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RESTRUCTURING THE MULTILATERAL EXPORT CONTROL REGIME SYSTEM

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ABSTRACT

This article identifies a current disharmony arising from increased expectations for the effectiveness and scope of the multilateral non-proliferation 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 article will propose that, through employing international legal and organisational theory, this disharmony can be substantially mediated, and that the expectations of the multilateral non-proliferation 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 higher 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 of regime members to institute programmes of reform within the regimes.

1 INTRODUCTION

With the recent coalition action in Iraq, attention among international lawyers interested in the system for normative ordering of international security relationships, has largely been focused on the arguments for and against the establishment of preemptive strike principles in both national security policy and international law to deal with the proliferation of weapons of mass destruction (WMD). The maintenance and legitimacy of such a principle, it is argued by some, are necessary to protect against the threats arising from such proliferation, including 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 destabilising quantities of WMD related material upon which they are based, are of interest and worthy of thorough study, they are not the focus of this article. This treatment will rather examine what is herein argued to be an even more important element in the overall programme of national and multilateral non-proliferation efforts than the doctrine of preemption – timely and effective prevention.

Benjamin Franklin noted in his *Poor Richard's Almanac* that 'an ounce of

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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, 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 programme, which has been a primary cause of two multi-national wars in 12 years aimed at containing the threat perceivedly produced thereby.[1] Due in part to these revelations and to the attacks of 11 September 2001, a number of important members of the international community have now pledged their resources to a perennial 'war on terrorism', with the explicit purpose of 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 a high level of continuing expenditures of resources and lives for the cause of security might not now be necessary.

These preventive frameworks will be the subject of the balance of this study. The multilateral export control regimes, which will be defined and discussed in detail later on, in particular have the potential to contribute significantly to the maintenance of a more harmonized and efficient overall non-proliferation regime at both the national and international levels, and thereby to the preventive programme 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 criticised in recent years as ineffective in performing their core roles of promulgating norms and facilitating co-ordination and co-operation among member states in the area of export control law and policy. This treatment will examine these claims of inefficiency and will seek both to provide commentary on their substance, and, more importantly, will propose means of institutional restructuring within the current multilateral export control regime system to remedy existing regime shortcomings.

As a policy matter, detailed study of the multilateral export control regimes and proposals for their strengthening could hardly be of more pressing and timely

[1] J. Holmes & G. Bertsch, 'Tighten Export Controls', *Defense News* (5 May 2003).

[2] On the role that export controls can play in non-proliferation efforts as well as the limitations of export controls see K. Bailey, 'Nonproliferation Export Controls: Problems and Alternatives' in K. Bailey and R. Rudney (eds.), *Proliferation and Export Controls* (1993); US Congress, Office of Technology Assessment, *Export Controls and Nonproliferation Policy* (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 (December 1999); National Academy of Sciences, *Elements of a New Response: Multilateral Export Control Regimes, Finding Common Ground: US Export Controls in a Changed Global Environment* (1991); R. Cupitt, *Multilateral Nonproliferation Export Control Arrangements in 2000: Achievements, Challenges and Reform* (September 2000).

importance as they bear on the maintenance and improvement of one vital arrow in the quiver of the international community's non-proliferation efforts. From a theoretical perspective as well, however, these regimes are interesting examples of continuously functioning international soft law arrangements, which while based upon non-binding foundational documents yet have elements of institutional structure such as regularised meetings, sophisticated information sharing networks and procedures for continuing norm generation. In the context of these policy arguments, therefore, this treatment will also examine some modern thinking in both international legal theory and international relations theory, and utilise these understandings both to explain the character of the regimes more fully as well as in making proposals for the future direction of the regimes.

2 THE REGIME SYSTEM

Consideration will first turn, however, 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 delivery system technologies area.[3] Several of these export control and non-proliferation 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 1972 Biological Weapons Convention (BWC) and the 1993 Chemical Weapons Convention (CWC).[4]

[3] See D. Gualtieri, 'The System of Non-Proliferation Export Controls' in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (2000); R. Forsberg, *et al.*, *Nonproliferation Primer: Preventing the Spread of Nuclear, Chemical and Biological Weapons* (1995); B. Kellman, 'Bridling the International Trade of Catastrophic Weaponry' (1994) 43 *Am. U. L. Rev.* 755; P. van Ham, *Managing Non-Proliferation Regimes in the 1990s: Power, Politics, and Policies* (1993); T. Bernauer, *The Chemistry of Regime Formation: Explaining International Cooperation for a Comprehensive Ban on Chemical Weapons* (1993); M. Lipson, 'The Reincarnation of COCOM: Explaining Post-Cold War Export Controls' (1999) *The NonProliferation Review*; G. K. Bertsch and S. Grillot, *Arms on the Market: Reducing the Risk of Proliferation in the Former Soviet Union* (1998); R. Cupitt and S. Grillot, 'COCOM is Dead, Long Live COCOM: Persistence and Change in Multilateral Security Institutions' (1997) 27 *British Journal of Political Science* 361; E. H. Noehrenberg, *Multilateral Export Controls and International Regime Theory: the Effectiveness of COCOM* (1995).

[4] Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature 1 July 1968, 21 UST 483, TIAS No. 6839, 729 UNTS 161; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin

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 co-operation among themselves. These communities are typified by interaction among members exhibiting an appreciation of both short term and long term communal interests in co-operating on issues of security concern. Security communities may be either loosely or tightly joined together as gauged by the degree of interaction and structural formality of the arrangement.[6]

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 primary purpose being to co-ordinate and harmonize national policies regarding non-proliferation 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 (that is supplier states). In addition to facilitating co-ordination and co-operation, the regimes have also

[4] *(continued)* Weapons and on Their Destruction, opened for signature 10 Apr. 1972, 26 UST 583, TIAS No. 8062, 1015 UNTS 163; Convention on the Prohibition of the Development, Production and Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature, Paris, 13 January 1993, entered into force 29 April 1997, 32 ILM 800.

[5] For an excellent review of international relations theories on institutions in the context of multilateral export control regimes, see M. Lipson, 'The Reincarnation of COCOM: Explaining Post Cold-War Export Controls' (1999) 6(2) *The Nonproliferation Review*. 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 S.D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' in Krasner (ed.), *International Regimes* (1983) 2.

[6] E. Adler and M. Barnett (eds.), *Security Communities* (1998).

become important promulgators of multilateral norms used in efforts by the regimes and by international civil society 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 both of a single use (that is of only military practical usefulness) and of a dual use character (that is with both legitimate civilian as well as WMD or high end conventional weapons-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 programme. 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 behaviour in the context of export controls. These guidelines are uniformally 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 mooting of regime principles.[8]

Three out of the four regimes can trace their origins to the Cold War period, and were initially formed by relatively small groups of 'like minded' states the chief goal of many of which was to counter the influence of the Soviet Union and protect the security interests of the West through harmonized control of WMD-related materials and technology transfer.[9] However, particularly since the fall of the Soviet Union the regimes have been faced with an identity 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

[7] See G.K. Bertsch and W.C. Potter (eds.), *Dangerous Weapons, Desperate States* (1999); G.K. Bertsch, *et al.* (eds.), *International Cooperation on Nonproliferation Export Controls* (1994); F.V. Kratochwil, *Rules, Norms, & Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989); J. Goldstein and R.O. Keohane (eds.), *Ideas and Foreign Policy: Beliefs, Institutions and Practical Change* (1993); J. Dhanapala, 'Multilateralism and the Future of the Global Nuclear Nonproliferation Regime' (2001) *The Nonproliferation Review*.

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

[9] See G.K. Bertsch, R.T. Cupitt and S. Elliot-Gower, 'Multilateral Export Control Organizations' in Bertsch, Cupitt and Elliot-Gower (eds.), *op. cit.*

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] Complicating matters further is the fact that some of these new supplier states have elected to remain outside of the existing regimes.[13]

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 decentralizing 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 programme which has met with mixed results internationally.[14]

[10] See S. Gahlaut and V. Zaborsky, *Do Regimes Have the Members They Need?* (February 2003); R.T. Cupitt and I. Khripunov, 'New Strategies for the Nuclear Suppliers Group (NSG)' (1997) 16 *Comparative Strategy* 305; G.K. Bertsch and S. Grillot (eds.), *Arms on the Market: Reducing the Threat of Proliferation in the Former Soviet Union* (1998) 235–36; J. Baker, *Nonproliferation Incentives for Russia and Ukraine* (1997) 84–90; H. Muller, 'Nuclear Export Controls in Europe: An Introduction' in Muller (ed.), *Nuclear Controls in Europe* (1995) 7–8. On problems stemming from increased numbers see R. Axelrod and R. Keohane, 'Achieving Cooperation Under Anarchy: Strategies and Institutions' (1985) 38 *World Politics* 237. On dealing with larger numbers see M. Kahler, 'Multilateralism with Small and Large Numbers' (1992) 46 *International Organization* 681.

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

[12] See W.A. Reinsch, 'Export Controls in the Age of Globalization' (1999) *The Monitor: Nonproliferation Demilitarization and Arms Control* 5; *Defense Industry Consolidation: Competitive Effects of Mergers and Acquisitions* (Testimony, 4 March 1998 GAO/T-NSIAD-98-112); W.W. Keller and J.E. Nolan, 'The Arms Trade: Business as Usual?' (1997) 109 *Foreign Policy* 113.

[13] Israel, India, Pakistan and China – all either declared or suspected nuclear weapons possessing states, and a number of which are suspected of involvement in secondary proliferation activities (i.e. proliferation from sources outside of the regimes) – are for example not members of the Nuclear Suppliers Group.

[14] On patterns of technology dissemination and the challenges presented thereby, see M. Moodie, 'The Challenges of Chemical, Biological and Nuclear Weapons Enabling Technology' in P. Gasprani Alves and K. Hoffman (eds.), *The Transfer of Sensitive*

Also with the end of the Cold War, proliferation of WMD-related materials and technology has until recently taken a back seat in the minds of many policymakers, as the newly arrived unipolar movement and resultant 'new world order' has 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 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.[15]

Finally, Iraqi post-1991 WMD revelations along with fears concerning WMD development programmes notably in North Korea and Iran, combined with the terror attacks of 11 September 2001, 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, and have highlighted the degree to which sophisticated states and non-state actors have acquired or are threatening to acquire WMD. In the wake of this modified calculus of geopolitical threat, 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 the regimes have been insufficiently adapted to the challenges posed by these and other forces of both external and internal character.[16] Some commentators have claimed 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 policies. Some have even questioned the regimes' relevance and value to the international community's non-proliferation efforts going forward.[17]

This article will proceed to consider the concerns raised by these commentators

[14] *(continued) Technologies and the Future of Control Regimes* (1997) 44–47. See also W.W. Keller and J.E. Nolan, 'Proliferation of Advanced Weaponry: Threat to Stability' (1997–1998) *Foreign Policy* 94; M. Hirsch, 'The Great Technology Giveaway', (September/October 1998) *Foreign Affairs* 70–71.

[15] 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* (September 2002). See also the General Accounting Office's 2002 report entitled *Strategy Needed to Strengthen Multilateral Export Control Regimes.*

[16] See J. Cirincione (ed.), *Repairing the Regime: Preventing the Spread of Weapons of Mass Destruction* (2000); M. Barletta and A. Sands (eds.), *Nonproliferation Regimes at Risk* (1999).

[17] See A. Latham and B. Bow, 'Multilateral Export Control Regimes: Bridging the North-South Divide' (1998) 3 *Canadian Institute of International Affairs International Journal* 53.

relative to the effectiveness and legitimate role of the multilateral export control regimes in the international community's 21st century non-proliferation programme, and will posit that the regime system is in fact 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, and will propose significant efforts of restructuring of the regimes to remedy these inherent structural problems and to meet modern challenges to their effectiveness in filling their core non-proliferation roles.

2.1 Regime Effectiveness

From the start it must be noted that analysis of regime effectiveness, as customarily cast in terms of member compliance with commitments undertaken in the context of the multilateral export control regimes, is an exercise in unsurety and definitional difficulty. As will be explained in more detail below, the guidelines of the regimes are extremely vague in outlining the parameters of member state commitments. 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 threat and status of the end user, along with the criteria for judging intent, as well as the level of 'restraint' appropriate in each case, is left wholly to national discretion based only upon a number of listed factors without authoritative interpretation or objective standards and with no transparent process for verification.

In any case of alleged noncompliance with regime commitments, therefore, there is precious little in the way of objectively ascertainable standards by which to determine such compliance, with the result that reliable or objectively legitimate studies or reports on levels of member compliance with regime norms have been impossible to produce. This fact has made efforts of reform of the regimes all the more difficult, as there has been very little data to point to establishing a compliance problem. This combined with the further reality that some influential nations have a vested interest in maintaining lax or ambiguous multilateral export control standards have made proposals for restructuring relatively easy for those officials to dismiss as unnecessary.

The compliance problem in the regimes can therefore be best described not only as one wherein existing rules are not being complied with, or implemented

sufficiently in national legal systems, but also one in which what rules there are, are incapable of authoritative interpretation and determination, due to the institutional characteristics of the regimes (discussed further below), on which to base a determination of non-compliance. That being said, there is a general understanding among observers of the regimes that a number of key regime members have acted in the past and are continuing to act in significant disharmony with interpretations of their commitments commonly held by a majority of regime members. Common targets of such criticism have included Russia and in some cases France and the United States with regard to their commitments in the context of regimes of which they have been members.

Of course casting the concept of regime effectiveness in terms of member compliance with existing commitments is in fact only half of the picture. The other half is the substance of the norms themselves. One hundred per cent member state compliance with norms insufficiently constructed to address proliferation problems would still not produce a regime system effective in achieving its goals in this regard. In reality therefore the ineffectiveness of the multilateral export control regimes is necessarily viewed as a two-fold problem, consisting both of levels of compliance with existing norms, and with the insufficient character of the norms themselves. However, both aspects of this larger issue of regime effectiveness can be viewed as being framed within the context of the gap between heightened expectations for regime effectiveness, to be found in statements of policymakers and others, and institutional facets of the current structure of the regimes themselves.

2.2 Structural Problems

Critics have identified a number of problems with the institutional structure of the regimes as currently constituted which are claimed to be at the root of problems of regime ineffectiveness. 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 perceptions of threat (that is 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 co-operation among member states relative to their national non-proliferation efforts.[18]

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.[19]

2.3 Informality

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.[20] 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 harmonisation of members' national licensing systems with regime control lists. For this reason, many 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.[21] In addition to this weakness in the 'letter' of regime documentary foundations is the further fact that the regimes as previously noted have been endowed with uniformly vague substantive rules, an aspect

[18] See *Strengthening Multilateral Export Controls: A Nonproliferation Priority* (September 2002).

[19] See M. Beck and S. Gahlaut, 'Creating a New Multilateral Export Control Regime' (April 2003) *Arms Control Today* 8–9.

[20] See M. Beck, 'Reforming the Multilateral Export Control Regimes' (2000) *The NonProliferation Review* 91.

[21] 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').

of their structures which has traditionally bedeviled efforts of promoting compliance even with the 'spirit' of the regimes.[22]

A further particularly poignant 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 with a multilaterally conceived set of normative prescriptions, and has left states to their own devices in making determinations of threat with no procedure for resolution of these issues having been achieved in the documentary foundations of the regimes.

International law has classically recognised two sources of binding norm generation 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

[22] M. Beck, 'Reforming the Multilateral Export Control Regimes' (2000) *The NonProliferation Review* 17–18 ('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 themselves to make risk assessments about the likelihood that an export will be diverted to unauthorized military uses').

[23] See UN Charter, Statute of the International Court of Justice, art. 38 (listing the sources of international law). See also G. Bunn, 'The Status of Norms Against Nuclear Testing' (1999) *The NonProliferation Review* 30–46 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 article to adopt the usage of 'soft law' common in international legal literature, though Bunn's usage and its implications are entirely accurate.

[24] See A.H. Chayes and A. Chayes, 'Regime Architecture: Elements and Principles' in J.E. Nolan (ed.), *Global Engagement: Cooperation and Security in the 21st Century* (1994) 54; P. Szasz, 'General Law-Making Processes' in O. Schachter and C. Joyner (eds.), *United Nations Legal Order* 152.

sources have traditionally been held to produce binding obligations, or 'hard' international law.

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 behaviour 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* (1998) 64–65. As Oscar Schachter, 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'. O. Schachter, *International Law in Theory and Practice* (1982) 178. See also O. Schachter, 'The Twilight Existence of Nonbinding International Agreements' (1977) 71 *American Journal of International Law* 296. 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 State 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'. 73 *US Department of State Bulletin* (1975) 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) 38.

[26] Van Hoof, *Rethinking the Sources of International Law* (1983) 187. 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 Hjerner* 550–551 (1990). However, as D.J. Harris, *op. cit.*, 65 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'. See also G. Bunn, 'The Legal Status of U.S. Negative Security Assurances to Non-Nuclear Weapon States' (1997) *The NonProliferation Review* 24.

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 non-proliferation 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 utilised to regulate areas of international interaction in which the value placed on making credible commitments is high, reduction of long-term transaction 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 legalisation 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 recognises 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 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 co-operative organizational understandings as opposed to harder, more compulsory ones.[29]

Again, however, for the heightened expectations of observers of the regimes to be met, that is for the regimes to be both more effective in the promulgation of adequate norms addressing problems of WMD proliferation and in facilitating member implementation of those norms in their national systems, it is this article's contention that attention will need to be paid to proposals for increasing the

[27] K. Abbot and D. Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421.

[28] *Ibid.*

[29] See A. Stein, 'Coordination and Collaboration: Regimes in an Anarchic World' in D.A. Baldwin (ed.), *Neorealism and Neoliberalism: The Contemporary Debate* (1993) 57–59; J. Grieco, 'Understanding the Problem of Institutional Cooperation' in Baldwin, *op. cit.*, 84; L.L. Martin, *Coersive Cooperation: Explaining Multilateral Economic Sanctions* (1993) 159–65; R.T. Cupitt and W.J. Long, 'Multilateral Cooperation and Nuclear Nonproliferation' in Z.S. Davis and B. Frankel (eds.), *The Proliferation Puzzle: Why Nuclear Weapons Spread and What Results* (1993) 40; G. Bunn and D. Holloway, *Arms Control Without Treaties?* (February 1998).

formality of the structure of the regimes. However, as a fuller discussion of this point below will establish, this formalisation 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 argued 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 together constitute the necessary elements of formalisation for increasing member compliance and regime effectiveness.

2.4 Consensus Rules

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 non-proliferation export controls, has formed a significant hinderance to the effectiveness of the regimes in promulgating progressive norms and in facilitating harmonisation 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.

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

[30] See M. Beck and S. Gahlaut, 'Creating a New Multilateral Export Control Regime', *Arms Control Today* (April 2003).

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 non-proliferation efforts of the international community to new levels of effectiveness to institute a bold new programme 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 merged entity.[31]

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 programme 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 co-operative relationship as well as the fact that in this effort compromise is crucial, as no higher powers (such as veto powers) will 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, including emerging 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 article 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.

[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* (1991) 131. See also P. Freedenberg and I. Khripunov, 'Arms Control is Global Mission', *Defense News* (27 January 1992); L.S. Spector and V. Foran, *Preventing Weapons Proliferation: Should the Regimes be Combined?* Report of the Thirty-Third Strategy for Peace, US Foreign Policy Conference, The Stanley Foundation, 22–24 October 1992; T.W. Galdi, *Proliferation Export Control Regimes: Options for Coordination or Consolidation* (1993). On the importance of state policies strengthening the multilateral regimes see H. Muller, 'Compliance Politics: A Critical Analysis of Multilateral Arms Control Treaty Enforcement' (2000) *The NonProliferation Review* 87 and O. Young, 'Political Leadership and Regime Formation: On the Development of Institutions in International Society' (1991) 45 *International Organization* 281.

2.5 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 centralisation. 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 non-proliferation export controls would facilitate inter-regime dialogue on issues of cross-cutting concern, including trans-shipment, transfers of intangible technologies, information sharing and end users of concern. Third, centralisation 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 the far flung meetings of each respective regime only to interact with the very same cast of diplomatic characters, simply wearing different 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 even more calendar-challenged and attention sparse higher ups would be significantly 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 realisation of the importance of and need for multilateral co-ordination 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.

[32] See M. Beck and S. Gahlaut, 'Creating a New Multilateral Export Control Regime', *Arms Control Today* (April 2003).

2.6 Formalisation

First on the topic of informality. There is a substantial body of literature linking formalisation 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 formalisation in the specific context of the multilateral export control regime system.[33] According to this literature, formalisation of commitments and institutionalisation of commitments in regime structures is facilitative of state compliance because of its functions in clearly delineating legitimate and illegitimate state behaviour, reducing transactions costs, establishing clear standards for state behaviour, establishing linkages between issues and between regimes, improving confidence in information sharing, reducing motivations to cheat, enhancing the value of reputation, and making decentralised enforcement possible by creating processes of institutional monitoring.[34]

There is also, however, a considerable and growing body of 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, formalisation in the structure of international institutions can be separated into at least three broad sub-categories – obligation, precision, and delegation – the sum of the relative presence of each being the functional determinant of the degree of formalisation, or legalisation, present in the regime. As described by Keohane *et al.*:

> 'Legalization' refers to a particular set of characteristics that institutions may (or may not) possess. These characteristics are defined along three dimensions: obligation, precision, and delegation. *Obligation* means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are *legally* bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. *Precision* means that rules unambiguously define the conduct they require, authorize, or proscribe. *Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.[35]

[33] See D. Gualtieri, 'The System of Non-Proliferation Export Controls' in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-binding Norms in the International Legal System* (2000) 123; B. Kellman, 'Bridling the International Trade of Catastrophic Weaponry' (1994) 43 *AUL Rev.* 755. See also G. Bunn, *Physical Protection of Nuclear Materials: Strengthening Global Norms*, IAEA doc., November 1997.

[34] See *ibid*; A. Chayes and A. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995); R. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (1984); A.S. Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *AJIL* 205; R. Jervis, 'Security Regimes' in S. Krasner (ed.), *International Regimes* (1983) 47.

[35] K. Abbot *et al.*, 'The Concept of Legalization' (2000) 54 *International Organization* 401.

In some cases, it is argued, greater legalisation 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.[36] The clear relevance of 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 formalisation in the structural attributes of international regimes, and its attendant positive impact upon compliance by member states, can be effected in the absence of legalised 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 formalisation 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 UN Human Rights Commission (low precision, high delegation).[37]

2.7 Compliance

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 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 behaviour 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

[36] *Ibid.*; K. Abbot and D. Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *International Organization* 421; J. Trachtman, 'Bananas, Direct Effect and Compliance' (1999)10 *EJIL* 655; G.W. Downs *et al.*, 'Is the Good News About Compliance Good News About Cooperation?' (1996) 50 *International Organization* 75; J. Goldstein and L. Martin, 'Legalization, Trade Liberalization and Domestic Politics: A Cautionary Note' (2000) 54 *International Organization* 603.

[37] See Kenneth Abbot *et al.*, 'The Concept of Legalization' (2000) 54 *International Organization* 401 for this method of categorisation of regimes.

non-governmental actors.[38] 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 fuelled and informed by the enmeshing results of globalisation, issue linkages, norm internalisation and the increasing legalisation of many aspects of international relations.[39]

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 legalisation of underlying commitments. Rather, in areas in which softness of obligations is either a theoretical utility or political necessity, attempts to increase the formalisation 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 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.[40]

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.[41] Thus, in some cases it is highly preferable to have

[38] Abram and Antonia Chayes, 'On Compliance' (1993) 47 *International Organization* 175; A.T. Guzman, 'A Compliance Based Theory of International Law' (2002) 90 *Cal. L Rev.* 24; H.H. Koh, 'Why Do Nations Obey International Law?' (1997) 106 *Yale LJ* 2599.

[39] See J. Elster, *The Cement of Society: A Study of Social Order* (1989); J.B. Braithwaite, *Crime, Shame and Reintegration* (1989); A. Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (1995); L.L. Martin, 'The Rational State Choice of Multilateralism' (1992) 46 *International Organization* 76; J. Checkel, 'Why Comply?: Social Learning and European Identity Change' (2001) 55 *International Organization* 3.

[40] J. Trachtman, 'Bananas, Direct Effect and Compliance' (1999) 10 *EJIL* 655.

[41] 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 favour of its observance. See M. Finnemore, 'Norms, Culture and World Politics: Insights from Sociology's Institutionalism' (1996) 50 *International Organization* 325; T. Franck, *The Power of Legitimacy Among Nations* (1990).

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.[42]

This observation that states are often no more likely to comply with a norm in its legalised 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 co-operative 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 formalised 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 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.

2.8 Non-Consensual Voting Procedures

Second, on the topic of consensus voting rules, a restructured multilateral export control regime system could incorporate a diversified approach to institutional decision-making, leaving in place consensus voting procedures for those issues of first importance (that is deal breaking issues such as new member admissions) and for elements of regime identity (for example amendments to originating documents), but substituting supermajority or weighted voting procedures for an array

[42] See J. Checkel, 'Why Comply?: Social Learning and European Identity Change' (2001) 55 *International Organization* 3. 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'. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' in S. Krasner (ed.), *International Regimes* (1983) 7–8.

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 security community and to safeguard their prosperity in a globalising economy, in which to be labelled 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 danger and difficulties.

3 NEW REGIME DESIGN

Having reviewed some general structural amendments which could be incorporated into a new multilateral export control regime system, this article 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 private 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 the 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 article will advance the thesis that an institutional arrangement most analogous to that currently applied in the World Trade Organization (WTO) will best suit those needs and lead to greatest efficiency and potential success for the restructuring effort. Before beginning this exercise, however, it should be clear that this paper's contention is simply that elements of the structural and procedural attributes of the WTO system, and not necessarily the role or function of that system, could find useful application in the multilateral export control regime context. In so disclaiming, it is hoped that automatic cognitive reference to issues of current discussion and perhaps concern peculiar to the latter characteristics of the WTO system will be avoided.

That being said, however, the history of international regulation of general trade since the mid-twentieth century, as considered by analogy from an institutional development perspective, is in fact also quite instructive to the current discussion concerning the multilateral export control regime system.[43] Commercial trade between nations has historically been among the most sensitive of areas to regulate because of the potential far-reaching effect of such regulation upon 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 lack of clarity and precision in its provisions led to *ad hoc* and inconsistent application of its precepts, and very often simple neglect

[43] For this section see J.H. Jackson, *The World Trading System* (2nd edn, 1998) 106; G.P. Sampson (ed.), *The Role of the World Trade Organization in Global Governance* (2001); T.H. Cohn, *Governing Global Trade: International Institutions In Conflict And Convergence* (2002); T.W. Zeiler, *Trade Free World: The Advent of GATT* (1999); J. Croome, *Reshaping the World Trading System: A History of the Uruguay Round* (1999); K. Adamantopoulos (ed.), *An Anatomy of the World Trade Organization* (1997).

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 States 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.[44] The GATT however served to introduce some normativisation to the issue area, and in doing so illustrated in a fairly non-threatening way to its signatories the advantages of mutual co-operation 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 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 institutionalised 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.[45] 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 subagreements 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,

[44] See J.H. Jackson *et al.*, *Legal Problems of International Economic Relations* (3rd ed., 1995) 289–326.

[45] As reprinted in the 1995 Documentary Supplement to J.H. Jackson, W.J. Davey and A.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.

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 – that is the same mid-level national officials which make up the General Council, simply wearing different functional hats.

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 decentralisation 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 decentralisation, 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 – that is as in many ways separate and independent subject-material focused normative regimes. Horizontal decentralisation 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 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-à-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 decentralised 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 formalised 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 decentralisation 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 to be 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 decentralisation 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, formalised, 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 (with the possibility of information firewalls between sub-regimes in deference to membership differences), 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 renegotiated 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 institutionalisation of commitments in this issue area (that is 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 formalising developments, the proposed regime structure should as previously discussed contribute significantly to issue area cohesion and closer co-operation 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 formalisation 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.

4 EPRM 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 established, institutionalised 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 as previously discussed, 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.[46]

As previously stated, the restructured multilateral export control regime system of which this article 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 (that is non-legally binding) documentary foundation. Thus while states under this structure will similarly not be legally liable for non-compliance with regime rules, the utility of instituting a process for authoritative, or official interpretation of regime rules and for passing judgements 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 globalisation, issue linkages, norm internalisation and the increasing legalisation 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 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 is an independent variable influencing compliance, as it is a moving factor for the types and degree of both internal and external compliance pressure which may be exerted upon officials of the member states in question.[47]

In the context of the restructured multilateral export control regime system, this sense of legitimacy of regime norms could be significantly enhanced by the institutionalisation of both an Export Policy Review Mechanism (EPRM) and a Compliance Determination Understanding (CDU) (based upon the WTO's TPRM and DSU mechanisms, though with some procedural alteration particularly with regard to the CDU), from which could be derived official pronouncements of interpretation and judgements regarding member state behaviour 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 EPRM in the multilateral export control regime context would be to provide a unified system with harmonised standards of review

[46] See US General Accounting Office, *Strategy Needed to Strengthen Multilateral Export Control Regimes* (2002) GAO-03-43, 23.

[47] See T. Franck, *The Power of Legitimacy among Nations* (1990).

for producing reports on the export control practices of member states. This largely informational function is a novel suggestion in that there is no currently institutionalised procedure for such reviews. The work of an Export 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 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 non-compliances 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 non-compliance 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 multilateral export control regime context. Deficient export controls, with few exceptions, by their nature are not easily linked to particular damage suffered by specific member states. The damage flowing from lax or incongruent export controls is usually of a more generalised 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 programme, 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 in 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 non-compliance. In this sense the compliance determination process pursuant to the CDU would be more inquisitorial than adversarial in nature, finding a better analogue in the procedures of the UN Commission on Human Rights.

The compliance determination mechanism described above, in which the

present or past non-compliance of a member state may be determined, should be distinguished from the procedure for *ex ante* authorisation of significant exports of sensitive goods which was an institutional feature of the Co-ordinating Committee for Multilateral Export Controls (COCOM), the Cold War predecessor of the Wassenaar Arrangement.[48] 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 supplement 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 institutionalise an *ex ante* procedure for license approvals requiring unanimity among regime members, while theoretically the most effective means of co-ordinating non-proliferation 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 non-compliance and promulgation of norms, without pushing the procedural envelope and ineffectually challenging notions of sovereignty among increasingly un-like-minded member states.

5 CONCLUSION

This article 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 non-proliferation efforts in the area of multilateral export controls.

In the hope of contributing to international debate on this issue, this article has advanced the proposition that a newly merged and restructured multilateral export control regime system incorporating some, but not all, elements of normative formality could in large measure 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 at the same time remaining grounded in political reality and in an understanding of the particular characteristics of the multilateral export control issue area.

[48] See R.T. Cupitt and S.R. Grillot, *COCOM is Dead, Long Live COCOM: Persistence and Change in Multilateral Security Institutions* (1997) 27 *British Journal of Political Science* 361; K. Dursht, 'From Containment to Cooperation: Collective Action and the Wassenaar Arrangement' (1997) 19 *Cardozo L Rev.* 1098.

It has further posited that an organizational structure analogous to that designed in the agreements establishing the WTO would offer many structural advantages and utilities as an institutional framework for this restructured regime, including through the maintenance of a specially designed Export Policy Review Mechanism and Compliance Determination Understanding aimed at producing official interpretations of regime norms and determinations of member state compliance with agreed commitments.

In discussions with governmental officials during the writing of this article, it has become clear that there are currently two primary hindrances to the restructuring of the multilateral export control regimes along lines similar to those outlined herein. The first is the strong sense that many officials in regime circles feel and manifest regarding the maintenance of the status quo in this area, a sense that is no doubt wedded at least partially to their own personal investments of time in working within the existing regime frameworks and developing of regime-specific expertise, and to their having obtained influential positions in their national governments by virtue thereof.

The second is the lack of momentum currently present within national governments to bring about a newly restructured regime which, although concededly offering significant points of added value, has not yet received the mandate of catastrophe. Meaning of course that there has not yet occurred a WMD event of the location and magnitude necessary to martial political will at high enough levels of government to allow such a restructuring to be pushed through bureaucratic channels. While the first hinderance described above is understandable and expected in any new endeavour of regime engineering, the second is more troubling.

It is a fact that international organizations in the security context have a history of being one generation too late to in fact perform the functions for which they are designed. The League of Nations was instituted, for example, in order to establish a procedural system of checks and limitations purposed to prevent the sorts of miscommunications from occurring which were thought to have precipitated the First World War, but were not in fact the primary modern threat, and thus not well dealt with under the League of Nations Covenant system. The United Nations Charter as well was established with a firm grasp of the sorts of normative protections and frameworks which might have been useful had they been instituted in 1938, but which fairly soon after the charter's establishment began to be criticised as being insufficient to cover more modern security realities.

It is unfortunate that the multilateral export control regime system seems destined to suffer the same fate, and that there is not enough farsightedness among government circles not just to act reflexively to calamities in their international institution building, but to proactively seek to prevent them *ex ante* by engaging in the sorts of relatively simple institutional reworkings considered herein. It is the more disturbing because the technologies which the multilateral export control regimes seek to regulate, and which they might more effectively control if properly institutionally endowed, are even less allowing of institutional amendment *ex post* than are the use of force regimes previously mentioned. In the field of WMD

proliferation, it is not prudentially sound to try and get things right the second time around.

Thus, it is this article's contention that national policymakers should in this area particularly heed the advice of Benjamin Franklin, and commit themselves sooner rather than too late to a course of consideration and proactive implementation of measures to strengthen the multilateral export control system. It is hoped that the prescriptions for structural change as herein discussed may contribute to that consideration.