

Of the many post-Cold War security challenges facing the world today, few are so daunting as the proliferation of weapons of mass destruction and advanced conventional munitions from the newly-independent states (NIS). The transfer of these military and dual-use items poses serious risks to international security. Should nuclear or other advanced military technologies find their way to the Middle East, Balkans, or other areas of conflict, regional instabilities will be worsened and global nonproliferation interests undermined. This problem is particularly concentrated in the four “nuclear” republics—Belarus, Kazakhstan, Russia, and Ukraine, but it has an important transnational dimension, reflecting the growing problem of “transshipments” of illicit exports along trading routes through the Baltics, Central Asia, and other points of exit.

The development and implementation of state systems of export controls provide a useful tool in efforts to combat this proliferation threat. Among industrialized nations, these systems are deeply ingrained in the national security culture. This is not the case in the NIS (particularly outside of Russia), where legal, policy, and technical expertise is limited; poor economic conditions spur illegal trade in dangerous commodities; the division of executive-legislative branch authority is ill-defined; computers and related automated equipment are scarce; and customs and border enforcement operations are primitive and porous.

To address these concerns, the United States has made modest amounts of export control support available to the Belarus, Kazakhstan, Russia, and Ukraine under the Nunn-Lugar Cooperative Threat Reduction program. Managed by the Pentagon, the Nunn-Lugar program has allocated \$11.04 million for export controls from fiscal 1992 through 1995, but much less has actually been spent. The Defense Department’s burdensome procurement requirements account for part of this delay, although differing interpretations between the U.S. and NIS representatives on how such funds should be spent have also played a contributing role. Ukraine, for example, only recently completed negotiations with the United

States on the full use of the \$7.26 million available for export control assistance. Moreover, only extremely limited resources have been targeted on the 11 other NIS states, all of which lack the administrative and fi-

nancial capacities to satisfy even the most minimal export control requirements.

Quite apart from external factors, the slow pace of export control development is linked to a failure within the NIS to embrace this concern as a national priority. As one expert who recently returned from Ukraine has noted, “the effective-

ness of the Ukrainian export control system is undermined...by the lack of a clear articulated national policy on the objectives of export controls that has been adopted by the national authorities (the President or the Rada).”¹ In the absence of such high-level commitments, export control systems in these states are developing from the bottom up, where mid-level bureaucrats who run the system lack policy guidance from above, and where information sharing and cooperation between the executive ministries, parliament, and industry is sharply limited. These distortions may in part explain why some in the NIS view Western assistance as a cynical attempt to deny market shares in high technology goods.

One promising avenue for encouraging high-level political attention to the export control problem is the development and enactment of national export control legislation. Most of the NIS have issued decrees on

**VIEWPOINT:
MODEL NIS EXPORT
CONTROL LEGISLATION**

by Lawyers Alliance for World Security

The model legislation is a product of the Lawyers Alliance for World Security project to promote export control development in the newly-independent states. The principal drafters are Michael Butler (a private consultant and former General Counsel of Overseas Private Investment Corporation), Burrus Carnahan (Senior Manager, Science Applications International Corporation), Thomas Crocker (Senior Partner in Shaw, Pittman, Potts & Trowbridge), Dan Hoydysh (Washington representative of the Unisys Corporation), and Edward Rubinoff (Senior Partner in Akin, Gump, Hauer, Strauss & Feld).

this subject, but none have advanced legislation for consideration by their parliaments. The adoption of laws (versus executive decrees) would have the comparative advantage of establishing durable norms governing such areas as national policy; regulatory and enforcement authority; transparency; and the involvement of the private sector. It would also establish greater accountability of both government regulators and the exporting industries—a *sine qua non* for the successful transition towards economic decentralization and a society based on the rule of law.

The model export control law in the Appendix was prepared by five legal and policy experts participating in the Lawyers Alliance for World Security (LAWS) project to promote export control development in the NIS. Although based on U.S. experience, the model avoids the U.S. legal example, in which export control authority is scattered across several agencies and statutes. Instead, it is a generic, concise compilation of 14 core concepts that any export control law should incorporate. The model could serve as a basis for export control legal reform in any of the advanced industrial states, but because of its simplicity, ease of administration and promotion of international standards of control, it is of particular use for governments starting from scratch. As structured, the law also addresses many of the concerns and problems that NIS officials have or will face in working through this issue. Sections I and II, for example, establish both export controls *and* the right to export as legitimate national priorities—an important precept which should guide the national export control debate. Other sections serve to clarify ministerial responsibility, promote private sector participation, establish licensing criteria and enforcement authority, and respond to the internationalization of crime.

The model does not represent exact language for adoption. Rather, it sets guideposts for determining where the administration of the policies contained in the export control law should be headed. Each of the NIS will want to craft legislation that reflects their own national experience and corresponds to their national circumstances and unique set of problems. It is important, however, that each government recognize that national interests will be served by moving forward to adopt a comprehensive export control law.

¹ Trip report of Dan Hoydysh, special advisor of the Lawyers Alliance for World Security (LAWS) to the Expert and Technical Committee of the Cabinet of Ministers of Ukraine (published by LAWS, March 1995).

Appendix

Model Export Control Legislation

Section 1. Policy

The Government of [country] makes the following declarations:

1. It is the policy of [country] to control the export and reexport of goods and technology:
 - (a) that would make a significant contribution to the military capability of countries that pose a threat to the security of [country];
 - (b) that would contribute to the proliferation of weapons of mass destruction and missile delivery systems in accordance with international agreements;
 - (c) that would contribute to international terrorism; and
 - (d) when necessary to further the foreign policy of [country] or to fulfill its international obligations.
2. It is the policy of [country] to use export controls only after full consideration of the effects on the economy of [country] and only to the extent necessary to accomplish the policies established by this statute.
3. It is the policy of [country] to provide the public with clear and efficient export control policies, guidelines, and procedures.
4. It is the policy of [country] to consult to the maximum extent practicable with the public and affected industries with respect to the implementation of these policies.
5. It is the policy of [country] to cooperate with all nations to control exports that would contribute to the proliferation of weapons of mass destruction.
6. It is the policy of [country] to increase trade among nations and to minimize uncertainties for exporters.

Section 2. Right to Export

1. A person may export or reexport any good or technology from [country] without a license or authorization unless the regulations issued pursuant to this legislation affirmatively state such a requirement.

Section 3. Authority

1. The [President] is authorized to control the export or reexport of any goods or technology to carry out the policies set forth in Section 1.
2. The [President] is authorized to promulgate such regulations as are necessary to carry out effectively the policies set forth in Section 1.

3. The [President] may delegate the authority to administer all activities under this legislation to such departments and agencies as the [President] may deem appropriate.
4. The [President] is authorized to establish a government agency to administer export controls established under this legislation.
5. The [President] is authorized to require or to permit the designated department or agency responsible for the administration of export controls to consult and cooperate with other agencies in carrying out its responsibilities.

Section 4. Control List

1. The [President] shall establish and maintain a Control List of goods and technology subject to a licensing requirement under this legislation.
2. The Control List shall describe with specificity the items subject to export control, reasons for control, and the export license requirements applicable to each item on the list.
3. The [President] shall publish the Control List and all license requirements, policies, and procedures. The public shall be notified promptly of any changes in these requirements, policies, and procedures and such changes shall be published promptly.
4. The [President] shall review the entire Control List [at least once each year], and shall revise or update the Control List as appropriate.

Section 5. Controlled Countries

1. The [President] shall establish and maintain a list of countries to which exports are controlled under this legislation.
2. In determining whether a country is placed on the list of Controlled Countries, the [President] shall take into account:
 - (a) the extent to which the policies of that country are adverse to the security or foreign policy interests of [country];
 - (b) multilateral arrangements and other international obligations and commitments of [country] aimed at preventing the spread of weapons of mass destruction;
 - (c) the relationship of that state with [country] and countries friendly or hostile to [country];
 - (d) such countries that aid or assist acts of international terrorism;
 - (e) such other factors as the [President] may deem

appropriate to protect the national interest of [country].

3. The [President] shall revise and update the list of Controlled Countries as appropriate.
4. The [President] may restrict exports to any country not on the list of Controlled Countries only as necessary to prevent the diversion of goods or technology to controlled countries.

Section 6. Licensing

1. Types of Licenses. To carry out the policies of this legislation, the President is authorized to require any of the following types of licenses for exports from [country] of goods and technology, and the reexport of goods and technology that originated in [country]:
 - (a) a General License authorizing defined categories of exports and reexports to specified destinations without application to the government of [country] for approval;
 - (b) a Validated License authorizing exports and reexports for specific uses or users of such exports and reexports pursuant to an application by the exporter;
 - (c) any other type of authorization or license that the [President] determines to be necessary to carry out effectively the policies of this legislation.
2. The [President] shall establish and publish detailed descriptions of all licenses established under this section, and procedures under which such licenses will be approved or denied.
3. Licenses for exports of goods or technology for munitions, war material and related goods and technology as defined in the implementing regulations shall require a Validated License.
4. Licenses for exports of goods and technology for commercial uses will generally be approved unless the government determines that the export would violate the policies of this legislation.
5. No restrictions may be placed on temporary exports of goods or technology for purposes of exhibit or demonstration at trade shows, provided the goods remain under the control of the exporter and will be returned to [country] within [—] days of export, unless the government determines that there is a high risk that the exported goods or technology will be diverted in violation of the policies of this legislation.
6. All requests for permission to export shall generally be approved or denied within [—] days of receipt of a completed license application unless the exporter is in-

formed within [—] days of submission that additional time is needed for review. However, the total time of review shall not exceed [—] days.

7. If a license is denied, the exporter shall be provided the specific rationale for the denial in writing within [-] days of a final decision.

Section 7. Special Licensing Authority

1. A Validated License is required for the export of any good or technology when the exporter has actual knowledge that the good or technology will be directly employed in, and will materially contribute to, the design, development, production, stockpiling, or use of weapons of mass destruction.

2. The [President] shall establish by regulation procedures for implementing paragraph 1 and identify the countries to which the licensing requirement established by paragraph 1 apply.

3. The President may choose to limit the scope of this section by establishing and publishing a list of items that are subject to this section because they could “materially contribute” to the design, development, production, stockpiling or use of weapons of mass destruction (positive list). Alternatively, the [President] may choose to limit the scope of this section by publishing a list of goods and technology that are not subject to control under this section (negative list).

Section 8. Notification of the Public

1. The [President] shall establish a program for keeping the public informed on export control policies, procedures, regulations, and the administration of the export control system. This program may include seminars, publications, and periodic meetings with exporters.

2. The [President] shall publish the complete text of all multilateral export control lists and agreements to which [country] is a party.

3. At the start of each year, the [President] shall submit to the [Parliament] a report on the administration of this legislation during the preceding year. This annual report will contain information with respect to:

- (a) implementation of the policies established by the legislation;
- (b) licensing activities including the number of licenses applied for, the number approved, denied, and their monetary value;
- (c) an assessment of the effectiveness of the controls in achieving the goals established by this leg-

islation;

(d) an assessment of the effects of export controls on the economy of [country]; and

(e) a report on the activities of the Advisory Committee established under Section 9.

Section 9. Advisory Committees

1. The [President] is authorized to establish committees of technical experts to advise the [President] on matters related to export control policy and procedures. Such committees shall consist of representatives of the exporting community of [country] and appropriate government departments or agencies that are concerned with export control policies established by the legislation.

2. Advisory committees shall advise the [President] and appropriate officials responsible for export controls on questions involving:

- (a) technical matters;
- (b) worldwide availability and utilization of controlled technology;
- (c) licensing procedures;
- (d) contents of export control lists;
- (e) the issuance of regulations;
- (f) economic effects of export controls; and
- (g) other questions relating to the administration of export controls under this legislation.

3. To facilitate the work of the committees, the [President] shall disclose to such committees adequate information, consistent with national security and Section 10, concerning export control policies, procedures, and decisions.

Section 10. Negotiations with Other Countries

1. The [President or his Designate], in consultation with the heads of other appropriate agencies designated by the [President], shall be responsible for conducting negotiations with other nations regarding their cooperation in controlling the export of goods and technology in order to carry out the policies set forth in Section 1.

2. The [President] is authorized to exchange relevant information concerning export controls with other cooperating nations provided the information exchanges are consistent with [country’s] security and foreign policy interests.

Section 11. Record Keeping

1. The [President] is authorized to require all exporters to keep and retain records of all transactions.
2. Any government agency or department that participates in export licensing decisions shall keep records of their recommendations and decisions. Such records shall be made available to other agencies or departments involved in export licensing upon request in accordance with accepted procedures for protecting sensitive information.

Section 12. Confidentiality

1. All information submitted by an exporter in connection with an application for an export license or authorization, as well as information on specific export transactions, shall not be made public without the consent of the applicant or as authorized by law.
2. Nothing in this Section shall be construed as authorizing the withholding of information concerning export licensing from Parliament or other government departments or agencies appropriately concerned with export licensing.

Section 13. Penalties

1. The [President] shall designate the agency or agencies authorized to enforce this legislation. Appropriate officials of the designated agency are authorized search property declared for export and review and copy export business records of persons engaged in the export business or holding an export license under this legislation. The [President] may vest any investigatory and arrest powers authorized by law in officials of the customs administration or other appropriate agencies.
2. Appropriate officials of the agency authorized to enforce this legislation may impose administrative penalties on any natural or judicial person who, without legal justification or excuse,
 - (a) fails to do any act required by this legislation or the public regulations implementing it;
 - (b) does any act prohibited by this legislation or the published regulations implementing it;
 - (c) fails to comply with any condition in an export license issued under this legislation; or
 - (d) provides false information concerning matters governed by this statute to any of the agencies responsible for administering this legislation.

3. Administrative penalties.
 - (a) Administrative penalties may only be imposed after notice of the violation has been given to the suspect and the suspect has been given a reasonable opportunity to present a defense, either personally or in writing.
 - (b) The administrative penalties referred to in the preceding section are:
 - (i) a fine not to exceed [—];
 - (ii) revocation of the right to engage in exporting and importing;
 - (iii) suspension, for a period not to exceed [—] months, of the right to engage in exporting and importing, or the right to apply for a license to export controlled goods or technology for any purpose.
4. Criminal penalties.
 - (a) In addition to or in lieu of the penalties described in paragraph 3 of this section, any person who willfully and knowingly does, or attempts to do, any act prohibited by this legislation or the published regulations implementing it, or provides false information concerning matters governed by this legislation to any of the agencies responsible for administering this statute, is guilty of a criminal offense punishable by imprisonment for up to [—] years and/or a fine of [\$—].
5. Upon petition of the public prosecutor, a court with jurisdiction over the offenses described in paragraphs 3 and 4 may order forfeiture to the state of any property that a person convicted of violating any provision of this legislation has exported or attempted to export unlawfully.
6. The offenses described in paragraph 4 are punishable if committed in the territory of [country] or on ship or aircraft registered in the state, or at any place by a citizen or national of this state.
7. Diversion of controlled items.
 - (a) Whenever the [President] determines that a recipient of controlled goods or technology has knowingly diverted these goods or technology to an unauthorized use in violation of the conditions of an export license issued by the government of [country], the [President] or officials of the appropriately designated agency may:
 - (i) deny further exports to that recipient of goods or technology for a period not to exceed [—] years for each offense; or
 - (ii) deny that recipient the privilege of exporting

products into [country] for a period not exceed [—] years for each offense.

(b) The [President] shall make public all decisions under this paragraph.

Section 14. Transshipments

1. Items moving in transit through [country] are subject to control under this legislation.
2. The President may establish by regulation conditions under which items shipped through [country] on board a conveyance and passing from one foreign country to another are subject to export licensing or are exempt from export licensing requirements.

Section 15. Definitions

1. The term “export” means:
 - (a) an actual shipment, transfer, or transmission of goods or technology out of the territory of [country];
 - (b) a transfer of goods or technology within [country] with the knowledge or intent that the goods or technology will be shipped, transferred, or transmitted to an unauthorized recipient; or
 - (c) the transfer of goods or information in [country] to an embassy or consulate of a foreign country.
2. The term “reexport” means the transfer of goods or technology outside the territory of [country] from one foreign destination or recipient to another foreign destination or recipient.
3. The term “good” means any article, natural or man-made substance, material, supply, or manufactured product, including inspection and test equipment, and excluding technology.
4. The term “weapon of mass destruction” means chemical, biological, radiological and nuclear weapons, and advanced delivery systems.
5. The term “technology” means specific information and know-how (whether in tangible form, such as models, prototypes, drawings, sketches, diagrams, blueprints, manuals, software, or in intangible form, such as training or technical services) that is required for the development, production, or use of a good, but not the good itself.