Spanish Law 53/2007 on Control of External Trade in Defence and Dual-Use Material

Carlos Espaliú Berdud[1]
Doctor in Public International Law
Ramón y Cajal Public International Law Assistant
University of Córdoba

> "I raised my head just a bit, and at once the machine gunners went into action. Not even a mouse could get through alive"! Again I raised my Red Cross flag over my head so that only my arm and the flag could be seen. I used my left hand so that if a bullet should find a target, I would be spared my right hand. But not a shot was fired. All was quiet, and I heard someone call out, "Cease fire! Red Cross" I stood up and, constantly waving the flag, crossed the bridge."[2]
>
> To the Red Cross, for their labours in furthering humanitarian international law.

---

[1] This study was undertaken as part of the Ramón y Cajal contract signed with the Ministry of Education and Science under its 2007 call for proposals.

[2] Goldmann, G.K., *The Shadow of His Wings*, Ignatius Press, San Francisco, 2000, p. 101.

Spanish Yearbook of International Law, Volume XIII, 2009

I. INTRODUCTION

Ever since industrial manufacturing began, the proliferation and uncontrolled trade in weapons has been at the root of some of the major security-related problems affecting and causing concern to the international community given their direct relationship with the number of armed conflicts and their influence on the underdevelopment of nations.[3] Nonetheless, this concern has not ceased to grow in recent years for a number of reasons, among them the invention of weapons of mass destruction; the globalisation of the economy, which has produced new weapons-exporting countries and brought simultaneous manufacturing and assembly of weapons at distant points on the globe; or the threat posed by the fact that now not only States but other non-State actors are in a position to endanger international peace and security or engage in terrorist activities, as we have found to our regret in the wake of the major attacks that have taken place about the world since 11 September 2001, including those perpetrated in our own country on 11 March 2004.

In the last few decades, in order to try to improve the situation States have adopted a considerable range of treaties prohibiting or restricting trade in chemical, biological and nuclear weapons, but little attention has been paid at a world level to the trade in conventional weapons. The consequences of this are disastrous, for as the International Committee of the Red Cross (ICRC) has pointed out, "it is conventional weapons – assault rifles, grenades, mines, bombs, rockets and missiles – that are causing most of the death and injury in today's conflicts".[4] Indeed, according to the ICRC "the unregulated availability and widespread misuse of weapons has facilitated violations of international humanitarian law and led to a deterioration in the situation of civilians during armed conflicts and in other situations of violence".[5]

In view of this, a broad-based body of opinion has been growing up – a movement led by prominent actors of civil society, and in particular the ICRC and certain non-governmental organisations – in favour of control by international organisations and States of the sale of defence and dual-use materials, with more emphasis on conventional weapons, which had received little attention hitherto. In this respect numerous regional instruments have been drawn up which include a list of criteria to be taken into consideration before authorising certain weapons transfers, in particular small arms and light weapons. However, treaties on the subject have not been adopted in all parts of the world, and furthermore the criteria included in those regional treaties vary from one to another. The situation is even worse within States, for as the ICRC warns, "[a]t the national level, criteria

---

[3] For example, one Vatican-based organisation does not hesitate to describe the international arms trade as "one of mankind's most grievous sores" (See the document: Pontifical Council for Justice and Peace, "The international Arms Trade. An ethical reflection").

[4] The International Committee of the Red Cross, "The development of an international arms trade treaty". Official Statement, 18–03–2008.

[5] Ibid.

for arms transfer decisions are even more disparate, and only rarely do they fully reflect all of States' obligations under international law".[6]

This panorama highlights the need to establish common world-wide rules in this sphere, based on the responsibility of States under international law in general and international humanitarian law in particular, to make States adopt consistent approaches when it comes to decisions concerning arms transfers. The United Nations Organisation (UN) appears to have been moving in this direction for some years now, and an International Treaty on Arms Trading is on the horizon. In the meantime, the UN Conference on the Illicit Trade in Small Arms and Light Weapons in July 2001 approved a Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects. This is not a legally binding agreement, but it does encourage Governments to take a variety of steps to exercise more control over small arms and light weapons, chiefly at a national level. Such steps include stricter controls on the production and transfer of arms, effective management and security of arms stocks, implementation of disarmament, demobilisation and reintegration programmes in post-conflict situations, measures to combat violations of UN arms embargos, and the development of laws to regulate brokering activities in arms trafficking. Since 2003 there have been meetings to examine implementation of the UN Programme of Action.[7]

It is in this context that we should view Spanish Law 53/2007 of 28 December on control of external trade in defence and dual-use material (BOE no 312, 29 December 2007), a law culminating a long internal process in which an effort has been made to establish progressive controls and achieve greater transparency in the matter. The first legislative steps came with Organic Law 3/1992 of 30 April, which for the first time put administrative offences and infringements in connection with smuggling defence and dual-use material on to the statute book, classifying the offence of smuggling in the same terms as in the Anti-Smuggling Act, Organic Law 12/1995 of 12 December – i.e. defining as such the unauthorised exportation or fraudulent acquisition of defence or dual-use material. Organic Law 3/1992 of 30 April was implemented by Royal Decree 824/1993 of 28 May approving the Regulation on external trade in defence and dual-use material. With this regulation, which unified the hitherto dispersed rules on the matter, the foundations were laid for a system of administrative control for material of this kind, based on the introduction of a register of exporters, the imposition of an obligation to obtain licences for the importation or exportation of defence and dual-use material – itemised in lists which are periodically updated in accordance with international parameters – and the creation of a controlling organ, an Inter-Ministerial Board, which issued licences. This Royal Decree was later replaced, first by Royal Decree 491/1998 of 27 March and then by Royal Decree 1782/2004 of 30 July. Coming into force on 1 October 2004 after several years of operation of the control system, it sought

---

[6] Ibid.

[7] On this point see Kytömäki, E., *Five years of implementing the United Nations Programme of Action on Small Arms and Light Weapons: Regional Analysis of National Reports,* UNIDIR, United Nations Institute for Disarmament Research, 2006.

to remedy the latter's shortcomings, namely to reinforce the controls on exports and flexibilise transactions entered into under international defence cooperation programmes, in which Spain was increasingly beginning to take part. However, to ensure that controls were conducted more effectively, it was felt that the Spanish legislation in these matters needed to be enshrined in a statute with the rank of law, and therefore Parliament debated the possibility of drafting a specific Act which would take into account the international obligations that Spain had been acquiring,[8] in particular Council Regulation (EC) no 1334/2000 of 22 June 2000 setting up a Community regime for the control of exports of dual-use items and technology, which like any other Regulation was fully binding on and directly applicable to each Member State. Thus, the roots of Law 53/2007 lie in a Green Paper drafted by the Defence Committee of the Congress of Deputies, which required the Government to present a Bill on the Arms Trade within twelve months as of 13 December 2005. In 2006 a preliminary draft was submitted to the ministers concerned for reports and to the Council of State of Spain for examination. It was approved by the Government on 29 December 2006 and sent to Parliament for debate in January 2007. On 9 January 2007 the Chamber of Congress Bureau returned it to the Defence Committee for approval with full legislative competence as provided in article 148 of the Regulation.[9] The latter handed down its opinion on the Bill in November 2007 and submitted it to the Full Session of Congress[10] which on 22 November 2007 passed the Bill with no amendments to the text as approved by the Defence Committee.[11] Following its passage through the Congress, the Senate in Full Session passed the Bill on control of external trade in defence and dual-use material on 19 December 2007 without introducing any changes in the text as remitted by the Congress of Deputies.[12] No amendment having been made by the Senate to the text remitted by the Chamber of Congress, the legislative process ended there. It was one of the last acts to be passed by the Seventh Legislature of the Spanish Parliament prior to its dissolution. At the same time it is worth noting the strong consensus that the Bill elicited among the political groups throughout its passage through Parliament.

As regards the distribution of legislative competences between the State and the Autonomous Communities as provided in the Spanish Constitution of 1978, note that, as the text of the Law 53/2007 itself states, this national Law was promulgated thanks to the exclusive competence of the State in matters of foreign trade and defence recognised in article 149.1.4 and 149.1.10 of the Spanish Constitution.

---

[8] Obligations acquired by Spain under the treaties and instruments cited in the preamble to Law 53/2007.

[9] See BOCG. Congreso de los Diputados, series A, no 121–1 of 15/01/2007.

[10] See BOCG. Congreso de los Diputados, series A, no 121–19 of 19/11/2007.

[11] See BOCG. Congreso de los Diputados No A–121–20 of 28/11/2007.

[12] See BOCG. Senado No II–139–d of 21/12/2007.

Following the passage of Law 53/2007, which is now in force,[13] we await the promulgation of implementing legislation that the Government must introduce by Royal Decree,[14] and likewise whatever provisions the Ministries of Industry, Tourism and Trade,[15] Foreign Affairs and Cooperation, Defence, Economy and Finance and Interior may make for their implementation within their respective purviews, as provided in the First final provision of the Act. Meanwhile, in accordance with the Sole Transitional Provision of Law 53/2007, the provisions of Royal Decree 1782/2004 of 30 July will remain in force to the extent that they do not conflict with the provisions of this Act.[16]

In this long legislative process within Spain the role of the NGOs Amnesty International, Intermon Oxfam and Greenpeace, who "on numerous occasions

---

[13] In accordance with the Seventh final provision, the Act came into force one month after publication in the Official State Gazette, that is on 29 January 2008.

[14] At all events a first draft of that Royal Decree is now ready. According to the document "Spanish export statistic regarding defence material, other material and dual-use items and technologies, 2006" from the Secretariat-General for External Trade, Ministry of Industry, Tourism and Trade "The principal changes envisaged in the said draft may be summarised as follows:

- Introduction of control over the import of certain biological items pursuant to the Biological Weapons Convention and conventions on Firearms in general (providing that muzzle kinetic energy exceeds 24.2 Joules), in keeping with the commitments laid down in the United Nations Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition.
- Update of the makeup of the JIMDDU (Police and Civil Guard Directorates-General).
- Establishment of a series of requirements for inscription, nullification and suspension in the Special Register of External Trade Operations.
- Replacement of the General Authorisation for Defence Material with the General License for Defence Material (arising from the work undertaken on the Letter of Intent for the restructuring and integration of the European defence industry) and with the General Authorisation for firearms (sporting and hunting firearms not formerly subject to control).
- Update of the Annexes of the control lists of items, license forms and control documents in accordance with the changes implemented in the different international regimes. The items subject to control under Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain items which could be used for capital punishment, torture or other cruel, inhumane or degrading treatment or punishment, have been eliminated from the List of Other Material figuring in Annex II."

[15] In this connection we would note that the Act amending the annexes to Royal Decree 1782/2004 of 30 July approving the Regulation on control of external trade in defence and other material and in dual-use products and technologies has now been implemented through Order ITC/822/2008 of 19 February (BOE no 76 of 28 March 2008).

[16] As well as that, the entry into force of this Act entails the repeal of all prior regulations that conflict with it, as provided in the Sole repeal provision, which states "All regulations of equal or inferior rank which conflict with the terms of this Law, specifically Law 3/1992 defining cases of smuggling in connection with the export of defence and dual-use material, are hereby repealed". At the same time, the Second final provision of Law 53/2007 ordains that the Government must submit the latest version of the Anti-Smuggling Act, Organic Law 12/1995 of 12 December, to Parliament in accordance with the international undertakings cited in the preamble to the Act.

have called for a Spanish law on arms trading, for which they have the support of hundreds of thousands of citizens", has been decisive.[17]

Law 53/2007 comprises seventeen articles arranged in three chapters. Chapter I contains three articles of general provisions; Chapter II is divided into three sections and contains eleven articles setting forth the regime of authorisations; and lastly Chapter III contains three articles setting out measures of control and transparency.

In the following chapters we shall be analysing the salient features of Law 53/2007, focusing on its scope, both *ratione materiae* and *ratione personae*, control mechanisms and the means of enforcing them, and the assurance of transparency in these control mechanisms. But first we shall take a brief look at some historical data on the arms sector in Spain, followed by a description of the present situation.

II. THE ARMS SECTOR IN SPAIN

Until the 18th century the manufacture of weapons in Spain, which were essentially intended to meet the needs of the Spanish Army and Navy, was largely in private hands. But in the course of that century the situation changed with the ascent to the throne of the enlightened Bourbon monarchs, who pursued a centralising policy and introduced strategic changes which meant increased State control of military industry. As Prieto Viñuela notes, the 18th century saw the development of the complex of public military enterprises, naval dockyards and arms factories which has been in operation largely unchanged up to the present day.[18] The scenario described above persisted until the end of the 19th century, when the poor overall situation of the country and in particular that of the State's naval dockyards, forced a policy of cooperation between the State and the privately-owned steel industry to assure the production of armaments. In addition, in the sphere of military theory the First World War demonstrated the need for coordination of civil and military industries to be able to effectively deal with a possible warlike crisis in a short time. For all these reasons, from the beginning of the 20th century on, the collaboration of civil industry in the manufacture of war materials was considered essential in Spain, to the extent that in 1916 a Civil Industries Department was created in the military administration in order to be able to coordinate arms production and harness civil industry in the event of war.[19] During the Second Republic, an Act of 6 February 1932 created the Consortium of Military Industries, whereby military industry came under the control of whatever government was in power. This situation did not last long; in 1935 it was decided to create a Directorate General of Military Industries in the War Ministry to control public and private manufacture of

---

[17] See the document: Amnistía Internacional, Intermón Oxfam y Greenpeace, *Comercio de armas en España: Una ley con agujeros. Recomendaciones al proyecto de ley sobre el comercio exterior de material de defensa y doble uso*, p. 29.

[18] Prieto Viñuela, J.J., *La industria de defensa en España*, Fundación para el análisis y los estudios sociales, Papeles de la Fundación nº 22, Madrid, pp. 10–11.

[19] Ibid., p. 18.

defence materials, a structure that was revived in the closing decades of the Franco regime.[20] The National Institute of Industry, created in 1941, was entrusted with the task of promoting and financing the creation and transformation of industries of all kinds, but most particularly those related to the national defence.[21] Under the impetus of this body, public arms enterprises began to emerge, such as Empresa Nacional Santa Bárbara (weapons manufacture), Empresa Nacional Bazán (naval shipbuilding), Construcciones Aeronáuticas (CASA) and CETME (research and development), some of which are still in existence today in more or less altered form. Paralleling this, in the mid-nineteen-sixties the private arms sector began a major resurgence,[22] to the extent that the combined strength of the two sectors gradually turned Spain into a medium player in the defence material manufacturing sector. In the last few decades Spanish exports have generally fluctuated significantly from year to year,[23] although in the last few years foreign trade has stabilised and actually grown, above all as a consequence of participation by Spanish industry in multinational – particularly European – defence programmes.[24] For instance, in 2006, the last year for which there are official statistics, defence material exports

---

[20] Ibid., p. 19.

[21] The preamble to the Act of 25 September 1941 states: "Furthermore, the needs of national defence require the creation of new industries and the multiplication of existing ones, (…). Moreover, organizations suitable for the financing of such large industrial programmes are lacking in our Nation. There is therefore a need for a body with sufficient economic capacity and the appropriate legal personality to draw up and implement our Nation's major reindustrialisation programmes, (…). This will enable the State to harvest and channel savings, thus turning them into a living adjunct to the country's economy, in accordance with the principles of the Movement. For instance, article 1 provided: "A National Institute of Industry is hereby created. This is to be a public law entity whose purpose is to promote and finance the creation and revival of our industries in the Nation's service, in particular (…) the defence of the country, or engaging in the development of our economic autarky, thus offering a secure and active means of investment for Spanish savings".

[22] Prieto Viñuela, J.J., La industria de defensa en España,…op. cit., pp. 45–47.

[23] According to the Spanish Ministry of Defence, Spain's defence industry has engaged in industrial restructuring in order to definitively assure its continuity and adapt to the new world situation arising from the perception of terrorism as a global threat. The Ministry seeks to transform the industrial and technological bases of defence by creating favourable conditions for participation in large European consortia which are already in existence or in the process of adaptation and will be capable of competing on equal terms in international markets. Thus, the four basic defence industry sectors – army, navy, aerospace and electronics/IT – have been consolidated by means of different options: integration in a large European group – EADS (European Aeronautic Defence and Space Company) – in the Aerospace sector; concentration of the naval sector in NAVANTIA and through ad hoc or permanent strategic alliances with multinational enterprises in the electronics and army sectors (see document: "Industria española de defensa" by the Directorate-General of Armament and Material, Ministry of Defence).

[24] Chiefly the Eurofighter programmes, the A 400M transport aircraft, the Tiger helicopter, the Leopard tank, Meteor and Iris-T Missiles and the Multifunctional Information Distribution System (MIDS). See the document "Spanish export statistic regarding defence material, other material and dual-use items and technologies, 2006" from the Secretariat-General for External Trade, Ministry of Industry, Tourism and Trade.

were 101.5% up on 2005, continuing an upward trend over the last few years and reaching a total of €845.1 million.[25] As for "Other Material", exports totalled €960,917.[26] Also, we should note that in 1985 the Spanish enterprises in the sector joined together in the Asociación Española de Fabricantes de Armamento y Material de Defensa y Seguridad (AFARMADE) in order to defend and promote their common interests.[27]

This broadly speaking describes the evolution and present situation of the Spanish armaments industry, a sector significantly affected by Law 53/2007, whose substance we shall now discuss.

III. SCOPE OF LAW 53/2007

1. Material Scope of Law 53/2007

Before going on to look at what types of conduct may be considered to fall within the scope of Law 53/2007, we need first to analyse the concepts that bear most closely on the object of the Act, which according to Article 1 is to regulate "the control procedures on the transfer of defence material, other material and dual-use items and technologies, including those conducted in free zones and free warehouses and the link to the Customs warehouse procedure, as well as brokering, licensed production agreements and technical assistance". In particular we should

---

[25] In 2000 defence material exports came to €138.27 million, in 2001 €231.18 million, in 2002 €274.71 million, in 2003 €383.10 million, in 2004 €405.90 million and in 2005 €419.45 million (see Ibid).

[26] See Ibid.

[27] The Afarmade enterprises are grouped in the following subsectors: Arms and Munitions; land platforms; naval platforms; aerospace; electronics, communications, optics and IT; engineering and R&D and security material and specialised equipment. In 2005 the following enterprises were members of Afarmade: Accenture, S.A; Aerlyper, S.A; Amper Programas, S.A; Amper Sistemas, S.A; Aries Ingeniería Y Sistemas, S.A; Avánzit Tecnología, S.L; Cicom Sistemas, S.L; Cimsa Ingeniería De Sistemas, S.A; Consulting Conexión Líder, S.L; Compañía Española De Sistemas Aeronáuticos, S.A; Eads Casa; Eads Telecom España, S.A; Electroop, S.A; Especialidades Eléctricas, S.A; Equipos Móviles De Campaña Arpa, S.A; Europavía España, S.A; Eurocopter España, S.A; Explosivos Alaveses, S.A; General Dynamics Santa Bárbara Sistemas, S.A; G.M.V., S.A; G.T.D. Ingeniería De Sistemas Y Software Industrial, S.A; Gamesa Aeronáutica, S.A; Indite 2000, S.L; Indra Sistemas, S.A; Industria De Turbo Propulsores, S.A; Ingeniería Y Servicios Aeroespaciales, S.A; Instalaza, S.A; Internacional De Composites, S.A; I.T. Deusto; Iveco Pegaso, S.L; Mecánica De Precisión Tejedor, S.A; Nextel Engineering System, S.L; Page Ibérica, S.A; Parafly, S.A; Quality Information Systems, S.A; Rodman Polyships, S.A; Sainsel, Sistemas Navales, S.A; Secuware, S.L; Sener Ingeniería Y Sistemas, S.A; Servicios Y Proyectos Avanzados, S.A; Sidenor Industrial, S.A; Sociedad Anónima De Electrónica Submarina; Sapa Placencia, S.L; Tecnalia Corporacion Tecnológica; Tecnobit, S.L; Telecomunicación, Electrónica Y Conmutación, S.A; and Uro Vehículos Especiales, S.A. See *Memoria de actividades del año 2005* at: http://www.afarmade.org/ccl/ma05.pdf).

look at what is meant by "defence material", "other material" and "dual-use items". According to article 3 paragraph 10, "defence material" means

> weapons and all other products and technologies specifically designed or modified for military use as instruments of force, information or protection in armed conflicts, and likewise those whose purpose is the development, production or use of materials included in the list approved by the Government for regulatory implementation.

As we can see, this is a modern and a very general definition which encompasses not only all kinds of arms as such but also all kinds of technology applied to military uses in a broad sense, including instruments of information. Indeed, the above quotation is vague enough to cover any instrument used for espionage. The breadth and vagueness of the terms used is limited by another condition for any object to be considered defence material, namely that it be included in a list that the Government must compile for the purpose and which will be included in future implementing regulations. Then the third final provision of the Act empowers the Ministry of Industry, Tourism and Trade, subject to a prior report from the Inter-Ministerial Regulatory Board on External Trade in Defence and Dual-use Material (JIMDDU), to update the lists of materials, products and technologies annexed to the Regulation drawn up by the Government in response to developments in the state of affairs.

According to article 3.12 of the Act, "other material" means "Law enforcement and security material not included in the list of defence material, concerning which control of transfer is compulsory by virtue of the international commitments undertaken by Spain or to which the conditions laid down in Article 8 apply". The wording of this provision could be clearer, but it does appear to seek to extend the scope of the regulation not only to instruments necessary for the maintenance of law and order included in the list to be compiled by the Government but also to others the transfer of which must be controlled in obedience to obligations acquired by Spain in the international sphere by virtue of treaties or resolutions of international organisations, especially the United Nations. Among other things, this could mean material included in an embargo imposed by the United Nations Security Council. For its part, the reference to article 8 is not very clear, but it appears to mean – and if it does then it is of particular interest – that the Act also applies to any object or technique used in contravention of the rules prohibiting the use of force in public international law or of Spain's interests in matters of defence and security.

Finally, article 3.13 of the Act offers the following definition of "dual-use items": "items including software and technology which can be used for both civilian and military purposes, and all items which can be used for non-explosive purposes and to aid in the manufacture of nuclear weapons or other explosive nuclear devices". At this point the Act would appear to open a Pandora's box, as the list of objects that could come under this definition is practically limitless. There is a need for greater precision here, particularly given the mention of objects that can be used in the manufacture of something so intrinsically dangerous as nuclear weapons. It

might perhaps have been better to return to the criteria laid down by the International Atomic Energy Agency (IAEA). And there is no remittal here to a possible Government-compiled list, which is dangerous if understandable given that such a list could be interminable.

Having established the basic concepts of the subject, let us now look at the types of conduct that the Act regulates. As we noted when presenting the second paragraph of article 1, the Act lays down a number of procedures for controlling "transfers" of the material defined above. The notion of "transfer" is therefore crucial in order to determine the material scope of the Act. Article 3 paragraph 14 is helpful in stating that the term "Transfer" covers a number of acts such as "export", "dispatch", "import", "introduction" (including arrivals and departures to and from exempt areas), "brokering" and "technical assistance". Transfers also include operations such as donations, concessions and leasing. We can find definitions of these concepts in other paragraphs of this article,[28] but essentially they cover any economic activity relating to defence and dual-use material, whether selling, buying or any other financial transaction, either direct or through intermediaries, using any medium or support, from abroad to Spanish territory or inversely from Spanish territory abroad, or even, in the case of brokerage, between third countries, meaning non-EU States.[29] Similarly, the concept of transfer includes any purely technical activity in connection with the manufacture or maintenance of defence and dual-use material.

---

[28] See paragraph 2 ("Technical assistance": any technical support in connection with repair, development, production, assembly, testing, maintenance or any other technical service; the technical support can take the form of instruction, training, transfer of practical knowledge or abilities, or the form of consultation, including assistance provided orally); paragraph 3 ("Brokering": activities of persons and entities that: a) negotiate or arrange transactions that may involve the transfer of items on the EU Common List of military equipment from a third country to any other third country; or b) buy, sell or arrange the transfer of such items that are in their ownership from a third country to any other third country); paragraph 6 ("Dispatch": the forwarding of goods originating in the European Community to a destination within the European Community or goods which, having originated in a third country, have been released for free circulation in Community territory); paragraph 7 ("Export": (i) an export procedure within Article 161 of the Community Customs Code; (ii) a re-export within Article 182 of that Code, and (iii) transmission of software or technology by electronic media, fax or telephone to a destination outside the Community; this applies to oral transmission of technology by telephone only where the technology is contained in a document the relevant part of which is read out over the telephone, or is described over the telephone in such a way as to achieve substantially the same result); paragraph 8 ("Import": the arrival of non-Community goods to Spanish territory within the confines of the European Union customs area and likewise the arrival of goods, regardless of their country of origin, in Ceuta and Melilla. The arrival of goods from exempt areas are also considered as imports) and paragraph 9 ("Introduction": the arrival of Community goods in the Spanish mainland, the Balearic Islands and the Canary Islands or, if originating in a third country, goods which have previously been released for free circulation within the customs territory of the Community).

[29] This definition of extraterritoriality is to be understood in relation to the terms of article 2 regarding the Subjects bound by it, as we shall see below.

2. Personal scope of Law 53/2007

The personal scope of the Act is defined in article 2, "*Parties subject*". According to this article, "[t]he provisions of this Law apply to any natural or legal person who habitually or occasionally engages in the activities described herein in Spanish territory in connection with the transfer of materials, items or technologies subject to control." We can thus see that the nexus linking such natural or legal persons to the law of Spain is Spanish territory. The desire of the Spanish legislator to control activities of the kind described that are carried on occasionally or sporadically in the national territory is of course justified; however, given the breadth of the range of activities cited and the complexity of electronic transactions, we do not see how, in many cases, certain sporadic transactions carried out by electronic means can well be controlled by the Spanish authorities. Take for example a transaction between third countries involving material covered by the Act and conducted on Spanish territory via electronic mail on a laptop computer.

In this connection we should also note the requirement of registration set out in article 12 for operators intending to carry out a transfer of such material. According to paragraph 1 of this article, "[i]nscription in the Special Register of External Trade Operators in Defence and Dual-use Material is a prerequisite for the issuing of any administrative authorisation for the transfers referred to in Article 4 of this Law". However, the Act contains a qualification to the effect that the obligation to register "is limited to those natural or legal persons who are residents in Spain", thus excluding enterprises and natural persons not resident in this country.[30] Under paragraph 2 of the article, exemption from the obligation to register also extends to "administrative bodies of the Armed Forces, State Police and Security Forces or Autonomous Community or Local Government Police Forces".[31] And finally, according to article 12 paragraph 3, the obligation to register also does not apply to "natural persons when a transfer transaction is undertaken regarding regulated arms not arising from economic or commercial activity".

---

[30] According to the report "Spanish export statistic regarding defence material, other material and dual-use items and technologies, 2006" from the Secretariat-General for External Trade, Ministry of Industry, Tourism and Trade, in 2006, "27 entries were made concerning companies trading in defence and other material. Of these entries, one corresponded to a legal person acting as a broker for both defence and dual-use Material".

[31] It is worth noting the content of article 12 paragraph 2: "However, their operation shall be made subject to the provisions of this Law regarding the authorisation requirement and compulsory report from the Inter-Ministerial Regulatory Board on External Trade in Defence and Dual-use Material referred to in Articles 4 and 14 of this Law". This makes it clear that transfers carried out by the administrative organs of the Spanish Army, while not subject to mandatory registration, do require prior authorisation, a very important issue which had nonetheless been absent hitherto. As we shall see in more detail later on when we look at article 5 as it relates to the need for prior authorisation for certain transfers, that obligation does not apply to transfers carried out within the context of joint military manoeuvres with allies abroad other than definitive assignments or sales of materials used in such manoeuvres.

IV. CONTROL MECHANISMS AND MEANS OF ENFORCEMENT

The mechanisms for control of transfers of defence and dual-use materials hinge on the requirement of prior administrative authorisation, which is regulated in chapter II of Law 53/2007. The Ministry of Industry, Tourism and Trade[32] is responsible for granting or rejecting applications for transfers, but for this purpose it must have a favourable report from an inter-ministerial body, the Inter-Ministerial Regulatory Board on External Trade in Defence and Dual-Use Material (JIMDDU), whose functions are regulated in article 14 of Law 53/2007 and which has already been operating for some years. The Board is responsible, inter alia, for authorising any incident that ought to be recorded in the Special Register of External Trade Operators in Defence and Dual-Use Material, and for issuing a mandatory report on any amendments that need to be made to the regulations governing overseas trading in the material concerned. According to article 14, the JIMDDU "is administratively attached to the Ministry of Industry, Tourism and Trade and shall be composed of representatives at Director-General level or higher from the Ministries of Industry, Tourism and Trade; Foreign Affairs and Cooperation; Defence; Economy and Finance and the Interior".[33] We can see, then, that this body – which is composed of senior political officials from various government ministries – is the cornerstone of the entire system, and the efficacy of the control mechanisms depends on its proper functioning. Clearly the ultimate responsibility falls upon the executive; however, one would have wished to see some parliamentary representation on the Board.

According to article 4 paragraph 2, applications for authorisation must be accompanied by a number of control documents, necessarily including non-re-exportation clauses; these are to be determined in due course by Government regulation in such a way as to provide adequate assurance that the destination and the end use of such materials, products or technologies do not overstep the bounds of the relevant authorisation. According to this article, applications for authorisation must include information on the countries of transit and the means of transport to be used, and in the event that a transfer is brokered, the means of financing must be stated. Article 4 paragraph 3 provides, without further clarification, that "[f]or each authorisation, an assessment must be made of the desirability of setting up mechanisms for verification, follow-up and collaboration between Governments".

Article 5 of the Act lists a number of cases in which official authorisation is not required. These are transfers of defence or dual-use material "which accompany

---

[32] According to the report "Spanish export statistic regarding defence material, other material and dual-use items and technologies, 2006" from the Secretariat-General for External Trade, Ministry of Industry, Tourism and Trade, "The procedure for the issuing of licenses and control documents is carried out by the Deputy Directorate-General of External Trade in Defence and Dual-Use Material, which in turn also serves as the Secretariat of the JIMDDU".

[33] According to the same report "the JIMDDU meets on a monthly basis with the exception of the month of August and has a Working Group responsible for preparing operations and reports".

or are to be used by the Spanish Armed Forces or the State Police and Security Forces on manoeuvres or missions outside Spain for the purpose of humanitarian operations, peace-keeping or other international commitments." This exception, which comes from Royal Decree 1782/2004 of 30 July, is intended to flexibilise the increasingly frequent instances of international defence cooperation, and particularly Spanish participation in United Nations or European Union peacekeeping operations. Similarly, it seeks to flexibilise military manoeuvres of Spain's allies in its territory by also exempting transfers of "material accompanying or to be used by armies of other countries on combined or joint manoeuvres with the Spanish Armed Forces in national territory" included in certain financial transactions. Nonetheless, if in such cases it is decided to sell or donate the material concerned, administrative authorisation will be required under the general rules.

The application for authorisation sets in motion an administrative procedure which is regulated in articles 6, 7, 8 and 9 of Law 53/2007. Among other things, article 8 – probably the most important article in the whole Act – lays down the reasons for which administrative authorisation is to be granted, refused, suspended or revoked.[34] First of all article 8a) requires that the purpose for which the material concerned is to be used be compatible with the essential principles of public international law, that the destination of the material not be a country from which it will be diverted to a third country, and that the transfer not be in violation of international undertakings made by Spain. In addition, the article states that in its task the deciding body may make use of reports on transfers of defence material and the ultimate destination of such transactions issued by international organisations in which Spain is a participant, reports on respect for human rights by international organisations, non-governmental organisations and internationally-respected research centres, and likewise the most up-to-date best practices described in the User's Guide for the European Union Code of Conduct of 8 June 1998 on arms exports. What we have here, then, is a set of legal criteria. Secondly, article 8b) provides that another criterion in deciding whether to grant authorisations will

---

[34] The official statistics for 2006 show that "a total of 812 applications for the export of defence material were processed, breaking down as follows: 627 individual licenses, 9 global licenses (for multiple shipments to different countries and recipients), 6 global project licenses (similar to global licenses but used for cooperation programmes in the defence field) and 170 temporary licenses. In addition to the foregoing, 2 inward processing traffic licenses were processed and rectifications were made to 205 licenses granted previously (rectification refers to an extension of the expiration date or a change in the customs release post). Under the heading "Other Material", 21 individual licenses and 6 rectifications were processed. Of those 21 licenses, 6 were approved, 14 were left pending and 1 expired. All the rectifications were approved. Of the 627 individual licenses, 559 were approved, 3 denied, 6 were abandoned by the exporter, 17 expired due to failure to submit the end-use control document associated with the license by the deadline date, and 42 were left pending for authorisation in 2007. Of the 9 global licenses, 8 were approved and one was left pending. The 6 global project licenses were approved. All the 170 temporary licenses were approved, with the exception of one which expired and another which was abandoned by the exporter. All the license rectifications were approved, with the exception of one which was abandoned by the exporter." See Ibid.

be conflict with the general interests of the State regarding national defence and foreign policy, which is a much more political consideration. Thirdly, article 8c) provides that decisions to grant, suspend or revoke authorisations must be made with due regard for the guidelines agreed on by the European Union, in particular the criteria set out in the Code of Conduct cited above, the criteria adopted by the Organisation for Security and Cooperation in Europe in the document on Small Arms and Light Weapons of 24 November 2000, and other relevant international provisions to which Spain is a signatory. And finally, the article provides that "the limits arising from international law such as, inter alia, the need to respect embargoes ordered by the United Nations and the European Union" must be taken into account.[35] As we can see, these last two groups of criteria again stress the need to observe public international law, and therefore the wording could have been very much simplified. And the wording of the Act in this area is certainly more complicated than article 8 of Royal Decree 1782/2004 of 30 July, which served the same purpose.

As already noted, the Act contemplates the possibility of an authorisation once granted being revoked if it is shown that it has come to conflict with the criteria cited above.[36]

Under article 11 of the Act, the Spanish State also has the power to seize defence or dual-use material "in transit through its territory or sea or air space under Spanish jurisdiction" in the event that such movement conflicts with any of the criteria laid down in article 8. Paragraph 2 further places upon the Ministry

---

[35] These criteria are actually in use at the present time; for instance, according to the official statistics for 2006, 3 applications were refused under the terms of the European Union Code of Conduct regarding arms exports of 8 June 1998, all relating to sporting firearms. The embargo criterion was applied in 2 of the cases and the risk of diversion criterion in the other (see Ibid.). For its part, as stated in the 2006 report containing the official statistics, before reporting on transactions the JIMDDU "conducted a case-by-case analysis of all 2006 transactions, applying the following parameters: a) Full and absolute respect for United Nations, European Union and OSCE embargoes currently in force [...]; b) Observance of undertakings made at international control and non-proliferation forums in which Spain participates; c) Application of the eight criteria of the European Union Code of Conduct on Arms Exports to exports of defence material; d) Adoption of restrictive principles in approving exports to certain countries immersed in domestic or regional situations of conflict, thus preventing the shipment of arms or equipment whose characteristics rendered them susceptible of use to take life or injure or for the purpose of domestic repression or as anti-riot material; e) Regarding transactions involving small arms and light weapons, in 2001 the JIMDDU took the decision to make export authorisation of these arms contingent upon the end recipient/user being a public body (armed forces or law enforcement officials) in the case of particularly sensitive countries or where there is a risk of diversion in terms of the end use made of this material. The requirement of submitting a control document continued throughout 2006, and this point was specified as a prerequisite for license authorisation; f) Export from Spain of certain devices for the restriction of bodily movement such as leg shackles and waist chains has been prohibited since December 2001. This prohibition was incorporated into the Fiscal, Administrative and Social Measures Act, Law 24/2001 of 27 December."

[36] See article 8.2 of the Act.

of Foreign Affairs and Cooperation the obligation to periodically report to the JIMDDU on transits that it has authorised; this suggests that Foreign Affairs is the Ministry competent to deal with these matters, as had already been provided by article 14 paragraph 6 of Royal Decree 1782/2004 of 30 July.[37]

The provisions of this article further serve to clarify the material scope of the Act, in particular the kind of transfers that are subject to the authorisation regime, which would otherwise not be entirely comprehensible. Thus, it seems from article 11 that the transfers for which authorisation under article 4 of the Act is required are those in which the place of destination or of origin is in Spanish territory but not those in which Spanish territory is merely a place of transit for the goods or technologies concerned. At all events the issue of transit here once again illustrates the difficulty of controlling movement of material of this kind, given that if a written authorisation is not required before military goods in transit can enter the country, then it is likely to be extremely hard in practice for the administration to control the entry of such materials in Spanish territory. Moreover, it seems surprising that the procedure for the granting of authorisations for material in transit should be regulated at this point when at no previous point in the Act is there any mention of a requirement of such authorisations for incoming and outgoing material whose place of origin or destination is not Spain.

Another key provision in the framework of Law 53/2007 is in our opinion article 44 paragraph 3. This provides that:

> Those administrative authorisations which do not contravene the precepts determined by regulation laid down in Article 8 of this Law may be exempt from the preliminary report and from the submission of control documents. In any case, these exemptions must not diminish the degree of control exercised over the said authorisations or requirement of the requisite guarantees. The Government shall issue a report, based on the model described in Article 16(1), on the type of operations exempted and the criteria to be applied in this connection.

This provision is one of the weak points in the regulation. From the wording it is not clear whether any exemption there may be will be established by the Government in a general way in the Regulation implementing Law 53/2007 or whether the JIMDDU will be empowered to decide on them case by case, although at first sight it looks as if general categories of exemptions could be ruled out. Whatever the case may be, pending the promised Regulation the Act unarguably affords the executive wide discretion in determining in what cases an operator may be exempted from having to submit control documents and the obligation to issue a prior report may be set aside. In our opinion this loophole could largely undermine the positive measures introduced by the Act and the effort that has been made

---

[37] According to the report "Spanish export statistics regarding defence material, other material and dual-use items and technologies, 2006" from the Secretariat-General for External Trade, Ministry of Industry, Tourism and Trade, "[t]he Spanish Ministry of Foreign Affairs denied approval of 5 transit requests out of a total 213 subject to processing in 2006".

regarding control of overseas trading in defence and dual-use material in Spain in the last few years. We believe that the submission of control documents and the compiling of a prior report by the JIMDDU ought to be mandatory in all cases and there should be no room for exemptions with the implicit risk of arbitrariness that these entail. One fails to see how the Government or the JIMDDU will be able to determine compliance with the criteria of article of Act *a priori* without having the control documents that guarantee the legitimacy of the final destination of defence or dual-use material before the transfer takes place. Determination in these terms will be based on mere appearance or on trust, which may be justified in many cases but is dangerous for all that. In any case those exceptions are unnecessary, for if there is absolute certainty that the material concerned will be put to appropriate use, what need is there to exempt the natural or legal person concerned from submitting the control documents precisely in cases where such submission should be trouble-free?

In any event it must be admitted that the final version of this provision, the result of an amendment introduced in its passage through Parliament, greatly improves the Bill drawn up by the Government. Article 14.3 of the Bill, where the functions of the JIMDDU were listed, proposed that the latter should have the power to "grant exceptions to the requirement of a prior report on operations where the Board itself expressly determines that the country of destination, origin or source, the characteristics and the amount do not contravene article 8[…]". Then the following paragraph proposed that, in cases where the JIMDDU saw fit, the operator could be excused from submitting control documents, or could be required to submit such other documents as the Board considers appropriate, and also the limits set in the various licence applications could be varied according to any circumstances that might arise in connection with a transfer of materials, products or technologies coming within the scope of the Act. As we can see, the Bill proposed discretionary powers for the JIMDDU itself to grant exemptions from the control measures, and that apparently depending on the circumstances of the case rather than on the nature of the transfer.

Alongside the control measures, the Act establishes a penalty regime to assure the implementation and enforceability of the measures provided. Article 10 provides that "[i]nfringements of this Act which constitute a criminal offence, misdemeanour or administrative infraction shall be governed by the provisions of the Criminal Code or by special anti-smuggling legislation as the case may be." We would note in this connection that according to article 2 1 j) of the Repression of Smuggling Act, Organic Law 12/1995 of 12 December (BOE no 297 of 13/12/95), "The export of defence or dual-use material without authorisation or with authorisation obtained by means of a false or incomplete declaration in respect of the nature or final destination of the said material or by any other illicit means" constitutes an offence of smuggling wherever the value of the goods, merchandise, substances or items is 3,000,000 pesetas or more. In addition, article 2.3 of the same Act also classifies as an offence of smuggling any of the actions listed in article 2 section 1 where, inter alia, a)…the goods smuggled are […] arms, explosives or any other goods whose possession constitutes a criminal offence or where the smuggling is

undertaken through an organisation even if the value of the goods, merchandise, substances or items is less than 3,000,000 pesetas".

For these offences article 3.1 of Organic Law 12/1995 of 12 December sets a penalty of six months' to six years' imprisonment and a fine of two to four times the value of the goods, merchandise, substances or items and further ordains that medium or maximum penalties are to be imposed. For sentencing purposes, it is important to note that according to the second paragraph of the same article 3 of Organic Law 12/1995 of 12 December, "Judges or courts shall apply the maximum penalty when the offence is committed by or to the benefit of persons, entities or organisations the nature or activity of which especially facilitate the commission of the said offence." On the other hand, actions listed in article 2 section 1 of the Act constitute mere administrative infractions under article 11 of Organic Law 12/1995 where the value of the goods, merchandise, substances or items concerned is less than 3,000,000 pesetas and the circumstances referred to in section 3 of the same article do not arise. Article 12 penalises administrative infractions with fines of one to three times the value of the goods, merchandise, substances or items.

The Criminal Code Act, Organic Law 10/95 of 23 November 1995 (BOE no 281 of 24/11/95) includes a Chapter V relating to the possession, trafficking and storage of weapons, munitions or explosives and offences of terrorism, the first section of which – possession, trafficking and storage of weapons, munitions or explosives – may be applicable to overseas trading in defence and dual-use material, particularly articles 566 to 570.[38]

---

[38] **Article 566.** Section 1. Anyone manufacturing, commercialising or storing weapons or munitions not authorised by Law or by a competent authority shall suffer the following penalties: 1. In the case of weapons or munitions of war or chemical weapons, the promoters and organisers shall be sentenced to between five and ten years' imprisonment, and their accomplices to between three and five years' imprisonment. 2. In the case of regulated firearms or ammunition for these, the promoters and organisers shall be sentenced to between two and four years' imprisonment, and their accomplices to between six months and two years' imprisonment. 3. The same penalties shall apply respectively to trafficking in weapons or munitions of war or defence, or of chemical weapons. Section 2. Any persons developing or using chemical weapons or initiating military preparations for their use shall be subject to the penalties provided in point 1 of the foregoing section. **Article 567.** 1. Storage of weapons of war means the manufacture, commercialisation or possession of any such weapons regardless of the model or class, including when these are disassembled. Storage of chemical weapons means the manufacture, commercialisation or possession thereof. Storage of weapons in the sense of commercialisation includes both sale and purchase. 2. Weapons of war are weapons so defined in the statutes regulating the National Defence. Chemical weapons are those so defined in the International Treaties or Conventions to which Spain is a signatory. Development of chemical weapons means any activity consisting in scientific or technical research or study for the purpose of creating a new chemical weapon or modifying an existing one. 3. Storage of regulated firearms means the manufacture, commercialisation or assemblage of five or more such weapons, including when they are disassembled. 4. As regards ammunition, the Courts shall decide whether they constitute storage within the meaning of this chapter on the basis of the amount and class thereof. **Article 568.**

Another control measure is enshrined in article 15 of Law 53/2007, according to which persons authorised to carry out transfers of the kind regulated in the Act will be subject to inspection by the services of the Ministry of Industry, Tourism and Trade and the Inland Revenue Agency as determined in the implementing legislation. To that end they must make available to the said services "any documentation relating to the transactions concerned that the General State Administration no longer has on file, and they must remain at the disposal of the said inspection services for a period of four years following the date of expiration of the authorisation". Persons authorised for purposes of dual-use material, on the other hand, will be subject to the control measures "laid down in Chapter VII of Regulation (EC) Nº 1334/2000 of 22 June 2000 setting up a community regime for the control of exports and dual-use items and technology."[39]

Finally, as regards the control measures implemented by Law 53/2007, we need to go back to the mandatory registration provided in article 12 for any operator seeking to carry out a transfer of these kinds of material.[40]

---

cont.

Possession or storage of explosive, inflammable, incendiary or asphyxiating substances or devices, or components thereof, and likewise the manufacture, trafficking or transportation, or supply in any other manner, not authorised by Law or by a competent authority shall bear a penalty of four to eight years' imprisonment in the case of promoters and organisers, and three to five years' imprisonment in the case of their accomplices. **Article 569.** Stores of weapons, munitions or explosives set up in the name or on behalf of a criminal association shall be declared illegal by court order and broken up. **Article 570.** In the cases contemplated in this chapter, if the offender is authorised to manufacture or trade in any of the substances, weapons or munitions mentioned herein, in addition to the penalties as set out, he shall be specifically barred from engaging in his trade or industry for twelve to twenty years.

[39] "Chapter VII. Control measures. Article 16: 1. Exporters shall keep detailed registers or records of their exports, in accordance with the practice in force in the respective Member States. Such registers or records shall include in particular commercial documents such as invoices, manifests and transport and other dispatch documents containing sufficient information to allow the following to be identified: (a) the description of the dual-use items; (b) the quantity of the dual-use items; (c) the name and address of the exporter and of the consignee; (d) where known, the end-use and end-user of the dual-use items. 2. The registers or records and the documents referred to in paragraph 1 shall be kept for at least three years from the end of the calendar year in which the export took place. They shall be produced upon request to the competent authorities of the Member State in which the exporter is established.

Article 17: In order to ensure that this Regulation is properly applied, each Member State shall take whatever measures are needed to permit its competent authorities: (a) to gather information on any order or transaction involving dual-use items; (b) to establish that the export control measures are being properly applied, which may include in particular the power to enter the premises of persons with an interest in an export transaction."

[40] See III.2 above.

V. CONTROL OF TRANSPARENCY

What is new in Law 53/2007 is the introduction of a procedure permitting parliamentary control over actions of the executive relating to overseas trade in defence and dual-use material. This is an *ex post* and not an *ex ante* or simultaneous control, so that, as is clear from the rest of the Act, the actual management of overseas trade remains entirely in the hands of the executive. According to article 16.1, every six months the Government must remit the requisite information to the Congress of Deputies regarding exports of defence and dual-use material that have taken place in the interim, providing a number of details such as "the value of the exports per country of destination, descriptive categories of the items, technical assistance, end-use of the items, whether the end user is a public or private entity, and refusals issued."

As we can see, the Government is only obliged to report on exports, so that there is no parliamentary control over any of the other activities regulated by the Act. We believe that this is a shortcoming and could be improved, although in fact exports are the transactions that raise most concern in connection with overseas trade in defence and dual-use material as addressed by the Act. Other arms transfers, for example imports or purchases of domestically-produced weapons by the Spanish armed forces or security forces, can and should be made subject to parliamentary control but may be regulated through other legal instruments.

As well as reporting half-yearly, article 16 paragraph 2 obliges the Government, in the person of the Secretary of State for Tourism and Trade, to appear yearly before the Defence Committee of the Congress of Deputies to report the statistics for the last period of reference. As provided in article16 paragraph 3 of Law 53/2007, on the basis of this information the Defence Committee of the Congress of Deputies must issue an opinion on the activity that it has assessed, which may include recommendations for the following year. And finally, the same paragraph provides that that the Secretary of State for Tourism and Trade must report to the Defence Committee of the Congress of Deputies on the implementation of the recommendations made by the latter in its last report.

For its part article 17 of the Act provides other transparency measures consisting, without further elaboration, in Spain's obligation by virtue of a number of international undertakings to remit the relevant information to the appropriate international bodies.[41] This provision is rather vague as to what type of transactions the duty to inform applies to and as to how the relevant information is to be conveyed; however, it is a positive development if viewed as an embryonic

---

[41] "Article 17. *Other transparency measures.* Compliance with the international commitments acquired by Spain referred to in Article 1 includes the exchange of information and transparency measures arising from the commitments acquired by Spain within the scope of the United Nations, the Organisation for Security and Cooperation in Europe and the European Union as well as different multilateral fora such as the Nuclear Suppliers Group, the Australia Group, the Wassenaar Arrangement, the Missile Technology Control Regime and the Zangger Committee."

provision for a system that may be developed subsequently in connection with whatever international commitments are involved.

In our own view the parliamentary control over transfers of defence and dual-use material is inadequate, and we believe it would be appropriate and desirable if Parliament were able to effectively track any transaction carried out in this sphere. In this connection it might have been a good idea, for example, to include a parliamentary representative on the JIMDDU, who would thus have the right to speak and vote on the handling of transfers regulated by Law 53/2007, or perhaps, as Amnesty International, Intermon Oxfam and Greenpeace propose, there might be a tendency to "create a standing committee to monitor overseas trade in defence and dual-use material, which would receive up-to-date information on the licences that have been approved and could act as a consultative body for the JIMDDU".[42]

However, in judging the appropriateness of the Act it must be remembered above all that the supreme responsibility in matters of defence lies with the Government according to the current article 5 of the National Defence Act, Organic Law 5/2005 of 17 November (BOE no 276 of 18/11/2005), in accord with article 97 of the Constitution of 1978.

And finally, in very close connection with the immediately foregoing, we should note that Law 53/2007 is silent on the question of whether the minutes of the JIMDDU's sessions should be public, from which it must be assumed that the situation remains unchanged – i.e. these minutes will remain secret as determined by the Government in a Cabinet Resolution of 12 March 1987.[43] But what is the scope of that determination? and above all, what are the limits as regards Parliament? To answer this question we should note that official secrets are regulated by the Official Secrets Act, Law 9/1968 of 5 April (BOE no 84 of 6/4/1968) as amended by Law 48/1978 of 7 October (BOE no 243 of 11/10/1978), which establishes as a general principle that the activity of the organs of the State is public, with the exception of cases where certain matters may be declared 'classified' in view of their nature. On this point article two of the Official Secrets Act provides that "any business, acts, documents, news, data or objects whose divulgence to unauthorised persons could be harmful or pose a risk to the security of the State or compromise the fundamental interests of the Nation in matters relating to the national defence, external peace or the constitutional order may be declared 'classified matters' ". The consequences of such a 'declaration' are defined in article 13 of the 1968 Official Secrets Act as amended by Law 48/1978, according to which activities reserved by declaration under the Act and 'classified matters' may not be communicated, disseminated or published, nor may their contents be used outside

---

[42] See the document: Amnistía Internacional, Intermón Oxfam y Greenpeace, *Comercio de armas en España: Una ley con agujeros. Recomendaciones al proyecto de ley sobre el comercio exterior de material de defensa y doble uso*, p. 31.

[43] See the Government's reply to a question from Izquierda Unida deputy José Navas Amores on the possibility of Turkey purchasing bombs for its Air Force from a Spanish enterprise (BOCG. Congreso de los Diputados, series D, no 352 General, 2 December 1998, pp. 47–48).

the limits laid down by the Act. The Act further provides that breaching of this limitation will be punishable, if applicable, under criminal law, through disciplinary procedures where appropriate, and in the latter case the infringement will be classed as very serious. For its part article 10.2 of Law 48/1978 amending the 1968 Official Secrets Act excludes the Congress and Senate from this limitation, so that they "shall always have access to whatever information they may require, in the manner determined by the relevant Regulations, and where appropriate in secret sessions". At this time these cases are regulated by a Resolution of the Presidency of the Congress of Deputies of 11 May 2004[44] laying down the conditions in

---

[44] Resolution of the Presidency of the Congress of Deputies on Official Secrets, 11 May 2004. Access by the Congress of Deputies to classified matters was first regulated by Resolution of the Presidency dated 18 December 1986. Later on, a Resolution of the Presidency of the Congress of Deputies on official secrets was passed on 2 June 1992, repealing the earlier one. In the present circumstances the access provided in point three of the Resolution of 2 June 1992 ought to be extended to all Parliamentary Groups. In accordance with the terms of article 32.2 of the Regulation, subject to the favourable opinion of the Chamber of Congress Bureau and the Spokespersons' Committee, this Presidency has resolved as follows: **One.** Access by the Congress of Deputies to official secrets shall be governed by the terms of the present Resolution. **Two.** The Commissions and one or more Parliamentary Groups comprising at least one-fourth of the members of Congress may ask, through the Presidency of the Chamber, that the latter be informed on matters that have been declared classified under the Official Secrets Act. **Three.** If the matters concerned have been classified as secret, the Government shall furnish the information gathered to one Deputy per Parliamentary Group. Deputies shall be chosen for this purpose by three-fifths majority of the Full Session of the Chamber. If in the course of the Legislature any of the appointees ceases to belong to the Parliamentary Group for which he/she was chosen, a substitute shall be chosen by means of the procedure set out in the previous paragraph. **Four.** If the matters concerned are classified as reserved, the Government shall furnish the information to the Spokespersons of the Parliamentary Groups, or to their representatives on the Commission where the latter has originated the request. **Five.** Exceptionally, the Government may, stating its reasons, propose to the Chamber of Congress Bureau that the information on a given matter classified as secret be furnished solely to the President of Congress, or to the Commission where the request has been made by the latter. In any case the final decision on the Government's request shall lie with the Chamber of Congress Bureau. **Six.** In addition, the Government may ask that the information on a given classified matter be divulged in secret to the Commission that requested it or to any Commission competent in that respect in the event that the initiative has come from a Parliamentary Group. In such cases only the members of the Commission may attend the informative session. **Seven.** Where the information furnished refers to the contents of a document, the authority responsible for so furnishing shall show the Deputies qualified under this Resolution for each case the original or a photocopy of the document if the persons to whom the information is addressed believe that it will be incomplete unless they have sight of the documents. **Eight.** The Deputies referred to in the foregoing point may personally examine the documents in the presence of the authority furnishing them and may take notes, but they may not obtain copies or reproductions. Documents shall be examined at the Congress of Deputies, or alternatively at the place where they are filed or deposited if in the President's opinion this will facilitate access thereto. **Nine.** The terms of article 16 of the Chamber Regulation shall apply to the actions of Deputies in connection with matters regulated by this Resolution. **Repeal provision.** The Resolution of the Presidency

which parliamentarians and parliamentary groups are to have access to restricted information. In the light of articles two and three of this resolution, considering that the minutes of the JIMDDU constitute matters classified as secret, we believe that the Commissions and one or more Parliamentary Groups comprising at least a quarter of the members of Congress are entitled to ask, through the Presidency of the Chamber, that the latter be informed on the content thereof, and that the Government must furnish information on the content of such minutes to one Deputy per Parliamentary Group, to be chosen for that purpose by a three-fifths majority of the Full Session of the Chamber.

VI. CONCLUSIONS

Spanish Law 53/2007 of 28 December on control of overseas trade in defence and dual-use material seeks within the Spanish legal system to regulate a highly delicate matter, namely the fight against arms trafficking, one of humankind's great scourges as the 21st century commences. The Act has materialised in the context of a very broad-based movement of opinion and regulation that has grown over the last few years in favour of control of sales of defence and dual-use material by international organisations and States, with more emphasis on conventional weapons, trafficking in which poses no less danger than nuclear, biological and other such weapons, known as weapons of mass destruction, which have become the object of growing attention in recent decades.

From the standpoint of legal theory, it is fair to say that Law 53/2007 seeks to strike a fine balance between State security and the protection of human rights,[45] an aspect closely linked to the problem of the different uses to which weapons can be put, and one that if properly addressed is one of the best indicators that a scholar can find of the degree of civilisation and rule of law that any given country has attained. On the one hand the interests of national defence demand a well-developed and technically-advanced domestic industry that is able to supply the national armed forces with cutting-edge weaponry and capable of sustaining an extraordinary effort in times of crisis. For all those reasons it is desirable that the arms industry, like any other, enjoy freedom of initiative and freedom of enterprise, including freedom to export.[46] Obviously, however, given their very

---

cont.

on access by the Congress of Deputies to classified matters dated 2 June 1992 is hereby repealed. **Final provision.** This Resolution shall enter into force on the day following its publication in the Official Gazette of the Cortes Generales. *Palacio del Congreso de los Diputados, 11 May 2004. – The President of the Congress of Deputies, Manuel Marín González.* (See BOCG. Congreso de los Diputados, Serie D, no 14 of 12 May 2004.)

[45] On this aspect see Bastid Burdeau, G., "Le commerce international des armes : de la sécurité à la défense de l'éthique et des droits de l'homme?", *Journal du droit international*, vol. 134, 2007, no 2, pp. 413–435.

[46] In the particular case of Spain, our geopolitical situation is such that ideally the domestic military industry should be able to coordinate, cooperate and compete with those of our

nature, the use of weapons poses very serious risks. In the hands of States with little respect for human rights, of terrorist groups or of other non-State entities capable of endangering international peace and security, weapons can contribute to major humanitarian disasters. This makes it necessary to have comprehensive control over the manufacture and the commercialisation of defence and dual-use material, particularly exports, in order to assure that the destination of the material is a proper one and that it is not later transferred elsewhere illegally.

Over a decade earlier, thanks to considerable mobilisation in civil society in general and especially to pressure from Non-Governmental Organisations, Spain had already taken up the challenge of gradually achieving greater control over transfers of defence and dual-use material by adopting appropriate regulations. And indeed, for some years the Government had been laying the groundwork for a system of official authorisations for transfers of this kind of material and of control over Spanish companies in the arms sector through the introduction of the Special Register of External Trade Operators in Defence and Dual-use Material. The body on which the entire system of authorisation and registration hinges is a senior government body, the Inter-Ministerial Regulatory Board on External Trade in Defence and Dual-use Material, which wields considerable discretionary powers in certain aspects of the discharge of its functions. However, any acceptance, denial or suspension of transfers must in principle obey a number of criteria laid down in article 8 of the Act, namely respect for international law in general and human rights in particular, a number of guidelines laid down by certain international organisations in these matters, especially the criteria in the European Union Code of Conduct of 8 June 1998 on arms exports, and compatibility with Spain's international policy and defence interests.

Law 53/2007 contributes two essential elements to the fabric of control over overseas trade in defence and dual-use material: firstly, it takes up all the advances achieved hitherto by regulation and enshrines then in the law; and secondly it establishes parliamentary control of the system's transparency by obliging the Government to report to the Cortes Generales on its implementation.

In our view certain aspects of Law 53/2007 or of the existing system as regards control over overseas trade in general are open to criticism, for instance an arguably excessive margin of discretion for the JIMDDU as the administrative body in the discharge of certain of its functions, the absence of parliamentary representation on the JIMDDU, or the scant role vouchsafed to the international legal department of the Ministry of Foreign Affairs, which is possibly the government service best equipped to opine on the legality and appropriateness of transfers of defence and dual-use material.

It is to be hoped that some of these problems may be remedied by further implementing legislation from the Government in the coming months. But on the

---

cont.

neighbours and allies, and indeed there have so far been international projects for the manufacture of defence material of great interest from every point of view.

whole Law 53/2007, which was strongly supported by the parliamentary groups in its passage through the house, is not unacceptable and is in fact one of the most advanced national regulations on the matter as viewed from the perspective of comparative law. And in fact this is consistent with the role currently being played by Spain as promoter of an effective and legally binding United Nations treaty on arms trading that will introduce world-wide rules for the transfer of weapons as expressly acknowledged in the fourth final provision of Law 53/2007.

It could also be argued that the system has been left mainly in the hands of the executive as opposed to the legislative power; but reasonable as this criticism is, it must be admitted that as regards the relative weights of security and human rights, the balance is now inclined in favour of security, a sphere in which both the Spanish Constitution and the National Defence Act, Organic Law 5/2005, assign supreme responsibility to the Government.

RESUMEN

La Ley española 53/2007, de 28 de diciembre, sobre el control del comercio exterior de material de defensa y de doble uso, viene a tratar de regular en el ámbito del ordenamiento jurídico español una materia muy delicada, la lucha contra el tráfico de armas, que constituye una de las grandes lacras de la humanidad en estos comienzos del siglo XXI. La Ley se enmarca en un movimiento de opinión y normativo de una gran amplitud que se ha generado en los últimos años tendente hacia el control por parte de los organismos internacionales y por los Estados de la venta de material de defensa y de doble uso, incidiendo más en las armas convencionales, cuyo tráfico no posee una menor peligrosidad que las armas nucleares, biológicas, etc., conocidas como armas de destrucción masiva, que han gozado de una mayor atención en las anteriores décadas. La Ley 53/2007 aporta dos elementos esenciales en el entramado del control del comercio exterior de material de defensa y doble uso, en primer lugar, que asume y consagra por vía legal todos los avances conseguidos anteriormente por vía reglamentaria y, en segundo lugar, que establece un control de la transparencia del sistema por parte del Parlamento, previéndose la obligación del Gobierno de informar a las Cortes Generales sobre la ejecución del mismo. Sin embargo, se puede criticar algunos aspectos de la Ley 53/2007, como la excesiva discrecionalidad del órgano administrativo, la JIMDDU, a la hora de ejercer determinadas de sus funciones, la falta de representación parlamentaria en el mismo, o el escaso papel que se le está dejando jugar a la asesoría jurídica internacional del Ministerio de Asuntos Exteriores, quizás el servicio administrativo mejor capacitado a la hora de dictaminar sobre la legitimidad y la oportunidad de las transferencias de material de defensa y doble uso.

ABSTRACT

Spanish Law 53/2007 of 28 December on control of overseas trade in defence and dual-use material seeks within the Spanish legal system to regulate a highly delicate matter, namely the fight against arms trafficking, one of humankind's great

scourges as the 21st century commences. The Act has materialised in the context of a very broad-based movement of opinion and regulation that has grown over the last few years in favour of control of sales of defence and dual-use material by international organisations and States, with more emphasis on conventional weapons, trafficking in which poses no less danger than nuclear, biological and other such weapons, known as weapons of mass destruction, which have become the object of growing attention in recent decades. Law 53/2007 contributes two essential elements to the fabric of control over overseas trade in defence and dual-use material: firstly, it takes up all the advances achieved hitherto by regulation and enshrines then in the law; and secondly it establishes parliamentary control of the system's transparency by obliging the Government to report to the *Cortes Generales* on its implementation. Nevertheless, certain aspects of Law 53/2007 are open to criticism, for instance an arguably excessive margin of discretion for the JIMDDU as the administrative body in the discharge of certain of its functions, the absence of parliamentary representation on the JIMDDU, or the scant role vouchsafed to the international legal department of the Ministry of Foreign Affairs, which is possibly the government service best equipped to opine on the legality and appropriateness of transfers of defence and dual-use material.

Palabras clave

Tráfico de armas;
Armas convencionales;
La Ley española 53/2007, de 28 de diciembre, sobre el control del comercio exterior de material de defensa y de doble uso;
Control sobre el comercio exterior de material de defensa y doble uso;
Junta Interministerial Reguladora del Comercio Exterior de Material de Defensa y de Doble Uso (JIMDDU);

Key words

Arms trade;
Conventional weapons;
Spanish Law 53/2007 on control of external trade in defence and dual-use material;
Control of external trade in defence and dual-use material;
Inter-Ministerial Regulatory Board on External Trade in Defence and Dual-use Material (JIMDDU).