FY 2018," Bureau of Industry and Security (BIS), <<https://www.bis.doc.gov/index.php/documents/pdfs/2401-2018-bis-annual-report/file>>.

53 "Revisions and Clarification of Export and Reexport Controls for the People's Republic of China (PRC); New Authorization Validated End-User; Revision of Import Certificate and PRC End-User Statement Requirements," 72 FR 33646, Federal Register, June 19, 2007, <<https://www.federalregister.gov/documents/2007/06/19/E7-11588/revisions-and-clarification-of-export-and-reexport-controls-for-the-peoples-republic-of-china-prc>>.

54 Ibid.

trade of a less significant amount with China could be facilitated without an EUC.⁵⁵

Third, 72 FR 33646 granted BIS the authority to publish a Validated End-User (VEU) list to facilitate trade with Chinese entities posing minimal U.S. national security concerns. The VEU enumerates entities to which the export of eligible items does not trigger a license requirement. To list a certain end-user on the VEU, an inter-agency committee led by BIS assesses the entity's eligibility by considering multiple factors. Those factors include the entity's solid track record of supporting exclusively civilian sectors, compliance with U.S. export controls, cooperation with the U.S. government in compliance measures, and relations with U.S. companies. The destination's nonproliferation status is also a criterion for listing on the VEU.⁵⁶

Since 2014, the U.S. has expanded the scope of the military end-use control scheme to serve broader foreign policy interests by targeting more countries of concern for various foreign policy reasons and introducing end-user-based controls. In September 2014, BIS issued 79 FR 55608, which places ten Russian entities on the Entity List in response to the occupation of Crimea in Ukraine. In addition, 79 FR 55608 imposes license requirements based not only on knowledge of military end-use but also on that of military end-users to which Chinese military-related entities also became subject in 2020.^{57,58} A few months later, BIS introduced another rule to extend the applications of military-focused controls to Venezuela given alleged human rights abuses and the hindrance of the democratization process by the Venezuelan military regime.⁵⁹

In 2021, the military-focused authorizations scheme was extended to cover Myanmar as a reaction to the military coup that occurred in the country in the same year. Myanmar had been under strict U.S. trade embargoes since the Clinton administration in 1997 due to lagging progress toward democratization. As the democratically elected government was established in Myanmar, the BIS terminated these restrictions on the country and moved it from Group D:1 to Group B in 2016. Group B means "countries raising few national security concerns" while Group D:1 indicates "countries raising national security concerns."⁶⁰ In other words, the relocation of Myanmar in Country Groups around the democratization period represents the US government's evaluation that Myanmar no longer poses an impediment to U.S. foreign

55 Ibid

56 "Revisions and Clarification of Export and Reexport Controls for the People's Republic of China (PRC); New Authorization Validated End-User," 71 FR 38313, Federal Register, November 3, 2006, <<https://www.federalregister.gov/documents/2006/07/06/E6-10504/revisions-and-clarification-of-export-and-reexport-controls-for-the-peoples-republic-of-china-prc>>.

57 "Russian Sanctions: Addition of Persons to the Entity List and Restrictions on Certain Military End-Uses and Military End-Users," 79 FR 55608, Federal Register, September 17, 2014, <<https://www.federalregister.gov/documents/2014/09/17/2014-22207/russian-sanctions-addition-of-persons-to-the-entity-list-and-restrictions-on-certain-military-end>>.

58 "Expansion of Export, Reexport, and Transfer (In-Country) Controls for Military End-Use or Military End-Users in the People's Republic of China, Russia, or Venezuela; Correction," 85 FR 34306, Federal Register, June 29, 2020, <<https://www.federalregister.gov/documents/2020/06/03/2020-09717/expansion-of-export-reexport-and-transfer-in-country-controls-for-military-end-use-or-military-end>>.

59 "Venezuela: Implementation of Certain Military End Uses and End Users License Requirements Under the Export Administration Regulations," 79 FR 66288, Federal Register, November 7, 2014, <<https://www.federalregister.gov/documents/2014/11/07/2014-26465/venezuela-implementation-of-certain-military-end-uses-and-end-users-license-requirements-under-the>>.

60 "Burma: Implementation of Sanctions," 86 FR 13173, Federal Register, March 8, 2021, <<https://www.federalregister.gov/documents/2021/03/08/2021-04745/burma-implementation-of-sanctions>>.

policy interests, so more lenient trade regulations are applicable.^{61,62,63,64} However, the military coup in 2021 led to the U.S. unilateral sanctions that have placed Myanmar under the military end-use and end-user controls and repositioned the country to Group D:1.⁶⁵

In sum, the U.S. military end-use and end-user control development trajectory reflects the government's perception of and reaction to varying international circumstances. As the great power competition with China became entrenched, the U.S. created a sub-regime targeting military end-use within what was previously a largely nonproliferation-focused end-use/r control framework, to impede its competitor's military advancement. In reaction to events destabilizing other regions, such as Russia's occupation of Crimea, the U.S. expanded the military-focused control regime to cover military end-users to restore regional stability. As seen in the Myanmar case, the U.S. operation of the military targeting authorization scheme presented the government's responsiveness to the changes in the country's governance system. The U.S. has flexibly implemented its catch-all and end-use/r control framework to deal with foreign policy issues (inclusive of national security, strategic stability, and political realities) extending beyond nonproliferation, which in the era when the EPCI was introduced had served as the primary driver of catch-all and end-use/r controls.

Case 3: European Union Cyber-Surveillance End-Use Catch-all Controls

The European Union's export control system is a regional-level system with requirements that apply to all EU Member States. The EU system, when contrasted with the U.S. system, is a comparatively young system – having formed with the launch of Regulation 428/2009 in 2009. The EU system arguably had, at its foundation, WMD nonproliferation as a core policy driver.⁶⁶ However, in recent years, other transnational foreign policies and security concerns appear to have at least joined WMD nonproliferation as one of the key focus areas of EU export controls – particularly in the context of catch-all controls to address end-uses.

Specifically, the introduction of the EU's export control Regulation 428/2009 included a clear articulation of nonproliferation-focused catch-all controls via its Article 4, which required exporters to apply for a license in advance of an export if the exporter has been informed by national authorities or is aware that the item to be exported will be used “with the

61 “Burma: Amendment of the Export Administration Regulations Consistent With an Executive Order That Terminated US Government's Sanctions,” 81 FR 94962, Federal Register, December 27, 2016, <<https://www.federalregister.gov/documents/2016/12/27/2016-31208/burma-amendment-of-the-export-administration-regulations-consistent-with-an-executive-order-that>>.

62 “Shipments of Limited Value,” Part 740.3, the Export Administration Regulations, December 8, 2023, <<https://www.bis.doc.gov/index.php/documents/regulations-docs/2341-740-2/file>>.

63 “Shipments of To Group B Countries (GBS),” Part 740.4, the Export Administration Regulations, December 8, 2023, <<https://www.bis.doc.gov/index.php/documents/regulations-docs/2341-740-2/file>>.

64 “Technology and Software under Restriction,” Part 740.6, the Export Administration Regulations, December 8, 2023, <<https://www.bis.doc.gov/index.php/documents/regulations-docs/2341-740-2/file>>.

65 “Burma: Implementation of Sanctions,” 86 FR 13173, Federal Register, March 8, 2021, <<https://www.federalregister.gov/documents/2021/03/08/2021-04745/burma-implementation-of-sanctions>>.

66 Council Regulation (EC) No. 428/2009 of 5 May 2009 Setting up a Community Regime for the Control of Exports, Transfer, Brokering and Transit of Dual-Use Items, Official Journal of the European Union (L 134/1) of May 29, 2009. See in particular paragraphs (3), (14), and (15) of the preamble.

development, production, handling, operation, maintenance, storage, detection, identification or dissemination of chemical, biological or nuclear weapons or other nuclear explosive devices or the development, production, maintenance or storage of missiles capable of delivering such weapons.”⁶⁷ In this regard, the WMD nonproliferation objectives were the most significant policy driver for the advent of the EU STC system.

Shortly after the introduction of Regulation 428/2009, efforts to update and reform the EU STC system introduced policy debate and recommendations on strengthening the implementation of catch-all controls and, importantly, expanding them to address human rights concerns.⁶⁸ Specifically, the EU Parliament’s recommendation in October 2012 states that catch-all controls should be expanded to include end-use-based restrictions on exports of cyber-surveillance items if likely to contribute to human rights abuses in the destination country.⁶⁹ Although this recommendation was not immediately adopted, it ultimately paved the way for an expansion of the scope of catch-all controls in 2021 via the introduction of the successor to Regulation 428/2009: EU Regulation 821/2021 published on June 11, 2021, also referred to as “the Recast.”

The preamble of the Recast explicitly specifies that one of the objectives of the Regulation is to ensure that the EU Member States take into account foreign policy considerations, especially human rights, in its implementation. In particular, Article 5 of the Recast exemplifies the EU’s efforts to address specific human rights concerns through the nonproliferation-driven framework. The Article imposes catch-all controls on EU exporters “if the exporter has been informed by the competent authority that the items in question... may be intended... for use in connection with internal repression and/or the commission of serious violations of human rights and international humanitarian law.”⁷⁰ Moreover, Article 9, albeit with hortatory nature, specifies that it is EU Member States’ discretion to establish requirements for catch-all controls for public security and broad human rights reasons.⁷¹ As a result, any non-listed items with the potential of having cyber-surveillance end-uses and possible extension to broader human rights abuses have become subject to what has been a traditionally nonproliferation-focused export control mechanism (catch-all).

The recent developments in the EU STC system show how the nonproliferation framework could be recalibrated to address specific foreign policy concerns. Unlike the unilateral initiatives of the U.S. export control system, the EU system may have a narrower window for flexibility and responsiveness to the contemporary international environment. It is because

67 Article 4, Council Regulation (EC) No. 428/2009 of 5 May 2009 Setting up a Community Regime for the Control of Exports, Transfer, Brokering and Transit of Dual-Use Items, Official Journal of the European Union (L 134/1) of May 29, 2009.

68 “Green Paper: The Dual-Use Export Control System of the European Union: Ensuring Security and Competitiveness in a Changing World,” Publication Office of the European Union, 30 June 2011, <<https://op.europa.eu/en/publication-detail/-/publication/e320e5f5-b204-47c6-9989-928a653a5e52/language-en>>.

69 “Community regime for the control of exports, transfer, brokering and transit of dual-use items,” European Parliament legislative resolution of 23 October 2012 on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 428/2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items (COM(2011)0704 – C7-0395/2011 – 2011/0310(COD)) (2014/C 68 E/25), Official Journal of the European Union, July 3, 2014.

70 Article 5, Council Regulation (EC) No. 821/2021 of 20 May 2021 Setting up a Community Regime for the Control of Exports, Transfer, Brokering and Transit of Dual-Use Items (Recast), Official Journal of the European Union, <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2021:206:FULL&from=EN>>.

71 Ibid, Article 9.

the EU Regulation establishes a regional-level system that should represent the common interests of dozens of states. Observers also note that the Recast contains less ambitious foreign policy-driven requirements than the European Commission initially proposed, as the cyber-surveillance catch-all obligation is the only mandatory foreign policy-related clause in the Regulation.⁷² However, the cyber-surveillance catch-all controls clearly illustrate how the EU's initially WMD-focused regulatory system has evolved to support other foreign policy concerns of like-minded countries.

Continuation of Trends in STC End-Use/r Controls

The three cases examined in the prior section all featured expansion of catch-all controls or end-use/r controls either informing catch-all controls or with “catch-all”-like characteristics – which, since the 1990s and through the institutionalization of UNSCR 1540, had been associated with WMD nonproliferation objectives – to address other foreign policy objectives. Notably, each of the three cases preceded the war in Ukraine of 2022, and the introduction of additional end-use/r-focused strategic trade controls by the U.S., EU, and other like-minded states in response. In the era of great power competition, the U.S. and like-minded countries may find foreign policy-driven end-use and end-user controls palatable in advancing their political goals by targeting specific countries or entities of concern that pose common threats to their national interests. Recent developments in the international environment, such as the onset of military conflict in Ukraine in 2022, have further accelerated the tendency of states to promote national and foreign policy interests through frameworks traditionally focused on nonproliferation. Between 2022 and 2023, the U.S. incrementally adopted sets of heavy sanctions measures on Russia, such as expanded licensing requirements for dual-use items, a luxury goods ban, industry sanctions targeting oil and gas sectors, and asset freezes of Russian officials. The license requirement revisions to EAR in particular corroborates how the U.S. is adapting end-use/r-focused STC's to accommodate strategic interests against its strategic competitor, Russia.

On March 22, 2022, BIS published a new rule, 87 FR 12226 (effective since February 24, 2022), to impose sanctions measures on Russia in response to the conflict in Ukraine. The rule explicitly states that its purpose is to protect U.S. national security and foreign policy interests by limiting Russia's access to U.S.-origin items that could contribute to its military capability. To that end, BIS introduced several end-user-focused measures, such as expanding the scope of Russian military end-user controls and introducing a new Foreign Direct Product (FDP) Rule concerning Russian military end-users.⁷³

Specifically, 87 FR 12226 removed 45 Russian entities from the Military End-User (MEU) List and placed them on the Entity List.⁷⁴ As previously stated, the military-focused control scheme targets specific items transferred to concerned end-users. Meanwhile, the Entity List

72 Chiara Klau, Kevin J. Wolf, Daniel Lund & Isabel Foster, “EU Publishes the Recast Regulation,” AG Data Dive, Akin Gump, Strauss Hauer & Feld LLP, June 11, 2011, <<https://www.akingump.com/en/experience/practices/cybersecurity-privacy-and-data-protection/ag-data-dive/eu-publishes-the-recast-regulation.html>>.

73 “Implementation of Sanctions Against Russia Under the Export Administration Regulations (EAR),” 87 FR 12226, Federal Register, March 3, 2022, <<https://www.federalregister.gov/documents/2022/03/03/2022-04300/implementation-of-sanctions-against-russia-under-the-export-administration-regulations-ear>>.

74 Ibid.

restricts the trade of any items subject to the EAR if destined to listed entities. Therefore, relocating Russian entities from the MEU List to the Entity List has expanded the scope of controlled items applicable to Russian military end-user controls. This is a particularly important observation because 73 FR 49311 of 2008, as noted previously, equips BIS with legal flexibility and responsiveness to international environments by allowing it to modify the Entity List for broader foreign policy objectives beyond nonproliferation purposes.

In addition, the Russian military FDP rule allows the U.S. to leverage its economic and political influence over global trade with Russia. According to the military FDP rule, any items that are direct products of U.S.-origin technology or were produced by facilities that involve U.S. equipment or technology at large are subject to the EAR.⁷⁵ In other words, foreign exporters should consider the FDP requirements when they know that their FDP-applicable items are destined for Russian military end-users, even if those are indigenously produced. Meanwhile, the FDP rule introduced a “Russia Exclusion List,” which enumerates countries that joined efforts to implement the sanctions on Russia and made license exceptions for the FDP rule available to those U.S. strategic partners.⁷⁶

Similar FDP rules have been deployed to address U.S. strategic concerns surrounding China’s potential access to advanced semiconductor production technologies and the benefits this would afford the PRC’s military capabilities. Introduced and augmented in a series of new rules from 2020 to 2022, this further application of the FDP rule followed expansions of the Entity List to include several China-based entities identified by the U.S. government as linked to the country’s military-civil fusion strategy.⁷⁷ Notably, these expansions included the addition of Huawei Technologies and over 150 affiliates to the Entity List across 2019 to 2020, including those involved in semiconductor development.⁷⁸ On October 7, 2022, via a new rule, the U.S. BIS further expanded the scope of FDP-related licensing requirements specific to select end-uses and end-users in China.⁷⁹ Some observers have argued that this suite of actions, accentuated by the deployment of the rule on October 7, 2022, has constituted a game-changing development in U.S.-China strategic competition.⁸⁰ This is particularly striking given that, until these recent expansions of FDP rules, the EAR featured only one FDP rule, which was generally applied to re-exports and not widely known beyond the domain of regulators and industry compliance practitioners.

75 Ibid.

76 “Countries Excluded from Certain License Requirements,” Supplement No.3 to Part 746, Export Administration Regulations (EAR), <<https://www.bis.doc.gov/index.php/documents/regulation-docs/420-part-746-embargoes-and-other-special-controls/file>>.

77 “Foreign Direct Product Rule Guidance,” Barnes / Richardson Global Trade Law, January 11, 2021, <<https://www.barnesrichardson.com/foreign-direct-product-rule-guidance>>.

78 Lauren Feiner, “U.S. Tightens Restrictions on Huawei Access to Technology and Chips,” CNBC, August 17, 2020, <<https://www.cnbc.com/2020/08/17/us-to-tighten-restrictions-on-huawei-access-to-technology-chips-sources-say.html>>.

79 Sylwia A. Lis, Frank Pan, Eunkyung Kim Shin, and Caroline Howard, “BIS Issues New Export Controls Targeting China’s Advanced Computing and Semiconductor Sectors,” Baker McKenzie Global Sanctions and Export Controls Blog, October 24, 2022, <<https://sanctionsnews.bakermckenzie.com/bis-issues-new-export-controls-targeting-chinas-advanced-computing-and-semiconductor-sectors/>>.

80 Gregory Allen, “Choking Off China’s Access to the Future of AI,” Center for Strategic and International Studies (CSIS), October 11, 2022.

Whether these developments constitute a longer-term trend in the use of nonproliferation-legacy catch-all and end-use/r controls may ultimately depend on the U.S. government's perception of their effectiveness. At this point, it is premature and beyond the scope of this study to make a definitive judgment on the efficacy of foreign policy-driven export controls in achieving national foreign policy objectives. The U.S. government has not yet made a deterministic assessment of the effectiveness of these recent measures, although the Secretary of Commerce commented in 2018 that the foreign policy-driven export controls employing the Entity List was "likely to achieve the intended foreign policy (and national security) purposes".⁸¹ However, as discussed above, the basis for establishing foreign policy-driven controls within the nonproliferation framework has helped the U.S. respond promptly to specific events posing imminent threats and may have facilitated aligning strategic interests among partners. These trends appear poised to continue and develop further in the context of ongoing great power competition, as seen in the U.S.-EU Trade and Technology Council (TTC) launched in 2021 to promote broad economic and foreign policy interests through trade-related cooperation among the partners, including export controls.^{82,83} As such, examining their implications – particularly for the original WMD nonproliferation applications of the end-use/r controls discussed here – is especially timely, as this can inform policy considerations with respect to promotion of STC best practices and, more broadly, nonproliferation goals in support of UNSCR 1540.

Conclusion

This trend of expanding application of catch-all and related end-use/r control mechanisms previously associated with nonproliferation goals to include foreign policy objectives carries implications for strategic trade controls and their promotion internationally. First, in U.S. and EU jurisdictional contexts particularly, end-use/r-based licensing requirements are positioned to become more institutionalized as a central focus of STC policy and implementation, on par with the position enjoyed by control list-based licensing since the Cold War-era. This in turn will likely increase awareness of end-use/r controls among private-sector international trade communities – particularly exporters subject to U.S. and EU jurisdictions (including U.S. extraterritorial jurisdiction via U.S. re-export controls and the FDP rule) – as well as governments actively considering development or augmentation of STC frameworks. By extension, this may increase awareness of WMD nonproliferation-focused catch-all controls. Additionally, on a technical level, nonproliferation-specific catch-all controls could themselves absorb innovations associated with highly configurable, context-dependent foreign policy-based military or human rights-focused end-use/r controls.

At the same time, however, this trends carries the risk that, in a UNSCR 1540 best practices context, catch-all and end-use/r controls will become increasingly associated with national-level strategic and foreign policy objectives rather than WMD nonproliferation as a transnational

81 "2018 Report on Foreign Policy-based Export Controls," Bureau of Industry and Security, United States Department of Commerce, 2018, <<https://www.bis.doc.gov/index.php/documents/pdfs/2186-bis-foreign-policy-report-2018/file>>.

82 "Request for Public Comments on Supply Chain Issues To Support the U.S.-EU Trade and Technology Council Secure Supply Chains Working Group," 87 FR 19854, Federal Register, April 6, 2022, <<https://www.federalregister.gov/documents/2022/04/06/2022-07211/request-for-public-comments-on-supply-chain-issues-to-support-the-us-eu-trade-and-technology-council>>.

83 "U.S.-E.U. Trade and Technology Council (TTC)," Office of the United States Trade Representative, <<https://ustr.gov/useutt>>.

goal. As a result, beyond the U.S., EU, and like-minded states with strategic concerns regarding the military capabilities of Russia and China, enthusiasm among UN member states for adopting new or implementing existing end-use/r controls may wane. This is because such controls may be seen less as a component of Operative Paragraph 3(d) of nonproliferation-focused UNSCR 1540 and more a feature of great power competition. Indications of increased ambivalence toward such controls may already be visible in other multilateral fora, outside of the UN.

For instance, at the Plenary meeting of the Wassenaar Arrangement (WA) in 2003, some member states expressed that they would not implement military end-use controls targeting China.⁸⁴ Moreover, according to one of the authors' discussions with an anonymous diplomat at a strategic trade control capacity-building event in 2022, it would be difficult for her/his country to implement STCs that incorporate military end-user controls or human rights elements since the country prefers to address those issues at more inclusive and multilateral venues, such as the UN.⁸⁵

As discussed in the introduction, controversy surrounding UNSCR 1540 in its early years, such as the method of its introduction and the potential costs of its obligations portended for UN member states, left the resolution's future status uncertain – at least until the introduction of UNSCR 1977, which extended the mandate of the 1540 Committee by ten years. If end-use/r controls, as a key component of the resolution's Operative Paragraph 3(d), become associated with other less universal but strategic goals of particular states, broad international support for strategic trade controls overall or even UNSCR 1540 itself could weaken over time. This in turn raises questions on how best to promote catch-all and end-use/r controls in a UNSCR 1540 context and the broader aim of WMD nonproliferation – particularly when the leading providers of international STC capacity-building assistance, the U.S. and the EU, are also at the forefront of this trend of applying such controls to other, more national-level foreign policy goals.

The expanded use of catch-all and end-use/r controls to support other national-level foreign policy objectives suggests a need for new considerations with respect to UNSCR 1540-related implementation of these mechanisms of nonproliferation STCs. With policymakers and practitioners tasked with advancing the implementation of UNSCR 1540 in mind, a set of possible considerations are highlighted below – all informed by the implications of this trend, as discussed above:

1. A thorough assessment of the impact and effectiveness of new end-use/r controls, driven by foreign policy goals other than nonproliferation, would have value for nonproliferation policy as well. Such an assessment would aim to identify possible innovations that could be beneficial if adapted for use by nonproliferation-specific catch-all and end-use/r control mechanisms.
2. When promoting STC best practices, particularly the U.S. and EU as state providers of capacity-building assistance, should consider distinguishing those catch-all and end-use/r controls with: a) a military end-use/r or human rights policy focus, vs. b) those

84 “Revisions and Clarification of Export and Reexport Controls for the People’s Republic of China (PRC); New Authorization Validated End-User; Revision of Import Certificate and PRC End-User Statement Requirements,” 72 FR 33646, Federal Register, June 19, 2007, <<https://www.federalregister.gov/documents/2007/06/19/E7-11588/revisions-and-clarification-of-export-and-reexport-controls-for-the-peoples-republic-of-china-prc>>.

85 The author’s interview with a diplomat who prefers to remain anonymous was conducted in June 2022.

with a nonproliferation focus, specific to the context of UNSCR1540. Separate capacity-building programming for each focus area might be needed to ensure that UNSCR1540-driven programming features b) rather than a) above and is not seen as promoting unrelated, national-level strategic interests.

3. In support of 2) above, states actively adopting end-use/r controls with foreign policy drivers other than nonproliferation may need to consider making the specific control mechanisms – particularly use of restricted party lists – more distinguishable in their national system. As a good practice, since the early 2010s, the U.S. government has maintained a Consolidated Screening List (CSL) tool for use by exporters and other businesses that combines multiple restricted entity lists, inclusive of those operated by distinct agencies (e.g., – Department of Commerce, Department of Treasury, etc.). When an entity listed on the Entity List is searched for and found on the CSL, the tool will produce a profile of the entity that includes a reference to the specific end-use/r control provision of the Export Administration Regulations that guided the entity's listing. With an understanding of which end-use/r control provisions are associated with WMD nonproliferation goals specifically, a practitioner using the CSL can confirm whether the listing of the entity on the Entity List was for nonproliferation reasons or due to other U.S. national security or foreign policy concerns. The CSL tool is widely used beyond the U.S. and introduced as a reference tool for export risk assessment material in many STC outreach training programs. The provision of specific contexts for additions within this single list could help the international STC and nonproliferation community more accurately identify WMD proliferation-specific risks in transactions in question, as opposed to risks strictly related to the U.S.' own national security and foreign policy objectives. With improvements to available search options, a nonproliferation-specific list could potentially be generated by the CSL tool, without a need for regulatory changes – and therefore referenced more readily as a national-level best practices example in an UNSCR1540 capacity-building context. This would also increase visibility of WMD nonproliferation, as a prioritized objective, among exporters.

