

RESTRUCTURING THE MULTILATERAL EXPORT CONTROL REGIME SYSTEM

by

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(Under the Direction of Professor Gary Bertsch)

ABSTRACT

This paper identifies a current disharmony arising from increased expectations for the effectiveness and scope of the multilateral export control regime system, coupled with the reality of regime structures the inherent institutional limitations of which form significant barriers to meeting these expectations. The paper will propose that, through employing international legal and organizational theory this disharmony can be substantially mediated, and that the expectations of the multilateral nonproliferation community can be essentially met through efforts of reform and restructuring of the multilateral export control regimes. These efforts, while endowing the regimes with the increased formality necessary for increased levels of effectiveness at the same time do not present the serious challenges to notions of state sovereignty that have contributed to the current unwillingness to institute programs of reform within the regimes.

INDEX WORDS: Multilateral export controls, International law,
Nonproliferation regimes

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B.A., Brigham Young University, 1998

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A Thesis Submitted to the Graduate Faculty of The University of Georgia in Partial
Fulfillment of the Requirements for the Degree

MASTER OF ARTS

ATHENS, GEORGIA

2003

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SECTION 1

INTRODUCTION

With the recent coalition action in Iraq, international attention has largely been focused on the arguments for and against the establishment of preemptive strike principles in both national security policy and international law. The maintenance and legitimacy of such a principle, it is argued by some, are necessary to protect against the threat of proliferation of weapons of mass destruction (WMD), and the acquisition and use of such technologies by states and non-state actors perceived to pose a threat to international peace and security.

While such arguments, and the exigencies presented by perceivedly hostile states already in possession of destabilizing quantities of WMD related material upon which they are based, are of interest and worthy of detailed and thorough treatment, they are not the focus of this study. This treatment will rather examine what is herein argued to be an even more important element in national and multilateral counterproliferation policy than the doctrine of preemption – timely and effective prevention.

Benjamin Franklin noted in his *Poor Richard's Almanac* that “an ounce of prevention is worth a pound of cure.” Although it is safe to assume that he never dreamed of the relevance of this classical maxim to modern security realities of WMD proliferation, its sage message is perfectly applicable. After all, it has become abundantly clear through revelations in the last decade that the lax export control standards of both national and multilateral regulatory frameworks contributed significantly to the development of the clandestine Iraqi WMD program, which has been a primary cause of

two wars in 12 years aimed at containing the threat produced thereby.¹ Due in part to these revelations and to the attacks of September 11, 2001, a number of important members of the international community have now pledged their resources to a perennial “war on terrorism,” with an understood focus on eliminating potential sources of WMD proliferation threat. And while current security imperatives may well justify this emphasis on active and invasive counterproliferation initiatives, it would be well for the international community to remember that had more comprehensive and effective preventive measures, in the form of more developed export control regulatory frameworks, been in place at both national and multilateral levels such continuing expenditures of resources and lives for the cause of security might not now be necessary.

This is in fact the subject of the balance of this study. The multilateral export control regimes, which will be defined and discussed in detail later on, have the potential to contribute significantly to the maintenance of a more harmonized and efficient overall nonproliferation regime at both the national and international levels, and thereby to the preventive program of the international community in the area of WMD related materials and technology and their proliferation to hostile or terrorist entities.² The regimes have, however, been criticized in recent years as ineffective in performing their core roles of promulgating norms and facilitating coordination and cooperation among member states

¹ James Holmes & Gary Bertsch, *Tighten Export Controls*, DEFENSE NEWS, May 5, 2003.

² On the role that export controls can play in nonproliferation efforts as well as the limitations of export controls see Kathleen Bailey, *Nonproliferation Export Controls: Problems and Alternatives*, in Kathleen Bailey and Robert Rudney, eds., *PROLIFERATION AND EXPORT CONTROLS* (1993); U.S. Congress, Office of Technology Assessment, *Export Controls and Nonproliferation Policy* (Washington, DC: GPO, May 1994), OTA-ISS-596; *Final Report of the Defense Science Board Task Force on Globalization and Security*, Office of the Under Secretary of Defense for Acquisition and Technology (Washington, DC: DSB, December 1999); National Academy of Sciences, *Elements of a New Response: Multilateral Export Control Regimes, Finding Common Ground: U.S. Export Controls in a Changed Global Environment* (Washington, DC: National Academy Press, 1991); Richard T. Cupitt, *Multilateral Nonproliferation Export Control Arrangements in 2000: Achievements, Challenges and Reform*, Center for Strategic and International Studies, Occasional Paper, September 2000.

in the area of export control law and policy. This treatment will examine in depth these claims of inefficiency and will seek both to provide commentary on their substance, and, more importantly, to propose means of institutional restructuring within the current multilateral export control regime system to remedy these problems.

SECTION 2

METHODOLOGY

The findings and conclusions of this paper are based upon research performed by the staff of the University of Georgia Center for International Trade and Security (UGA/CITS) in which the author has participated. This research was guided by four objectives:

- To explain and compare how export control arrangements operate;
- To assess the effectiveness of the arrangements;
- To make recommendations on how to strengthen the arrangements to meet nonproliferation objectives; and
- To assess and compare the ability of the arrangements to adapt to a new environment.

Data collection and analysis activities were divided into five phases:

Phase I: During the summer of 2001, the researchers first established a framework for evaluating multilateral regimes in general. Researchers then identified several elements critical to the effectiveness of international institutions, including the multilateral export control regimes. These elements included information sharing procedures, information-gathering procedures, decision-making practices, authority and autonomy, adaptation to international changes, compliance, legitimacy, and relationship of the regimes to other international nonproliferation efforts.

Phase II: Researchers developed a series of questions surrounding each element, broadly categorized under two sub-headings. The first set of questions aimed at systematizing

data about the policies, practices, procedures, norms, and rules related to each element of effectiveness. The second set of questions (identified through expert assessments) attempted to tap the perceived utility of these policies, practices, procedures, norms, and rules, in order to generate recommendations for changes, if any.

Phase III: Each researcher was assigned one of the regimes for analysis. Researchers gathered data through "official" documents (press releases, information on regime-websites, information compiled and released by member governments) of each regime, to help answer the first set of questions developed in Phase II. This formed the backbone of the initial exploration by the UGA/CITS team, and was supplemented with the published and unpublished description, analyses, and critiques of the regimes available in the open source literature. This initial data helped the researchers identify some of the constant themes being discussed vis-à-vis a particular regime and to extract issue-areas of common concern.

Phase IV: Researchers developed two primary sources for systematic examination of the second set of questions developed in Phase II. First, they used these to conduct interviews with officials in some large and some small member states of the regimes. Some interviews were conducted in national capitals while others were conducted during regional export control conferences, viz. the Oxford Conference in UK and the Asian Export Control Seminar in Tokyo, Japan. Overall, officials from 24 different countries were interviewed over the course of the year. Officials from the following countries were interviewed: Argentina, Australia, Austria, Belarus, Belgium, Brazil, Canada, Czech

Republic, Denmark, the European Union, France, Germany, Iceland, Japan, Kazakhstan, Latvia, Netherlands, Norway, Poland, Russia, Switzerland, South Korea, Ukraine, United Kingdom, and the United States.

Second, in order to augment the qualitative assessments, CITS/UGA researchers designed and conducted a brief written survey of export control officials (current and past) in states that participate in at least one export control regime. All information collected from interviews, surveys, and official meetings, was gathered on a "not-for-attribution" basis, to maintain anonymity for respondents and to promote frank discussion. The survey was distributed to international officials at several conferences and e-mailed to international experts over the course of seven months.

Phase V: Finally, a small experts workshop was convened in order to share initial findings and to seek additional input on multilateral export control regime challenges. Officials from the United States, UK, Australia, the Netherlands, Denmark, and Germany participated in the workshop, and gave detailed (off-the-record) responses to our questions and comments regarding the challenges and the future of the regimes.

From this research, among other conclusions, it became clear that there is currently within the multilateral export control community a disharmony arising from increased expectations for the effectiveness and scope of the multilateral export control regimes, coupled with the reality of regime structures the inherent institutional limitations of which form significant barriers to meeting these expectation. The situation is further

complicated by an unwillingness on the part of these same international policy officials to take serious steps to endow the regimes with the institutional competence and formality necessary to meet these expectations. This disharmony forms the puzzle this paper seeks to address.

The paper will propose that, through employing international legal and organizational theory this disharmony can be substantially mediated, and that the expectations of the multilateral nonproliferation community can be essentially met through efforts of reform and restructuring of the multilateral export control regimes. These efforts, while endowing the regimes with the increased formality necessary for increased levels of effectiveness at the same time do not present the serious challenges to notions of state sovereignty that have contributed to the current unwillingness to institute programs of reform within the regimes.

It will propose specifically that through a documentary emphasis on specificity and delegation and not on obligation, and institutionalization according to the decentralized pattern laid out in the World Trade Organization Agreement, a merged and restructured multilateral export control regime may be designed to meet the theorized criteria.

This treatment constitutes an effort on the part of an outside observer to contribute to both academic debate and actual policy formulation by performing research to determine the core causes of a paradoxical situation obtaining among policymakers, and further by making a proposal based upon this research through which might be facilitated the overcoming of official inertia and the making of needed changes to the multilateral export control regimes.

It is hoped that this effort might provide a paradigm for social scientific research going forward, as it attempts not only to contribute to the development of theory in the areas of international law and nonproliferation studies, but also attempts to make a concrete contribution to the actual functioning of the international political system. This joint purpose, it is proposed, is not impossible by its terms. Nor is the value of social scientific research lessened through taking the further step of generating practical proposals based thereon. Rather, these wedded goals can substantially supplement each other, by adding thoughtfulness to policy and by keeping theory grounded in reality and in genuine issues of political concern.

SECTION 3

THE REGIME SYSTEM

Consideration will first turn to an explication of the regimes and their role and essential attributes as well as some characteristics of the modern security environment in which they exist. The multilateral export control regime system is currently comprised of four separate and almost wholly independent functional supplier state regimes, the Nuclear Supplier's Group (NSG) in the nuclear weapons and materials context, the Wassenaar Arrangement in the conventional weapons context, the Australia Group concerned with chemical and biological weapons proliferation, and the Missile Technology Control Regime (MTCR) in the missile and related technologies area.³ Several of these export control and nonproliferation regimes supplement the provisions of binding, multilateral treaties primarily focused on the development and possession of weapons technologies, including the 1968 Nuclear Non-Proliferation Treaty (NPT), the

³ See Davis S. Gualtieri, *The System of Non-Proliferation Export Controls*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton, ed. 2000); Randall Forsberg, et al., NONPROLIFERATION PRIMER: PREVENTING THE SPREAD OF NUCLEAR, CHEMICAL AND BIOLOGICAL WEAPONS (1995); Barry Kellman, *Bridling the International Trade of Catastrophic Weaponry*, 43 AM. U. L. REV. 755 (1994); Peter Van Ham, MANAGING NON-PROLIFERATION REGIMES IN THE 1990'S: POWER, POLITICS AND POLICIES (1993); Thomas Bernauer, THE CHEMISTRY OF REGIME FORMATION: EXPLAINING INTERNATIONAL COOPERATION FOR A COMPREHENSIVE BAN ON CHEMICAL WEAPONS (1993); Michael Lipson, *The Reincarnation of COCOM: Explaining Post-Cold War Export Controls*, THE NONPROLIFERATION REVIEW (Winter 1999); Gary K. Bertsch and Suzette Grillot, ARMS ON THE MARKET: REDUCING THE RISK OF PROLIFERATION IN THE FORMER SOVIET UNION (1998); Richard Cupitt and Suzette Grillot, *COCOM is Dead, Long Live COCOM: Persistence and Change in Multilateral Security Institutions*, 27 BRITISH JOURNAL OF POLITICAL SCIENCE 361 (1997); Eric H. Noehrenberg, MULTILATERAL EXPORT CONTROLS AND INTERNATIONAL REGIME THEORY: THE EFFECTIVENESS OF COCOM (1995).

1972 Biological Weapons Convention (BWC) and the 1993 Chemical Weapons Convention (CWC).⁴

While differences exist among the particulars of the respective regimes, their essential attributes share a great deal of similarity. All are informal political arrangements, with no elements of legal formality in the commitments of member states either in the originating regime documents or with regard to subsequent guidelines and decisions made by or within the regimes. The regimes may perhaps best be described using the framework for characterization of security communities, as a subset of international institutions, laid out by Emanuel Adler and Michael Barnett.⁵ This framework identifies security communities as arrangements between states wherein members share identities, values and meanings concerning issues related to their survival, and have an expectation of peaceful cooperation among themselves. These communities are typified by interaction among members exhibiting an appreciation of both short term and long term communal interests. The communities may be either loosely or tightly joined together as gauged by the degree of interaction and structural formality of the arrangement.⁶

⁴ Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, opened for signature Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062, 1015 U.N.T.S. 163; Convention on the Prohibition of the Development, Production and Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature, Paris, January 13, 1993, entered into force April 29, 1997, 32 I.L.M. 800.

⁵ For an excellent review of international relations theories on institutions in the context of multilateral export control regimes, see Michael Lipson, *The Reincarnation of COCOM: Explaining Post Cold-War Export Controls*, THE NONPROLIFERATION REVIEW, Vo. 6 No. 2 (Winter, 1999). Regimes are defined by Stephen Krasner as the “principles, norms, rules and decision-making structures” that influence the behavior of states in various issue areas. See Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in Krasner, ed., INTERNATIONAL REGIMES 2 (1983).

⁶ Emanuel Adler and Michael Barnett, eds., SECURITY COMMUNITIES (1998).

Adler and Barnett classify security communities in their movement from loose to tight interaction and commonality of perspective using a categorical nomenclature of nascent, ascendant and mature communities. The multilateral export control regimes have varied in their placement within this categorization scheme both among themselves and also collectively over the course of their evolutionary track, at times arguably regressing within this hierarchy of developmental status. However, in general they may be described as bordering between nascent and ascendant communities, typified by their character as thoroughly informal, voluntary and vague associations of states who maintain discretion in implementing regime policies, but which at the same time have become influential in the promulgation of norms and in possessing some elements of institutionalization, including in some cases the appointment of permanent secretariats with staff and a standing physical presence.

Their purpose being to coordinate and harmonize national policies regarding nonproliferation export controls, the core membership of the regimes has traditionally been those states already in possession of significant amounts of such technologies, and therefore a proliferation threat (i.e. supplier states). One of the regimes' primary roles is in the promulgation of norms to be used in efforts of compliance pressuring, directed both at regime members and non-members.⁷

The central features of each regime include a control list, composed of items generally of a dual use character (i.e. with both legitimate civilian as well as WMD-

⁷ See Gary K. Bertsch and William C. Potter, eds., *DANGEROUS WEAPONS, DESPERATE STATES* (1999); Gary K. Bertsch, et al., eds., *INTERNATIONAL COOPERATION ON NONPROLIFERATION EXPORT CONTROLS* (1994); Friedrich V. Kratochwil, *RULES, NORMS AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS* (1989); Judith Goldstein and Robert O. Keohane, eds., *IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS AND POLITICAL CHANGE* (1993); Jayantha Dhanapala, *Multilateralism and the Future of the Global Nuclear Nonproliferation Regime*, *THE NONPROLIFERATION REVIEW* (Fall 2001).

related potential application) which are to be monitored with utmost diligence by member states within their national regulatory systems, and which should be a part of each member state's export licensing program. These lists are regularly updated as their covered technologies develop. The regimes operate without exception on the principle of member consensus. Such consensus is needed either to change originating documents, amend control lists or promulgate additional guidelines, or hortatory normative statements establishing minimal standards for member state behavior in the context of export controls. These guidelines are uniformly vague and lacking in precision and are, of course, subject to national discretion in their implementation in state law and policies.

In most of the regimes, there are procedures for information sharing among member states particularly relating to license denials. When a denial of an export license for an item on a control list is made at the national level, member states under this rule are to notify the regime. This is a crucial element in ensuring member states that the restrictive policies of the regime will not be abrogated to the financial gain of one or a few members, to the corresponding loss of the remainder of member states whose positions have thereby been undercut and to the mooted of regime policies.⁸

All of the regimes can trace their origins to the Cold War period, and were initially formed by relatively small groups of "like minded" states with the chief goal of countering the influence of the Soviet Union and protecting the security interests of the West through harmonized control of WMD-related materials and technology transfer.⁹ However, since the fall of the Soviet Union the regimes have been faced with an identity

⁸ The Wassenaar Arrangement is the only one of the regimes without these denial notification/no undercut policies.

crisis, and their character as supply side regimes comprised of like minded states has been challenged through the addition of new members, many of whom were former targets of regime controls including Russia itself, and many of which are either questionable in their categorization as supplier states, have widely divergent perceptions of threat identification and security interests, or which are substantively lacking in resources to devote to export control efforts.¹⁰

The regimes have in recent years been faced with other challenges flowing from global politico-economic macro phenomena.¹¹ These include the expansion in number of states possessing sufficient quantities of dual use technologies to qualify as significant supplier states. This expansion, coupled with general trends of increased trade and the interlinking processes of globalization of business transactions and interests particularly in defense industries, has contributed to the threat of proliferation and the resulting complexity of regulating trade in WMD-related technologies at the multilateral level.¹²

⁹ See Gary K. Bertsch, Richard T. Cupitt and Steven Elliot-Gower, *Multilateral Export Control Organizations*, in Bertsch, Cupitt and Elliot-Gower, eds., *INTERNATIONAL COOPERATION ON NONPROLIFERATION EXPORT CONTROLS* (1994).

¹⁰ See Seema Gahlaut and Victor Zaborsky, *Do Regimes Have the Members They Need?*, Center for International Trade and Security Working Paper (Athens; Center for International Trade and Security, February 2003); Richard T. Cupitt and Igor Khripunov, *New Strategies for the Nuclear Suppliers Group (NSG)*, 16 *COMPARATIVE STRATEGY* 305 (1997); Gary K. Bertsch and Suzette Grillot, eds., *Arms on the Market: Reducing the Threat of Proliferation in the Former Soviet Union* (1998); John Baker, *Nonproliferation Incentives for Russia and Ukraine*, Adelphi Paper 309, International Institute for Strategic Studies (London, OUP 1997); Harald Muller, *Nuclear Export Controls in Europe: An Introduction*, in Muller, ed., *NUCLEAR EXPORT CONTROLS IN EUROPE* (1995). On problems stemming from increased numbers see Robert Axelrod and Robert Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, 38 *WORLD POLITICS* 237 (1985). On dealing with larger numbers see Miles Kahler, *Multilateralism with Small and Large Numbers*, 46 *INTERNATIONAL ORGANIZATION* 681 (1992).

¹¹ See *Proceedings of the Fourth International Conference on Export Controls*, Warsaw, Poland, September 30-October 4, 2002.

¹² See William A. Reinsch, *Export Controls in the Age of Globalization*, *THE MONITOR: NONPROLIFERATION DEMILITARIZATION AND ARMS CONTROL* 5 (Summer 1999); *Defense Industry Consolidation: Competitive Effects of Mergers and Acquisitions* (Testimony, March 4, 1998 GAO/T-NSIAD-98-112); William W. Keller and Janne E. Nolan, *The Arms Trade: Business as Usual?*, 109 *FOREIGN POLICY* 113 (1997).

Complicating matters further is the fact that some of these new supplier states have elected to remain outside of the existing regimes.

In addition, public control of trade in dual use items has been rendered more difficult through the phenomenon of privatization of dual use goods production. In the Cold War years, development of dual use goods and weapons related technology was largely conducted by government-funded research, and thus was relatively easy to keep track of and regulate. More recently, however, production of dual use technologies has shifted in large degree to elements of the private sector, as national governments have found that higher quality and lower prices are available “off the shelf” in private markets. This shift has had the result of significantly de-centralizing the production of sensitive items and requiring increased coordination between the private and public spheres and the institutionalization of corporate compliance measures in the private sector, a program which has met with mixed results internationally.¹³

Also with the end of the Cold War, proliferation of WMD-related materials and technology began to take a back seat in the minds of policymakers, as the newly arrived unipolar moment and resultant “new world order” seemed to justify turning attentions elsewhere. As a result, there has been a lack of high-level political attention given to the multilateral export control regimes in the past thirteen years. Part of this problem no doubt stems from the complexity of the issue-area generally and the disparate nature of the regimes, with four separate (and not always functionally named) groups with independent mandates and lists of covered materials. The true possessors of expertise

¹³ On patterns of technology dissemination and the challenges presented thereby, see Michael Moodie, *The Challenges of Chemical, Biological and Nuclear Weapons Enabling Technology*, in Pericles Gasprani Alves and Kerstin Hoffman, eds., *THE TRANSFER OF SENSITIVE TECHNOLOGY AND THE FUTURE OF THE CONTROL REGIMES* (1997). See also William W. Keller and Janne E. Nolan, *Proliferation of Advanced*

and keepers of institutional wisdom and concern relative to the regimes are to be found at mid-level official posts. This fact, while not harmful to the daily functioning of the regimes, has resulted in some stagnation in regime policies, as the natural difficulty of consensus building among nations to make desired changes is supplemented by the fact that those most “in the know” regarding needed alterations do not have the authority to bring them about.¹⁴

Finally, the attacks of September 11, 2001 and subsequent events particularly in Iraq have thrust into the public spotlight the nexus of WMD proliferation and global terrorism as the most serious challenge facing the international community in the 21st century. The multilateral export control regimes have in recent years, and particularly in the wake of September 11, been the target of criticism by some both within national governments and without who claim that they have been insufficiently adapted to the challenges posed by these and other forces of both external and internal character.¹⁵ These commentators claim that the regimes have been ineffective in accomplishing the goal of stopping the proliferation of their subject materials and technology, and have insufficiently addressed the nexus of threat of terrorism and WMD proliferation in their

Weaponry: Threat to Stability, FOREIGN POLICY (Winter 1997-1998); Michael Hirsch, *The Great Technology Giveaway*, FOREIGN AFFAIRS, September/October 1998.

¹⁴ See a full discussion of the current weaknesses of the multilateral export control regimes and proposals for restructuring in *Strengthening Multilateral Export Controls: A Nonproliferation Priority* (Center for International Trade and Security report, September 2002). See also the General Accounting Office’s 2002 report entitled *Strategy Needed to Strengthen Multilateral Export Control Regimes*.

¹⁵ See Joseph Cirincione, ed., *REPAIRING THE REGIME: PREVENTING THE SPREAD OF WEAPONS OF MASS DESTRUCTION* (2000); Michael Barletta and Amy Sands, eds., *Nonproliferation Regimes at Risk*, Occasional Paper No. 3, Center for Nonproliferation Studies (Monterey: Monterey Institute for International Studies, 1999).

policies. Some have even questioned the regimes' relevance and value to the international community's nonproliferation efforts going forward.¹⁶

This paper will proceed to consider the claims of those who criticize the effectiveness and legitimate role of the multilateral export control regimes in the nonproliferation program of the 21st century, and will posit that the regime system is currently at a defining moment due to the clash of increased expectations for regime performance with inherent structural limitations of the regimes themselves. It will consider both policy and process level issues relating to this moment, but will focus on generating recommendations for restructuring the regimes to remedy these inherent structural problems and to meet modern challenges to their effectiveness in filling their core nonproliferation roles.

¹⁶ See Andrew Latham and Brian Bow, *Multilateral Export Control Regimes: Bridging the North-South Divide*, CANADIAN INSTITUTE OF INTERNATIONAL AFFAIRS INTERNATIONAL JOURNAL, 53, 3 (Summer 1998).

SECTION 4

STRUCTURAL PROBLEMS

Critics have identified a number of problems with the institutional structure of the regimes as currently constituted. It is proposed herein that it would in fact be more accurate to describe these structural elements as limitations rather than problems in the most fundamental sense. For as the insider government officials who constitute the functioning members of the regimes are quick to point out, the regimes were never designed to fulfill the expectations which have been placed upon them of late. Indeed, as previously noted the origin of the multilateral export control regimes is to be found in small groups of supplier states (of generally uniform identity throughout the regimes) relatively speaking of a “like mind” concerning perception of threat (i.e. states to be the target of regime controls) and their security interests in general.

The primary function of the regimes during their formative stages was to aid in the harmonization of national export control policies and to provide fora for cooperation, information sharing, and the promulgation of norms to govern trade in sensitive items and technologies. The regimes were not originally mandated to take on separate lives as organizations, charged with taking independent measures in the struggle against proliferation, and were certainly not chartered as institutions focused upon the very nebulous and at that time immature phenomenon of international terrorism. In fact, most officials maintain that the regimes have performed relatively well given their modest

mandates and have been effective in accomplishing their goals of facilitating cooperation among member states relative to their national nonproliferation efforts.¹⁷

However, there is a simple tautological truth in the statement that voluntary, normatively vague organizational and rulemaking structures are efficient in accomplishing their aims only when those aims are of a character which can be satisfied by levels of uniformity in member-state compliance consistent with voluntary, vague and thereby unenforceable rules. This almost insultingly simple maxim-like statement has however profound implications for the multilateral export control regime system. As will be more fully discussed below, if the current regime system is to be instrumental in effecting increased levels of harmonization among national export control policies and compliance with a multilaterally conceived set of normative bases for the deterrence of WMD proliferation, as is desired by many in the security community, it will by necessity need to be endowed with an institutional structure capable of the clarity, independent interpretive discretion, and precision necessary to bring about such results.¹⁸

Among the limitations in existing elements of regime structure which have been identified, the most problematic and influential is the informal nature of the regimes as institutions.¹⁹ As previously noted, each of the regimes was established by its members with no legally binding character attaching either to originating documents (which as a rule were adopted only by joint declaration and without signatures) or to subsequent guidelines or decisions of the regimes, including those relating to the harmonization of members' national licensing systems with regime control lists. For this reason, many

¹⁷ See *Strengthening Multilateral Export Controls: A Nonproliferation Priority* (Center for International Trade and Security report, September 2002).

¹⁸ See Michael Beck and Seema Gahlaut, *Creating a New Multilateral Export Control Regime*, ARMS CONTROL TODAY (April 2003).

have quite accurately likened the current structure of the multilateral export control regime system to a collection of “supplier states clubs,” bereft of normative or legal foundation or compulsory procedures to produce compliance with regime rules.²⁰ In addition to this weakness in the “letter” of regime documentary foundations is the further fact that the regimes have been endowed with uniformly vague substantive rules, an aspect of their structures which has traditionally bedeviled efforts of promoting compliance even with the “spirit” of the regimes.²¹

One example of this vagueness in substantive regime rules is the lack of consensus in any of the regimes regarding end users of concern. The technological annexes to the regimes are as a general rule highly detailed in their specification of items subject to regime regulation. Thus, when contemplating an export, a regime member may be reasonably assured of the sensitivity level of items in question. However, due to the lack of consensus on bad end users, there is very little either in the guidelines or annexes of the regimes to guide a member state as to proper and improper destinations for the items. This absence of a collective determination of threat and end users of concern has had a significant undermining effect upon efforts to promote compliance intelligence analysis informing their judgements on end users, with no multilateral

¹⁹ See Michael Beck, *Reforming the Multilateral Export Control Regimes*, THE NONPROLIFERATION REVIEW 91 (summer 2000).

²⁰ See the Congressional Research Service study *Treaties and other International Agreements: The Role of the United States Senate*, 103rd Congress, 1st Session (November 1993) (“Non-binding agreements may take many forms, including. . . declarations of intent, joint communiques and joint statements (including final acts of conferences) and informal agreements.”)

²¹ Michael Beck, *Reforming the Multilateral Export Control Regimes*, THE NONPROLIFERATION REVIEW (Summer 2000) (“A regime is effective to the extent that its members comply or abide by regime provisions. However, in the case of the export control regimes, the regime guidelines are often so vague that disputes can arise over what exports are contrary to regime provisions. For example, the Nuclear Suppliers Group guidelines set forth a ‘nonproliferation principle’ whereby supplier states are called upon to only authorize exports of sensitive nuclear items when they are ‘satisfied that the transfers would not contribute to the proliferation of nuclear weapons’ . . . Moreover, the provision calls upon member states

resolutions of these issues having been achieved in the documentary foundations of the regimes.²²

International law has classically recognized two sources of binding normative development in relations among states. The first is treaties, which are written agreements between two or more parties, the obligations of which apply solely to those executing the treaty. Treaties are binding upon their signatories and subject to adjudication in international judicial fora. The second is customary international law, which develops through the acts of states accompanied with sufficient *opinio juris*, or expressed sense of legal obligation, of state officials.²³ Custom may form parallel to or wholly independent from treaties and may bind not only those who participate in its creation, but potentially also other states who do not successfully obtain persistent objector status while the customary norm is in creation.²⁴ While not without theoretical and practical weaknesses as a true system of law, these two sources have traditionally been held to produce binding obligations, or “hard” international law.

themselves to make risk assessments about the likelihood that an export will be diverted to unauthorized military uses.”)

²² For example, when considering the transfer of Category II items, including complete rocket systems (ballistic missiles systems, space launch vehicles and sounding rockets) and unmanned air vehicles (including cruise missile systems, target drones, and reconnaissance drones) the MTCR Guidelines state only that “Particular restraint will also be exercised in the consideration of transfers. . . if the Government judges, on the basis of all available, persuasive information, evaluated according to factors including those in paragraph 3, that they are intended to be used for the delivery of weapons of mass destruction, and there will be a strong presumption to deny such transfers.” Thus the determination of end user status is left wholly to national discretion based only upon a number of factors for consideration, with no objective process of identification of threats.

²³ See UN CHARTER, STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38 (listing the sources of international law). See also George Bunn, *The Status of Norms Against Nuclear Testing*, THE NONPROLIFERATION REVIEW (Winter 1999) for an excellent review of the sources of international norms, including what Bunn refers to as “politically binding” as opposed to “legally binding” soft international norms. I have chosen in this piece to adopt the usage of “soft law” common in international legal literature, though Bunn’s usage and its implications are entirely accurate.

²⁴ See Abram and Antonia Chayes, *Regime Architecture: Elements and Principles*, in GLOBAL ENGAGEMENT: COOPERATION AND SECURITY IN THE 21ST CENTURY (Janne Nolan, ed. 1994); Paul Szasz, *General Law-Making Processes*, in UNITED NATIONS LEGAL ORDER (Oscar Schacter and Christopher Joyner, eds. 1994).

Such structures as the multilateral export control regimes by contrast are representative of a modern movement in international law and organization to give some credence to the normative utility of instruments and understandings between state parties that are not strictly speaking legally binding, but which are entered into with an expectation that they will influence the behavior of their declarants.²⁵ Speaking of the proponents of this “soft law” movement, one commentator has written:

they stress that these instruments fulfill at least some, if not a great number, of the criteria required for rules to be considered rules of international law and cannot therefore be simply put aside as non-law. In other words, they acknowledge that there exists a considerable ‘grey area’ of ‘soft-law’ between the white space of law and the black territory of non-law. Simultaneously, they make the salient point that the ‘grey area’ may greatly affect the white one and explain, sometimes in considerable detail, in what ways ‘soft law’ can have legal effects.²⁶

²⁵ See D.J. Harris, *CASES AND MATERIALS ON INTERNATIONAL LAW* 64-65 (5th ed. 1998). As Oscar Schacter, a preeminent international law scholar, has noted “States entering into a non-legal commitment generally view it as a political (or moral) obligation and intend to carry it out in good faith. Other parties and other states concerned have reasons to expect such compliance and to rely on it. . . [P]olitical texts which express commitments and positions of one kind or another are governed by the general principle of good faith.” *INTERNATIONAL LAW IN THEORY AND PRACTICE* 178 (1982). See also Oscar Schacter, *The Twilight Existence of Nonbinding International Agreements*, 71 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 296 (1977). While such soft law instruments are not submitted to the advice and consent and ratification procedures required for treaties under United States law, when questioned about them by the Senate Foreign Relations Committee, then Secretary of States Henry Kissinger once remarked that the United States is not “morally or politically free to act as if they did not exist. On the contrary, they are important statements of diplomatic policy and engage the good faith of the United States as long as the circumstances that gave rise to them continue.” *US Department of State Bulletin* 73 (1975) pg. 613, quoted in the Congressional Research Service study *Treaties and other International Agreements: The Role of the United States Senate*, 103rd Congress, 1st Session (November 1993) Pg. 38.

²⁶ Van Hoof, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 187 (1983). The distinction between hard and soft law and the recognition of soft law instruments has met with disapproval by some in the international legal community, however. As expressed by Jerzy Sztucki: “*Primo*, the term is inadequate and misleading. There are no two levels or “species” of law – something is law or is not law. *Secundo*, the concept is counterproductive or even dangerous. On the one hand, it creates illusory expectations of (perhaps even insistence on) compliance with what no one is obliged to comply; and on the other hand, it exposes binding legal norms for risks of neglect, and international law as a whole for risks of erosion, by blurring the threshold between what is legally binding and what is not.” *Festkrift Hjermer* 550-551 (1990). However, as D.J. Harris has responded, “While it may be paradoxical and confusing to call something “law” when it is *not* law, the concept is nonetheless useful to describe instruments that clearly have an impact on international relations and that may later harden into custom or become the basis of a treaty.” *CASES AND MATERIALS ON INTERNATIONAL LAW* 65 (5th ed. 1998); George Bunn, *The Legal Status of U.S. Negative Security Assurances to Non-Nuclear Weapon States*, *THE NONPROLIFERATION REVIEW* (Spring/Summer 1997).

There are of course sound reasons why the framers of the various multilateral export control regimes chose to institutionalize the international regulation of the area of nonproliferation export controls using softer, as opposed to harder, forms of institutional structure and procedures. As noted in one of the leading treatments of the relative advantages of soft versus hard law structure in international organizations, hard law is best utilized to regulate areas of international interaction in which the value placed on making credible commitments is high, reduction of long-term transactions costs from continual re-negotiation is important, political strategies may be supplemented by adjudicative or otherwise legalistic international regimes, and where delegation of authority to international fora is an attractive means for remedying inherent problems of incomplete contracting.²⁷

It concludes that soft law, by contrast, is most attractive in issue areas in which a premium is placed on low initial contracting costs, where the use of hard law would present unacceptable sovereignty costs (which are highest when proposed international legalization touches upon important issues of national security), and where the novelty and complexity of the issue area create a high degree of uncertainty and possibility for positional change which make hard law enshrinement of norms unattractive. It also recognizes soft law as being an efficient means of compromise between antagonistic positions between states, particularly in the early stages of normative consideration of a subject area.²⁸

The area of nonproliferation export controls, particularly in the sub-categories of WMD related and dual use items, is an issue area intimately tied to perceptions of

²⁷ Kenneth Abbot and Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INTERNATIONAL ORGANIZATION 421 (2000).

national security interest and fundamental national sovereignty concern. It additionally has from its inception constituted an attempt to regulate a variety of dynamic and often overlapping technologies and their transfer to end users the threat status of which is a source of considerable contention among regime members. Thus, it is an area convincingly argued to be best regulated, at least in the preliminary stages of regime formation, by softer, more cooperative organizational understandings as opposed to harder, more compulsory ones.²⁹

Again, however, for the heightened expectations of observers of the regimes to be met, i.e. for the regimes to be more effective in the promulgation of norms regarding WMD proliferation and in facilitating member implementation of those norms in their national systems, attention will need to be paid to proposals for increasing the formality of the structure of the regimes. However, as a fuller discussion of this point below will establish, this formalization need not be effected by an increase in the binding nature of commitments relative to the regimes. Rather, employing modern trends in both international legal theory and international relations theory it will be shown that increases in specificity of those commitments, combined with the institution of an adjudicatory forum within the structure of the regimes to which will be delegated interpretive authority, can constitute the necessary formalization for increasing member compliance and regime effectiveness.

²⁸ See *id.*

²⁹ See Arthur Stein, *Coordination and Collaboration: Regimes in an Anarchic World*, in *NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE* (David A. Baldwin ed. 1993); Joseph Grieco, *Understanding the Problem of Institutional Cooperation*, in *NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE* (David A. Baldwin ed. 1993); Lisa L. Martin, *COERCIVE COOPERATION: EXPLAINING MULTILATERAL ECONOMIC SANCTIONS* (1993); Richard T. Cupitt and William J. Long, *Multilateral Cooperation and Nuclear Nonproliferation*, in *THE PROLIFERATION PUZZLE: WHY NUCLEAR WEAPONS SPREAD AND WHAT RESULTS* (Zachary S. Davis and Benjamin Frankel, eds. (1993); George

In addition to informality, another limitation in the structural makeup of the regimes which has been pointed to by critics is the practice in all the regimes of acting only upon the basis of consensus.³⁰ The consensus rule applies across the board to changes in originating documents, changes to guidelines, membership decisions, as well as alterations to control lists. This consensus principle, while understandable considering the sovereignty and security relevance of the issue area of WMD nonproliferation export controls, has formed a significant hinderance to the effectiveness of the regimes in promulgating progressive norms and in facilitating harmonization of members' national export control systems. It has, according to experts, made the regimes slow to respond to technological changes, including intelligence on new military applications of existing technologies, new means of acquisition of illicit materials and technology by states of concern, and other emerging threats to international security.

Consensus rules have become a particularly difficult problem due to the more recent phenomenon of expansion of regime membership, and the inclusion of states with highly varied perceptions of threat and concern regarding trade in sensitive technologies. Due to the maintenance of consensus voting rules, regime action can be, and in fact has often been, held up by one dissenting member. This fact is even more troubling to members forming a majority view on such points as it is understood that any change in regime voting rules, or in the membership status of problematic members, is held hostage by the very same principle.

Bunn and David Holloway, *Arms Control Without Treaties?* Stanford University CISAC Working Paper (February 1998).

³⁰ See Michael Beck and Seema Gahlaut, *Creating a New Multilateral Export Control Regime*, ARMS CONTROL TODAY (April 2003).

Consensus voting rules within the regimes are in fact the principal reason for the conclusion that, in order for meaningful restructuring of the regimes to take place, an entirely new institutional structure for the regimes will need to be created. Simply put, with the consensus voting rules in place no significant restructuring to meet modern challenges and heightened expectations, and to remedy structural limitations of informality and the very existence of such rules, will take place because at every turn in this process there will inevitably be aggrieved and dissenting regime members. Changes in structure to allow for greater formality and lesser unilateral control over regime decisionmaking will by their very nature and purpose affect a loss in autonomy of members to act according to their national discretion. In the security realm as in others, but poignantly so in this context, such concessions of national sovereignty are not made lightly by states and perspectives on details of the new regime order are likely to vary substantially among members. Thus it will fall to those states desirous of pushing forward the nonproliferation efforts of the international community to new levels of effectiveness to institute a bold new program of reform and creation of a new regime *sui generis*, which while sharing many characteristics and attributes of the existing regimes will be a new and independent entity.³¹

³¹ The idea of merging the multilateral export control regimes is not new. It was recommended a decade ago in a study by the National Academy of Sciences, *Finding Common Ground: U.S. Export Controls in a Changed Global Environment*, P. 131. (Washington, DC: National Academy Press, 1991). See also Paul Freedenberg and Igor Khripunov, *Arms Control is Global Mission*, DEFENSE NEWS, January 27, 1992; Leonard S. Spector and Virginia Foran, *Preventing Weapons Proliferation: Should the Regimes be Combined?* Report of the Thirty-Third Strategy for Peace, U.S. Foreign Policy Conference, The Stanley Foundation, October 22-24 1992; Theodor W. Galdi, *Proliferation Export Control Regimes: Options for Coordination or Consolidation* (Washington, DC: Congressional Research Service, 1993). On the importance of state policies strengthening the multilateral regimes see Harald Muller, *Compliance Politics: A Critical Analysis of Multilateral Arms Control Treaty Enforcement*, THE NONPROLIFERATION REVIEW (Summer 2000) and Oran Young, *Political Leadership and Regime Formation: On the Development of Institutions in International Society*, 45 INTERNATIONAL ORGANIZATION 281 (1991).

This referenced division of perspectives will of course yet be the case even in the context of the creation of an entirely new institutional structure. The advantages of such a new program of establishment, however, include the fact that the states who will again be at the nucleus of this revised effort are likely to be relatively like minded and therefore able to compromise and produce results due both to their like minded and cooperative relationship as well as the fact that in this effort compromise is crucial, as no higher powers (such as veto powers) have yet been granted to negotiating participants. To this new institution formed ideally by a small number of the most influential supplier states will undoubtedly be drawn the other supplier states and even non-supplier states whose membership will not only be a sign of maturity and inclusion in the international community, but whose prosperity can – as it has in the case of membership in the existing regimes – be linked in very real ways to accession to the new comprehensive regime structure.

In the interests of contributing to debate within both legal and policy circles relative to the potential design of such a merged and restructured multilateral export control regime system, this paper will proceed to consider concrete proposals of institutional restructuring to aid in meeting the referenced modern challenges of politico-economic reality and increased expectations of the security community, and to remedy the identified structural limitations of the existing regimes.

SECTION 5

NEW REGIME FOUNDATIONS

The advantages of a new restructured and merged regime system in the multilateral export control context include at the most basic level those efficiencies which naturally flow from centralization. Not least among these advantages is simple avoidance of redundancy and duplication of effort. Notwithstanding their different subject areas of control and the separate identities and developed cultural characteristics, as well as attached policy and technical experts communities of the four existing regimes, they yet boast nearly identical membership rolls. And while bureaucratic turf wars may ensue within national governments if member states are limited to one delegation to the regime system instead of four, it remains the case that issues and strategies to deal with the complex controls and end user issues present in all four current regimes are very similar if not identical and may therefore most logically and efficiently be addressed in one unified structural framework.

Second, the co-location in a single institutional context of all regimes focused on multilateral WMD nonproliferation export controls would facilitate inter-regime dialogue on issues of cross-cutting concern, including transshipment, transfers of intangible technologies, information sharing and end users of concern. Third, centralization of regime activities into one overarching forum would save scarce resources and cut down on what have become excessive practices of “diplomatic tourism,” in which the international working groups of official experts have been known to spend vast

percentages of their calendars in travelling to far flung meetings of each regime, at which meetings they tend to interact with the very same cast of diplomatic characters as at their previous visited locale, simply wearing differing regime delegation name tags.

Finally, a centralized multilateral export control regime system would counteract the previously identified problems of issue area complexity and confusingly dispersed and independent regime frameworks which have hindered the attraction of higher-level political attention to regime issues. These higher ups would be more likely to attend one comprehensive plenary meeting covering all subjects of export control concern, held in one locale, than they would to attend four annual plenaries, one for each sub-regime. Their participation and realization of the importance of and need for multilateral coordination of export control efforts would have an incalculable effect upon the future direction and success of such efforts, particularly in their ability to negotiate substantive changes to the regimes as needed to allow them to better adapt to the constantly changing international security environment.³²

In addition to these simple advantages of co-location, however, could be added more substantive structural modifications to the existing regime system. First on the topic of informality. There is a substantial literature linking formalization in the institutional structure of international regimes, and particularly in the substance of obligations undertaken by regime members, to increased member-state compliance with regime rules. There are in fact at least two treatments that argue for such binding formalization in the specific context of the multilateral export control regime system.³³

³² See Michael Beck and Seema Gahlaut, *Creating a New Multilateral Export Control Regime*, ARMS CONTROL TODAY (April 2003).

³³ See David S. Gualtieri, *The System of Non-Proliferation Export Controls*, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton,

According to this literature, formalization of commitments and institutionalization of commitments in regime structures is facilitative of state compliance because of its functions in clearly delineating legitimate and illegitimate state behavior, reducing transactions costs, establishing clear standards for state behavior, establishing linkages between issues and between regimes, improving confidence in information sharing, reducing motivations to cheat, enhancing the value of reputation, and making decentralized enforcement possible by creating processes of institutional monitoring.³⁴

There is also, however, a considerable and growing literature disputing the claim that an increase in the binding nature of commitments at the documentary foundation of international regimes inescapably leads to increased levels of member compliance. Rather, say proponents of this opposing view, formalization in the structure of international institutions can be separated into at least three broad sub-areas - obligation, precision, and delegation - the sum of the relative presence of each being the functional determinant of the degree of formalization, or legalization, present in the regime. In some cases, they argue, greater legalization of commitments, as through the conclusion of binding treaties, is not advantageous, particularly as those obligations cover areas of state interaction in which sovereignty costs and uncertainty are high.³⁵ The clear relevance of

ed. 2000); Barry Kellman, *Bridling the International Trade of Catastrophic Weaponry*, 43 AM. U. L. REV. 755 (1994). See also George Bunn, *Physical Protection of Nuclear Materials: Strengthening Global Norms*, IAEA Doc., November 1997.

³⁴ See *id.*; Abram Chayes and Antonia Chayes, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); Robert Keohane, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda* 87 A.J.I.L. 205 (1993); Robert Jervis, *Security Regimes*, in *INTERNATIONAL REGIMES* (Steven Krasner, ed. (1983).

³⁵ Kenneth Abbot et al., *The Concept of Legalization*, 54 INTERNATIONAL ORGANIZATION 401 (2000); Kenneth Abbot and Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INTERNATIONAL ORGANIZATION 421 (2000); Joel Trachtman, *Bananas, Direct Effect and Compliance*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 655 (1999). George W. Downs et al., *Is the Good News About Compliance Good News About Cooperation?*, 50 INTERNATIONAL ORGANIZATION (1996); Judith Goldstein

WMD export controls to concerns of national security and the intimacy of security to perceptions of national sovereignty, along with the previously mentioned technologically dynamic aspects of export control regimes, serve to perfectly qualify the multilateral export control regime system as a candidate for informal obligation in the documentary structure of the regime.

However, it is also important to note that formalization in the structural attributes of international regimes, and its attendant positive impact upon compliance by member states, can be effected in the absence of legalized obligations by increases in either the precision of regime rules or by processes of delegation of some rulemaking or interpretive authority to regime structures or by a combination of these elements. Examples of regimes in which formalization has been achieved through a combination of precision and delegation include the UN Committee on Sustainable Development (Agenda 21) with its accompanying non-binding normative instruments, including the Forest Principles adopted at the 1992 Rio Conference on Environment and Development (high precision and moderate delegation), the CSCE/OSCE's 1975 Helsinki Final Act (high precision and low delegation), and the U.N. Human Rights Commission (low precision, high delegation).³⁶

A note on compliance. In formulating theories of state compliance with international law prescriptions, it is easy and perhaps too common to project our assumptions flowing from individual and collective experience living under the vertical enforcement mechanisms of national legal systems onto the international legal system

and Lisa L. Martin, *Legalization, Trade Liberalization and Domestic Politics: A Cautionary Note*, 54 INTERNATIONAL ORGANIZATION 603 (2000).

³⁶ See Kenneth Abbot et al., *The Concept of Legalization*, 54 INTERNATIONAL ORGANIZATION 401 (2000) for this method of categorization of regimes.

writ large. As most such exercises are, however, this fallacy of composition is based upon a fundamentally misinformed conception of the contours and substantive attributes of the international legal system, and therefore leads to false expectations for the behavior of its processes and creations. Compliance with the dictates of international law, or the rules of international organizations, is in fact effected through a much more complex, much looser horizontal system of both domestic and international pressure by citizens and by other states and non-governmental actors.³⁷ Its primary guarantor of enforcement relies upon a cost-benefit (or cost-value) analysis by the state-subjects of such rules, an analysis which is fueled and informed by the enmeshing results of globalization, issue linkages, norm internalization and the increasing legalization of many aspects of international relations.³⁸

There are substantial grounds on which to posit, therefore, that at least in some areas of international interaction, levels of state compliance with international norms within regimes are not significantly increased through the legalization of underlying commitments. Rather, in areas in which softness of obligations is either a theoretical utility or political necessity, attempts to increase the formalization of obligations of member states may in fact lead to an over-playing of the hand of the organization and of the international legal system in general, likely resulting either in a substantial increase in vagueness or generality in substantive rules and commitments or, if the former does not

³⁷ Abram and Antonia Chayes, *On Compliance*, 47 INTERNATIONAL ORGANIZATION 175 (1993); Andrew T. Guzman, *A Compliance Based Theory of International Law*, 90 CAL. L. REV. (2002); Harold H. Koh, *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599 (1997).

³⁸ See Jon Elster, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* (1989); John B. Braithwaite, *CRIME, SHAME AND REINTEGRATION* (1989); Axel Honneth, *THE STRUGGLE FOR RECOGNITION: THE MORAL GRAMMAR OF SOCIAL CONFLICTS* (1995); Lisa L. Martin, *The Rational State Choice of Multilateralism*, 46 INTERNATIONAL ORGANIZATION 765 (1992); Jeffrey Checkel, *Why Comply?: Social Learning and European Identity Change*, 55 INTERNATIONAL ORGANIZATION 3 (2001).

occur, in a compliance deficit which the organization does not have the institutional capacity to narrow. As Joel Trachtman has explained

hard law is not necessarily good law, and [] strengthened implementation, including possible direct effect, is not necessarily desirable. This seems obvious once we recognize that, putting aside for a moment transaction costs and strategic costs, states generally have the level of compliance that they want. The correct role for scholars and for lawyers involved with these issues is to help political decision-makers to identify circumstances in which, due to such problems, states have not achieved the desired level of compliance.³⁹

Implicit in this assertion is that it is the weight of a norm as a recognized international community standard, with the corresponding moral, reputational, and precedential factors militating for its observance, that in fact effects compliance and not the precise status of the norm in the relative hierarchy of legality imposed by the international legal system.⁴⁰ Thus, in some cases it is highly preferable to have specific, soft commitments than to have more vague, binding commitments as the specificity of the norm is more likely to form a principled locus around which efforts of domestic and international compliance pressure may be focused.⁴¹

³⁹ Joel Trachtman, *Bananas, Direct Effect and Compliance*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 655 (1999).

⁴⁰ This of course presupposes a degree of transparency in the workings of institutions such that there is adequate information disclosure regarding norms around which pressure can be brought to bear upon states in favor of its observance. See Martha Finnemore, *Norms, Culture and World Politics: Insights from Sociology's Institutionalism*, 50 INTERNATIONAL ORGANIZATION 325 (1996); Thomas Franck, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

⁴¹ See Jeffrey Checkel, *Why Comply?: Social Learning and European Identity Change*, 55 INTERNATIONAL ORGANIZATION 3 (2001). This conclusion has some theoretical kinship to the arguments of the managerial school of regime theory, in which compliance with regime norms is asserted to be more likely achieved through persuasive and "managerial" approaches rather than by the use of coercive sanctions built into the structure of regimes. See Abram and Antonia Chayes, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995). It is also in keeping with the definition of international regimes put forward by Stephen D. Krasner as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in INTERNATIONAL REGIMES (Stephen Krasner, ed. 1983).

This observation that states are often no more likely to comply with a norm in its legalized incarnation than in its embodiment in softer, non-binding instruments is inspiring of optimism in the modern era in which increasing use is being made of soft-law based regulatory or cooperative regimes in a variety of international issue areas in order to overcome the difficulties of securing hard commitments particularly in areas of state sovereignty sensitivity.

The immediate implications for the multilateral export control regimes include the strong likelihood that an increase in specificity of regime rules and some form of albeit primitive delegation for the purpose of interpretive uniformity can lead to increased state compliance with a more cohesive set of regime rules even in the absence of more binding documentary structures, which are unlikely to be concluded by member states in this area in the near future. This proposal for reforming the multilateral export control regime system into a merged institutional structure still based on non-binding initial documents yet comprised of significantly more formalized substantive provisions and procedures is based upon an understanding and appreciation of the particular nature of multilateral regulation in this sovereignty-sensitive area. It is in the final analysis a far more politically palatable option for policymakers to consider, and hopefully even embrace, than is the position of some observers of the regimes, who in a haste to recommend changes to deal with the apparent weaknesses of the regimes adopt overly-elementary and non-politically-viable structural models for such modification.

Second, on the topic of consensus voting rules, a restructured multilateral export control regime system could incorporate a diversified approach to institutional decisionmaking, leaving in place consensus voting procedures for those issues of first

importance (i.e. deal breaking issues such as new member admissions) and for elements of regime identity (e.g. amendments to originating documents), but substituting supermajority or weighted voting procedures for an array of decisions in such areas as modification of control lists, identification of member violations, sanctioning and expulsion of members, passage of guidelines, and identification of end users of concern.

This substitution of non-consensual voting procedures is a vital part of any proposed restructuring effort and is becoming increasingly necessary particularly due to the new membership issues discussed previously and the admission to the regimes since the end of the Cold War of states with widely varying threat perceptions and value placed on export controls. It would enormously aid in the efficiency of the regime and the ability of members to make needed changes and take action deemed by a vast majority of members to be prudent without fear of being forever hung by procedure through the dissenting votes of one or a few members.

While it is relatively easy to propose the institution of non-consensual voting procedures for the new regime structure, this in fact is no modest proposition inasmuch as it is likely to face strident opposition by many current regime members. This again raises the question of status quo versus something different, and the clashing of higher expectations with current structural regime limitations. Despite this opposition, based in arguments of sovereign autonomy and the sensitivity and security relevance of regime decisions, it is likely to be the case that if the originating nucleus of states-proponents of the restructured regime commit themselves and their influence to the establishment of a merged and restructured entity including the elements of formality and voting procedures discussed in this section, there will be a domino effect of second-tier supplier states and

others who will accept membership in the new regime to preserve their place in the international community and to safeguard their prosperity in a globalizing economy, in which to be labeled a pariah by the most influential members of the international community, particularly in the area of WMD proliferation, is to unlock a Pandora's box of difficulties.

SECTION 6

NEW REGIME DESIGN

Having reviewed some general structural amendments which could be incorporated into a new multilateral export control regime system, this paper will proceed to offer a more detailed proposal of an institutional model for the new merged and restructured regime. This in fact is an area in which this treatment hopes to make a significant contribution to existing debates concerning the future of the multilateral regimes, as to the author's knowledge no such detailed institutional proposals have ever been offered. This section will bring principles of institutional design and organizational structure to bear on the question of what institutional model would best suit the renewed multilateral export control regime system.

In many ways, forming an international institution is an exercise similar to that in which a corporate lawyer engages when considering the structure of a new corporation. There are of course a number of legitimate models to choose from in the corporate design context, each coming with a particular set of advantages and areas of strength which must be fit to the corresponding facts of each case to determine which model will produce the best and most desirable fit. When forming an international institution, consideration must first be had of the particular needs and characteristics of the issue area in question and the desires and needs of potential member states. Then and only then can a proper institutional framework be divined by creative thinking and by reference to the vast array of designs already in place to facilitate international interaction in various issue areas.

Taking into consideration the needs and desires of the multilateral export control regime system and its concerned community, this paper will advance the thesis that an institutional arrangement most analogous to that currently in employ in the World Trade Organization will best suit those needs and lead to greatest efficiency and potential success for the restructuring effort. The history of international regulation of general trade since the mid-twentieth century is in fact quite instructive by analogy to the current discussion concerning the multilateral export control regime system.⁴²

Trade between nations has historically been among the most sensitive of areas to regulate because of the potential far-reaching effect of such regulation on perceived domestic prerogatives and the importance of successful international trade to national economies. After the Second World War, the largest economic powers concluded on a relatively loose association to preliminarily cover the area of international trade, established by the General Agreement on Tariffs and Trade (GATT). While technically a binding international agreement, the GATT was in actuality quite soft in a number of ways.

The GATT was subject to a number of institutional “birth defects” having never been intended or structured to compose a true organization in the international legal sense and being adopted only provisionally after the failure of the International Trade Organization in 1950. Partially due to its unintended rise to prominence, the provisions of the GATT relative to rulemaking and adjudication were fashioned quite broadly and vaguely, attributes of its structure which would come back to haunt it time and again as

⁴² For this section see John H. Jackson, *THE WORLD TRADING SYSTEM* 106 (2nd ed 1998); Gary P. Sampson, ed. *THE ROLE OF THE WORLD TRADE ORGANIZATION IN GLOBAL GOVERNANCE* (2001); Theodore H. Cohn, *GOVERNING GLOBAL TRADE: INTERNATIONAL INSTITUTIONS IN CONFLICT AND CONVERGENCE* (2002); Thomas W. Zeiler, *FREE TRADE, FREE WORLD: THE ADVENT OF GATT* (1999); John Croome,

lack of clarity and precision in its provisions led to ad hoc and inconsistent application of its precepts, and very often simple neglect of its use. Its adjudication procedures as well were often hamstrung in their effectiveness due to the practice of requiring consensual adoption of panel rulings in order to bestow finality upon them – including the consent of the state against whom the adjudicatory panel had ruled.

These and other institutional imperfections, including the fact that the GATT was entered into as an executive agreement by the United States and never subjected to senate ratification, also led to great doubt and disagreement as to the relevance of GATT rules and adjudicatory procedures to national law and policy. In the United State in particular there was great debate in legal circles as to the binding character of GATT obligations in national law. This ambiguity relative to implementation of GATT policy further strained its institutional credibility and thereby undercut its effectiveness in regulating the area of international trade.⁴³ The GATT however served to introduce some normativization to the issue area, and in doing so illustrated in a fairly non-threatening way to its signatories the advantages of mutual cooperation in the area based on norms.

With the institution of the World Trade Organization in 1995, many of the inefficiencies proceeding from structural imperfection in the GATT were remedied. The provisions of the World Trade Organization Agreement were decidedly more clear and comprehensive, particularly in terms of the administrative structure of the organization, than were the GATT provisions on these subjects. The Dispute Settlement Understanding (DSU), attached as an annex to the agreement, set out a much clearer and

RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND (1999); Konstantinos Adamantopoulos, ed., AN ANATOMY OF THE WORLD TRADE ORGANIZATION (1997).

⁴³ See John H. Jackson et al., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 289-326 (3rd ed. 1995).

more formal adjudication process for disputes arising among members. The DSU, for example, reversed the procedure for adoption of dispute panel rulings making such reports presumptively binding absent its unanimous disapproval by all member states. Also included in the WTO Agreement was the Trade Policy Review Mechanism (TPRM), an institutionalized procedure for promoting transparency and for assessing the overall effectiveness of the regime through a regular review of member states' trade policies.

The general institutional structure of the World Trade Organization is also quite instructive. The WTO Agreement itself is a mere ten pages long.⁴⁴ Its purpose is simply to establish a framework of organizational elements and organs to provide an administrative system for the institution. It therefore details the various bodies through which the organization functions at the general level. These include a Ministerial Conference, composed of all members, which meets approximately once every two years and which has authority to take decisions under all of the sub-agreements and to make substantive changes to all organizational documents. Also included in the organizational structure is a General Council, also composed of representatives of all members, which meets on a more regular and frequent basis, and which conducts the functions of the Ministerial Conference when it is not in session. The General Council additionally convenes as appropriate to discharge the responsibilities of the Dispute Settlement Body, and the Trade Policy Review body – i.e. the same mid-level national officials which make up the General Council, simply wearing different functional hats.

⁴⁴ As reprinted in the 1995 Documentary Supplement to John H. Jackson, William J. Davey and Alan O. Sykes, Jr., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* (3rd ed, 1995). This is in stark contrast to the 22,500 pages of tariff bindings which complete the Uruguay Round Agreements establishing the WTO.

Attached to this framework administrative structure are a number of sub-agreements which cover substantive areas of trade, including the revised General Agreement on Tariffs and Trade, the General Agreement on Trade in Services (GATS), and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). These three agreements, termed multilateral agreements, are currently binding upon all WTO members. In addition, however, there are two plurilateral agreements, the Agreement on Trade in Civil Aircraft and the Agreement on Government Procurement, which are only binding upon their signatories and not incumbent upon all WTO members.

These sub-agreements and their substantive provisions, while referenced by and subject to the general administrative organs in the WTO Agreement, are at the same time independent normative regimes and, in the case of the plurilateral agreements, are comprised of differing memberships. The WTO Agreement makes clear that states may maintain membership in the WTO while being signatories to and participating in either, both or none of the plurilateral agreements. Thus, states may be members of the framework administrative agreement and fully active at the general level of regime activity while not being a member of all WTO sub-agreements.

This structural model of a framework administrative agreement with attached substantive sub-agreements is representative of a modern trend in international organizational design, with other notable examples of its use being found in the Vienna Convention for the Protection of the Ozone Layer and associated Montreal Protocol on ozone-depleting gases, and the United Nations Framework Convention on Climate Change and associated Kyoto Protocol on greenhouse gases. It incorporates two aspects

of institutional decentralization which are of note in consideration of the potential use of this model for a restructured multilateral export control regime system.

First, this structure provides for horizontal decentralization, in the sense that the existing multilateral regimes could be incorporated into the comprehensive framework in much the same form in which they presently exist – i.e. as in many ways separate and independent subject-material focused normative regimes. Horizontal decentralization is potentially useful in this context for a number of reasons. It allows, as previously stated, for diversity of membership among the sub-regimes. This is an important area of institutional flexibility and a strength of the WTO-type framework agreement design. While membership in the existing regimes is largely similar, there are some notable differences in regime membership rolls which could otherwise be extremely problematic to make allowance for in the merged regime context. For example, Russia, traditionally one of the states of greatest concern vis a vis proliferation threat, is not a member of the Australia Group. In this particular case, it is not the state that refuses accession to the regime, but the regime which, for a variety of reasons, has consistently refused to accept Russia as a member. Thus, in the horizontally decentralized framework structure under consideration, Russia could be a member of the framework administrative agreement, including whatever compliance determination mechanisms which may be in place at that level, and be a member of only three of the sub-regimes. This aspect of the framework structure is advantageous in its inclusivity and provision of a formalized institutional structure through which to monitor compliance with regime rules, while yet allowing for plurilateral regimes from a membership standpoint at the sub-regime level.

Horizontal decentralization further allows for the existing regime-centric communities of specialists at both policy and technical levels to maintain feelings of identity and institutional ownership, values that have been expressed as important by international officials in the export control issue area. This aspect of the framework structure contributes significantly to the political viability of the entire enterprise of restructuring the multilateral export control regimes, and is thus of great practical as well as theoretical value. Lastly, it allows for easier addition and subtraction of sub-regimes with a minimum of restructuring required to the system in the event of such changes.

The framework agreement structure also, however, incorporates vertical decentralization of authority and an almost federal-type system of multi-levelling in its design. Again, the primary purpose of the framework agreement itself is to provide for organs of general administration for the regime. At that level are carried out macro-policy discussions and decisions on cross-cutting issues, inter-regime information sharing, and regime compliance review as well as activities encouraging issue-area cohesion and a unified institutional presence with a permanent Secretariat. The sub-regime level, however, could retain a great deal of its existing competencies with a renewed, formalized, documentary foundation. At this sub-regime level could be kept the ordinary functioning of and expertise regarding the control lists, including the authority and responsibility to regularly update lists. Intra-regime information sharing, material-specific target lists, and regime guidelines could be continuing facets of the sub-regimes. This again would, from a practical standpoint, cause as little trauma to existing communities and to the functioning of the regimes themselves as possible in the process of restructuring. As noted, it is expected that the existing regimes would be re-negotiated

and their foundational documents significantly revised in light particularly of the principles of formality and consensus voting already laid out as proposed characteristics of the restructured regime system before taking their place as sub-regimes within the framework structure.

Before continuing, it is important to note that the merged and restructured framework agreement structure under consideration is not proposed to be the last step in progression of the multilateral export control regime system. As discussed earlier, as regime members become more supportive of yet harder, more binding forms of institutionalization of commitments in this issue area (i.e. treaties), such support and resulting hard agreements together with their compliance enhancing qualities can and should supplant the informal structures proposed here. However, it will also be noted that the framework structure which is herein discussed is eminently qualified to act as a facilitator of this process on a number of levels. First in terms of facilitation of the requisite level of member support for such formalizing developments, the proposed regime structure should as previously discussed contribute significantly to issue area cohesion and closer cooperation both between states and between regimes in this area, hopefully fostering continued positive interaction and a level of trust conducive to contemplation of yet more bindingness of commitments. This indeed is one of the strengths of soft law structures – as preliminary facilitators of exchange and overcoming of information barriers leading to the creation of political will to conclude harder law structures.

Second simply in terms of institutional design, as in the case of the WTO the framework agreement model is easily adapted *in toto* into such forms of increased

formality as a treaty-based organization. Thus if in the future the time should arrive in which the members of the restructured regime system desire to increase the formalization of the norms and relationships incorporated therein, there would need be no serious structural or functional upheavals. The job would rather fall to their lawyers to draft the necessary documents for signature, with the work of the regimes continuing unabated.

SECTION 7

TPRM and CDU

A couple of institutional facets of the proposed restructured regime system bear more detailed review and explication. Within the structure of the WTO framework agreement, two of the most novel structural elements in terms of international organizational design are the Trade Policy Review Mechanism and the Dispute Settlement Understanding, both of which have been alluded to previously. The inclusion of analogous processes, in addition to organs approximating the others established by the WTO Agreement, in the restructured multilateral export control regime system is proposed herein to be of great advisability.

Within the current organization of the regimes, there are no mutually established, institutionalized processes for determining the compliance of member states with regime rules and policies. In fact, as many policy experts in the area are quick to point out, it is an assumption even to speak of member “compliance” in the context of the multilateral export control regimes. Many have asserted that member acts and omissions in this area may at worst only be termed as not “in keeping with the spirit” of the regimes. This is more than a simple semantic debate. It has reference first to the informal character of obligations undertaken by virtue of membership in the regimes, but is also importantly an indictment of the specificity of regime guidelines and the absence of any process of authoritative interpretation of regime rules. Thus, even though 32 of the 34 members of the Nuclear Supplier’s Group agreed that Russia’s shipments of fuel to the Terapur

nuclear reactor in India in January 2001 were inconsistent with Russia's NSG commitments, no authoritative mechanism existed by which to render an interpretation of regime guidelines and officially sanction Russia.⁴⁵

As previously stated, the restructured multilateral export control regime system of which this paper conceives, due to an existing lack of political will to establish harder more binding legal instruments, is proposed to be one founded on a soft law (i.e. non-legally binding) documentary foundation. Thus while states under this structure will similarly not be legally liable for noncompliance with regime rules, the utility of instituting a process for authoritative interpretation of regime rules and for passing official judgments regarding the harmony of member state action with such established norms is proposed to be of significant worth. As discussed earlier, in the absence of vertical enforcement mechanisms the primary guarantor of enforcement of any rule of international law currently relies upon a horizontal system of internal and external compliance pressuring, a process in which the enmeshing results of globalization, issue linkages, norm internalization and the increasing legalization of many aspects of international relations affect the decisions of policymakers. Thus, while the character of norms as being derived from hard law versus soft law instruments is likely not a decisive factor in determining the level of state compliance which can be expected in reference thereto, the level of objective legitimacy, both procedural and substantive, which the international community perceives as being attached to a norm likely is an independent variable influencing compliance, as it is a moving factor for the types and degree of both

⁴⁵ See U.S. General Accounting Office, *Strategy Needed to Strengthen Multilateral Export Control Regimes*, Pg. 23 (Washington, DC: General Accounting Office, 2002) GAO-03-43.

internal and external compliance pressure which may be exerted upon officials of the member states in question.⁴⁶

In the context of the restructured multilateral export control regime system, this sense of legitimacy of regime norms could be significantly enhanced by the institutionalization of both a Trade Policy Review Mechanism (TPRM) and a Compliance Determination Understanding (CDU) (based upon the WTO's TPRM and DSU mechanisms), from which could be derived official pronouncements of interpretation and judgments regarding member state behavior through a mutually agreed upon procedure and according to clear standards. In support of these determinations, it is proposed, there will be an increase in compliance pressuring, as clear standards are produced and official sanctioning rendered to which both other governments and international civil society may point in their castigatory rhetoric and around which they can organize more persuasive pressuring efforts. Thus even without an increase in formal legality or bindingness of obligations within the regime system, an increase of specificity and the delegation of interpretive authority to regime structures can constitute a form of formality likely to positively impact member compliance levels.

The main purpose of the TPRM in the multilateral export control regime context would be to provide a unified system with harmonized standards of review for producing reports on the export control practices of members states. This largely informational function is a novel suggestion in that there is no currently institutionalized procedure for such reviews. The work of a Trade Policy Review Body, analogous to its role in the WTO context, would promote transparency in members' export control policies and regulatory frameworks and would contribute to general understandings regarding export

⁴⁶ See Thomas Franck, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

controls, and would be of particular usefulness to nations with developing export control systems. This uniform system for review of member state export control policies would itself likely bring about improved member compliance with regime rules, as it would bring such noncompliances into the light of international civil societal scrutiny. It would further, however, contribute to the functioning of the Compliance Determination Understanding.

As previously mentioned, one of the most significant limitations of the current regimes is the lack of any institutional procedure through which to officially declare a members' actions in noncompliance with its commitments and with regime rules. In considering possible models for such a mechanism in the restructured multilateral export control regime context, first to be considered would naturally be an adversarial system such as that in place in many international organizations, including the WTO, through which individual members who feel their interests have been materially damaged due to another member's abrogation of regime commitments bring such claims to an adjudicatory forum for disposition and for the awarding of a judgement specifying remedial action on the part of a liable defendant state. This paradigm, however, seems fairly unworkable in the restructured regime context. Deficient export controls, with few exceptions, by their nature are not easily linked to particularizable damage suffered by specific member states. The damage flowing from lax or incongruent export controls is usually of a more generalized nature, in allowing for the export from a member state of sensitive items which may or may not be subsequently involved in a WMD development program, the results of which then may or may not be proliferated either to hostile states or terrorist entities and used against the interests of another member state. Linking such a

causal chain back to a defendant country would be an extremely difficult task and would, if jurisdiction were linked as is usually the case to such evidence of concrete damage, be an exercise of futility and very much in the “too little too late” category.

If, however, the process of compliance determination were not to be jurisdictionally linked to 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, it would of course not be possible to award damages to a particular party. It could rather be triggered procedurally not by the presentation of one specific aggrieved party, but upon the referral of any member state having information upon which to base a suspicion or allegation of noncompliance. In this sense the compliance determination process pursuant to the CDU would be more inquisitorial than adversarial in nature, finding a better analog in the procedures of the UN Commission on Human Rights.

Such a compliance determination process could be carried out through the appointment by a Compliance Review Committee (following the example set in the WTO, this Committee would be the Plenary Conference again simply wearing a different hat) by majority vote of a Compliance Panel, composed on an ad hoc basis of independent experts in the field of nonproliferation export controls. The Compliance Panel would operate much like a civil law judiciary panel, in deciding issues of both fact and rule involved in the referred complaint. Its decisions would be binding upon a member referred to its procedures by the Compliance Review Committee, yet would in the civil law tradition have no precedential merit for the determination of future referrals. The decision of the Compliance Panel would then be submitted to the Compliance Review Committee, which would make a determination on the report and, absent a

unanimous vote to overturn the panel report, would adjudge the compliance or noncompliance of the defending member pursuant thereto. In the case of a determination of noncompliance, the Executive Committee (the functioning agent organ of the Plenary Conference – analogous to the General Council in the WTO context) would issue a statement officially condemning the relevant acts or omissions of the noncompliant member.

It is important to reiterate at this point that the interpretations of documents and guidelines made by the Compliance Panel would be made within the context of specific referred cases and would not be binding upon future cases. The authority to interpret documents and guidelines on a permanent basis would lie exclusively with the general Plenary Conference and Executive Committee, and in the case of a provision of a sub-arrangement's documents or guidelines would be based upon the recommendation of the chief organ overseeing the functioning of that sub-regime (in keeping with the federal-type multi-levelled authority structure). The decisions of the Compliance Panel would however offer some guidance to members on interpretation of regime rules and would serve primarily in specific cases to produce judgments of noncompliance resulting in an official sanction of a noncompliant member state. This sanction, although again of course of diplomatic and not legal consequence, would serve as a perceivedly objective and legitimate statement on which to ground compliance pressures, and would present an institutional response which would have to be dealt with by the noncompliant member state in its public relations.

The compliance determination mechanism described above, in which the present or past noncompliance of a member state may be determined should be distinguished

from the procedure for *ex ante* authorization of significant exports of sensitive goods which was an institutional feature of the Coordinating Committee for Multilateral Export Controls (COCOM), the Cold War predecessor of the Wassenaar Arrangement.⁴⁷ COCOM members wishing to export certain highly sensitive items were required beforehand to submit an application for review and approval by the entire COCOM membership. Unanimous member consent was required for the export to proceed. While both this *ex ante* procedure and the *ex post* compliance determination mechanism currently under consideration fill the role of norm-promulgation processes, it is simply a current reality that the like-mindedness of membership within the regimes and the mutual identification of threat and end users of concern have become significantly diluted due to both macro-political changes and changes in regime membership since the disbanding of COCOM in 1994. Thus attempting to institutionalize an *ex ante* procedure for license approvals requiring unanimity among regime members, while theoretically the most effective means of coordinating nonproliferation efforts, would without doubt be an unworkable prospect in the context of a restructured multilateral regime. The *ex post* system here proposed would however serve an important purpose in providing an avenue for official determinations of noncompliance and promulgation of norms, without pushing the procedural envelope and ineffectually challenging notions of sovereignty among increasingly un-like-minded member states.

⁴⁷ See Richard T. Cupitt and Suzette R. Grillot, *COCOM is Dead, Long Live COCOM: Persistence and Change in Multilateral Security Institutions*, 27 BRITISH JOURNAL OF POLITICAL SCIENCE 361 (1997); Kenneth Dursht, *From Containment to Cooperation: Collective Action and the Wassenaar Arrangement*, 19 CARDOZO L. REV. 1098 (1997).

SECTION 8

CONCLUSION

This paper has attempted to identify the tensions currently existing between the expectations of many in the international security community with regard to the role and effectiveness of the multilateral export control regime system, and inherent structural limitations within the current regimes. It has posited that this clash of expectations and structural limitations has produced a defining moment for international WMD nonproliferation efforts in the area of multilateral export controls. In the hope of contributing to international debate on this issue, this paper has advanced the proposition that a newly merged and restructured multilateral export control regime system, using a framework-type structure put to exemplary use in the World Trade Organization, could largely overcome these structural limitations and contribute to the more effective functioning of the regime system in carrying out its vital role in international security while remaining grounded in political reality and in an understanding of the particular characteristics of the multilateral export control issue area.

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APPENDIX

DRAFT INITIAL ELEMENTS OF PROPOSED RESTRUCTURED MULTILATERAL EXPORT CONTROL REGIME SYSTEM

INITIAL ELEMENTS OF THE MULTILATERAL EXPORT

CONTROL REGIME (MECR)

I. Objectives

The Multilateral Export Control Regime (hereinafter “MECR” or “the Regime”), the attributes of which are outlined in these Initial Elements, is comprised of Participating States striving to limit the spread of nuclear, chemical, biological weapons and missiles capable of delivering such items, and to regulate the transfer of other weapons and weapons-related items. Accordingly, Participating States (hereinafter “Members” or “Member States”) agree to formulate and implement policies that will serve to impede hostile states, groups and individuals from obtaining weapons and goods, technologies, and know-how that can be used for producing weapons of mass destruction.

The Multilateral Export Control Regime seeks to:

1. complement the objectives of international nonproliferation treaties, including the Nonproliferation Treaty (NPT), Biological Weapons Convention, and the Chemical Weapons Convention.
2. contribute to international security and nonproliferation efforts by establishing common regulations for the trade and transfer of conventional weapons and dual-use items, and for the trade and transfer of goods, material, and technology which can be used to manufacture weapons of mass destruction.
3. limit the access of terrorist organizations and groups, individuals, and nations sponsoring terrorists to weaponry and goods, materials, and technologies that can be used to manufacture or produce weapons of mass destruction, by regulating international transfers of such items.
4. limit the ability of states seeking weapons of mass destruction from obtaining the technology, goods, material, and know-how needed to build such weapons, thereby allowing time for political change to occur or pursuit of such weapons to be abandoned.
5. deny conventional weapons and related dual-use items to states or groups hostile to the interests of the Regime’s members, or to states or groups that, in the collective judgment of the Members, have one or both of the following characteristics:
 - a) States or groups that have shown blatant disregard for human rights;
 - b) States or groups incapable of maintaining, or unwilling to maintain, physical control over weapons.

Members agree to adhere to the guidelines of the Regime, which aim to establish transparent, effective and harmonious export control policies and practices that help achieve the objectives of the Regime without impeding legitimate commercial transactions.

II. Membership

1. Membership shall be open to those states that are currently participating in any of the four export control arrangements (The Nuclear Suppliers Group, The Australia Group, The Wassenaar Arrangement and The Missile Technology Control Regime as currently constituted) and to other States that have demonstrated:

- a. capability to trade, transfer, or re-transfer relevant goods/technologies (either domestically produced or produced within a common market area of which the state is a member);
- b. unambiguous national commitment to the objective of nonproliferation in general, and to the MECR's objectives in particular;
- c. unambiguous national commitment to harmonize national export control regulations and lists with other members of the MECR;
- d. a commitment to abide by the decisions of the Regime, including those that represent less than unanimous Member consent; and
- e. a commitment and ability to implement export control regulations.

2. Membership shall be decided by the Regime's members with a consensus of all members required for admission of a new member. A member of the MECR which has persistently violated the principles contained in these Initial Elements or in any of the Multilateral Export Control Arrangements of which it is a member may be expelled from membership in the MECR by the Executive Committee or by the Plenary Conference through a vote concurred in by representatives of two-thirds of the other Members of the Regime represented thereon.

3. Any Member may withdraw from adhesion to these Initial Elements. Such withdrawal shall take effect upon the expiration of six months from the date on which written notice of withdrawal is received by the Director-General of the MECR. Withdrawal from a Multilateral Export Control Regime Arrangement included in Annexes 3, 4, 5, and 6 to these Initial Elements shall be governed by the provisions of that Arrangement.

III. Scope of the MECR

1. The MECR shall provide the common framework for the conduct of relations among its Members in matters related to these Initial Elements and the associated Multilateral Export Control Regime Arrangements included in the Annexes to these Initial Elements.
2. The agreements included in Annexes 3, 4, 5 and 6 (hereinafter referred to as "Multilateral Export Control Regime Arrangements") are part of these Initial Elements for those Members that have accepted them. The Multilateral Export Control Regime Arrangements do not create either obligations or rights for Members that have not accepted them.
3. In the event of a conflict between the provisions of these Initial Elements and the provisions of any of the Multilateral Export Control Regime Arrangements, the provisions of these Initial Elements shall prevail to the extent of the conflict.

IV. Functions of the MECR

1. The MECR shall provide the framework for and shall facilitate the implementation, administration, operation, and further the objectives, of these Initial Elements and of the Multilateral Export Control Regime Arrangements.
2. The MECR shall provide the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under these Initial Elements and the Arrangements in the annexes hereto. The MECR may also provide a forum for further negotiations among its Members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Plenary Conference.
3. The MECR shall also provide a forum for the consideration of issues of common policy concern to members in the issue-area of nonproliferation export controls, and for the adoption of unified policies to address these concerns. It shall further provide a forum for information sharing between members on matters of such common concern.
4. The MECR shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes in Annex 2 to these Initial Elements.
5. The MECR shall administer the Trade Policy Review Mechanism provided for in Annex 1 to these Initial elements.

V. Structure of the MECR

The Multilateral Export Control Regime will be based in Vienna, Austria.

1. Members shall meet periodically to make decisions regarding the Regime and its objectives; to share information; to harmonize and coordinate policies and practices; and to respond to new security and/or trade concerns.

2. There shall be a Plenary Conference composed of representatives of all Members, which shall meet at least once every two years. The Plenary Conference shall carry out the functions of the Regime, and take actions necessary to this effect. The Plenary Conference shall have the authority to take decisions on all matters under any of the Multilateral Export Control Regime Arrangements, if so requested by a Member, in accordance with the specific requirements for decision-making specified in these Initial Elements and in any Multilateral Export Control Regime Arrangement. The Plenary Conference shall also have the authority to establish policy for the Regime in areas of common concern and interest to Regime Members and in keeping with the Objectives of the MECR. Such policies shall be effective upon Members of the MECR and upon the Multilateral Export Control Regime Arrangements and all members thereof notwithstanding contrary provisions contained therein.

3. There shall be an Executive Committee composed of representatives of all the Members, which shall meet as appropriate. In the intervals between meetings of the Plenary Conference, its functions shall be conducted by the Executive Committee. The Executive Committee shall also carry out the functions assigned to it by these Initial elements. The Executive Committee shall establish its rules of procedure.

4. The Executive Committee shall convene as appropriate to discharge the responsibilities of the Compliance Review Committee provided for in the Compliance Determination Understanding in Annex 2. The Compliance Review Committee may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfillment of those responsibilities.

5. The Executive Committee shall convene as appropriate to discharge the responsibilities of the Trade Policy Review Body provided for in the Trade Policy Review Mechanism in Annex 1. The Trade Policy Review Body may have its own chairman and shall establish such rules of procedure as it deems necessary for the fulfillment of those responsibilities.

6. The bodies provided for under the Multilateral Export Control Regime Arrangements shall carry out the functions assigned to them under those agreements and shall operate within the institutional framework of the MECR. These bodies shall keep the Executive Committee informed of their activities on a regular basis.

7. The Executive Committee shall establish a Policy Experts Group to consider and address cross-cutting issues of policy common to these Initial Elements and the Multilateral Export Control Regime Arrangements and the work of the bodies thereof.

The Policy Experts Group shall be composed of recognized policy experts, who shall assist the Executive Committee in formulating common Regime policy through the provision of research and recommendations based thereon.

VI. Relations With Other Organizations

1. The Executive Committee shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the MECR.
2. The Executive Committee shall make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the MECR.

VII. The Secretariat

1. There shall be a Secretariat of the MECR (hereinafter referred to as “the Secretariat”) located in Vienna and headed by a Director-General.
2. The Plenary Conference shall appoint the Director-General by majority vote of the Members and adopt regulations setting out the powers, duties, conditions of service and terms of office of the Director-General.
3. The Director-General shall appoint the members of the staff of the Secretariat and determine their duties and conditions of service in accordance with regulations adopted by the Plenary Conference.
4. The responsibilities of the Director-General and the staff of the Secretariat shall be exclusively international in character. In the discharge of their duties, the Director-General and the staff of the Secretariat shall not seek or accept instructions from any government or any other authority external to the MECR. They shall refrain from any action which might adversely reflect on their position as international officials. The Members of the MECR shall respect the international character of the responsibilities of the Director-General and the staff of the Secretariat and shall not seek to influence them in the discharge of their duties.
5. The Secretariat shall undertake the responsibilities entrusted to it, including, but not limited to, information exchange, communication, outreach, and analytical studies.

VIII. Decision-Making

1. The MECR shall operate on the basis of decisionmaking by consensus.⁴⁸ Except as otherwise provided for herein or in the Multilateral Export Control Regime Arrangements

⁴⁸ The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting where the decision is taken, formally objects to the proposed decision.

included in the Annexes hereto, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Plenary Conference and the Executive Committee, each Member of the MECR shall have one vote. Decisions of the Plenary Conference and the Executive Committee shall be taken by a two-thirds majority of the votes cast, unless otherwise provided in these Initial Elements or the relevant Multilateral Export Control Regime Arrangement.

2. The Plenary Conference and the Executive Committee shall have the exclusive authority to adopt interpretations of these initial elements and of the Multilateral Export Control Regime Arrangements. In the case of an interpretation of a Multilateral Export Control Regime Arrangement in Annexes 3,4,5 & 6, they shall exercise their authority on the basis of a recommendation by the chief organ overseeing the functioning of that Arrangement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members. This paragraph shall not be used in a manner that would undermine the amendment provisions in Article IX.

3. In exceptional circumstances, the Plenary Conference may decide to waive an imperative undertaken by a Member through these Initial Elements or any of the Multilateral Export Control Regime Arrangements; provided that any such decision shall be approved by three-fourths of the Members.

(i). A request for a waiver shall be submitted to the Plenary Conference for consideration pursuant to the practice of decision-making by consensus. The Plenary Conference shall establish a time-period which shall not exceed ninety days to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three-fourths of the Members.

4. A decision by the Plenary Conference granting a waiver shall state the exceptional circumstances justifying the decision, the terms and conditions governing the application of the waiver, and the date on which the waiver shall terminate. Any waiver granted for a period of more than one year shall be reviewed by the Plenary Conference not later than one year after it is granted, and thereafter annually until the waiver terminates. In each review, the Plenary Conference shall examine whether the exceptional circumstances justifying the waiver still exist and whether the terms and conditions attached to the waiver have been met. The Plenary Conference, on the basis of the annual review, may extend, modify or terminate the waiver.

IX. Amendment

1. Any Member of the MECR may initiate a proposal to amend the provisions of these Initial Elements by submitting such proposal to the Plenary Conference. Any amendment to these Initial Elements shall be approved by consensus of the Plenary Conference.

ANNEX I

Trade Policy Review Mechanism

Members hereby agree as follows:

A. Objectives

(i). The purpose of the Trade Policy Review Mechanism is to contribute to improved adherence by all Members to rules and commitments made under the Multilateral Export Control Regime Arrangements and hence to the smoother functioning of the multilateral export control system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members. Accordingly, the review mechanism will enable the regular collective appreciation and evaluation by the Plenary Conference of the full range of individual Members' trade policies and practices regarding control of sensitive items and technologies and their impact on the functioning of the multilateral export control system. It is not, however, intended to serve as a basis for the enforcement of specific commitments under the Arrangements or for dispute settlement procedures, or to impose new policy commitments on Members.

(ii). The assessment to be carried out under the review mechanism will, to the extent relevant, take place against the background of the wider economic and developmental needs, policies and objectives of the Member concerned, as well as of its external environment. However, the function of the review mechanism is to examine the impact of a Member's export control policies and practices on the multilateral export control system.

B. Domestic Transparency

Members recognize the inherent value of domestic transparency of government decision-making on export control policy matters for both Members' economies and the multilateral export control system, and agree to encourage and promote greater transparency within their own systems, acknowledging that the implementation of domestic transparency must be on a voluntary basis and take account of each Member's legal and political systems.

C. Procedures for Review

(i). Trade policy reviews will be carried out by the Trade Policy Review Body (TPRB).

(ii). The export control policies and practices of all Members will be subject to periodic review. The impact of individual Members on the functioning of the multilateral export control system, defined in terms of their share of world trade in sensitive items in a recent representative period, will be the determining factor in deciding on the frequency of reviews. The first four trading entities so identified (counting the European Communities as one) will be subject to review every two years. The next sixteen will be

reviewed every four years. Other Members will be reviewed every six years, except that a longer period may be fixed for least-developed country Members. It is understood that the review of entities having a common external policy covering more than one Member shall cover all components of policy affecting export control including relevant policies and practices of the individual Members. Exceptionally, in the event of changes in a Member's export control policies or practices which may have a significant impact on the multilateral export control system, the Member concerned may be requested by the TPRB, after consultation, to bring forward its next review.

(iii). In the light of the objectives set out in A above, discussions in the meeting of the TPRB will, to the extent relevant, take place against the background of the wider economic and development needs, policies and objectives of the Member concerned, as well as of its external environment. The focus of these discussions will be on the Member's export control policies and practices which are the subject of the assessment under the review mechanism.

(iv). The TPRB will establish a basic plan for the conduct of the reviews. It may also discuss and take note of update reports from Members. The TPRB will establish a program of reviews for each year in consultation with the Members directly concerned. In consultation with the Member or Members under review, the Chairman may choose discussants who, in their personal capacity, will introduce the discussions in the TPRB.

(v). The TPRB will base its work on the following documentation:

(a). A full report, referred to in paragraph D below, supplied by the Member or Members under review.

(b). A report, to be drawn up by the Secretariat on its own responsibility, based on the information available to it and that provided by the Member or Members concerned. The Secretariat should seek clarification from the Member or Members concerned of their export control policies and practices.

(c). Reports by other Members or by other interested parties, including non-governmental organizations.

(vi). The reports by the Member under review and by the Secretariat, together with the minutes of the respective meeting of the TPRB, will be published promptly after the review.

(vii). These documents will be forwarded to the Plenary Conference, which will take note of them.

D. Reporting

In order to achieve the fullest possible degree of transparency, each Member shall report regularly to the TPRB. Full reports will describe the export control policies and practices

pursued by the Member or Members concerned, based on an agreed format to be decided upon by the TPRB. This format may be revised by the TPRB in the light of experience. Between reviews, Members will provide brief reports when there are any significant changes in their trade policies; an annual update of statistical information will be provided according to the agreed format. Particular account will be taken of difficulties presented to least-developed country Members in compiling their reports. The Secretariat shall make available technical assistance on request to developing country Members, and in particular to the least-developed country Members. Information contained in reports should to the greatest extent possible be coordinated with notifications made under provisions of the Multilateral Export Control Regime Arrangements.

E. The TPRB will undertake an appraisal of the operation of the TPRM not more than five years after the adoption of the Initial Elements of the MECR. The results of the appraisal will be presented to the Plenary Conference. It may subsequently undertake appraisals of the TPRM at intervals to be determined by it or as requested by the Plenary Conference.

F. An annual overview of developments in the international export control environment which are having an impact on the multilateral export control system will also be undertaken by the TPRB. It will be assisted by an annual report by the Director-General setting out major activities of the MECR and highlighting significant policy issues affecting the export control system.

ANNEX II

Compliance Determination Understanding

Members hereby agree as follows:

- A. The Executive Committee of the MECR, acting as the Compliance Review Committee, shall have authority to determine that a Member is in non-compliance with the commitments undertaken in the Initial Elements of the MECR or in any of the Multilateral Export Control Regime Arrangements in the Annexes thereto.
- B. The Compliance Review Committee shall take cognizance only of cases of suspected non-compliance referred to it by a Member of the MECR.
- C. Such a referral shall be made to the Chairman of the Compliance Review Committee and shall include a detailed account of the information held by the complaining Member upon which it bases its suspicions of non-compliance by the defending Member.
- D. Upon referral of the case, the Chairman shall forward the matter to the Compliance Review Committee, which upon a majority vote shall establish a Compliance Panel to review the case.
- E. Compliance Panels shall be composed of independent experts in the field of nonproliferation export controls. The Compliance Review Committee shall establish procedures for the establishment and operation of such Compliance panels, including rules for submission of evidence and substantive rules of determination both of fact and of rule and commitment that shall be followed by Compliance Panel members.
- F. The Compliance Panel shall submit a report of its findings and determinations to the Compliance Review Committee, which shall conduct a review of the same.
- G. After the conclusion of this review, the Compliance Review Committee shall make a determination based upon the report of the Compliance Panel. Absent a unanimous vote overturning the report of the Compliance Panel, the Compliance Review Committee shall adopt the report of the Compliance Panel and, in accordance with such a determination by the Compliance Panel, shall determine that the defending Member either is presently or has been in noncompliance with its commitments undertaken in the Initial Elements of the MECR or in any of the Multilateral Export Control Regime Arrangements in the Annexes thereto.
- H. In the case of such a determination of non-compliance, a formal report of the determination of the Compliance Review Committee and the facts appertaining thereto shall be drafted and published, and the Executive Committee of the MECR shall issue a statement condemning the acts or omissions of the Member concerned.

ANNEX III
The Nuclear Suppliers Group

(A renewed version of the NSG's foundational documents)

ANNEX IV
The Australia Group

(A renewed version of the AG's foundational documents)

ANNEX V
The Wassenaar Arrangement

(A renewed version of the WA's foundational documents)

ANNEX VI
The Missile Technology Control Regime

(A renewed version of the MTCR's foundational documents)

The Multilateral Export Control Regime

