

The end of the Cold War has increased worries about strategic weapons proliferation, due in large part to the chaotic state of Eastern European, Russian, and Central Eurasian affairs. As a result, it has become increasingly fashionable to ask if illicit, international commerce in military and strategic weapons technology has become ungovernable. Where once non-proliferation export controls were the hot topic, now terrorist theft and use of weapons of mass destruction, strategic weapons technology “brain drain,” and illicit techno-smuggling are the issues of concern.

The conventional wisdom about the inadequacy of existing national and multilateral controls in combating proliferation *is* reasonable. After the Gulf War and the fall of the Soviet Union, newspaper reporting affirmed this view on a regular basis. German sting operations netting Russian nuclear materials, fears of loose nukes in the former Soviet republics, reports of hundreds of Russian strategic weapons technicians in China and the Middle East, Saddam’s continued covert efforts to rebuild his strategic weapons arsenal, the growing availability of all kinds of technical information over the Internet, concerns that civilian satellite imagery and navigation services is promoting smaller nations’ development of accurate, stealthy cruise missiles—all of these developments have made it clear that strategic technology proliferation is becoming less controllable.

Yet, beyond these extralegal developments are legal decisions that the United States and other advanced nations are making to: 1) decontrol the export of dual-use strategic technologies (such as high-performance computers); 2) make uncontrollable dangerous activities and materials seem legitimate or “safe” through ineffective safeguards (e.g., safeguarding reprocessing in Japan and proposing to safeguard enrichment and reprocessing plants in Pakistan and India); 3) eliminate discriminatory membership in existing and planned control regimes by making target or trouble nations members (for example, making Russia a member of the Missile Technology Control Regime (MTCR)); and 4) ignore the in-

creasing illicit, unlicensed trade in military and dual-use technology.

Collectively these actions are quite literally making previously illicit proliferation endeavors legitimate. More important, if continued, they will give far more scope for the very sort of ungovernable proliferation activities experts now are so worried about.

These trends are not inevitable. Nor does fighting them require undermining increased commerce or trade. There may be real limits to what laws can do to prevent d e t e r m i n e d

proliferators, but it is just as clear that the international community can do better or worse in promulgating and enforcing policies and laws to provide restraint.

What more can be done? Five specific measures deserve attention.

First, stop making things worse. Further decontrol—creation of license-free trade zones, creation of general licensing schemes, legal “harmonization” of nations’ control efforts to the least common denominator—should be resisted.¹

Similarly, efforts to eliminate “discrimination” against proliferators (e.g., China, Russia, and a host of smaller nations with dubious nonproliferation credentials) by quickly bringing them into international proliferation control regimes (such as the MTCR, the follow-on organization for the Coordinating Committee for Multilateral Export Controls (COCOM), etc.) should be heavily conditioned on better nonproliferation behavior (i.e., made probationary) or put off. Simply bringing them “in” threatens not only to make a mockery of these

Henry Sokolski is Executive Director of the Nonproliferation Policy Education Center. He served as Deputy for Nonproliferation Policy in the Pentagon from 1989-93. A version of these remarks was presented at the Conference on "Non-Governmental Security Threats: The 'Grey Area' Challenge," sponsored by the American Bar Association's Standing Committee on Law and National Security and the Center for National Security Law, Washington, D.C., December 2, 1994.

control regimes, but also to dangerously increase these nations' access to military and strategic weapons technologies.²

Second, proposals to safeguard the unsafeguardable (facilities that produce or use weapons-usable nuclear materials, weapons-usable materials themselves, critical cruise missile or rocket technology, mainframe supercomputers, and chemical or biological weapons-related technologies) although popular among diplomats and legalists, should be rejected.³ We simply do not know how to get timely warning of a diversion of these items, activities, or materials to military purposes. We might be able to monitor them—although not very well. But monitoring is no safeguard. With weapons-usable materials production and use, for example, we frequently “miss” many bombs worth of production a year at existing reprocessing and enrichment plants. By the time we learned of a diversion, it would have already been completed in most cases; we might be able to detect some diversions, but never in time to do anything meaningful to stop them.

Rather than try to hide or dress up this ugly truth, we would do well to admit it up front and to encourage a consensus about what is too dangerous to safeguard in the first place.⁴ Since many of these materials and technologies—weapons-usable nuclear fuel and their related production facilities, large rocket development, and mainframe supercomputers—are highly unprofitable to invest in for “peaceful” purposes and are still relatively scarce, we should be far more ambitious about proscribing their use or development.⁵ Failure on this front will only make illicit strategic commerce more difficult to discern against the new and dangerously expanded backdrop of “legitimate,” “safeguarded” activities and materials.

As for agreements to control chemical and biological weapons-related technologies, here too the nonproliferation community must be more candid, particularly about the inherent difficulties of even monitoring, much less safeguarding and preventing production or diversion. It would be a major accomplishment if we could effectively detect and sanction nations' use of such weapons.

Third, instead of focusing so much on how licensed exports should be controlled, governments would do well to consider ways of controlling illicit trade in unlicensed exports—i.e., smuggling of military and strategic weapons-related technology, unreported shipments of such goods, and the movement of scientists and engi-

neers knowledgeable about strategic weapons technology. The problem here isn't that there are no laws against such illicit trade, but rather too little effort to enforce them and gaps in existing authority.

It would be helpful, for example, if nations could agree to extradite scientists and engineers who have violated a nation's laws against assisting proliferating states. A German or Russian nuclear engineer who, in violation of German or Russian law, helps Iraq rebuild its nuclear program ought not to be able to take his ill-earned profits to live the good life in Tahiti. Nations seem to understand the need for extradition agreements when it comes to international airplane hijackers. Perhaps it is time that they agree that those who illicitly trade in strategic weapons technology should be subject to the same kind of legal treatment.

Similarly, as useful as it may be for nations to spend millions to produce intelligence sting operations to entrap prospective strategic or military “techno-bandits,” it is at least as useful to make such monies available for sound informant “tips” on real deals. This could be done unilaterally (with the United States, for example, making such payoff money available for tip-offs on transactions relating to the currently public list of “countries” and “projects of concern”) or multilaterally (with the Organization for Economic Cooperation and Development, Organization of American States, Association of Southeast Asian Nations, Gulf Cooperation Council, European Community, International Atomic Energy Agency, MTCR, Australia Group, Nuclear Suppliers Group, or United Nations acting as the mediating body).

It also would be helpful if nations began to monitor and screen unlicensed exports. U.S. Customs estimates that perhaps as much as \$40 billion in U.S. exports alone go unrecorded (and unlicensed) every year. Undoubtedly, much of what smaller nations are seeking in the way of military and strategic weapons-related technology makes its way through this channel.

Yet, most advanced nations do monitor the amount of their exports, licensed and unlicensed, by requiring all exporters to file shipper's export declarations. The problem is that most nations only ask that these declarations—which require a listing of the type, worth, and end destination of the item—be filed some time after the time of shipment. Australia asks that they be filed before shipment by computer so that they can be precleared: i.e., checked against a list of bad end destinations. Because this is done by computer, it does not slow down or restrict trade, and it works. Other nations, including

the United States could adopt a similar system and even distribute it through e-mail on a secure line. This would hardly prevent all illicit unlicensed trade, but it would help prevent the honest or unknowing shipper from becoming an unwitting accomplice.

Fourth, governments need to be more honest about what it is they want to control and should experiment with free market incentives for enforcing these controls. To date, most export control legal expertise is devoted to promulgating or interpreting new control or decontrol regulations. In a desire to encourage freer trade on the one hand, and to restrict the proliferation of dangerous technology on the other, however, we have ended up with a schizophrenic patchwork of regulations that prohibits direct sales of our best technology to the worst proliferators but allows such sales, to varying degrees, to a bewildering variety of recipients outside this group.

This may seem to be a convenient way to strike a political compromise between nonproliferation restraint and freer trade. Yet, with such a patchwork control system, it is relatively easy to re-export dangerous goods through nations that profess adherence to nonproliferation norms, but who have lax export control enforcement. Indeed, the unnecessary sophistication and complication of our export controls in this regard only make it easier for illicit trade to occur while affording it a legal cover.

Again, the United States and other governments need to be more honest. One idea the U.S. House Armed Services Committee adopted in 1994 in its package of amendments to the Export Administration Act was a request that the president send Congress a list of all dual-use technology and materials that the executive branch determined should not be exported or go unlicensed to nations it considers to be "rogue" states. The president could develop any list of commodities as long or short as he pleased. But whatever was on the list, the amendment would require the executive branch to insist that its export entail an individual validated license (IVL) no matter where it was being shipped. This, in turn, would mean that the recipient of the item would have to secure U.S. consent prior to its re-exportation.

If the president's list were identical to that of all the items that currently require an IVL to any destination because of existing multilateral agreements, no one could claim that the United States was trying to do anything more to stem proliferation than any other country. If, on the other hand, the list were longer, there undoubtedly would be complaints from U.S. exporters of hav-

ing to compete against foreign firms with an unfair disadvantage. However, such competitive "disadvantages" could be mitigated if U.S. exporters had the right to sue for "relief" that would penalize foreign firms that undercut unilateral U.S. controls.

This, then, suggests the fifth legal step the United States and other nations could take to help stem proliferation: Give industry and lawyers positive incentives to enforce and encourage more, rather than less, nonproliferation restraint. If U.S. exporters had the right to sue competitors who undercut existing national or international controls (or to plead their cases before some U.S. regulatory body), relief could include legal judgments for "damages" or an injunction barring offending foreign firms from access to the U.S. market. Such "relief" would not only "equalize" whatever trade disadvantages unilateral controls might inflict on U.S. firms, it would give private industry a financial interest in alerting the U.S. government to illicit trade activities abroad. If other nations sought to adopt similar measures of their own, it would only tend to increase the level of trade restraint in dangerous technology.⁶

Such a legal market approach to enforcement of unilateral controls clearly would be somewhat disruptive and would lack the grandeur or harmonization of existing "control regimes." On the other hand, it would be a legal disruption pointed in the right direction—toward greater levels of trade restraint and actual infliction of discriminate sanctions against bad actors. Indeed, in a world where military and strategic technology is becoming more and more ungovernable and existing and proposed controls threaten to accelerate this trend, giving private firms (and lawyers) an entrepreneurial interest in enforcing trade controls is a new legal approach that might actually help.

Certainly, this much is clear: using legal mechanisms simply to decontrol exports or to make dangerous technology seem safeguardable (when it is not) is a prescription for making proliferation both more ungovernable and "legal." Indeed, current trends supporting these seemingly sophisticated and "realistic" approaches should be recognized as dangerous, since they work against the goal of nonproliferation. While there is still a chance to do so, the nonproliferation community must curb their use and work to develop more effective alternatives.

¹ In the case of license-free trade within the European Community (EC), it may already be too late. However, the United States should treat the EC as a special case, i.e., as if it were a single nation, and work with it to prevent leakage or reexportation through its weakest member states. Certainly, the last thing the United States should do is let the EC's license-free trade serve as a model for trade among the members of the other control regimes.

² With the COCOM follow-on regime, it appears that at most there will be a gentleman's agreement among members—which is likely to include Russia—not to sell certain items to an unpublished list of trouble countries without some sort of “prenotification.” For a detailed discussion of the kind regime the United States would ideally want see Henry D. Sokolski, “Proliferation: The Case for Export Controls,” *The Heritage Lectures* (Washington, D.C.: The Heritage Foundation, Lecture 491, 1994).

³ Consider, for example, President Clinton's U.N. proposal to negotiate a global ban on the production of highly-enriched uranium and the separation of plutonium from spent fuel if either activity is pursued for nuclear weapons purposes. Implicit in this “ban” is allowing nations to conduct enrichment or plutonium separation for “peaceful” purposes so long as these activities are pursued under international “safeguards.” Consider also an earlier presidential proposal of September 1993 to share space launch vehicle technology more widely assuming “safeguards” could be developed.

⁴ A recent RAND study noted that by the year 2003 the amount of weapons-usable material that continued civilian separation of plutonium would generate would exceed the 40,000-bombs worth of material made available from the dismantling of U.S. and former Soviet weapons stockpiles. The international commerce in this material would only increase the prospects of diversion by both state and nonstate actors. See Brian Chow and Kenneth Solomon, *Limiting the Spread of Weapon-Usable Fissile Materials* (Santa Monica, CA: The RAND Corporation, October 1993).

⁵ One such issue is what the United States intends to do about granting its European allies continued rights to reprocess spent fuel from European and Asian reactors using fuel of U.S. origin. For a taste of the legal issues this policy problem is likely to raise over the next 12 months, see Paul Leventhal, “Setting the Record Straight About Renegotiating the U.S.-EURATOM Nuclear Cooperation Agreement,” (Washington, D.C.: Nuclear Control Institute, November 23, 1994). A similar set of issues has already arisen concerning U.S. consent rights over the reprocessing of U.S.-origin react fuel under the U.S.-Indian Nuclear Cooperative Agreement, which lapsed earlier this year.

⁶ There is legal precedent for the U.S. affording such standing. In 1986, the “Comprehensive Anti-Apartheid Act” against South Africa, Section 403 afforded U.S. persons the right to sue for damages against any person “... that takes commercial advantage of any sanction or prohibition against any national of the United States imposed by or under this Act.” For more on this idea see Ramon P. Marks, Testimony Before the House Foreign Affairs Subcommittee on International Security International Organizations and Human Rights, September 14, 1993, Washington, D.C.