

# An Additional Tool for Economic Integration? How Coordination on Strategic Trade Controls Can Promote Regional Cooperation within ASEAN

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## Abstract

*The Association of Southeast Asian Nations (ASEAN) has made the next step toward regional integration with the ASEAN Economic Community. With increased trade in the region, the risk of proliferation of dual-use items rises. Such items could be used for the development of weapons of mass destruction, and might fall into the wrong hands due to the lack of comprehensive strategic trade controls in several of ASEAN's Member States. Given the proximity to North Korea and the influx of the Islamic State in the region, this could evolve into a significant security threat. The need to establish a more effective strategic trade control regime throughout ASEAN should however be viewed as more than just an unavoidable necessity; it can serve as a tool for enhancing regional integration. The example of the European Union's strategic trade control regime presents multiple policies that can be pursued and adapted to the regional context of Southeast Asia, to both foster cooperation and prevent the spread of sensitive dual-use items. It also offers an insight into the numerous implementation challenges that exist even within the deeply integrated European Union. Suggestions as to how successful cooperation on export controls might be achieved include: the establishment of national strategic trade control frameworks, the coordination on export control lists, assessing the potential use of the ASEAN Single Window as well as the establishment of a regional export control network for cooperation with experienced outside actors such as the European Union. By promoting effective strategic trade control programs and adapting uniform control lists, the region can reduce risks and become more attractive to investors.*

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## Keywords

Association of Southeast Asian Nations (ASEAN), European Union (EU), export controls, regional cooperation, strategic trade controls, Southeast Asia, Weapons of Mass Destruction (WMD), Islamic State

## Introduction

In early September, North Korea announced its fifth and according to seismic data most powerful nuclear test, this time of a nuclear warhead.<sup>2</sup> Such an event serves as a reminder of the dangers presented by the fallibility of the export control regimes currently in place within the region, as the nation successfully circumvented sanctions and controls to reach its goal of becoming a nuclear state. In the past, the A.Q. Khan network already made use of Southeast Asian firms and lax export controls regimes in Malaysia to provide parts to Libya's nuclear weapons program.<sup>3</sup> Especially in light of the increasing foothold of terrorist groups such as the Islamic State in Southeast Asia,<sup>4</sup> preventing nuclear proliferation is essential for both national as well as regional security. Consequently, the question of how to counter the spread of weapons of mass destruction (WMD) through effective strategic trade controls (STC) is more than an intellectual exercise but a necessity in the increasingly economically integrated Association of Southeast Asian Nations (ASEAN). Another region that went through the process of deepening economic cooperation while also facing the challenging task of establishing effective export control mechanisms is the European Union (EU). Hence, the study of the EU STC regime and its development offers the opportunity to assess how a STC system could be successfully established within ASEAN.

The ten ASEAN Member States are at a crossroads in several ways. Struggling to find a unified response to issues such as the policy towards China and the disputes in the South China Sea, the establishment of the ASEAN Economic Community (AEC) in 2015 was a major milestone.<sup>5,6</sup> ASEAN does however continue to struggle with regional cooperation because of concerns about

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- 2 Victor Cha, "Snapshot of North Korea's Five Nuclear Tests," *Beyond Parallel*, September 9, 2016, <<http://beyondparallel.csis.org/fifth-nuclear-test-snapshot/>>; Katie Hunt, K.J. Kwon, and Jason Hanna, "North Korea Claims Successful Test of Nuclear Warhead," *CNN*, September 10, 2016, <<http://edition.cnn.com/2016/09/08/asia/north-korea-seismic-activity/>>.
  - 3 David Albright, Paul Brannan, and Andrea Scheel Stricker, "Detecting and Disrupting Illicit Nuclear Trade after A.Q. Khan," *The Washington Quarterly* 33 (2010), pp. 89, 98; Stephanie Lieggi, "Dual-Use Technologies in Southeast Asia: Nonproliferation Challenge for the Next Decade," *Strategic Trade Review* 2 (Autumn 2015), p. 74.
  - 4 Phuong Nguyen and Conor Cronin, "Recalibrating the Islamic State Threat in Southeast Asia," *Southeast Asia from Scott Circle* VII (2016): 4; Joseph Chinyong Liow, "ISIS in the Pacific: Assessing Terrorism in Southeast Asia and the Threat to the Homeland," *Testimony before the House Subcommittee on Counterterrorism and Intelligence*, April 27, 2016, <<https://www.brookings.edu/testimonies/isis-in-the-pacific-assessing-terrorism-in-southeast-asia-and-the-threat-to-the-homeland/>>.
  - 5 "ASEAN Economic Community," ASEAN, <<http://asean.org/asean-economic-community/>>.
  - 6 "ASEAN: A Blueprint for Growth, ASEAN Economic Community 2015: Progress and Achievements," (Jakarta, Indonesia, 2015), <<http://www.asean.org/storage/images/2015/November/aec-page/AEC-2015-Progress-and-Key-Achievements.pdf>>.

national sovereignty and largely differing views concerning fundamental political, security, and economic issues.<sup>7</sup> Thus, the AEC offers a distinct model for cooperation when compared to other regional economic integrative efforts such as the EU. While the goal of the AEC is to create an integrated regional economy, enhance sectoral cooperation and simultaneously deepen the integration of ASEAN into the global economy, these Southeast Asian nations are by no means pursuing the level of regional integration and cooperation practiced in the EU.<sup>8</sup> Newly initiated cooperation through the AEC is nevertheless an important step for the world's fourth largest exporting region and offers new opportunities for intra-regional trade of technology, further boosting its attractiveness as an investment destination and manufacturing hub.<sup>9,10</sup> However, the uneven application of STC in the region creates risks concerning the growing prevalence of intra-regional trade as well as the export of dual-use goods.

Sectors that are of particular concern regarding dual-use items include oil & gas, chemical, aerospace, nuclear energy, electronics, and automobile manufacturing.<sup>11</sup> Even though increased investments in these sectors within ASEAN would be beneficial for both regional economic integration as well as the development of ASEAN and the AEC, the lack of effective export controls in some Member States leads to the risk of the proliferation of dual-use items. National trade authorities being limited by available resources and competing economic interests further complicates the implementation of such controls.

Addressing this common security challenge requires regional cooperation because in an increasingly integrated regional economy, trade in dual-use items cannot be regulated sufficiently by one nation alone. Working toward a comprehensive STC regime can be more than an unavoidable necessity. Instead, it offers opportunities for increased regional cooperation, just as envisioned in the AEC Blueprint 2025. There is no expectation that the AEC will mirror the level of economic integration of the EU. Consequently, this article will not address how an EU STC regime could be implemented within the AEC for three primary reasons: First, the level of economic integration between the Member States of ASEAN and of the EU is not comparable. Second, willingness differs among ASEAN Member States to subject themselves to formalized instruments that might erode national sovereignty. Finally, STC regimes in many ASEAN Member States are nascent and can therefore not be directly compared to EU efforts in the area of export control.<sup>12</sup> Instead, this article will highlight the lessons that can be learned from the EU to identify benefits that can derive from cooperation on a regional STC regime.

7 Shaun Narine, *Explaining ASEAN: Regionalism in Southeast Asia* (Boulder: Lynne Rienner Publishers, 2002), p. 206.

8 "ASEAN Economic Community," ASEAN, <<http://asean.org/asean-economic-community/>>.

9 Stephanie Lieggi, "Dual-Use Technologies in Southeast Asia: Nonproliferation Challenge for the Next Decade," *Strategic Trade Review 2* (Autumn 2015), p. 76.

10 ASEAN, *ASEAN Economic Blueprint 2025* (Jakarta, Indonesia, 2015), <[http://www.asean.org/storage/2016/03/AECBP\\_2025r\\_FINAL.pdf](http://www.asean.org/storage/2016/03/AECBP_2025r_FINAL.pdf)>.

11 Stephanie Lieggi, "Dual-Use Technologies in Southeast Asia: Nonproliferation Challenge for the Next Decade," *Strategic Trade Review 2* (Autumn 2015), p. 75.

12 David Albright, Paul Brannan, and Andrea Stricker, "Detecting and Disrupting Illicit Nuclear Trade after A.Q. Khan," *The Washington Quarterly* 33:2 (April 2010), p. 91. More on the current state of national STC legislation in Southeast Asia: Carl Baker, David Santoro, and John K. Warden, "Implementing Strategic Trade Controls in Continental Southeast Asia," *Issues & Insights* 15 (2015), pp. 1-10.

First, this article briefly outlines what STC regimes encompass. It then considers the EU STC regime with its core elements and finally it offers policy recommendations that can be drawn from EU cooperation on STC and adapted to increasing regional cooperation among ASEAN Member States.

### Strategic Items and Strategic Trade Controls

An STC system encompasses strategic export controls as well as border, transit, and transshipment controls.<sup>13</sup> There are several multilateral export control arrangements (MECAs) in place, such as the Australia Group (AG), the Missile Technology Control Regime (MTCR), the Nuclear Suppliers Group (NSG), the Wassenaar Arrangement (WA) and the Zangger Committee. These MECAs offer countries the opportunity to coordinate national export policies and seek to prevent the spread of dual-use goods, chemical and biological weapons, nuclear weapons as well as WMD and their delivery systems.<sup>14</sup> They are however closed-membership organizations and thus have limited normative impact on non-Member States.<sup>15</sup> While EU Member States are members of most MECAs, this is not the case with the ASEAN Member States and in some cases reflects a broader skepticism of those instruments.<sup>16</sup>

On an international level, United Nations Security Council Resolution (UNSCR) 1540 calls for countries to establish effective export control systems.<sup>17</sup> Adopted under Chapter VII of the UN Charter, UNSCR 1540 is legally binding for all UN Member States. The goal of the resolution is to deny non-state actors access to WMD and the means needed to develop them. According to UNSCR 1540, control lists are among the cornerstones of national STC systems. If items are on the control lists, their transfer requires government authorization, thus limiting the potential for WMD proliferation.

Examples for existing control lists include the lists provided by the various MECAs. The WA has both a military as well as a dual-use list and thus covers some of the content of the other control lists.<sup>18</sup> The common control lists of the AG include chemical weapons precursors, dual-use chemical manufacturing facilities and equipment, related technology and software, dual-use biological equipment, related technology and software, human and animal pathogens, and toxins as well as plant pathogens.<sup>19</sup> It thus includes many of the elements of the WA but goes beyond it

13 Catherine B. Dill and Ian J. Stewart, "Defining Effective Strategic Trade Controls at the National Level," *Strategic Trade Review* 1 (Autumn 2015), p. 5.

14 Ibid, 7.

15 Matthew Fuhrmann, "Making 1540 Work: Achieving Universal Compliance with Nonproliferation Export Control Standards," *World Affairs* 169 (2007), p. 143.

16 Some countries such as Indonesia are critical to multilateral efforts as they believe that they limit cooperation. More on this: Andy Rachmianto, "Indonesia's Approach to Strategic Trade Controls: The Perspective of a Developing and Archipelagic Country," *Strategic Trade Review* 2 (Spring 2016), pp. 131-133.

17 United Nations Security Council Resolution 1540, S/RES/1540, New York, April 2004.

18 D. J. van Beek, "A Practical Way to Implement Export Control Lists in Developing Countries," *1540 Compass* 7 (Fall 2014), pp. 24-25.

19 "Australia Group Common Control Lists," Australia Group, <<http://www.australiagroup.net/en/control-lists.html>>.

in its specificity with regards to chemical and biological weapons. The NSG sets out guidelines for nuclear transfers as well as the transfer of nuclear-related dual-use equipment, materials, software, and related technology.<sup>20</sup> Finally, the MTCR integral common list of controlled items covers those related to unmanned delivery systems capable of delivering WMD.<sup>21</sup>

On a national level, many countries chose to adopt a military list as well as a dual-use list. Military goods, meaning items specifically intended for military use, such as weapons, small arms, armed vehicles, and protective equipment are on the military list. This article will not include items on the military list, but rather focuses on dual-use lists, given their multifaceted implications for large manufacturers as well as regional economic integration within ASEAN. Items that have both civilian as well as potential military applications such as sensors, lasers, and high-end electronics, belong on the dual-use list.<sup>22</sup> To keep up with technological advancements and guarantee comprehensive control of dual-use items, the list needs to be updated on a regular basis.<sup>23</sup>

At first sight, establishing an STC system poses constraints on businesses seeking to export their products and trading globally. But given the essential importance of STC in preventing the proliferation of WMD, it is indispensable that nations realize the need to establish effective export control systems, often times necessitating cooperative efforts. Further countering initial concerns that these control regimes are a burden to economic development, a study has suggested that export controls do not have a negative impact on trade.<sup>24</sup> Moreover, STC have shown to be a positive factor in the process of regional economic integration. A look at EU cooperation on STC regimes demonstrates how coordinated regional efforts to counter the trade in dual-use items can be beneficial for individual Member States. Aside from the obvious advantage of countering the spread of dual-use items, other benefits include strengthened regional cooperation as well as reduced compliance costs and greater legal clarity for companies operating in the region.

## The European Union Path to Cooperation on Strategic Trade Controls

The EU STC regime is enabled by inter-agency cooperation and a network between different regional as well as national authorities. This process of cooperating on STC dates back to the 1990s, when economic cooperation within the EU, then called the European Community, was less established. A predominant challenge to establishing an effective export control regime within the EU was to find the right balance between security and trade. This combined with differing

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20 “Guidelines,” Nuclear Suppliers Group, <<http://www.nuclearsuppliersgroup.org/en/guidelines>>.

21 “MTCR Guidelines and the Equipment, Software and Technology Annex,” Missile Technology Control Regime, <<http://www.mtcr.info/english/guidelines.html>>.

22 “Common Dual-Use and Military Control Lists of the EU,” United States Department of State, <<http://www.state.gov/strategictrade/resources/controllist/>>.

23 Commission Delegated Regulation (EU) No. 1382/2014 of 22 October 2014 Amending Council Regulation (EC) No. 428/2009 Setting up a Community Regime for the Control of Exports, Transfer, Brokering and Transit of Dual-use Items, Official Journal of the European Union (L 371/1), December 30, 2014.

24 Scott Jones and Johannes Karreth, *Assessing the Economic Impact of Adopting Strategic Trade Controls* (Washington D.C.: U.S. Department of State, 2010), pp. 31-32.

national as well as regional preferences complicated export control efforts. Understanding the difficulty in finding this balance and ways to manage expectations realistically is of critical importance when assessing the potential for cooperation on STC within ASEAN. Beyond takeaways for the AEC from the current EU STC regime, analyzing the way in which the regional system on export controls developed in the EU and the impact it had on regional cooperation and economic integration proves even more useful.

In the past, some ASEAN Member States have voiced criticism that Western security agendas are imposed on developing nations without taking their particular security needs and national priorities into consideration.<sup>25</sup> As questions about export control regimes involve debates about national security, many countries prefer to make those decisions on a national level. This was initially also the case for the European Union, where Member States long preferred to retain sovereignty over arms transfer policies.<sup>26</sup> But while sovereignty concerns are an argument for regulation of exports on a national level, differing regulatory schemes can create larger security risks. Additionally, disparities in national regulation can become problematic for regions looking to further economic cooperation, as companies might engage in license shopping and thus favor less regulated countries, creating economic imbalances and setting wrong incentives. Moreover, some companies might be reluctant to locate manufacturing hubs or invest in countries that do not have strong STC regimes. Not only might companies shy away from such places because of the reputational risk associated with any potential contribution to proliferation, the lack of legal clarity and predictability also increases compliance costs and thus negatively impacts their profit margin.<sup>27</sup> By having uniform or at least coordinated regulation in place, it is easier to create an integrated economy in which all actors stand to gain from economic cooperation.

Under the provisions of Regulation 3381/94 of 1994, which preceded the current EU STC regime, an export authorization was deemed valid throughout the European Community, creating a mutual recognition system.<sup>28</sup> While there was still significant leverage for national authorities in adopting additional control measures, it acknowledged the equality of export authorizations issued by one national authority throughout the entire Community and therefore set a precedent for community-wide acceptance of national decisions, even if made by another country's authorities. This fostered cooperation among national authorities as well as trust in

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25 Tanya Ogilvie-White, "Non-proliferation and Counter-terrorism Cooperation in Southeast Asia: Meeting Global Obligations through Regional Security Architectures," *Contemporary Southeast Asia* 28 (2006), p. 6.

26 Yann Aubin, Arnaud Idiart, Aude de Clercq, and Laurent Papiernik, "The European Union," in: Yann Aubin and Arnaud Idiart (eds.), *Export Control Law and Regulations Handbook: A Practical Guide to Military and Dual-Use Goods Trade Restrictions and Compliance*, 2<sup>nd</sup> ed. (Alphen aan den Rijn: Kluwer Law International, 2011), p. 107; More on the debate about sovereignty versus comprehensive export regulation in the EU: Panos Koutrakos, "The Reform of Common Rules on Export of Dual-Use Goods under the Law of the European Union," *European Journal of Law Reform* 2 (2000), pp. 167-189.

27 "EU Export Control Policy Review: Online Public Consultation Report," DG Trade, European Commission, p. 7, <[http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_154003.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_154003.pdf)>.

28 Anna Giulia Micara, "Current Features of the European Union Regime for Export Control of Dual-Use Goods," *Journal of Common Market Studies* 50 (2012), p. 582; Panos Koutrakos, *EU International Relations Law*, 2<sup>nd</sup> ed. (Oxford: Hart Publishing Ltd, 2015), p. 489.

the decision-making process of another country.<sup>29</sup> This mutual recognition principle is still in place and enables the free trade of dual-use items within the European Union up until today, with certain exceptions.

However, even among EU Member States, emphasizing national sovereignty when denying export authorizations and the particular means of implementing EU regulations continue to interfere with the overall export control system. Therefore, while the approach of mutual recognition is useful in the process of regional integration, it is likely too early for ASEAN as it requires greater transparency and a significant level of trust in other national authorities' decision-making processes.

### The Current European Union Strategic Trade Control System

The EU's export control regime is based on Regulation (EC) No 428/2009 (hereafter: the Regulation). The Regulation addresses dual-use items and also covers technology transfers.<sup>30</sup> According to the Regulation, export authorization is required for items that are on the EU Control List, listed in the Regulation's Annex I. Those items derive from the various MECAs and thus include items related to WMD development, as addressed in the MTCR, the NSG and the AG but also span the items listed in the Chemical Weapons Convention (CWC).

Additionally, items not listed can be controlled under a catch-all clause if they might be used in violation of an arms embargo or in connection with a biological, chemical, nuclear weapons or delivery system program.<sup>31</sup> The catch-all clause will be discussed later on in more depth.

For exceptional cases and if public security or human rights are under scrutiny, EU Member States can even impose controls for other non-listed items.<sup>32</sup> Because of the common control system, dual-use items can be traded freely within the EU Single Market. Exceptions are highlighted in the Regulation, particularly in Annex IV.<sup>33</sup>

### Consolidated Dual-Use List

The EU's consolidated dual-use list (Annex I to the EU Dual-Use Regulation) is based on the WA, the MTCR, the NSG, the CWC, and the AG's export control regime control lists.<sup>34</sup>

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29 Panos Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law: The Legal Regulation of sanctions, exports of dual-use goods and armaments* (Oxford and Portland: Hart Publishing, 2001), p. 97.

30 European Commission Delegated Regulation No. 2420/2015 amending Council Regulation (EC) No. 428/2009 Setting up a Community Regime for the Control of Exports, Transfer, Brokering and Transit of Dual-use Items, Official Journal of the European Union, 12 October, 2015, Art. II.

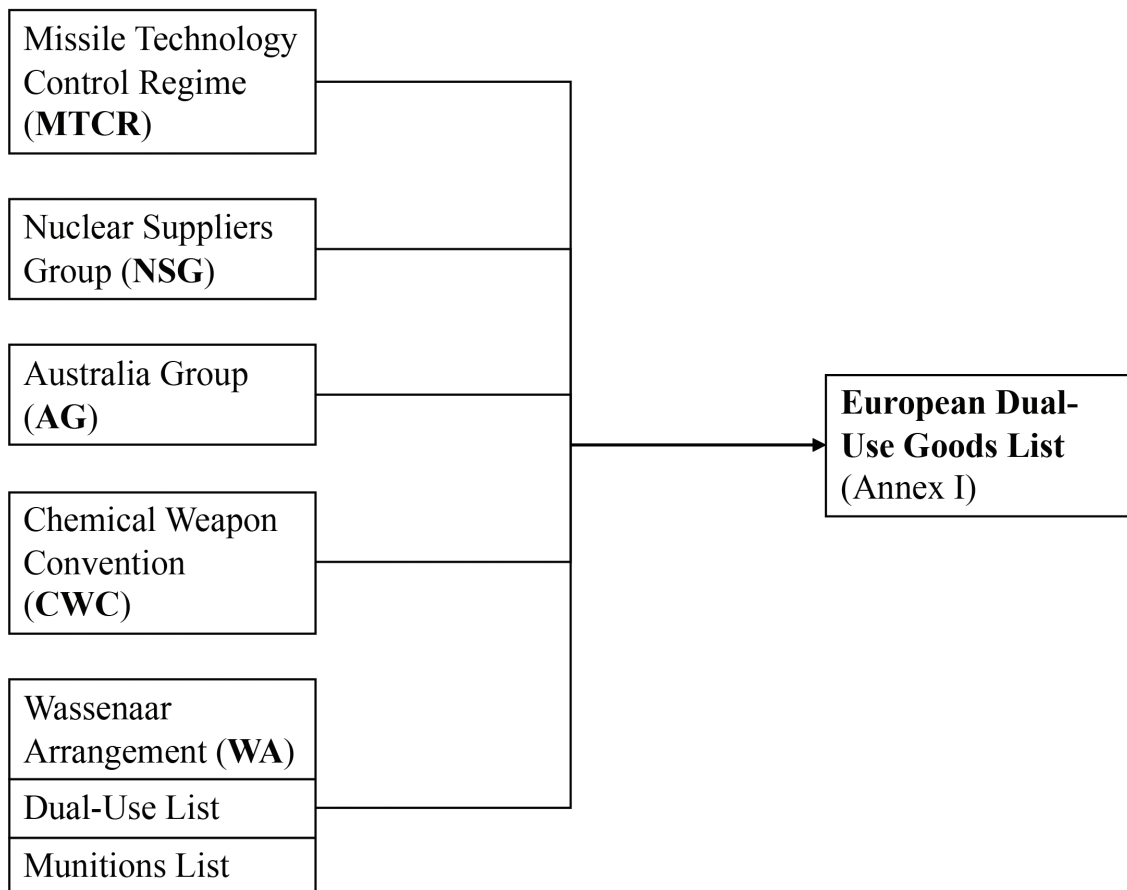
31 "The EU Dual Use Export Control Regime," DG Trade, European Commission, 2014, <[http://trade.ec.europa.eu/doclib/docs/2014/february/tradoc\\_152181.pdf](http://trade.ec.europa.eu/doclib/docs/2014/february/tradoc_152181.pdf)>.

32 Ibid.

33 Ibid, 2.

34 European Commission Delegated Regulation No. 2420/2015 amending Council Regulation (EC) No. 428/2009 Setting up a Community Regime for the Control of Exports, Transfer, Brokering and Transit of Dual-use Items, Official Journal of the European Union, 12 October, 2015, Annex I, List of Dual-Use Items and Technology.

The EU list is updated on a regular basis and the last update was undertaken in December 2015, taking into account technical, industrial, scientific as well as commercial developments and thus protecting EU competitiveness and reflecting changes in the MECAs.<sup>35</sup> To allow for swifter integration of changes to the control list, EU institutions have approved a fast track mechanism.<sup>36</sup>



*Figure 1: European Dual-Use Goods List<sup>37</sup>*

The EU has opted for a consolidated dual-use goods list over parallel lists of the individual Member States. While such a consolidated list is more complicated to draft and update than parallel lists from each Member State, it minimizes double coverage and allows for a more

35 For an overview on the methodology used for the 2015 update of the Dual-Use List: “Comprehensive Note Change Summary For the Council Regulation 428/2009,” DG Trade, European Commission, October 2015, <[http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc\\_153893.pdf](http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153893.pdf)>.

36 SIPRI and Ecorys, *Final Report: Data and Information Collection for EU Dual-Use Export Control Policy Review* (Stockholm and Rotterdam, 2015), p. 97.

37 This graph is based on: Joachim Wahren, “The Export Control Lists of the European Union,” presentation at Pacific Forum CSIS/Institute of International Relations of the National Chengchi University Workshop on Strategic Trade Controls, Taipei, Taiwan, September 2, 2014.



comprehensive regulation.<sup>38</sup> Ultimately this contributes to regional economic integration by helping to overcome conflicting regulations and promoting clarity for the risk assessment processes of governments and exporters. It does however, require the existence of a significant level of regional cooperation, a commitment to establish common legal and institutional frameworks as well as a willingness for national authorities to cede powers to supranational ones. Adopting this approach in ASEAN, where Member States are uncomfortable with ceding competences to supranational organizations, is infinitely more complicated. Even in the EU system with the consolidated list, the need to implement the regulation domestically, resulting in twenty-eight potentially differing interpretations, mitigates the benefits that result from such cooperative efforts.

### Licensing Procedures

Export of dual-use items to non-EU Member States requires an authorization, which can be obtained through a license for dual-use exports. In the EU, there are four different types of export licenses that can be obtained:

- 1) EU General Export Authorizations (GEA), whereby one of the six currently existing EU GEAs has been given to seven countries, namely Australia, Canada, Japan, New Zealand, Norway, Switzerland (including Liechtenstein), and the United States (EU001), while the others cover exports of certain dual-use items to certain destinations (EU002), exports after repair/replacement (EU003), temporary export for exhibition or fair (EU004), telecommunications (EU005), and chemicals (EU006);<sup>39</sup>
- 2) An individual export license covering one transaction with one particular end-user (for example, for very sensitive items) whereby national practices can differ from state to state;
- 3) General export licenses offering simplified procedures for export of controlled goods to certain destinations; and
- 4) A global export license, which can be granted to a specific company that needs to export certain goods to specified destinations over a predefined period of time.<sup>40</sup>

EU Member States retain the right to deny export licenses for public policy or public security reasons whereby the Regulation provides criteria to be assessed in this process.<sup>41</sup> When denying an export license however, they need to subsequently inform their counterparts in the other EU Member States about their decision so that they are aware of the proliferation risk.<sup>42</sup>

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38 Ibid, 5.

39 “Fact Sheet on New EU General Export Authorisations,” DG Trade, European Commission, Doc. No. CG/2011/Nov/02 rev. 1, <[http://trade.ec.europa.eu/doclib/docs/2011/december/tradoc\\_148466.pdf](http://trade.ec.europa.eu/doclib/docs/2011/december/tradoc_148466.pdf)>.

40 Yann Aubin, Arnaud Idiart, Aude de Clercq, and Laurent Papiernik, “The European Union,” in: Yann Aubin and Arnaud Idiart (eds.), *Export Control Law and Regulations Handbook: A Practical Guide to Military and Dual-Use Goods Trade Restrictions and Compliance*, 2<sup>nd</sup> ed. (Alphen aan den Rijn: Kluwer Law International, 2011), pp. 117-118.

41 Ibid, 118.

42 Ibid, 120.

This guarantees that national concerns and sovereignty considerations are respected as well as regional consistency. Aside from the benefit of having largely uniform standards for exports to non-EU Member States, this approach also facilitates intra-regional trade of dual-use items.

### **Additional Provisions and Their Impact**

Two additional provisions regulate dual-use trade with vastly differing effects for regional cooperation: the no undercut principle and the catch-all clause. Understanding these provisions, their challenges, and their implications for regional coordination of export control efforts is important for ASEAN regional coordination considerations.

The no undercut principle prevents a company from attempting to acquire an authorization by one Member State, if the authorization was previously denied by another Member State. This prevents license shopping by companies. In the case of disagreement between Member States about whether an authorization should be granted, they have to consult with one another and inform the European Commission.<sup>43</sup> This principle is supposed to help streamline regional export control efforts and is thus beneficial to regional cooperation. It prevents companies from benefiting from disagreements among the EU Member States while preventing the creation of regulatory loopholes that could potentially enable proliferation of dual-use goods.

The catch-all clause of Art. IV of the Regulation presents a very different example. It is aimed at controlling the export of goods that are not listed in Annex I but might be used for military purposes by a country under an arms embargo or if the development of WMD might be the end-use of the goods. In such cases, Member States can deny the export and subsequently must inform other national authorities of their decision.<sup>44</sup> This level of national discretion opens the door for inconsistent licensing procedures and discrimination of enterprises because of differing national legislation, especially as there is no requirement to implement the same level of controls throughout the region upon notification.<sup>45</sup> The 2015 Export Control Forum addressed this fundamental challenge with regards to catch-all clauses. While comprehensive export controls were recognized as an important tool, the uneven implementation and resulting lack of legal clarity was highlighted as the weak link in the chain of controls. The goal, as stated in the Communication by the EU Commission, a policy document with no mandatory authority, was to establish an EU catch-all database and to harmonize catch-all controls.<sup>46</sup> This would certainly be another step toward deepened regional cooperation and would ultimately make the STC regime more effective.

In order to discuss how the current export control regime should evolve, the European Commission holds talks with major stakeholders from industry associations, academia and civil society to identify existing problems and avoid that reform efforts negatively affect key actors. The impact assessments by the European Commission are then used to prepare proposals

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43 Ibid.

44 Ibid, 121.

45 Anna Giulia Micara, "Current Features of the European Union Regime for Export Control of Dual-Use Goods," *Journal of Common Market Studies* 50 (2012), p. 586.

46 "The Export Control Policy Review: State of Play and Prospects," DG Trade, European Commission, 2015, <[http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc\\_154041.pdf](http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc_154041.pdf)>.

for amendments to the Regulation as part of the review process, which will be elaborated on later in this paper<sup>47</sup> In the last EU Export Control Policy Review, the necessity to improve the existing regime of catch-all controls was also highlighted, arguing that greater legal clarity and predictability through converged catch-all controls would reduce compliance costs and enhance competitiveness. Of those stakeholders questioned, eighty-six percent were in favor of harmonization of the definition and scope of catch-all controls.<sup>48</sup> The broad support from industry and other major stakeholders showed that, for extending cooperation, only the willingness of national authorities is missing to further harmonize STC and ensure comprehensive controls.

### Expert Networks and Information Sharing

As set forth in Art. XXIII of the Regulation, the Dual-Use Coordination Group (DUCG) examines issues concerning the export control regime and brings together experts from Member States as well as the EU Commission.<sup>49</sup> The DUCG discusses best practices and is seen as the basis of the EU Export Control Network, which the Commission wants to develop in order to strengthen information exchange among export control authorities and outreach and capacity-building activities.<sup>50</sup> To support the practical implementation of the measures provided for under the Regulation, the DUCG has developed the “EU Guidelines on Dual-Use Export Controls.”<sup>51</sup> Establishing a similar network among experts within ASEAN would create the potential to share information on challenges the individual Member States are experiencing and would create capacity-building potential. A practical challenge with regards to information sharing among authorities, even within the EU, is however the existing concern over secrecy, the protection of industry, and the economic interests of the Member States. This will likely be an even bigger hurdle within ASEAN.

Other measures ensuring the implementation of the Regulation include industry outreach activities and dialogue with academia. Additionally, the Commission hosts a Dual-use e-System (DUeS) allowing all Member States to exchange information concerning denials on dual-use items.<sup>52</sup> The DUeS could potentially become the basis of a common IT platform for the EU Export Control Network, enabling structured information sharing, trade control synergies via the IT platform as well as operational cooperation through a pool of experts.<sup>53</sup> For this measure to be implemented within ASEAN, the STC regime would need to be significantly more developed and more importantly, countries would need to be able to sufficiently trust each other to allow for this level of information-sharing.

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47 “Dual-use Export Controls,” DG Trade, European Commission, <<http://ec.europa.eu/trade/import-and-export-rules/export-from-eu/dual-use-controls/>>.

48 Ibid, 7.

49 “Report from the Commission to the Council and the European Parliament on the Implementation of Regulation (EC) No. 428/2009 Setting up a Community Regime for the Control of Exports, Transfer, Brokering and Transit of Dual-use Items,” COM/2013/0710, European Commission, p. 6.

50 “The Export Control Policy Review: State of Play and Prospects,” DG Trade, European Commission, 2015, <[http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc\\_154041.pdf](http://trade.ec.europa.eu/doclib/docs/2015/december/tradoc_154041.pdf)>.

51 Ibid, 6.

52 Ibid, 7.

53 Ibid.

## Review of the Regulation and Identified Challenges

Every three years, a review process of the Regulation is initiated in accordance with Art. XXV, for which the aforementioned meetings with key stakeholders are held. The next proposal for amendments to the Regulation, a result of the review process, is expected this year. The main goal of the review process is to highlight the difficulties existing within the currently existing system. The findings of this review process are thus important for ASEAN as they offer direct insights into what struggles another region, albeit at a very different stage of integration, faces in coordinating their STC efforts.

One key problem within the existing STC regime is differing national implementation, which can mitigate some of the benefits of uniform regional policies and undermine the basic idea of creating a level playing field.<sup>54</sup> Given that this is already a challenge within the highly integrated EU, it will be even more difficult to achieve for ASEAN Member States, which worry more about losing their competitive advantage over neighboring states. A key focus highlighted in the review process is thus also the establishment of a “risk-based approach” when considering licensing decisions so that license applications are assessed in a more uniform way. This would create a level playing field within the EU, in that companies have to expect similar waiting times and costs for the application of export licenses.<sup>55</sup> Within ASEAN, the lack of uniform licensing standards and mechanisms highlights the same problem, in that countries can make use of the licensing process to achieve a competitive advantage instead of working towards the creation of a level playing field. In the EU context, the harmonization of catch-all controls continues to be on top of the European Commission’s agenda, yet as it is even unlikely to be achieved within the EU, pursuing this within ASEAN would be overly optimistic.<sup>56</sup>

Beyond various specific implementation hurdles within the EU, a general challenge is how to deal with the increasing skepticism regarding regional integration and economic cooperation. As these sentiments are also preeminent within ASEAN, it will be interesting to monitor how the EU is dealing with this new trend. Looking, in particular, at the looming Brexit, it is unclear how far the United Kingdom will continue to implement the standards set by the EU in the area of export controls and whether companies might face stricter regulation when exporting to the UK if it leaves the Single Market.<sup>57</sup> Understanding the economic consequences of such a scenario and finding domestic solutions for questions related to STC serves as an interesting lesson for ASEAN when determining the merit of cooperation on STC over individual, domestic solutions.

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54 Highlighting this as a problem for the EU: SIPRI and Ecorys, *Final Report: Data and Information Collection for EU Dual-Use Export Control Policy Review* (Stockholm and Rotterdam, 2015), p. 17.

55 Sybille Bauer and Mark Bromley, “The Dual-Use Export Control Policy Review: Balancing Security, Trade and Academic Freedom in a Changing World,” *EU Non-Proliferation Consortium Non-Proliferation Papers* 48 (March 2016), p. 5.

56 Ibid, 5.

57 Mark Bromley, “Brexit and Export Controls: Entering Uncharted Waters,” *SIPRI Commentary*, July 1, 2016, <<https://www.sipri.org/commentary/topical-backgrounder/2016/brexit-and-export-controls-entering-uncharted-waters>>.

### Options for Increased Cooperation on Strategic Trade Controls within ASEAN

As previously highlighted, license shopping and regulatory loopholes as well as uncertainty can prove problematic not only for the country's export control initiatives, but also for efforts to intensify regional economic integration. Furthermore, international companies might be reluctant to locate their manufacturing hubs in countries lacking strong trade control systems because of the associated risks as well as heightened compliance costs. Therefore, regional cooperation on STC might enable the AEC to create a level playing field for exporters within the region while also opening up opportunities for strengthened economic cooperation.<sup>58</sup> It also provides investors with the aforementioned greater clarity about the existing regulatory environment and could even serve to strengthen the attractiveness of the AEC as a market and in particular a site for manufacturing facilities.

After a differentiated analysis of the potential takeaways from the EU example, five main areas can be identified for increased coordination on STC to improve regional cooperation:

- 1) Assisting countries in establishing national STC frameworks which can later be integrated into regional initiatives;
- 2) Coordinating export control lists;
- 3) Assessing the potential use of the ASEAN Single Window for STC purposes;
- 4) Establishing a regional export control network;
- 5) Cooperating with outside actors such as the EU on capacity building.

While there are many more areas in which deepened regional cooperation is possible, those five areas seem to offer most potential to promote a distinct kind of cooperation that is realistic for ASEAN.

### Establishing National Strategic Trade Control Frameworks

As has been previously noted, there is a wide variance among ASEAN states when it comes to implementation of STCs. There are some without an STC system, some with a nascent system, and some with a fully developed system. For those without a system, the initial step is to establish legal frameworks, licensing as well as enforcement authorities.<sup>59</sup> This should be part of a regional capacity-building effort and not a stand-alone task those states need to fulfill. This capacity-building effort can serve to increase regional cooperation as it establishes the trust and culture of information sharing, which is indispensable for a strengthened regional STC regime.

Practical challenges with regards to information sharing among authorities are however existing concerns over secrecy, the protection of industry as well as economic interests of the Member States. A first nascent initiative highlighting the potential to coordinate among regional

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58 This argument for the need to establish a level playing field was made concerning EU export control by: Anna Giulia Micara, "Current Features of the European Union Regime for Export Control of Dual-Use Goods," *Journal of Common Market Studies* 50 (2012), p. 579.

59 Stephanie Lieggi, "Dual-Use Technologies in Southeast Asia: Nonproliferation Challenge for the Next Decade," *Strategic Trade Review* 2 (Autumn 2015), p. 88.

authorities is the ASEAN Network of Regulatory Bodies on Atomic Energy (ASEANTOM), which provides opportunities for cooperation with clear national security benefits.<sup>60</sup> Should the Member States make positive experience with this initiative, their willingness to submit to further cooperation might increase.

As was already highlighted in the Council for Security Cooperation in the Asia Pacific (CSCAP) Memorandum on “Guidelines for Managing Trade of Strategic Goods,” it is essential that national legislation includes catch-all provisions and that region-wide common licensing standards are established. This will help make the process of acquiring licenses more cost and time efficient throughout ASEAN and help fill loopholes.<sup>61</sup>

Potentially, countries with advanced STC regimes such as Singapore could take on a mentorship role in establishing STC systems throughout ASEAN.<sup>62</sup> There are however significant caveats regarding this mentorship potential. Even though Singapore has welcomed any ASEAN Member State to share experiences on implementing a Strategic Trade Management system, so far only Malaysia, Thailand, and the Philippines have visited Singapore. While there is significant potential for Singapore to play a greater role in mentoring, some experts question the likelihood of this given ASEAN’s political history.<sup>63</sup> Other reasons why Singapore in particular might not be thoroughly welcomed as a mentor are seen in its role as a small, advanced economy and city state whose legitimacy as a country is questioned by some of its neighbors and finally the overarching skepticism of regional cooperation.<sup>64</sup> While other countries such as Malaysia might be more accepted as mentors, their export control systems are nascent as well and this mentorship approach might thus offer limited merit. Generally, the potential for mentorship within ASEAN in light of the particular political and historical realities is a topic that warrants further study, both regarding possible approaches as well as their implementation.

### Coordination of Export Control Lists

Second, looking beyond necessary initiatives on a national level, a starting point for cooperation on STC within ASEAN could be regional coordination of control lists, bearing in mind differing national capabilities and preferences. In order to save resources, drawing on the model of the EU lists as a baseline might prove valuable, as the list would only need to be adapted according to ASEAN needs.<sup>65</sup> The ASEAN Member States could either jointly decide to use the EU Control Lists as the basis for their national control lists or decide to make adjustments on a regional level to tailor them to needs of ASEAN. Already the national control lists of Thailand, Malaysia, and Singapore are based on the EU Control Lists, and others are expected to follow,

60 “Background Information,” ASEANTOM, <<http://www.aseantom.net>>.

61 CSCAP, *Guidelines for Managing Trade of Strategic Goods*, Memorandum No. 14 (Kuala Lumpur, Malaysia, 2009), <<http://www.cscap.org/uploads/docs/Memorandums/CSCAP%20Memorandum%20No%2014%20--%20Guidelines%20for%20Managing%20Trade%20of%20Strategic%20Goods.pdf>>.

62 “Initial Visit in Singapore,” News, EU P2P Export Control Programme, <<https://export-control.jrc.ec.europa.eu/News/ArtMID/481/ArticleID/3273/Initial-Visit-in-Singapore>>.

63 Interview with George Tan, Principal, Global Trade Security Consulting Pte Ltd, September 10, 2016.

64 Interview with Carl Baker, Director of Programs, Pacific Forum CSIS, September 10, 2016.

65 Baker, Santoro and Warden, “Implementing Strategic Trade Controls in Continental Southeast Asia,” p. 6.

such as the Philippines.<sup>66,67,68,69</sup> While ASEAN is not yet at a stage where a consolidated control list seems like a feasible option, coordination on national control lists or first attempts to establish parallel lists could greatly improve the regulatory environment in the AEC.

An argument against such cooperation on control lists could be seen in the very different development status of several ASEAN Member States, such as Cambodia and Laos. As nations with limited export volumes, a greater focus on trans-shipment and transit might seem more feasible than having comprehensive control lists. It might thus also be an option for those countries to adopt limited control lists, adapted to their specific needs and capabilities and to expand those in the future. However, despite those varying needs within the region, cooperation on control lists, at least among the more export-oriented ASEAN Member States offers many opportunities both for regional cooperation and for enhanced export controls.

The EU control lists are updated in accordance with the updates of relevant export control regimes, yet several ASEAN countries are not parties to those MECAs. The ASEAN Member States might therefore not want to adopt all changes suggested in those MECAs as they are sometimes skeptical with regards to the role of those agreements.<sup>70</sup> But the EU Control Lists nevertheless serve as a useful foundation for future regional efforts toward establishing their own control lists. Updates to the EU control lists could be adapted based on ASEAN needs through consensus or at least taken as an indicator for the need to study the relevance of newly added items for trade within the region.

It is highly unlikely that ASEAN will work towards consolidated ASEAN control lists in the near future and is not feasible given the current state of regional economic integration as well as the different state of export control regimes in place. For now, having national control lists, which allow for countries to retain a level of sovereignty over export controls while coordinating on the baselines of those lists seems like the more feasible option. A good practice to follow in this context is to base control lists on regulations and not laws, as this allows for easier updates and thus also coordination within the region.<sup>71</sup> Should ASEAN countries decide to base their national control lists on the model lists of the EU, this would certainly enhance its effort to become increasingly integrated into the global economy as companies will find it easier to deal with a system they are already familiar with. Companies venturing into Southeast Asia in search of more competitive marketplaces might therefore perceive this as an additional benefit.

66 According to: European Parliament Policy Department, Directorate-General for External Policies, *Workshop: Dual Use Export Controls* (Brussels, Belgium, 2015), p. 14, <[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/535000/EXPO\\_STU\(2015\)535000\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/535000/EXPO_STU(2015)535000_EN.pdf)>.

67 Mohamed Shahabar Abdul Kareem, "Implementation and Enforcement of Strategic Trade Controls in Malaysia," *Strategic Trade Review 2* (Spring 2016), p. 110.

68 Ibid.

69 The expectation is that the National Strategic Goods List of the Philippines, as provided for in the Strategic Trade Management Act, will consist of the EU Control Lists alongside additional nationally controlled goods: Proceedings of the Asia Pacific Trade & Commerce Client Conference, Baker & McKenzie, May 25, 2016, Tokyo, Japan.

70 Rachmianto, "Indonesia's Approach to Strategic Trade Controls: The Perspective of a Developing and Archipelagic Country," *Strategic Trade Review 2* (Spring 2016), pp. 131-133.

71 Carl Baker, David Santoro, and John K. Warden, "Implementing Strategic Trade Controls in Continental Southeast Asia," *Issues & Insights 15* (2015), p. 5.

## Assessing the Potential of the ASEAN Single Window

Third, the AEC will have to evaluate what existing or planned mechanisms it wants to make use of to strengthen regional cooperation on STC. One option to further cooperation on STC within an existing framework is if the ASEAN Member States were to rely on the ASEAN Single Window (ASW). The ASW connects and integrates National Single Windows in an effort to expedite cargo clearance throughout ASEAN's Member States and could thereby prove helpful for export control purposes.<sup>72</sup> There is however no consensus yet among ASEAN countries in how far STC should be part of ASW. While some argue that it would be overly complicated to extend the scope of the ASW to also include STC, others see great potential in the ASW. It is thus still uncertain how STC cooperation, in the context of the ASW or as a distinct concept, should be integrated into AEC.<sup>73</sup> Thinking about a way in which the ASW can be used to coordinate on STC will be important as trade facilitation endeavors such as ASW otherwise create the risk of increased trade of dual-use items without being accompanied by the necessary stricter controls to avoid the proliferation of WMD. In the EU context, dual-use export control has been under the exclusive competence of the EU since 1995.<sup>74</sup> It was recognized as an essential component to a coordinated trade policy in the process of increasing regional economic integration. While the ASEAN Member States are not reflecting this level of commitment to regional integration, they need to find a way to balance regional economic integration with the growing risk of proliferation.

## Establishing an Export Control Network

Regardless of how AEC Member States decide to coordinate their STC systems, they could cooperate on establishing an export control network, potentially even with the long-term goal of having a common IT infrastructure to enable information sharing, a catch-all database and operational cooperation. This network would enable the countries to share information and advice on best practices. The level of information sharing would depend on the level of STC coordination that is envisaged by the AEC and could gradually evolve in the process of strengthened regional economic integration.

When looking at the lessons learned from EU cooperation, the examples of the no-undercut principle as well as the catch-all clause have highlighted that it is important to streamline regional coordination on STC. While national sovereignty remains important and has to be factored into decisions regarding what is regulated on a regional level as opposed to nationally, whenever national regulation is favored over regional coordination, the risk of companies either trying to undercut this regulation or countries facing problems with their economic restrictiveness

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72 "What is the ASEAN Single Window?," ASEAN, last updated April 26, 2013, <<http://asw.asean.org/archives/agreements/item/protocol-to-establish-and-implement-asean-single-window>>.

73 Carl Baker, David Santoro and Federica Dall'Arche, "Dialogue on Nonproliferation and Nuclear Security Cooperation in Southeast Asia: A Conference Report," *Issues & Insights* 16 (2016), pp. 7-8; Carl Baker, David Santoro, and John K. Warden, "Implementing Strategic Trade Controls in Continental Southeast Asia," *Issues & Insights* 15 (2015), p. 9.

74 "Green Paper: The Dual-use Export Control System of the European Union: Ensuring Security and Competitiveness in a Changing World," DG Trade, European Commission, 2011, <[http://trade.ec.europa.eu/doclib/docs/2011/june/tradoc\\_148020.pdf](http://trade.ec.europa.eu/doclib/docs/2011/june/tradoc_148020.pdf): 2>.



compared to their neighboring countries will persist. On the other hand, information sharing on catch-all provisions would be useful to ensure that all national authorities have the same information and can ensure that WMD proliferation efforts are not successful.

### Cooperation with Outside Actors

Finally, cooperation with outside actors provides the opportunity to learn from best practices and to get the necessary assistance in capacity building. As the EU has found a way to strengthen regional coordination on STC in a phase of increasing economic cooperation while balancing national security and sovereignty concerns, it could assist in the process of establishing a stronger STC regime in the AEC. While cooperation between the EU and Southeast Asian countries has been ongoing for several years, only the last iteration of the program has focused on all ASEAN countries. Through the EU Partner-to-Partner (EU P2P) Export Control Program, the EU now offers technical support to ASEAN countries. In early 2016, the EU P2P Program conducted first visits to most ASEAN Member States to discuss ways in which consistent STC regimes can be established. During those visits, opportunities for cooperation were seen in the field of legal and technical assistance, which would enable ASEAN Member States to draw from the expertise of the EU in implementing comprehensive STC while bearing in mind the implications for regional cooperation.<sup>75</sup> It will be important to remember that the overall goal is not to simply apply the model used in the EU to ASEAN but to adapt it to regional needs and capacities. The potential for cooperation with outside actors also expands beyond the EU. Others active in this area include the United States through the Export Control and Related Border Security (EXBS) Program, which also cooperates with ASEAN.<sup>76</sup>

### Conclusion

There is no expectation that the AEC will establish an STC regime that is based on a common regulation and a transfer of competency to the AEC. The model of economic cooperation in ASEAN differs vastly from that of the EU and therefore does not allow this conclusion. Instead, it will be important for the AEC Member States to find ways to coordinate their national STC regimes so that they can avoid legal loopholes that would both enable the proliferation of dual-use items as well as hamper regional economic cooperation. At the same time, ASEAN Member States have shown a preference for quiet consultation and an informal political culture as the basis of their cooperation.<sup>77</sup>

75 As an example for these EU visits to ASEAN Member States: “Dual-Use: Initial Visit to Vietnam,” News, EU P2P Export Control Programme, <<https://export-control.jrc.ec.europa.eu/News/ArtMID/481/ArticleID/2664/Dual-Use-Initial-Visit-to-Vietnam>>.

76 Jabin Vahora, “The Export Control and Related Border Security (EXBS) Program in ASEAN and ASEAN Single Window (ASW) Initiative,” *ASEAN Regional Forum*, March 2012, <<http://aseanregionalforum.asean.org/files/Archive/19th/4th%20ARF%20ISM%20on%20NPD,%20Sydney,%208-9March2012/Presentation%20-%20EXBS%20Program%20in%20ASEAN%20and%20ASEAN%20--Single%20Window%20Initiative.pdf>>.

77 Tanya Ogilvie-White, “UN Security Council Resolution 1540: Origins, Status, and Future Prospects,” in Jeffrey W. Knopf (ed.), *International Cooperation on WMD Nonproliferation* (Athens, Georgia: University of Georgia Press, 2016), pp. 153-154.

As a first step toward establishing a comprehensive export control regime in Southeast Asia, countries will need to establish their own STC systems and will require assistance in the process. Instead of waiting for each country to establish a different system, the nascent state of STC systems in several AEC Member States can be used as an opportunity for coordination. Parallel or possibly coordinated lists instead of consolidated control lists do not offer the same level of clarity. However, if they are based on the same model, such as the EU control lists, it will be easier to coordinate the updating procedure until AEC Member States decide that they are open for more integration and opt for a distinct, consolidated AEC regional control list. This way global concerns about WMD proliferation can be alleviated and countries can cooperate in an area that contributes to each one's national security.

So long as there is no regional consensus on export controls, license shopping will enable companies to opt for the market that allows them most leverage in exporting their products. However, given the overarching need to reduce proliferation risks, this cannot be in the interest of the AEC and could even be counterproductive in light of efforts to strengthen regional economic integration. With the region attempting to attract investments in the high-tech sector, ensuring companies that they will face minimized reputational risks as well as reducing their compliance efforts will be a further benefit.

As laid out, cooperation on STC within the AEC is unavoidable. But it can prove to be more than just another part of the lengthy process ahead for the AEC towards regional economic integration. Instead, it comes with many benefits for the community. Having an area for cooperation in which all Member States have shared interests and similar objectives can serve to establish channels for future cooperation. Furthermore, building comprehensive STC regimes, especially in dynamic regions that aspire to attract more trade, is in the interest of the global community. Therefore, any initiatives by the AEC should be supported by capacity building efforts from countries with advanced STC systems as well as extra-regional players such as the EU. After all, the model of the EU offers many examples of how a region-wide STC regime improved through the process of regional economic integration.