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Non-Proliferation Export Controls: Origins, Challenges, and Proposals for Strengthening

Daniel Joyner (Editor). Ashgate Publishing Ltd. 2006
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Today few topics seem to occupy the public consciousness with as much intensity as global terrorism. Ever since the September 11th attacks on U.S. soil, Islamic jihadists have been permanent fixtures in the Western media, featured prominently in almost every newscast, and are filling the role once occupied by Soviet Russia. The issue of global terrorism has become the oversized blimp that shoves out of the public debate room, almost entirely, all other issues of public concern. For instance, in January 2008 the United States Supreme Court heard constitutional challenges to the three-chemical formula that the majority of States use to carry out the death penalty by lethal injection. Capital punishment is historically a very divisive topic in American politics, yet mainstream media's coverage of the case was less than luke warm. Indeed, political analysts predict that the ideological debate over capital punishment will have little to no influence at all on the upcoming presidential election with the American populace largely preoccupied with concerns over national security (and, more recently, the economy).

However, to fully grasp the scope of the non-proliferation challenge, one must look beyond the policies of any one government or administration. At the international level the coordinated efforts of nations over the past fifty years have produced an extensive (and daunting) patchwork of non-proliferation treaties, UN Security Council resolutions, multilateral export control regimes, a number of implementing organizations, and a few recent initiatives, all aimed at controlling the flow of conventional arms, as well as

chemical and biological weapons, and nuclear technologies. But in a commercial, globalized world where ninety percent of all trade moves in sea containers, controlling the flow of weapons is no easy task.¹ Nor is it easy for the lay person to understand the internal workings of the various export control regimes. This edited volume is the ideal starting point for anyone who seeks to understand the present state of international non-proliferation efforts.

This volume is a collection of essays written by fourteen different contributors including academics and government officials. The volume begins with an introduction to international export controls in general, before examining the individual regimes with the help of case studies from States such as the United Kingdom and Denmark and from regions such as East Asia, before finally pondering the future of international export controls. The book concludes with the editor's own novel suggestions on how the regime system could be improved.

The first thing to understand is that the bulk of international non-proliferation efforts is conducted within a system of multilateral export control regimes (MECR). The goal is to prevent dangerous accumulations of weapons in the hands of suspicious, ill-intentioned groups in unstable regions of the world. To do this, regime members agree to apply export controls to an agreed list of weapons and weapons components. When a regime member denies a given export license request, that information is then shared with the rest of the regime membership, it being understood that the other regime members will also deny an export license request for that item by the same requesting party. It would be a stretch to say that these export controls have been institutionalized *per se*, because, as the contributors explain, regimes are really just informal political arrangements which lack elements of legal formality.

The regime system is comprised of four independent functional supplier state regimes, each with its own specific mandate, and membership is inconsistent among them. They include: the Nuclear Suppliers Group (nuclear weapons and materials), the Australia Group (chemical and biological weapons proliferation), the Missile Technology Control Regime (missile and related delivery system technologies), and the Wassenaar Arrangement (conventional weapons). The volume contains several very helpful charts that detail overlapping membership, common principles, common rules of operation, and the existence of catch-all clauses among the four regimes. The defining characteristics which all four regimes have in common include the use of control lists to track single- and dual-use technologies, the requirement of member consensus for any significant action or regime change, and information sharing of export license denials.

The nature of the non-proliferation challenge has changed fundamentally since its early Cold War years, and it continues to change. During the Cold War the predominant philosophy was one of containment; global dynamics have shifted the challenge to a non-

¹ Witness bizarre stories like Somali pirates hijacking a Japanese chemical tanker that was transporting benzene from Singapore to Israel in October 2007. The owners of the tanker paid the pirates a half-million dollar ransom to free the ship and its crew. Reported by *Reuters*. Available at <http://www.alertnet.org/thenews/newsdesk/L12187866.htm>.

proliferation paradigm. Further, over the last few decades several global politico-economic macro phenomena have developed which are undercutting the effectiveness of the MECCR, whose original identity was a group of like-minded *supplier* States. An increase in number of supplier States, increased trade, globalization of business transactions, and the shift of production of dual-use technologies to private sector enterprises all complicate and weaken the MECCR.

The essays also identify the MECCR's inherent problems. Most importantly, there is the compliance problem—low levels of actual compliance and the insufficient character of the norms (against acquisition, use, transfer, inspection). There are also structural limitations—the modest mandate of the regimes themselves. And there is the informality problem—the absence of a collective determination of threat and end user concerns. These inherent problems preclude many of the improvements suggested by the volume's contributors. For example, while the Missile Technology Control Regime has been successful at limiting proliferation, it still suffers from compliance and formality weaknesses: there are no international binding restrictions to limit trade in combat aircraft, strong norms against the possession and testing of missiles do not exist, and while contributor Scott Jones recommends a more detailed, treaty-like framework to address these weaknesses, he points out that this would require a unanimous vote or complete disbandment, both politically unlikely propositions.

One of the most commendable attributes of this volume is the breadth of perspectives it offers. The individual contributors offer specific improvements that could be made to each of the regimes discussed and also to the bureaucratic frameworks of specific States. However, not all of the contributors advocate an overhaul of the MECCR in favor of a more consolidated framework. For example, Adam Scheinman, a policy director at the US Department of Energy, advocates tightening existing supplier restrictions and rules and ensuring that States exercise their domestic responsibility to fully implement and enforce those restrictions and rules. Scheinman views the MECCR's inbuilt flexibility (or informality) as a positive attribute and he emphasizes its capacity to evolve. According to Scheinman, it is through sustained high-attention that repeat cases of rogue States like Iran, Libya, and North Korea will be thwarted, not through a more formalized multilateral framework.

The volume editor, on the other hand, strongly favors an institutional restructuring of the MECCR into one unified structural framework. Daniel Joyner outlines a merged and restructured system that borrows certain elements from the World Trade Organization's structure. An Export Policy Review Mechanism and a Compliance Determination Understanding would offer "official pronouncements of interpretation and judgment regarding member state behaviour through a mutually agreed upon procedure and according to clear standards." While the new regime system would be built upon a soft law foundation, the procedural and substantive legitimacy afforded by these enhanced mechanisms would likely increase member compliance, thus strengthening norm building. The new multilateral export control regime system could also mirror the WTO's horizontal decentralization: the existing multilateral regimes could be

incorporated into the merged system as sub-regimes and informational firewalls could be put in place to account for varying membership among the various sub-regimes.

Of course, the type of adversarial setting that exists for States in disagreement over protectionist trade policies, for example, could not be replicated in a multilateral system tasked with controlling instruments of national security. Joyner's answer to this discrepancy is an inquisitorial, rather than adversarial, compliance determination process in which any member state having information of non-compliance can refer a case to be investigated. In this new system, "compliance determination would not be jurisdictionally linked to a particular damage but rather based upon the breach itself with an understanding that any such breach contributes *per se* to a latent threat to international security." Awarding damages to a particular party would be out of the question, but the increased legitimacy provided to the multilateral system would be substantial.

At a recent lecture at the University of California at San Diego promoting his new book "On Nuclear Terrorism," Council on Foreign Affairs Scholar Michael Levi offered an optimistic view of counter-terrorism in the US. Levi cautions against thinking in terms of "the perfect defense" and emphasizes in its place a "layered defense." He stresses that national security officials must first get the threat assessment right, and then they should focus on (and emphasize to the public) the infinite interception opportunities that exist along a time and space continuum, from the point of acquisition of individual nuclear weapon components, to the transport of those components on the high seas, to their arrival at a nation's borders, and the high probability of failure that always exists for an attempted deployment. In short, defense is a broad system.

Levi's realistic outlook and Joyner's suggestions for a merged and restructured MECR system are both encouraging premises for the highly rational timely-and-effective-prevention approach to the non-proliferation challenge (as opposed to the deadly and costly pre-emptive strike approach adopted by some governments). Nevertheless, for the average person it seems like everyday there is some sobering news to dampen these well-informed hopes. After all, the arms industry is big business, and arms sales between regime members of items not contained on the control lists and which are approved via the members' respective domestic government channels will not be prevented by export controls. When the US Congress approves a \$20 billion arms deal to Saudi Arabia, with a corresponding offer of \$30 billion in new weapons to Israel, one cannot help but be discouraged. The work of these fourteen contributors is thorough and it is most useful in that it can be digested by the educated lay citizen, whose responsibility it is to understand the current state of the non-proliferation challenge in order to bring the proper pressure to bare on our own Western political representatives who wield so much influence on world events.