

IT DON'T COME EEZ: THE FAILURE AND FUTURE OF COASTAL STATE FISHERIES MANAGEMENT

DONNA R. CHRISTIE*

Table of Contents

I.	INTRODUCTION	1
II.	THE CONTINUING DECLINE OF EEZ FISH STOCKS	4
III.	EEZ MANAGEMENT AND THE LAW OF THE SEA CONVENTION	5
	A. <i>The Framework for Management</i>	5
	B. <i>The Inadequacy of the Management Principles of Articles 61 and 62</i>	6
IV.	ADDRESSING EEZ FISHERIES MANAGEMENT ISSUES FOR THE FUTURE	17
	A. <i>Revisiting the LOS Convention Provisions</i>	17
	B. <i>New Developments Affecting Management of EEZ Fisheries</i>21
V.	CONCLUSION	34

I. INTRODUCTION

Early in the negotiations of the Third United Nations Conference on the Law of the Sea (UNCLOS III) there was widespread agreement that coastal states should exercise exclusive jurisdiction over fisheries in an extended economic zone (EEZ).¹ This consensus developed quickly into customary international law.² By 1977, more than forty nations had extended sovereign or

* Elizabeth C. & Clyde W. Atkinson Professor of Law, Florida State University College of Law; B.S. Chem. 1969, University of Georgia; J.D. 1978, University of Georgia; Post Doc. 1978-1980, Marine Policy and Ocean Management, Woods Hole Oceanographic Institution. This article is adapted from a book chapter previously published in DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW (Ellen Hey ed., 1999) (Kluwer Law International, ISBN 90-411-1322-3). The author wishes to thank her research assistant, Jennifer Paterson, for her relentless and meticulous research and documentation work.

1. See generally U.N. DIV. FOR OCEAN AFFAIRS AND THE LAW OF THE SEA, OFFICE OF LEGAL AFFAIRS, CONSERVATION AND UTILIZATION OF THE LIVING RESOURCES OF THE EXCLUSIVE ECONOMIC ZONE: LEGISLATIVE HISTORY OF ARTICLES 61 AND 62 OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA at 113-18, U.N. Sales No. E.95.V.21 (1995) [hereinafter EEZ UNCLOS]. UNCLOS III was convened in 1973. *Id.* at 71. By 1975, both the concept of exclusive coastal state jurisdiction over a 200-mile EEZ and most of the basic management and conservation obligations of coastal states were settled. *Id.* at 113-18.

2. Donna R. Christie, *The Conservation and Management of Stocks Located Solely within the Exclusive Economic Zone*, in DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW 395 (Ellen Hey ed., 1999).

exclusive jurisdiction over fisheries to 200 miles,³ and by the conclusion of UNCLOS III negotiations in 1982, more than ninety nations had extended offshore jurisdiction over fisheries to 200 miles.⁴ This early consensus in the UNCLOS III negotiations and rapidly emerging state practice reflected the urgency that coastal states perceived concerning the escalation in distant water fishing, declining fish stocks, and the failure of international fisheries organizations to manage high seas fisheries effectively.⁵

A number of premises formed the basis for the Law of the Sea Convention's (LOS Convention)⁶ grant of exclusive fishery management authority to coastal states.⁷ The first was "that coastal state jurisdiction could provide a more functional fisheries management regime."⁸ Most fisheries are located within 200 miles of a coast,⁹ "making the 200-mile [EEZ] a rational area for management."¹⁰ Second, "by placing these areas under exclusive jurisdiction [of the coastal state], entry into fisheries would be controlled, thereby reducing both the potential for overfishing and for overcapitalization of fishing fleets."¹¹ In addition, coastal states would have authority "to enforce regulations against all vessels within the [EEZ]"¹² and not be dependent on the weak flag state enforcement that characterized regulation by international fisheries

3. See WILLIAM T. BURKE, *THE NEW INTERNATIONAL LAW OF FISHERIES* 22 n.76 (1994). Forty-four states extended some form of jurisdiction over fisheries to 200 miles offshore between 1975 and 1977. *Id.*

4. See ROBERT W. SMITH, *EXCLUSIVE ECONOMIC ZONE CLAIMS, AN ANALYSIS AND PRIMARY DOCUMENTS* 4 tbl. 1 (1986). In 1982, the International Court of Justice noted that "the concept of the exclusive economic zone . . . may be regarded as part of modern international law." *Continental Shelf (Tunis v. Libya)*, 1982 I.C.J. 18, 74 (Feb. 24).

5. See BURKE, *supra* note 3, at 23-24. Burke notes that the failure of international fisheries bodies "was not the result of an inherent incapacity for management by international agencies. . . . [but the lack of] political will [by coastal states and fishing states] to create international bodies with the necessary competence and assets to implement effective management." *Id.*

6. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) [hereinafter LOS Convention].

7. *Id.* pt. V, arts. 55-75; see Christie, *supra* note 2, at 395-96.

8. Christie, *supra* note 2, at 396.

9. *Id.* It is estimated that ninety percent of fisheries' catch is within 200 miles of the coast. *Id.* at 397. See also Garry R. Russ & Dirk C. Zeller, *From Mare Liberum to Mare Reservarum*, 27 *MARINE POL'Y* 75, 76 (2003); ELLEN HEY, *THE REGIME FOR THE EXPLOITATION OF TRANSBOUNDARY MARINE FISHERIES RESOURCES* 1 (1989). Prior to the widespread adoption of 200-mile EEZs, the high seas provided even less of the worldwide catch. Foreign fishing fleets were largely forced outside 200 miles. See Carolyn Deere, *International Trade, Conservation, and Sustainable Development in the Fisheries Sector: Conflict or Compatibility?*, 15 *OCEAN Y.B.* 102, 126 (2001) (noting that in 1980 only five percent of the world's catch came from the high seas).

10. Christie, *supra* note 2, at 396.

11. *Id.*

12. *Id.*

organizations.¹³ Finally, “prevailing theories of fisheries management were presumed to be adequate to protect and maintain fisheries if jurisdictional control and effective enforcement authority were established. None of these premises turned out to be entirely valid.”¹⁴

The next two decades saw fisheries stocks continuing to decline in both EEZs and on the high seas.¹⁵ A great deal of international attention has focused on the effects on EEZ management of illegal fishing and intense high seas fishing for straddling stocks and highly migratory species,¹⁶ but coastal states cannot totally shift culpability to distant-water fishing fleets for the failure of fisheries management in the EEZ.¹⁷ Coastal states were given virtually complete discretion in interpreting and implementing their duties under the LOS Convention and must take primary responsibility for failure to meet their most fundamental obligation — the prevention of overexploitation of EEZ fish stocks.¹⁸

In Part II, this article discusses the continuing decline of the state of fisheries since the development in international law of coastal state management of fisheries within 200-mile EEZs. Part III focuses on the management framework created by the LOS Convention and its weaknesses in assuring sustainable fisheries regimes for EEZs. The future of EEZ management in the

13. See Warren G. Magnuson, *The Fishery Conservation and Management Act of 1976: First Step Toward Improved Management of Marine Fisheries*, 52 WASH. L. REV. 427, 444-45 (1977) (discussing the lack of enforcement with regard to state-owned fishing fleets); R. R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 286-87 (3d ed. 1999) (discussing the problems of jurisdictional competency of international fisheries organizations and the disincentives for compliance). See generally Rebecca Bratspies, *Finessing King Neptune: Fisheries Management and the Limits of International Law*, 25 HARV. ENVTL. L. REV. 213, 223-26 (2001); Shigeru Oda, *Fisheries Under the United Nations Convention on the Law of the Sea*, 77 AM. J. INT'L L. 739, 740-41 (1983).

14. Christie, *supra* note 2, at 396.

15. *Id.*

16. See, e.g., Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, *approved* Nov. 24, 1993, S. TREATY DOC. NO.103-24, 33 I.L.M. 968 (1994); Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 Dec. 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec. 4, 1995, S. TREATY DOC. NO. 104-24, 34 I.L.M. 1542 (1995) (entered into force Dec. 11, 2001) [hereinafter U.N. Fish Stocks Agreement]; International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, Mar. 2, 2001, *available at* <http://www.fao.org> (last visited Mar. 12, 2004). See generally Ellen Hey, *Global Fisheries Regulations in the First Half of the 1990s*, 11 INT'L J. OF MARINE & COASTAL L. 459 (1996); Evelyne Meltzer, *Global Overview of Straddling and Highly Migratory Fish Stocks: The Nonsustainable Nature of High Seas Fisheries*, 25 OCEAN DEV. & INT'L. L. 255 (1994).

17. See generally Harry N. Scheiber, *Ocean Governance and the Marine Fisheries Crisis: Two Decades of Innovation – and Frustration*, 20 VA. ENVTL. L.J. 119, 127 (2001).

18. LOS Convention, *supra* note 6, art. 61(2).

international context is discussed in Part IV, which considers the role of the LOS Convention and other international treaties and obligations, as well as other developments, such as market-based approaches to improving fisheries management.

II. THE CONTINUING DECLINE OF EEZ FISH STOCKS

Since the extension of jurisdiction over EEZ fisheries by coastal states in the mid-1970s, worldwide marine catch has increased from about 60 million tons to a highpoint of about 94.8 million tons in 2000.¹⁹ The latest analysis of main stocks or species groups indicates that only about twenty-five percent of these stocks or species groups are underexploited or moderately exploited, forty-seven percent are fully exploited, eighteen percent are overexploited, and the remaining ten percent are either significantly depleted or recovering from depletion.²⁰

Fishing effort in the form of fishing capacity and more efficient technologies has, however, increased much more quickly than catch.²¹ In addition, as more valuable fish stocks have become depleted, juveniles and lower-value species represent a larger proportion of landings.²² Overfishing and the practice of fishing down the food web²³ can lead to long-term and potentially irreversible ecosystem level consequences through effects on “predatory relationships, genetic diversity of fish stocks, and the future recruitment and regenerative capacity of [fisheries].”²⁴ These indicators, along with recent periodic leveling-off or decline in total marine catch, suggest that fisheries cannot be sustained at current

19. U.N. FOOD & AGRIC. ORG., *THE STATE OF WORLD FISHERIES AND AQUACULTURE* 5, 8 (2002), available at <http://www.fao.org> (last visited Oct. 9, 2004).

20. *Id.* at 23.

21. Deere, *supra* note 9, at 115 (“[N]ew technology and fishing techniques . . . have increased the length and intensity of fishing trips, often turning fishing into an industrial activity.”); Christopher D. Stone, *Too Many Fishing Boats, Too Few Fish: Can Trade Laws Trim Subsidies and Restore the Balance in Global Fisheries?*, 24 *ECOLOGY L. Q.* 505, 507-08 (1997).

22. See Stone, *supra* note 21, at 508; see also Deere, *supra* note 9, at 117 (“Only the ability of the global fishing fleet to move on to lower-valued species . . . after having overfished the more highly valued species . . . has prevented sharp declines in the total catch over the past 2 decades.”).

23. See generally Daniel Pauly et al., *Fishing Down Marine Food Webs*, 279 *SCI.* 860 (1998), available at <http://www.seafriends.org> (last visited Oct. 9, 2004). Fishing down the food web refers to the practice of fishermen moving to species further down the food chain or web as larger fish are depleted. *Id.*

24. See Deere, *supra* note 9, at 117. Pauly et al., *supra* note 23, note that “[f]ishing down food webs . . . leads at first to increasing catches, then to a phase transition associated with stagnating or declining catches.” They also note that these practices are “unsustainable.” *Id.*

levels and that EEZ fisheries management, even by developed nations, has been unsuccessful.²⁵

Although a great deal of recent international attention has focused on the effects of intense high seas fishing for straddling stocks and highly migratory species on the management of EEZ, coastal states cannot totally shift responsibility for the failure of fisheries management in the EEZ to distant-water fishing fleets. Over ninety percent of the fish are located within 200 miles of the shore.²⁶ Currently, distant-water fishermen account for only about five percent of the total marine landings.²⁷ Despite this, commercial species located entirely within the EEZ or associated with the continental shelf largely continue to decline. These circumstances have led to serious questions concerning the adequacy of the principles embodied in articles 61 and 62 of the LOS Convention to manage the living resources of the EEZ sustainably.

III. EEZ MANAGEMENT AND THE LAW OF THE SEA CONVENTION

A. *The Framework for Management*

The primary obligations of coastal states for management of EEZ fishery resources are set out in articles 61 and 62 of the LOS Convention. Article 61 addresses conservation of living resources of the EEZ and sets out the following obligations:

1. Coastal states “shall determine the allowable catch” for EEZ fisheries;²⁸
2. Coastal states must take into account the best available scientific information;²⁹

25. See, e.g., Elisabeth M. Borgese & Krishan Saigal, *Managerial Implications of Development in the Ocean*, 12 OCEAN Y.B. 1, 9 (1996); BURKE, *supra* note 3, at 80-81; Douglas M. Johnston, *Is Coastal State Fishery Management Successful or Not?*, 22 OCEAN DEV. & INT'L L. 199, 204 (1991). See generally Carl Safina, *Where Have All the Fishes Gone?*, 10 ISSUES IN SCI. & TECH. 37, 39 (1994) (discussing the failure of U.S. management within the EEZ), available at <http://www.seaweb.org>.

26. Christie, *supra* note 2, at 397.

27. RICHARD GRAINGER, U.N. FOOD & AGRIC. ORG., RECENT TRENDS IN GLOBAL FISHERIES PRODUCTION FIG. 11 (2001), at <http://www.fao.org> (last visited Oct. 9, 2004). Distant-water fishery production has generally declined since 1973 as a percentage of annual fisheries production; since 1989, distant-water fisheries catch has also declined sharply. *Id.* FAO figures for distant-water fisheries include both foreign EEZ and high seas catch. See *id.*

28. LOS Convention, *supra* note 6, art. 61(1).

29. *Id.* art. 61(2).

3. Coastal states must adopt measures to prevent overexploitation;³⁰
4. Coastal states must maintain or restore stocks to produce maximum sustainable yield (MSY), “as qualified by relevant environmental and economic factors;”³¹ and
5. Measures must consider “effects on species associated with or dependent upon harvested species” to ensure such species do not become “seriously threatened.”³²

Article 62 concerns utilization of EEZ living resources and addresses the circumstances and conditions for access to a country’s EEZ fisheries by foreign fishermen.³³ The most important management principle incorporated in article 62 is the obligation for coastal states to “promote the objective of optimum utilization” of EEZ living resources.³⁴ The objective of optimum utilization is to be applied, however, “without prejudice to article 61,”³⁵ which authorizes coastal states to set conservative levels for exploitation of stocks if justified by conservation principles or economic factors.

B. The Inadequacy of the Management Principles of Articles 61 and 62

1. Allowable Catch

Article 61(1) sets the stage for uncertainty as to the legal obligations of states by the provision: “The coastal State shall determine the allowable catch of the living resources in its [EEZ].”³⁶ This language may simply be declaring that setting allowable catch is within the exclusive domain of the coastal state, or it may be creating a duty for coastal states to set an allowable catch. The

30. *Id.*

31. *Id.* art. 61(3).

32. *Id.* art. 61(4).

33. *Id.* art. 62(1)-(5).

34. LOS Convention, *supra* note 6, art. 62(1). The final text specifically rejects the objectives of maximum or full utilization which were considered in the negotiations at UNCLOS III. *See, e.g.*, EEZ UNCLOS, *supra* note 1. The maximum utilization principle for fisheries was suggested in proposals by the United Kingdom and the Republic of Korea while the full utilization of fisheries principle was proposed by the United States. *See generally* BURKE, *supra* note 3, at 59-62.

35. LOS Convention, *supra* note 6, art. 62(1).

36. *Id.* art. 61(1).

language is ambiguous both as to whether it creates any state responsibility to set allowable catch³⁷ and, if it does, as to the scope of the responsibility it creates. To the extent that “shall” is mandatory language requiring states to set allowable catch, the requirement should reasonably extend only to those stocks that are significantly exploited or are potentially exploited beyond a sustainable harvest level.³⁸ Unfortunately, the number of these stocks has increased significantly as fishermen move from one depleted fishery to another,³⁹ fishing down the food web.⁴⁰ States’ resources have been strained as more and more stocks require management, and resource planning has largely lacked perspective when responding to one management crisis following another. This situation has forced many states into a pattern of incremental management by quotas on a species-by-species basis with little opportunity to consider alternative approaches, not because of the requirements of article 61, but because of necessity.⁴¹

Incorporating the provision for coastal state determination of allowable catch in the first section of article 61 is not only consistent with the states’ sovereign rights over the resources of the EEZ,⁴² but also provides a basis for presuming that setting allowable catch — quotas — is a required or predominant management technique.

37. Preeminent law of the sea expert Professor William T. Burke stated in a 1984 article that “[t]he use of the mandatory ‘shall’ in article 61 indicates that the coastal State is obligated to decide upon an allowable catch.” William T. Burke, *The Law of the Sea Convention Provisions on Conditions of Access to Fisheries Subject to National Jurisdiction*, 63 ORE. L. REV. 73, 78 (1984). In his 1994 treatise, however, Professor Burke concluded that “[t]he purport of article 61(1) is that only the coastal state shall determine the allowable catch” and that “decision[s] about an allowable catch is exclusively that of the coastal state.” BURKE, *supra* note 3, at 46. See also LOS Convention, *supra* note 6, art. 297(3)(a) which refers to a state’s “discretionary powers for determining the allowable catch”

38. See BURKE, *supra* note 3, at 46 (“Common sense would suggest that article 61(1) does not require purely theoretical catch calculations for all living resources that might conceivably be exploited, but rather applies to stocks that are believed to be significantly affected by exploitation. . . .”); see also Oda, *supra* note 13, at 743 (“It can be argued that it is not appropriate for the coastal state . . . to determine the allowable catch of the living resources in the EEZ and that it is extremely difficult to perform this obligation properly.”).

39. R. J. R. Grainger & S. M. Garcia, CHRONICLES OF MARINE FISHERY LANDINGS 1950-1994: TREND ANALYSIS AND FISHERIES POTENTIAL, U.N. FOOD & AGRIC. ORG. FISHERIES TECHNICAL PAPER NO. 359 § 4.2 (1996), available at <http://www.fao.org> (last visited Oct. 9, 2004).

40. “Fishing down the food web” occurs when traditional stocks become depleted, and fishermen must turn to stocks not ordinarily targeted. In many cases, these previously unexploited stocks have become the dominant species in the ecosystem. Fishing down the food web provides some economic relief for struggling fishermen, but the practice further disrupts the ecosystem, making recovery of the ecosystem even more difficult to achieve. For a discussion of this practice, see PEW OCEANS COMM’N, AMERICA’S LIVING OCEANS: CHARTING A COURSE FOR SEA CHANGE 38-40 (May 2003), available at <http://www.pewoceans.org> (last visited Mar. 22, 2004).

41. See generally STUART M. KAYE, INTERNATIONAL FISHERIES MANAGEMENT 98 (2001).

42. *Id.* at 99.

Professor William Burke challenges this interpretation, however, because of the difficulties of administering fishery regulation by quotas.

[T]he central place of allowable catch in the convention scheme is curious, because regulating the allowable catch is but one means of managing fishery exploitation, and it both encounters and creates serious problems. The data requirements for catch quotas are difficult to meet, particularly for developing states, because the scientific basis for data collection and analysis is frequently inadequate. Therefore, regulation of fishing by this method is very difficult and often impossible. In developed communities, catch quota regulation is also costly and provokes serious economic problems. In both developed and developing states, allowable catch regulation may lead to distorted information because of wilful [sic] underreporting of catch stimulated by the regulation.⁴³

If article 61 requires coastal states to set allowable catch, the requirement may have had little relationship to its importance or utility as a management tool for EEZ living resources. The LOS Convention envisioned that other nations should have access to surplus stocks in the EEZ, and determination of allowable catch is a critical element in the article 62(2) formula⁴⁴ for determining the existence and amount of surplus stocks available to foreign fishermen.⁴⁵ The importance of allowable catch in this context is emphasized by the fact that the arbitrary refusal of a coastal state to set allowable catch is one of the very few coastal state obligations concerning fisheries management that is subject to any type of compulsory dispute resolution.⁴⁶

43. BURKE, *supra* note 3, at 45. Professor Burke concludes that even if the Convention requires states to set allowable catch, "it does not follow that . . . catch regulations [must be used] for management." *Id.* at 47.

44. LOS Convention, *supra* note 6, art. 62(2) provides in relevant part: "Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall . . . give other States access to the surplus of the allowable catch. . . ."

45. *Id.* A determination of allowable catch and domestic harvesting capacity provides the basis for calculating surplus stocks available to foreign fishermen. *See id.*

46. LOS Convention, *supra* note 6, art. 297(3)(b)(ii) requires submission of a dispute to compulsory conciliation if "a coastal State has arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources. . . ." Although the procedure is mandatory, conciliation leads only to non-binding "recommendations" that may be rejected by the coastal nation. *Id.* Annex V, art. 7(2).

Even if the setting of allowable catch is a requirement for purposes of determining surplus, the requirement is today largely illusory. By the time the LOS Convention came into force in 1994, many states had already excluded foreign fishers either because domestic harvesting capacity exceeded allowable catch or because allowable catch was set at domestic harvesting capacity.⁴⁷ In addition, commentators agree that there is no obligation to set an allowable catch above zero or above domestic harvesting capacity.⁴⁸ The conclusion that allowable catch is an illusory principle is further reinforced by article 297(3)(a) of the LOS Convention which provides that coastal states are not:

obliged to accept the submission to [compulsory] settlement of any dispute relating to its sovereign rights with respect to the living resources in the [EEZ] or their exercise, including its *discretionary* powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.⁴⁹

The ambiguity of the coastal state's obligation concerning the determination of allowable catch, the problems with allowable catch as a regulatory technique, and its ultimate unenforceability as a method to procure foreign access to EEZ fishery stocks are factors that contribute to the inevitable conclusion that allowable catch should not be presumed to represent a required or predominant method for EEZ fisheries management.⁵⁰ Further, these factors lead to the conclusion that a state's discretion in setting allowable catch at an unsustainably high level does not violate any enforceable provisions of article 61.

47. See S. Garcia et al., *The New Law of the Sea, and the Access to Surplus Fish Resources*, 10 MARINE POL'Y 192, 192-95 (1986).

48. See BURKE, *supra* note 3, at 63; Garcia et al., *supra* note 47, at 196-98; CHURCHILL & LOWE, *supra* note 13, at 286; Satya Nadan, *Implementing the Fisheries Provision of the Convention*, in CONSENSUS AND CONFRONTATION: THE UNITED STATES AND THE LAW OF THE SEA CONVENTION 390-91 (1985) (remarks of Ambassador Tommy Koh); Ellen Hey, *The Fisheries Provisions of the LOS Convention*, in DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW 13, 21-22 (Ellen Hey ed., 1999).

49. LOS Convention, *supra* note 6, art. 297(3)(a) (emphasis added).

50. Professor Burke concludes that even if the LOS Convention requires states to set allowable catch, "it does not follow that . . . catch regulations [must be used] for management[,] . . . but management might proceed on any other basis the coastal state believes proper under the circumstances." BURKE, *supra* note 3, at 47.

2. *Best Scientific Evidence Available*

Article 61(2) of the LOS Convention directs coastal states to “tak[e] into account the best scientific evidence available”⁵¹ in management of the living resources of the EEZ. This language is generally considered to be facilitative, authorizing states to manage fisheries even if scientific information is inadequate or unavailable.⁵² The term “available” also serves, however, to put little or no burden on the coastal state to acquire data for fisheries management.⁵³ The requirement that the best scientific evidence merely be “tak[en] into account” arguably further relegates scientific evidence to merely a consideration in development of management measures with little determinative weight.⁵⁴ Thus, states have great flexibility and virtually no international legal obligation to base management on objective scientific criteria.⁵⁵

Although the quality of scientific evidence is clearly relevant, the “best available” evidence may be woefully deficient to provide a basis for management.⁵⁶ Funding for fisheries research is not a high priority in most countries. Fisheries data must often be extrapolated from reporting by fishermen and landing data.⁵⁷ Because funding for enforcement of fisheries regulations, including reporting requirements, is also low⁵⁸ and fishermen have strong incentives to under-report (particularly when quota systems are used),⁵⁹ such data may be unreliable at best. Reliable information concerning unlanded species (e.g., discarded incidental catch) may be particularly difficult to collect.

3. *Measures to Prevent Overexploitation*

Perhaps the clearest obligation created for coastal states by article 61 is the duty to prevent overexploitation.⁶⁰ Left to their own

51. LOS Convention, *supra* note 6, art. 61(2).

52. See Burke, *supra* note 37, at 84; KAYE, *supra* note 41, at 103; see also M. DAHMANI, THE FISHERIES REGIME OF THE EXCLUSIVE ECONOMIC ZONE 44-45 (1987).

53. Most commentators, however, view the context of the provision in relation to the duty to take “proper conservation and measures” as creating some obligation to acquire the scientific data necessary to make meaningful management decisions. See Burke, *supra* note 37, at 84-85; KAYE, *supra* note 41, at 103-04; BURKE, *supra* note 3, at 57.

54. See BURKE, *supra* note 3, at 56; KAYE, *supra* note 41, at 103.

55. See KAYE, *supra* note 41, at 103.

56. See DAHMANI, *supra* note 52, at 44-45.

57. See *id.* at 45.

58. *Id.*

59. *Id.* at 43.

60. LOS Convention, *supra* note 6, art. 61(2). The precise language of article 61(2) is that the coastal state must “ensure” that “the maintenance of the living resources in the exclusive economic zone is not endangered by overexploitation.” *Id.* Professor Burke posits that this, like other provisions of art. 61, is vague and ambiguous. See William T. Burke, *U.S. Fishery*

discretion, however, coastal states have been quite unsuccessful at accomplishing this goal.⁶¹

Control of access to fisheries created the possibility for coastal states to address the “tragedy of the commons” within the EEZ.⁶² Displacement of foreign fisheries from EEZs was viewed by many nations, however, as the opportunity to develop their domestic fishing industries, and freedom of the high seas was replaced by virtually open access for national fishermen.⁶³ In addition, many countries subsidized the development of their fishing industries, further fueling overcapitalization as fishing efforts, in terms of time, resources and technology, increased to capture diminishing stocks.⁶⁴ Some of the nations that lacked the resources to either exploit or effectively manage the EEZ simply sold access rights to foreign fleets.⁶⁵ The result is that extension of national jurisdiction has not adequately addressed the issue of open access and, therefore, has not been able to control or prevent overexploitation.⁶⁶

4. *Qualified Maximum Sustainable Yield*

Maximum sustainable yield (MSY) is a pre-UNCLOS conservation concept that is generally defined as the largest annual catch or yield of a fishery that can be taken continuously from a stock, based on the renewability of the resource.⁶⁷ The concept is tied to the objective of maximizing or optimizing food production from the ocean. Even at the time of UNCLOS negotiations, MSY was subject to much criticism. Among the problems attributed to MSY management were the difficulties in defining MSY due to variations in environmental conditions, the complex inter-relationships of stock, the failure to take into account the economics of fisheries, and the role played by density of population.⁶⁸

Management and the New Law of the Sea, 76 AM. J. INT'L L. 24, 29 (1982).

61. See Scheiber, *supra* note 17. Professor Scheiber states that “in the nearly two decades since UNCLOS validated the 200-mile EEZs, every coastal state with major fishing interests has failed to sustain the level of stocks in its fisheries.” *Id.* at 127.

62. See generally Stone, *supra* note 21, at 510.

63. *Id.*

64. *Id.* at 515-16.

65. Deere, *supra* note 9, at 163.

66. See Stone, *supra* note 21, at 510-12; BURKE, *supra* note 3, at 348; Alison Rieser, *International Fisheries Law, Overfishing and Marine Biodiversity*, 9 GEO. INT'L ENVTL. L. REV. 251, 263-64 (1997).

67. U.N. STATISTICS DIV.: ENVIRONMENT GLOSSARY, available at <http://unstats.un.org> (last visited Oct. 9, 2004).

68. See generally Gary Knight, *International Fisheries Management - A Background Paper*, in *THE FUTURE OF INTERNATIONAL FISHERIES MANAGEMENT* 16-37 (Gary Knight ed., 1975). The failure of MSY to incorporate fisheries economics is said to lead to overfishing and overcapitalization. John J. Rooney, *Impact of the Magnuson Fisheries Conservation and Management Act on Fisheries in the U.S. Exclusive Economic Zone*, 12 OCEAN Y.B. 92, 98

Article 61(3) of the LOS Convention was viewed as addressing many of the deficiencies of management to produce MSY by providing that coastal states' management measures should be designed to "produce the maximum sustainable yield, *as qualified by* relevant environmental and economic factors."⁶⁹ This formulation grants states the discretion to take into account not only the scientific and economic shortcomings of MSY, but also to incorporate a wide range of social and political considerations.⁷⁰ Coastal states are specifically authorized to adjust MSY to "meet [their] interests as [they] determine[] them."⁷¹ Although the environmental and economic problems of MSY may be addressed by downward adjustment of annual harvest, the LOS Convention does not limit adjustments to lowering of MSY.⁷² In fact, the factors that may be taken into account in qualifying MSY under article 61(3) include "the economic needs of coastal fishing communities and the special requirements of developing States."⁷³ The inclusion of these factors leads to the conclusion that the LOS Convention drafters contemplated circumstances in which a coastal state might find it in its best interest to qualify MSY by adjusting the allowable catch of a fish stock upward.⁷⁴

In spite of the flexibility created by qualifying MSY by relevant economic and environmental factors, the methodology has received increased criticism as a threshold or target reference point for management.⁷⁵ The original problems concerning the inadequacy of information and models to predict MSY reliably in a changing

(1996). As available stock is depleted, fishing efforts will tend to increase to inefficient levels; the cost to harvest the last fish is much greater than the cost to harvest the first fish and may eventually exceed the value of the fish. *Id.*; DAVID J. ATTARD, THE EXCLUSIVE ECONOMIC ZONE IN INTERNATIONAL LAW 153 (1987).

69. LOS Convention, *supra* note 6, art. 61(3) (emphasis added).

70. BURKE, *supra* note 3, at 54.

71. *Id.* at 55.

72. In 1996, the U.S. Magnuson-Stevens Fishery Conservation and Management Act amended the provisions on establishment of optimum yield of a fishery to limit modifications of MSY for economic, social, and ecological factors to *lowering* the permissible catch. 16 U.S.C. § 1802(2) (1996).

73. LOS Convention, *supra* note 6, art. 61(3), at 1281.

74. The implication here should not be that all adjustments of harvest in excess of MSY of a particular stock will have negative impacts. Previous fishing or overfishing may have altered the balance of species in an area, and fishing patterns that maximize the catch of predators or food competitors may have the effect of restoring or enhancing levels of more valued species. *But see* Lewis M. Alexander, *Large Marine Ecosystems: A New Focus for Marine Resources Management*, 17 MARINE POL'Y 186, 198 (1993) (warning about such a mitigative strategy because of unanticipated effects on the ecosystem).

75. *See* G. L. Kesteven, *MSY Revisited: A Realistic Approach to Fisheries Management and Administration*, 21 MARINE POL'Y 73, 75 (1997). Dr. Kesteven supports the concept of MSY, but finds that "its determination [is] rarely, if ever, correct." *Id.* at 73.

environment and in relation to other species persist.⁷⁶ Critics continue to assert that the manner in which MSY has been applied has failed to take into account biological variables in sustainability based on short-term and long-term variations in abundance, composition, and environment.⁷⁷ In assessing how this relates to the effectiveness of coastal state fisheries management, Dr. Douglas Johnston stated:

Fishery management specialists today acknowledge that in the past . . . too much weight was given to fishing effort, and not enough to environmental and hydroclimatic factors. In short, the natural variability of stocks was underestimated. Today it is recognized more widely that fishery management cannot be conducted on the basis of informational certainty.⁷⁸

In addition, more fundamental objections to the use of MSY as an accepted target reference point for fisheries management have been raised due to the nature of managing highly-variable stocks and stocks that are fully-exploited or declining.⁷⁹ In the case of stocks with highly-variable recruitment, conventional methods to predict MSY modeled on historical data lead to serious overfishing in years of poor recruitment.⁸⁰ Thus, MSY is more appropriately used as a limit reference point, that is, a maximum level of harvest and the point at which effort reduction policies should be applied.⁸¹ More precautionary targets, corresponding to about two-thirds of the fishing effort to produce MSY, are recommended to produce harvests that are likely to be truly sustainable and “allow a very large fraction (about 80%) of the MSY to be harvested with a significantly reduced risk of stock collapse.”⁸² In the case of depleted

76. *See id.* at 73.

77. *See generally* John M. Macdonald, *Appreciating the Precautionary Principle as an Ethical Evolution in Ocean Management*, 26 OCEAN DEV. & INT'L L. 255, 271-76 (1995); Kesteven, *supra* note 75, at 74-76.

78. Johnston, *supra* note 25 at 204. Dr. Johnston adds that “political and social objectives add to the natural uncertainty inherent in [fishery management].” *Id.*

79. *See* J. F. CADDY & R. MAHON, REFERENCE POINTS FOR FISHERIES MANAGEMENT, U.N. FOOD & AGRIC. ORG., FISHERIES TECHNICAL PAPER NO. 347 § 2.4.1 (1995), available at <http://www.fao.org> (last visited Oct. 9, 2004).

80. *See id.* The authors state that “the use of the word ‘sustainable’ for an MSY obtained in the conventional way is inappropriate, since ‘in the presence of fluctuations in production, attempts to remove the MSY yield each year from a stock leads to a disaster.’” *Id.* (quoting W. G. DOUBLEDAY, INT'L COMM. FOR THE NORTHWEST ATLANTIC FISHERIES, ENVIRONMENTAL FLUCTUATIONS AND FISHERIES MANAGEMENT, Sel. Pap. 1 at 141-50 (1976)).

81. *Id.*

82. *Id.*

or declining stocks, targets generally need to be much lower than conventionally-determined MSY, depending on the level of overexploitation and the time period for rebuilding.⁸³ In other words, as fisheries management has changed orientation from maximization of catch to risk management, the role of MSY must be reassessed.

5. Consideration of Associated or Dependent Stocks

The LOS Convention article 61(4) is not clear what is included in terms of considering effects on associated or dependent stocks⁸⁴ in managing EEZ fisheries. The background of the reference in the LOS Convention is vague and does not have a common usage. It may have been formulated in reference to fisheries interactions with marine mammals; it may have been intended to include biological relationships between and among other stocks; and “associated” species may have had reference to all types of incidental catch.⁸⁵ This discussion assumes that all of these considerations were included in the language.⁸⁶

To this point, most fishery management regimes do not take adequate account of relations between and among stocks for at least three reasons: In the majority of situations, regulation has, of necessity and in response to sharp declines in particular stocks, developed on a species by species basis. In other cases, fishery managers lacked enough information about the biological relationships within food webs and ecosystems to take these relations into account. Finally, the EEZ may simply not “fit” the natural systems being regulated.⁸⁷

It is relatively clear that the LOS Convention’s drafters did not envision states’ obligations under this section to extend to ecosystem management.⁸⁸ Ecosystem-based management would require consideration of:

all interactions that a target fish stock has with predators, competitors, and prey species; the effects of weather and climate on fisheries biology and

83. See generally *id.* § 2.7.

84. LOS Convention, *supra* note 6, art. 61(4), at 1281. Note also that the threshold for consideration of effects on associated or dependent species seems to be the point “at which their reproduction may become seriously threatened.” *Id.*

85. BURKE, *supra* note 3, at 58.

86. Marine mammal/fisheries interactions will not be specifically discussed in this article.

87. WILLIAM T. BURKE, *UNCED and the Oceans*, 17 MARINE POL’Y 519, 520 (1993).

88. BURKE, *supra* note 3, at 59 (quoting *Report of the ACMRR Working Party on the Scientific Basis of Determining Management Measures*, U.N. Food and Agric. Org., at 20, U.N. Doc. FIRM/R22336, FAO Fisheries Technical Paper No. 236 (1980)).

ecology; the complex interactions between fish[] and their habitat; and the effects of fishing on fish stocks and their habitat.⁸⁹

Assessments of states' capabilities for ecosystem management at the time of negotiation of the LOS Convention were pessimistic. For example, a 1980 United Nations Food and Agriculture Organization (FAO) Technical Paper reported:

The management implication of the term "ecosystem management" presumes a reasonable understanding of the physical and chemical environment and biological species which describe an ecosystem, plus an understanding of the interactions among and between the species complex and their environment. Effective ecosystem management would also require an understanding of the flow of material energy and nutrients within the ecosystem. At the present the totality of interactions is not sufficiently understood in any ecosystem to allow for comprehensive ecosystem management.⁹⁰

More recently, a 1994 FAO report admitted that "[i]n practice, we do not yet know how to manage ecosystems."⁹¹

The inadequacy of scientific understanding of complex relationships among species means that states have had difficulty in developing management measures that consider associated and dependent species except in a limited number of fisheries. Information has also been lacking in most cases to evaluate the effects of fishing and fishing gear on habitat, a factor that is now considered an important part of today's understanding of ecosystem management,⁹² but which is not mentioned in article 61(4).

89. ECOSYSTEMS PRINCIPLES ADVISORY PANEL, ECOSYSTEM BASED FISHERIES MANAGEMENT: A REPORT TO CONGRESS 1 (1999) [hereinafter ECOSYSTEM-BASED MANAGEMENT REPORT].

90. See BURKE, *supra* note 3, at 59 (quoting *Report of the ACMRR Working Party on the Scientific Basis of Determining Management Measures*, U.N. Food and Agric. Org., at 20, U.N. Doc. FIRM/R22336, FAO Fisheries Technical Paper No. 236 (1980)).

91. U.N. FOOD & AGRIC. ORG., THE PRECAUTIONARY APPROACH TO FISHERIES WITH REFERENCE TO STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS 12, U.N. Doc. FIRM/C871(Tri), FAO Fisheries Cir. No. 871 (1994).

92. Certain types of mobile fishing gear, e.g., trawls, dredges, and demersal long-lines, can have obvious, immediate, and direct physical impacts on seafloor habitats. PAUL K. DAYTON ET AL., PEW OCEAN COMM'N, ECOLOGICAL EFFECTS OF FISHING IN MARINE ECOSYSTEMS OF THE UNITED STATES 26 (2002) [hereinafter EFFECTS OF FISHING], *available at* http://www.pewoceans.org/reports/POC_EcoEffcts_Rep2.pdf (last visited Mar. 22, 2004). "The physical impact of the gear dragged over . . . or set upon . . . the seabed is influenced by gear

While generally scientific information may still be inadequate for comprehensive ecosystem management, recent scientific studies indicate that an “ecosystem-based approach” to management of individual or closely-related groups of species is not only possible,⁹³ but necessary to restore the balance of ecosystems and allow the recovery of overexploited stocks.⁹⁴

Much more obvious than the indirect effects of a fishery on other species and habitat are the direct effects of fisheries on non-targeted species taken as incidental catch or bycatch.⁹⁵ Bycatch can be almost anything, including seabirds, marine mammals, non-targeted and lesser-valued fish stocks, and juveniles of the targeted species.⁹⁶ The FAO estimates that fisheries now take about 20 million tons per year of bycatch.⁹⁷ This bycatch is discarded at sea because of lack of markets, regulations prohibiting possession of the bycatch (size, season or other limits), or to maximize the value of the harvest (highgrading).⁹⁸ Discarding often results in a total mortality rate of the bycatch.⁹⁹

mass, the point or points of contact with the seafloor, the speed with which gear is dragged, and the frequency with which these events are repeated.” *Id.* Less obvious is the effect of simply removing fish from the ecosystem (which is aggravated by overfishing and complicated bycatch issues). “Fishing not only alters the abundance of stocks, but it also affects the age of maturity, size structure, sex ratio, and genetic makeup of populations.” *Id.* at 11 (citations omitted). Fishing can have cumulative and synergistic effects throughout the food web that are diverse and unpredictable. *See generally id.* at 7-15.

93. *See* ECOSYSTEM-BASED MANAGEMENT REPORT, *supra* note 89. The Report emphasized that “[e]cosystem-based fisheries management does not require that we understand all things about all components of the ecosystem.” *Id.* at 10.

94. *See, e.g.*, Martin H. Belsky, *The Ecosystem Model Mandate for a Comprehensive United States Ocean Policy and Law of the Sea*, 26 SAN DIEGO L. REV. 417, 462 (1989). *See generally* W.M. von Zharen, *Ocean Ecosystem Stewardship*, 23 WM. & MARY ENVTL. L. & POLY REV. 1 (1998); Marion McPherson, *Integrating Ecosystem Management Approaches into Federal Fishery Management through the Magnuson-Stevens Fishery Conservation and Management Act*, 6 OCEAN & COASTAL L.J. 1 (2001); Cymie Payne, *Symposium: The Ecosystem Approach: New Departures for Land and Water: Fisheries Management*, 24 ECOLOGY L.Q. 619 (1997).

95. *Fisheries Bycatch and Discards*, U.N. Food and Agric. Org. Committee on Fisheries, 22d Sess., para. 1, U.N. Doc. COF1/97/Inf.7 (1996), available at <http://www.fao.org>.

96. *Id.* para. 4.

97. *Id.* para. 8. FAO had estimated bycatch during the 1980s and early 1990s as between 17.9 and 39.5 million tons per year, an average of about 27 million tons per year. The 1996 reduced estimate was considered to be a result of:

- a) decline in the levels of fishing, b) time/area closures, c) new or more selective harvest and utilization technologies, d) greater utilization for human consumption and feed for aquaculture and livestock, e) enforcement of prohibition on discarding by some countries[,] and f) a more progressive attitude of fishery managers, user groups and society to the need to resolve problems resulting from discarding.

Id.

98. *See generally* EFFECTS OF FISHING, *supra* note 92, at 17.

99. *Id.*

Although the FAO estimates that the total level of bycatch has begun to decrease significantly, the effect of bycatch and discards still requires study to determine the effects on the bycatch stocks, the effect on targeted species of the bycatch of juveniles, and the ramifications for the ecosystem of both the removal of bycatch species and the discard of dead bycatch.¹⁰⁰ As fishing efforts increase to catch diminishing levels of target species, the bycatch problem could be further exacerbated, making bycatch reduction an even more important issue.

Finally, although most exploited stocks are found within the EEZ, they may not be within the control of a single coastal state, and interrelated stocks that are affected may be beyond a coastal states' jurisdiction.¹⁰¹

6. Conclusions

In summary, the provisions of article 61 of the LOS Convention have failed to create a regime that provides for effective management of the living resources of the EEZ. Many of the assumptions underlying the establishment of the EEZ were not valid, and problems of overfishing, overcapitalization, single-species management, insufficient scientific data, and excessive bycatch persist within the EEZ. In addition, article 61 makes no mention of coastal state obligations to address other causes of the decline of fisheries, such as destruction or degradation of habitat.

IV. ADDRESSING EEZ FISHERIES MANAGEMENT ISSUES FOR THE FUTURE

A. Revisiting the LOS Convention Provisions

The imprecise principles of article 61 of the LOS Convention have not prevented continued depletion of EEZ fisheries resources. The principles to guide conservation and management of the EEZ, at best, are vague and ambiguous, and, at worst, are based on precepts that are unworkable to maintain the sustainability of the living resources of the EEZ in the current environment. Unlike articles 63 and 64 concerning straddling stocks and highly

100. Current studies are indicating that in many fisheries, bycatch can have serious impacts on the ecosystem. A large proportion of the bycatch is dead when returned to the sea. This discarded material causes behavioral changes in resident scavenger and predator species, leads to collateral mortality of species attracted by the bycatch and can cause "localized hypoxic or anoxic zones on the seafloor." *Id.* at 21-2. Species with low productive rates, such as seabirds, marine mammals, sharks and sea turtles can suffer "population-level consequences" from collateral mortality. *Id.* at 16.

101. See Christie, *supra* note 2, at 396-97.

migratory species, however, the terms of article 61 were not anticipated by the drafters to be elaborated and implemented primarily through separate international agreements.¹⁰² But article 61 does provide that, as appropriate, states should cooperate to develop scientific information and conservation measures that will ensure that EEZ resources are “not endangered by over-exploitation,”¹⁰³ and that measures to restore and maintain fisheries resources take into account “generally recommended international minimum standards.”¹⁰⁴ While not creating any enforceable coastal state obligations, these sections can provide a strong rationale for turning to more recent agreements, guidelines, and customary law to interpret and refine the vague principles of article 61.

Patricia Birnie also argues that “in the light of subsequent advances in knowledge . . . the aims specified by the LOS Convention for fisheries conservation [including the goals of the Preamble] can be interpreted as implying that [new concepts] should be applied (without prejudice to whether or not this is a legal requirement).”¹⁰⁵ She contends that terms of the LOS Convention, such as conservation and MSY, are “flexible” enough to be interpreted to introduce new principles.¹⁰⁶

To read article 61 as freezing the interpretation of management principles in 1970's terms ignores another precept of the same article — to take account of the best scientific information¹⁰⁷ — and frustrates the basic object and purpose of the LOS Convention concerning conservation of the living resources of the sea. The principle that a treaty should be interpreted “in light of its object and purpose” is codified in article 31 of the 1969 Vienna Convention on the Law of Treaties.¹⁰⁸ Article 31(3) also states that treaty interpretation shall take into account:

1. any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

102. In fact, the LOS Convention was quite clear that jurisdiction of the coastal state over EEZ living resources was “exclusive” and subject to its virtually complete discretion. LOS Convention, *supra* note 6, art. 61(1), at 1281.

103. *Id.* art. 61(2), at 1281.

104. *Id.* art. 61(3), at 1281.

105. Patricia Birnie, *Are Twentieth-Century Marine Conservation Conventions Adaptable to Twenty-First Century Goals and Principles?: Part I*, 12 INT'L J. OF MARINE & COASTAL L. 307, 314 (1997).

106. *Id.* at 338.

107. LOS Convention, *supra* note 6, art. 61(2), at 1281.

108. Vienna Convention on the Law of Treaties, May 23, 1969, art. 31, 1155 U.N.T.S. 331, 8 I.L.M. 679, 692 (1969) (entered into force on Jan. 27, 1980) [hereinafter Vienna Convention].

2. any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretations; and
3. any relevant rules of international law applicable in the relations between the parties.¹⁰⁹

Thus, the Vienna Convention recognizes that treaty interpretation can hinge on subsequent agreements, state practice, and development of international law.¹¹⁰ This precept is reflected in customary international law in the principle of contemporaneity. The nature of areas such as environmental law and human rights law, where knowledge and awareness are rapidly evolving and damage may be irreversible, requires that treaties should be interpreted in terms of the standards and norms that are in force at the time of the application of a treaty, not at the time of the conclusion of a treaty.¹¹¹

The International Court of Justice (ICJ) addressed this issue in the *Case Concerning the Gabčíkovo-Nagymaros Project* (Hung. v. Slov.).¹¹² The ICJ found that the development of new norms of environmental law did not preclude the performance of a long-term treaty that incorporated consideration of impacts on the environment.¹¹³ Rather, the Court held that the evolution of environmental knowledge and standards could be anticipated and that such a treaty had to be interpreted to recognize the evolving nature of environmental norms.¹¹⁴ The Court stated:

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and new standards have been developed, set forth in a great number of instruments during the last two

109. *Id.* art. 31(3), at 692.

110. For a detailed discussion of the interpretation of treaties in the context of emerging marine conservation principles, see Birnie, *supra* note 105, at 322-39.

111. See *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7, 113-14 (Sept. 25) (separate opinion of Vice-President Weeramantry).

112. 1997 I.C.J. 7 (Sept. 25).

113. *Id.* at 114 (separate opinion of Vice-President Weeramantry).

114. *Id.* at 113-14.

decades. *Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.* This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.¹¹⁵

In his separate opinion in the case, Vice-President Weeramantry referred to this as the “inter-temporal aspect” of treaties dealing with activities that affect the environment.¹¹⁶ This inter-temporal aspect goes not only to the continuing validity of a treaty, but also to its application.¹¹⁷ He asserted that “[t]he ethical and human rights related aspects of environmental law bring it within the category of law so essential to human welfare that we cannot apply to today’s problems in this field the standards of yesterday.”¹¹⁸ In this respect, Vice-President Weeramantry explained that such treaties must be “living” instruments, responsive to continuing and current environmental concerns regardless of when the activity was originally undertaken or the treaty concluded.¹¹⁹

In the relatively short time since the LOS Convention was concluded, international environmental law has been developing rapidly. The marine environment and marine fisheries have been a central focus of many of these developments. Among the relevant developments that affect management of EEZ fisheries are the Rio Declaration,¹²⁰ Chapter 17 of Agenda 21,¹²¹ the FAO Code of Conduct for Responsible Fishing,¹²² the Convention on Biological Diversity,¹²³ and the Jakarta Mandate on Marine and Coastal Biological Diversity.¹²⁴ In addition, the 1995 United Nations Agreement on

115. *Id.* at 78 (emphasis added).

116. *Id.* at 113-14.

117. *Id.* at 114.

118. Gabčíkovo-Nagymaros Project, 1997 I.C.J. at 114 (separate opinion of Vice-President Weeramantry).

119. *Id.* at 115.

120. Rio Declaration on Environment and Development, *adopted* June 13, 1992, U.N. Doc. A/Conf151/5/Rev.1, 31 I.L.M. 874 (1992) [hereinafter Rio Declaration].

121. U.N. CONFERENCE ON ENV'T AND DEV., AGENDA 21, CHAPTER 17, U.N. Doc. A/CONF.151.26, U.N. Sales No. E.93.I.11 (1992) [hereinafter AGENDA 21], *reprinted in* 7 INT'L J. OF ESTUARINE AND COASTAL L. 296 (1992).

122. U.N. FOOD & AGRIC. ORG., CODE OF CONDUCT FOR RESPONSIBLE FISHERIES (1995) [hereinafter FAO CODE OF CONDUCT], *available at* <http://www.fao.org> (last visited May 6, 2004).

123. United Nations Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (1992) (entered into force Dec. 29, 1993) [hereinafter Biological Diversity Convention].

124. The Jakarta Mandate consists of the following documents: (1) *Report of the Second*

Straddling Stocks and Highly Migratory Fish Stocks¹²⁵ (Fish Stocks Agreement or the Agreement) has implications for management of *all* fish stocks beyond and within the EEZ. All of these documents, with the exception of the Rio Declaration, make reference to the LOS Convention. Considered together, these actions are strong evidence that the international community perceives changes in international environmental norms and the need to supplement and further develop at the international level existing international *and* national fisheries regulations through the incorporation of new or rapidly emerging principles of international environmental law.¹²⁶ The linkage of these regimes within the framework of the LOS Convention can fundamentally change the current approach to, and the effectiveness of, coastal state fisheries management.

B. New Developments Affecting Management of EEZ Fisheries

1. The Rio Declaration

The Rio Declaration,¹²⁷ although not specifically a marine conservation document, must be mentioned as a starting point. Adopted at the United Nations Conference on Environment and Development (UNCED) in 1992,¹²⁸ the non-binding Rio Declaration

Meeting of the Conference of the Parties to the Convention on Biological Diversity, U.N. Environmental Program, Decision II/10, U.N. Doc. UNEP/CBD/COP/2/19 (1995); (2) *Report of the First Meeting of the Subsidiary Body on Scientific, Technical and Technological Advice*, Conference of the Parties to the Convention on Biological Diversity, Subsidiary Body on Scientific, U.N. Environmental Program, Recommendation I/8, U.N. Doc. UNEP/CBD/COP/2/5 (1995) [hereinafter Jakarta Mandate]. See generally Maas M. Goote, *Convention on Biological Diversity: The Jakarta Mandate on Marine and Coastal Biodiversity*, 12 INT'L J. OF MARINE & COASTAL L. 377 (1997); *Introduction to Jakarta Mandate on Marine and Coastal Biodiversity*, U.N. Environmental Program, Agenda Item 4, para. 8(a), U.N. Doc. UNEP/CBD/JM/Expert/I/2 (1997).

125. U.N. Fish Stocks Agreement, *supra* note 16.

126. See Hey, *supra* note 16, at 459-62 (1996). Dr. Hey points out that the issue that will eventually need to be resolved is the extent to which minimum international standards should be set for activities, like EEZ fisheries management, which have traditionally been viewed as solely within the jurisdiction of the coastal state. *Id.* at 462. Dr. Hey asserts that international law currently accords third parties and common interests, such as marine biodiversity, little recognition and, therefore, creates little basis for such international standards. *Id.*

127. Rio Declaration *supra* note 120.

128. The United Nations Conference on Environment and Development (UNCED) convened in Rio de Janeiro, Brazil, June 3-14, 1992, and adopted the Rio Declaration, an action plan for carrying out the principles of the Declaration (Agenda 21). See generally AGENDA 21, *supra* note 121. Three other documents were opened for signature at the conference. These were the following: (1) A Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, U. N. Doc. A/CONF.151/26 (1992); (2) the Convention on Biological Diversity, *opened for signature* June 5, 1992, 31 I.L.M. 818; and (3) the Framework Convention on Climate Change, *adopted* May 9, 1992, 31 I.L.M. 849.

provided the official introduction into international environmental law of two dominant resource management themes for the 1990s — the goal of sustainable development and the application of the precautionary principle or precautionary approach.¹²⁹ The theme of sustainable development extends throughout the Rio Declaration, but is summarized in Principle 3: “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”¹³⁰ The precautionary approach, as embodied in Principle 15, provides that “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”¹³¹

2. Agenda 21

Agenda 21 is the comprehensive action plan adopted by the UNCED Plenary (and later endorsed by the General Assembly) for implementing the principles of the Rio Declaration.¹³² Specifically, Chapter 17, entitled “Protection of the Oceans, all Kinds of Seas, including Enclosed and Semi-Enclosed Seas, and Coastal Areas and the Protection, Rational Use and Development of their Living Resources,” sets out a strategy for protection and sustainable development of the marine and coastal environment and its resources which requires “new approaches . . . that are integrated in content and are precautionary and anticipatory in ambit.”¹³³ Chapter 17 identifies seven program areas¹³⁴ and provides objectives, activities and means of implementation for each area.

In addressing the issues of marine areas within national jurisdiction, Agenda 21 charges nations to ensure conservation and management of EEZ living resources in accord with the LOS

129. Edith Brown Weiss, *United Nations Conference on Environment and Development: Introductory Note*, 31 I.L.M. 814, 814-16 (1992).

130. Rio Declaration, *supra* note 120, Principle 3. See also Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 78 (Sept. 25) (where the ICJ specifically adopted the principle of sustainable development as relevant to interpreting obligations in relation to evolving environmental norms).

131. Rio Declaration, *supra* note 120, Principle 15 at 879.

132. See AGENDA 21, *supra* note 121.

133. *Id.* ch. 17.1, at 296.

134. Chapter 17.1 program areas are: (a) Integrated management and sustainable development of coastal areas, including exclusive economic zones; (b) Marine environmental protection; (c) Sustainable use and conservation of marine living resources of the high seas; (d) Sustainable use and conservation of marine living resources under national jurisdiction; (e) Addressing critical uncertainties for the management of the marine environment and climate change; (f) Strengthening international, including regional, cooperation and coordination; and (g) Sustainable development of small islands. *Id.* at 296-97.

Convention.¹³⁵ The management-related activities called for in this programmatic document address many of the problems identified in the previous section of this article, including assuring more and better monitoring and assessment; developing more effective predictive tools; strengthening legal, regulatory and enforcement authorities; and taking measures to reduce bycatch and wastage.¹³⁶ Although coastal states are directed to “[i]mplement strategies for the sustainable use of marine living resources,”¹³⁷ the objective for management continues to be maintenance or restoration of stocks “at levels that can produce the maximum sustainable yield as qualified by relevant environmental and economic factors, taking into consideration relationships among species.”¹³⁸

A major contribution of Agenda 21 is the incorporation of protection of habitat as an issue in marine fisheries management.¹³⁹ In order to attain sustainable use and conservation of EEZ resources, Chapter 17 sets out an objective of preservation of rare or fragile ecosystems by identifying ecosystems with high productivity and biodiversity, such as coral reefs, estuary wetlands, and seagrass beds, and also by providing special protections such as the designation of protected areas.¹⁴⁰ But Chapter 17 also goes further in recognizing linkages in ecosystems by encouraging integrated management of coastal and marine areas and resources.¹⁴¹

Ten years after adoption of Agenda 21, the 2002 World Summit on Sustainable Development at Johannesburg, South Africa, confronted the issue that progress on meeting the goals of Agenda 21 has been disappointing.¹⁴² The Summit adopted a new Plan of Implementation¹⁴³ for Agenda 21, and the Commission on Sustainable Development subsequently created a systematic approach to achieving progress on the plan through a series of implementation cycles, each focusing on a thematic cluster of

135. *Id.* ch. 17.78, at 315.

136. *Id.* ch. 17.79.

137. *Id.* ch. 17.79(b), at 315.

138. *Id.* ch. 17.75(c), at 314.

139. Part XII of the LOS Convention creates a general obligation to protect and preserve the marine environment, including taking necessary measures “to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life.” LOS Convention, *supra* note 6, art. 194(5), at 1308. This obligation is created, however, in the context of pollution control, not management of living marine resources.

140. AGENDA 21, *supra* note 121, chs. 17.75(f), 17.86.

141. *Id.* chs. 17.1, 17.5.

142. See WORLD SUMMIT ON SUSTAINABLE DEVELOPMENT, PLAN OF IMPLEMENTATION (2002), available at <http://www.johannesburgsummit.org> (last visited Apr. 14, 2004).

143. *Id.*

uses.¹⁴⁴ Unfortunately, marine resources are not scheduled to be addressed until the 2014/2015 implementation cycle.¹⁴⁵

3. *The U.N. Fish Stocks Agreement*

One of the most important recommendations of Agenda 21 was to convene a United Nations conference to implement the LOS Convention provisions on straddling and highly migratory fish stocks.¹⁴⁶ The U.N. General Assembly subsequently adopted a resolution calling for such a conference,¹⁴⁷ which, after three years of negotiations, resulted in the adoption of the 1995 U.N. Fish Stocks Agreement.¹⁴⁸ The Agreement does not specifically address fish stocks found only in the EEZ, but management of straddling and migratory fish stocks according to the principles of the agreement is required even while the stocks are present within the EEZ.¹⁴⁹ Because the Agreement eschews single-species management, coastal state management of most EEZ stocks will, however, certainly be affected by straddling stock management measures as the treaty is implemented.

With regard to management of straddling stocks within national jurisdiction, the Agreement heightens the degree of obligation on the coastal state imposed by article 61 of the LOS Convention. Terms used in article 61, such as “take into account” and “consider,” are generally replaced in the Agreement with “shall” adopt, ensure and protect.¹⁵⁰ The Agreement also expands upon conservation and management concepts of the LOS Convention by specifically including more contemporary concepts recommended by UNCED and the FAO.¹⁵¹ Several of the general principles of the Agreement reflect UNCED’s recommendations on sustainability, ecosystem

144. U.N. DEP’T OF ECON. & SOC. AFFAIRS, DIV. FOR SUSTAINABLE DEV., MULTI-YEAR PROGRAMME OF WORK FOR CSD: 2004/2005 TO 2016/2017, *available at* <http://www.un.org> (last visited Apr. 11, 2004).

145. *Id.*

146. AGENDA 21, *supra* note 121, ch. 17.50.

147. G.A. Res. 192, U.N. GAOR, 47th Sess., U.N. Doc. A/Res/47/192 (1992).

148. U.N. Fish Stocks Agreement, *supra* note 16.

149. *Id.* art. 3.

150. *See id.* art. 5. For example, the LOS Convention, *supra* note 6, art. 61, requires the coastal state only to take into account the best scientific evidence; the U.N. Fish Stocks Agreement provides that states shall ensure that measures are based on the best scientific evidence and further obligates states to “promote and conduct scientific research.” U.N. Fish Stocks Agreement, *supra* note 16, art. 5(k).

151. These principles are incorporated in article 5 of the Agreement. Article 3(2) of the Fish Stocks Agreement provides: “In the exercise of its sovereign rights for the purposes of exploring and exploiting, conserving and managing straddling fish stocks and highly migratory fish stocks within areas under national jurisdiction the coastal State shall apply *mutatis mutandis* the general principles enumerated in article 5.” U.N. Fish Stocks Agreement, *supra* note 16, art. 3(2).

management, and integrated management, including requirements to: 1) adopt measures to assure long-term sustainability of straddling and migratory fish stocks;¹⁵² 2) adopt measures to protect species within the same ecosystem;¹⁵³ 3) take measures to prevent or eliminate overfishing and excess capacity to ensure a fishing effort that will allow sustainable use of fishery resources;¹⁵⁴ 4) minimize pollution, waste, discards, and impact on associated or dependent species;¹⁵⁵ 5) protect biodiversity of the marine environment;¹⁵⁶ and 6) assess the impact of fishing, other human activities and environmental factors on target stocks, associate and dependent species, and other species in the ecosystem.¹⁵⁷ Clearly, successful implementation of these ecosystem-based obligations within the EEZ for straddling stocks requires broad considerations that will have positive implications for other stocks within the management area.

The U.N. Fish Stocks Agreement continues to require that measures “maintain or restore stocks at levels capable of producing maximum sustainable yield.”¹⁵⁸ But the Agreement also requires application of the precautionary approach.¹⁵⁹ When these provisions are considered together with the requirement to ensure long-term sustainability of stocks,¹⁶⁰ MSY assumes a different role. Annex II of the Agreement, which provides guidelines for application of precautionary reference points, distinguishes target reference points and limit reference points.¹⁶¹ MSY should be applied as a limit reference point to create boundaries to restrain harvest, rather than a target reference point to meet management objectives.¹⁶² Again, this modification of the use of MSY is unlikely to be applied only to straddling stocks or highly migratory species and should affect the use of MSY for other fisheries within the EEZ.

Effective coastal state management is further encouraged by the incentive created by the “compatibility” provisions. Article 7(2)(a) of the U.N. Fish Stocks Agreement requires compatible

152. *Id.* art. 5(a).

153. *Id.* art. 5(e).

154. *Id.* art. 5(h).

155. *Id.* art. 5(f).

156. *Id.* art. 5(g).

157. U.N. Fish Stocks Agreement, *supra* note 16, art. 5(d).

158. *Id.* art. 5(b).

159. *Id.* arts. 5(c), 6.

160. *Id.* art. 5(h).

161. *Id.* Annex II, para. 2.

162. *Id.* See also André Tahindro, *Conservation and Management of Transboundary Fish Stocks: Comments in Light of the Adoption of the 1995 Agreement for the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, 28 OCEAN DEV. & INT'L L. 1, 5-6 (1997).

management of straddling stocks within and beyond national jurisdiction taking into account “the conservation and management measures *adopted and applied* . . . by [the] coastal States within areas under national jurisdiction and ensur[ing] that measures established in respect of such stocks for the high seas do not undermine the effectiveness of such measures.”¹⁶³ Thus by taking effective conservation and management measures based on article 61 within the EEZ, coastal states can assure that regional fishery organizations are obligated to adopt measures for exploitation of high seas fisheries that will allow states to manage fisheries effectively within their EEZs. Coastal states that have blamed high seas fishing for undermining the effectiveness of their EEZ management must, however, take a leadership role in establishing effective management regimes to take advantage of this provision.

In addition to the “carrot” provided for coastal states by the compatibility provisions of article 7(2)(a), the U.N. Fish Stocks Agreement may provide a somewhat limited “stick” to enforce coastal states’ obligations under the Agreement.¹⁶⁴ Article 7(2) provides that “measures established for the high seas and those adopted for areas under national jurisdiction shall be compatible in order to ensure conservation and management of the straddling fish stocks and highly migratory fish stocks in their entirety.”¹⁶⁵ States have a duty to cooperate to achieve these compatible measures,¹⁶⁶ but if states are unable to achieve agreement in a reasonable time, a state party may invoke the binding dispute settlement mechanisms of Part VIII of the Agreement.¹⁶⁷ Article 32 of the Agreement, however, limits the applicability of the dispute resolution procedure by adopting the provisions of article 297, paragraph 3, of the LOS Convention.¹⁶⁸ By exempting disputes concerning the sovereign rights of countries over their EEZ living resources, the Fish Stocks Agreement restricts the ability to require a coastal state to adopt specific measures compatible with an adjacent high seas regime.¹⁶⁹

163. U.N. Fish Stocks Agreement, *supra* note 16, art. 7(2)(a) (emphasis added).

164. *See* Rieser, *supra* note 66, at 274.

165. U.N. Fish Stocks Agreement, *supra* note 16, art. 7(2).

166. *Id.*

167. *Id.* pt. VIII, arts. 27-32.

168. *Id.* art. 32. *See also supra* note 48.

169. *See* Rosemary Rayfuse, *The Interrelationship Between the Global Instruments of International Fisheries Law*, in DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW 107, 134-35 (Ellen Hey ed., 1999).

4. *FAO Code of Conduct for Responsible Fisheries*

The FAO Committee on Fisheries (COFI) in 1991,¹⁷⁰ the 1992 Cancun Declaration which emerged from the Cancun Conference on Responsible Fisheries,¹⁷¹ and UNCED's Agenda 21¹⁷² all called for elaboration of new policies and practices for the conservation and management of fisheries in both the high seas and in areas within coastal state jurisdiction. The extension of coastal state fishery jurisdiction to 200 miles was recognized as "a necessary *but insufficient* step toward the efficient management and sustainable development of fisheries."¹⁷³ While the U.N. Fish Stocks Agreement was being negotiated, the FAO carried out concurrent negotiations from 1992 through 1995 to develop a Code of Conduct for Responsible Fisheries which would be global in scope and application.¹⁷⁴ The Code of Conduct was adopted by consensus by the Twenty-eighth Conference of the FAO on October 31, 1995.¹⁷⁵

The Code of Conduct was a major development in that it comprehensively addressed all aspects of fisheries. In addition to considering subjects traditionally within the scope of fisheries documents, such as conservation, management and development,¹⁷⁶ the Code focused on the roles of excess fishing capacity and overcapitalization,¹⁷⁷ aquaculture,¹⁷⁸ trade,¹⁷⁹ research,¹⁸⁰ and integration of fisheries into coastal area management.¹⁸¹ The Code's drafters incorporated the knowledge and experience gained in ten years of implementation of the LOS Convention with new understandings of marine ecosystems and the effects of fishing and new developments in international law.¹⁸² The Code has been referred to as "the 'perfect' agenda for attaining sustainable fishing practices."¹⁸³

170. See FAO CODE OF CONDUCT, *supra* note 122, Annex 1, para. 2.

171. *Id.* para. 3.

172. See AGENDA 21, *supra* note 121.

173. FAO CODE OF CONDUCT, *supra* note 122, Preface (emphasis added).

174. *Id.* arts. 1.2-1.3.

175. *Id.* at Annex 2.

176. *Id.* arts. 7-8.

177. *Id.* arts. 6.3, 7.1.8, 7.4.3, 7.6.3 .

178. *Id.* art. 9.

179. FAO CODE OF CONDUCT, *supra* note 122, art. 11.

180. *Id.* art. 12.

181. *Id.* art. 10.

182. See Hey, *supra* note 16, at 483.

183. *Id.* Another commentator refers to the Code of Conduct as "the best, most complete and innovative statement of principles of responsible fisheries and fisheries management." Gerard Moore, *The Code of Conduct for Responsible Fisheries*, in DEVELOPMENTS IN INTERNATIONAL FISHERIES LAW 85, 96 (Ellen Hey ed., 1999).

The Code of Conduct is a voluntary agreement, but because it incorporates principles already reflected in the LOS Convention and other treaties, some of the provisions already, or may in the future, have binding effect through those instruments.¹⁸⁴ The Code is to be “interpreted and applied in conformity with relevant rules of international law, as reflected in the United Nations Convention on the Law of the Sea.”¹⁸⁵ Because the provisions of the Code of Conduct provide a much more detailed elaboration of fishery management principles and practices, the more relevant issue is, however, whether LOS article 61 will be interpreted and applied in conformity with the Code. For example, the Code of Conduct recognizes sustainable use as “the overriding objective” of fisheries management¹⁸⁶ and adopts the precautionary approach for dealing with lack of information and uncertainties concerning the state of stocks or impacts of fisheries activities.¹⁸⁷ The Code also provides a detailed list of the “relevant environmental and economic factors” that should be considered to qualify MSY,¹⁸⁸ and technical guidelines for the Code explain that MSY should be used in terms of a limit reference point rather than a target reference point in fisheries management.¹⁸⁹ While these provisions can clearly be interpreted as compatible¹⁹⁰ with the LOS Convention, such interpretations are not compelled by article 61.

Although the Code is voluntary, it makes provision for implementation and monitoring and calls upon everyone involved in fisheries management, utilization or trade to collaborate in

184. FAO CODE OF CONDUCT, *supra* note 122, art. 1.1.

185. *Id.* art. 3.1. The Code is also to be interpreted consistently with the U.N. Fish Stocks Agreement, the Cancun Declaration, the Rio Declaration, and Agenda 21. *See id.* art. 3.2.

186. *Id.* art. 7.2.1 (emphasis added).

187. *Id.* art. 7.5.

188. *Id.* art. 7.2.2. Measures to achieve MSY while taking into account “relevant environmental and economic factors” include: avoiding excess fishing capacity; assuring the economic conditions of the fishing industry promote responsible fisheries; taking account of the interests of fishers, including those in subsistence, small-scale and artisanal fisheries; conserving biodiversity and ecosystems; allowing recovery or restoration of depleted stocks; assessing and correcting negative environmental impacts of human activity; and minimizing bycatch. *Id.*

189. *See* U.N. FOOD & AGRIC. ORG., FAO TECHNICAL GUIDELINES FOR RESPONSIBLE FISHERIES NO. 2, PRECAUTIONARY APPROACH TO CAPTURE FISHERIES AND SPECIES INTRODUCTIONS 10-11, paras. 29-34 (1996), available at <ftp://ftp.fao.org/docrep/fao/003/W3592e/W3592e00.pdf> (last visited Apr. 9, 2004); *see also* Moore, *supra* note 183, at 97.

190. The precautionary approach is not mentioned in the LOS Convention, and commentators disagree as to whether the approach is implicitly incorporated into the provisions. Even if the precautionary approach was not contemplated in the drafting of article 61, the qualification of MSY by relevant environmental factors seems to provide a sufficient basis for incorporation of the precautionary approach. *See generally* Grant J. Hewison, *The Precautionary Approach to Fisheries Management: An Environmental Perspective*, 11 INT’L J. OF MARINE & COASTAL L. 301, 316-17 (1996).

fulfilling the objectives of the Code.¹⁹¹ One must assume that the monitoring of the implementation of the Code is not only for gauging its success or need for modification, but also to identify “bad actors” who may be subject to international pressure to conform.

In 1999, the FAO Ministerial Meeting on Fisheries adopted the Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries,¹⁹² which called upon the FAO to give high priority to continued implementation of the Code and upon users of fisheries resources to apply the Code.¹⁹³ Nine years after its adoption, the Code of Conduct continues to form the overarching framework for the world-wide achievement of sustainable fisheries. The FAO has elaborated the principles of the Code in nine technical guideline documents;¹⁹⁴ developed international plans of action (IPOAs) on management of fishing capacity,¹⁹⁵ reduction of seabird incidental catch,¹⁹⁶ shark management and conservation,¹⁹⁷ and deterrence of illegal, unregulated, and unreported fishing;¹⁹⁸ negotiated the Compliance Agreement for Fishing Vessels on the High Seas;¹⁹⁹ and developed a strategy for improving information

191. FAO CODE OF CONDUCT, *supra* note 122, art. 4.

192. The Rome Declaration on the Implementation of the Code of Conduct for Responsible Fisheries, *adopted* Mar. 10-11, 1999, *available at* <http://www.fao.org> (last visited Mar. 17, 2004).

193. *See id.* para. 12.

194. U.N. FOOD & AGRIC. ORG, FAO TECHNICAL GUIDELINES FOR RESPONSIBLE FISHERIES NO. 1, FISHING OPERATIONS (1996); U.N. FOOD & AGRIC. ORG, FAO TECHNICAL GUIDELINES FOR RESPONSIBLE FISHERIES NO. 2, PRECAUTIONARY APPROACH TO CAPTURE FISHERIES AND SPECIES INTRODUCTIONS (1996); FOOD & AGRIC. ORG, FAO TECHNICAL GUIDELINES FOR RESPONSIBLE FISHERIES NO. 3, INTEGRATION OF FISHERIES INTO COASTAL AREA MANAGEMENT (1996); U.N. FOOD & AGRIC. ORG, FAO TECHNICAL GUIDELINES FOR RESPONSIBLE FISHERIES NO. 4, FISHERIES MANAGEMENT (1997); U.N. FOOD & AGRIC. ORG, FAO TECHNICAL GUIDELINES FOR RESPONSIBLE FISHERIES NO. 5, AQUACULTURE DEVELOPMENT (1997); U.N. FOOD & AGRIC. ORG, FAO TECHNICAL GUIDELINES FOR RESPONSIBLE FISHERIES NO. 6, INLAND FISHERIES (1997); U.N. FOOD & AGRIC. ORG, FAO TECHNICAL GUIDELINES FOR RESPONSIBLE FISHERIES NO. 7, RESPONSIBLE FISH UTILIZATION (1998); U.N. FOOD & AGRIC. ORG, FAO TECHNICAL GUIDELINES FOR RESPONSIBLE FISHERIES NO. 8, INDICATORS FOR SUSTAINABLE DEVELOPMENT FOR MARINE CAPTURE FISHERIES (1999); U.N. FOOD & AGRIC. ORG, FAO TECHNICAL GUIDELINES FOR RESPONSIBLE FISHERIES NO. 9, IMPLEMENTATION OF THE INTERNATIONAL PLAN OF ACTION TO DETER, PREVENT AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING (2002). All of these technical reports can be viewed at the following website: <http://www.fao.org> (last visited Apr. 8, 2004).

195. *Report of the Twenty-third Session of the Committee on Fisheries*, U.N. Food and Agric. Org. Comm. on Fisheries, 23d Sess., Appendix E.3, FAO Fisheries Report. No. 595 (1999), *available at* <http://www.fao.org> (last visited Apr. 9, 2004).

196. *Id.* Appendix E.1.

197. *Id.* Appendix E.2.

198. U.N. FOOD & AGRIC. ORG., INTERNATIONAL PLAN OF ACTION TO PREVENT, DETER AND ELIMINATE ILLEGAL, UNREPORTED AND UNREGULATED FISHING (2001), *available at* <http://www.fao.org> (last visited Apr. 16, 2004).

199. Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, Nov. 23, 1993, S. TREATY DOC. 103-24, 33 I.L.M. 968 (1994).

and the status and trends of capture fisheries.²⁰⁰ The FAO has also provided technical and financial assistance to developing countries through efforts to strengthen regional fisheries organizations.²⁰¹ In general, however, the implementation of the Code must be achieved through international and regional agreements and organizations and through national legislation.

One commentator has noted that “[a] fundamental concept underlying the implementation of the Code is the assumption that governments want better managed fisheries, and that they are prepared to take difficult decisions, in the short-term, as a means of attaining longer-term sustainability gains.”²⁰² This is often not the case. In the case of some developed countries, however, particularly Australia,²⁰³ Canada,²⁰⁴ and the United States,²⁰⁵ the continued decline in major fisheries resources has led to the conclusion that the countries’ self-interest is better served by promoting policies reflected in the Code aimed at long-term sustainability. Many other countries are focusing on selected areas of the Code, and although some notable improvements in fisheries management and utilization are noted, rapid change through implementation of the Code is “unlikely to result, nor indeed should . . . be expected.”²⁰⁶

While many developing countries are making progress on implementation of the Code, a report by COFI,²⁰⁷ based on a self-reporting questionnaire,²⁰⁸ identified numerous fundamental barriers to implementation, including:

inadequate institutional and technical capacity,
inadequate funding, lack of information and
inadequate access to information, including public

200. U.N. FOOD & AGRIC. ORG., STRATEGY FOR IMPROVING INFORMATION ON STATUS AND TRENDS OF CAPTURE FISHERIES (2003), available at <http://www.fao.org> (last visited Apr. 11, 2004).

201. See generally Moore, *supra* note 183, at 102-03.

202. DAVID J. DOULMAN, CODE OF CONDUCT FOR RESPONSIBLE FISHERIES: DEVELOPMENT AND IMPLEMENTATION CONSIDERATIONS (2000), available at <http://www.fao.org> (last visited Apr. 7, 2004).

203. See AUSTRALIAN SEAFOOD INDUS. COUNCIL, A CODE OF CONDUCT FOR A RESPONSIBLE SEAFOOD INDUSTRY, available at <http://www.seafoodsite.com.au> (last visited Apr. 14, 2004).

204. See FISHERIES MANAGEMENT REPORTS & PUBLICATIONS, CANADIAN CODE OF CONDUCT FOR RESPONSIBLE FISHING OPERATIONS (1998), available at <http://www.dfo-mpo.gc.ca> (last visited May 15, 2004).

205. See U.S. NAT’L MARINE FISHERIES SERV., IMPLEMENTATION PLAN FOR THE CODE OF CONDUCT FOR RESPONSIBLE FISHERIES (1997), available at <http://www.nmfs.noaa.gov> (last visited Apr. 14, 2004).

206. DOULMAN, *supra* note 202.

207. *Progress in the Implementation of the Code of Conduct for Responsible Fisheries and Related International Plans of Action*, U.N. Food and Agric. Org., Committee on Fisheries, 24th Sess., U.N. Doc. COFI/2001/3 (2001), available at <http://www.fao.org>.

208. *Id.* paras. 1-2.

education programmes, under-utilization of the media, as well as inadequate participation of all stakeholders, inappropriate legislative framework, the socio-economic implications of reducing fishing effort and the difficulties of implementing such concepts as the precautionary approach in the context of reduced human and financial resources in developing countries, as major preoccupations and the principal constraints in most developing countries.²⁰⁹

The FAO's continued efforts at training, technical assistance, educational outreach, and capacity building are, however, leading to incremental, but steady, progress toward wider adoption of the Code of Conduct's principles.

5. *The Convention on Biological Diversity and the Jakarta Mandate on Marine and Coastal Biological Diversity*

The Convention on Biological Diversity (CBD)²¹⁰ was rapidly embraced by the international community, coming into force a mere eighteen months after it was signed.²¹¹ The basic objectives of the convention are “conservation of biological diversity[,] the sustainable use of its components [and the fair and] equitable sharing of [the] benefits . . . of genetic resources.”²¹² The CBD is primarily a framework agreement to be implemented through its organs — the Conference of Parties, the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA), and the Secretariat²¹³ — and subsequent agreements. Although the Convention makes no specific reference to the marine environment, the first meeting of the Conference of Parties in 1994 led to an agenda that gave conservation and sustainable use of marine and coastal biodiversity a priority status.²¹⁴ Subsequently, the SBSTTA began a series of meetings which resulted in development of the Jakarta Mandate on Marine and Coastal Biological Diversity.²¹⁵

209. *Id.* para. 47.

210. Biological Diversity Convention, *supra* note 123.

211. The Convention on Biological Diversity entered into force on December 29, 1993. *See id.* As of March 2004, there were 188 parties to the Convention. SECRETARIAT OF THE CONVENTION ON BIOLOGICAL DIVERSITY, U.N. ENVTL. PROGRAM, PARTIES TO THE CONVENTION ON BIOLOGICAL DIVERSITY / CARTAGENA PROTOCOL ON BIOSAFETY, at <http://www.biodiv.org> (last updated October 12, 2004).

212. Biological Diversity Convention, *supra* note 123, art. 1.

213. *Id.* arts. 23-25.

214. Goote, *supra* note 124, at 378.

215. *See id.* at 377-87.

The Jakarta Mandate is based upon the recommendations of the SBSTTA²¹⁶ as adopted by the Second Meeting of the Conference of Parties in five thematic areas, including integrated marine and coastal management, marine and coastal protected areas, and sustainable use of coastal and marine living resources.²¹⁷ The recommendations reiterate the necessity for application of the precautionary approach and ecosystem management principles,²¹⁸ as well as the need for integrated coastal and marine area management.²¹⁹

The Jakarta Mandate also focuses on the role of marine protected areas (MPAs) in conservation of marine biodiversity and encourages the use of MPAs within the context of integrated coastal and marine area planning.²²⁰ The establishment of MPAs is consistent with the obligation under the CBD to conserve biological resources in-situ and to “[e]stablish a system of protected areas or areas where special measures need to be taken to conserve biological diversity.”²²¹ The establishment of MPAs also reflects concerns about the ecosystem-level effects of overfishing and some fishing techniques and the CBD obligation to “[p]romote the protection of ecosystems, natural habitats and the maintenance of viable populations of species in natural surroundings.”²²² MPAs are regarded as a matter of high priority and urgency in recent recommendations of the SBSTTA, which call for establishment and maintenance of MPAs “that are effectively managed, ecologically based and contribute to a permanent representative global network of [MPAs] . . . to maintain the structure and functioning of the full range of marine and coastal ecosystems, in order to provide benefits to both present and future generations.”²²³

216. *Report of the First Meeting of the Subsidiary Body on Scientific, Technical and Technological Advice*, Conference of the Parties to the Convention on Biological Diversity, Subsidiary Body on Scientific, Technical and Technological Advice, U.N. Env'tl. Program, Recommendation I/8, U.N. Doc. UNEP/CBD/COP/2/5 (1995) [hereinafter SBSTTA], available at <http://www.biodiv.org> (last visited Apr. 14, 2004).

217. *Introduction to Jakarta Mandate on Marine and Coastal Biodiversity*, U.N. Env'tl. Program, Agenda Item 4, para. 8(a)(1)-(3), U.N. Doc. UNEP/CBD/JM/Expert/I/2 (1997), available at <http://www.biodiv.org> (last visited Apr. 14, 2004). The other areas are mariculture and alien species. *Id.* para. 8(a)(iv)-(v).

218. *See, e.g.*, SBSTTA, *supra* note 216, paras. 10(b)(ii), 12(a), 15(e), Annex para. 6.

219. *Id.* para. 10.

220. *Id.* para. 11.

221. Biological Diversity Convention, *supra* note 123, art. 8(a).

222. *Id.* art. 8(d).

223. *Report of the Eighth Meeting of the Subsidiary Body on Scientific, Technical and Technological Advice*, Conference of the Parties to the Convention on Biological Diversity, Subsidiary Body on Scientific, Technical and Technological Advice, U.N. Env'tl. Program, Recommendation VIII/3, Annex B, at 71, para. 8, U.N. Doc. UNEP/CBD/COP/7/3 (2003); *see also Thematic Programmes of Work: Review, Further Elaboration and Refinement*, Conference of the Parties to the Convention on Biological Diversity, U.N. Environmental Program, at 7,

Recommendations for the protection of biodiversity also conform with the LOS Convention, Agenda 21, and the FAO Code of Conduct.²²⁴ The CBD's relation to other treaties and agreements is set out specifically in article 22, which provides:

1. The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.
2. Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea.²²⁵

Section 1 of article 22 reflects the rule of treaty interpretation that in the case of a conflict, the obligations under a later treaty will prevail.²²⁶ The language of article 22, section 2 raises concerns that if elements of implementation of the CBD conflict with rights or duties of states under the LOS Convention, the LOS Convention will prevail.²²⁷ A study of the parallel provisions of the LOS Convention and the CBD related to conservation, sustainable use, and research concludes that provisions are complementary and can be implemented "together in ways that are consistent, mutually supportive and productive."²²⁸ In addition, the reference to "the law of the sea" encompasses not only the LOS Convention, but other conventions, such as the U.N. Fish Stocks Agreement and the Compliance Agreement, as well as development of customary international law. The law of the sea for coastal states in regard to fisheries management now goes well beyond the relatively limited

U.N. Doc. UNEP/CBD/COP/ 7/12/Add.2 (2003).

224. SBSTTA, *supra* note 216, para. 12(e).

225. Biological Diversity Convention, *supra* note 123, art. 22. The LOS Convention is not specifically referenced in section 2 and was not yet in force when these provisions were adopted, but the CBD does not refer in this section to the "existing" law of the sea, as it did in section 1. *Id.* The term "law of the sea" is generally considered to apply both to customary law of the sea as well as the LOS Convention, which has been so widely adopted now that it may be considered as embodying the law of the sea. See R.R. CHURCHILL & A.V. LOWE, *THE LAW OF THE SEA* 18 (1983).

226. Vienna Convention, *supra* note 108, art. 30.

227. Biological Diversity Convention, *supra* note 123, art. 22(2).

228. A. Charlotte De Fontaubert et al., *Biodiversity in the Seas: Implementing the Convention on Biological Diversity in Marine and Coastal Habitats*, 10 *GEO. INT'L ENVTL. L. REV.* 753, 849-53 (1998).

obligations of the LOS Convention. This evolution contributes to the conclusion that actions to promote biodiversity and ecosystem integrity under the CBD will be consistent with states' rights and duties under the law of the sea.²²⁹

V. CONCLUSION

The premise that coastal state jurisdiction over marine living resources to 200 miles offshore would prevent the overexploitation of marine fisheries has proved to be flawed. Scientific information and management methodologies continue to be inadequate; entry into domestic fisheries has largely not been controlled; enforcement and reporting remain questionable; and the EEZ as a management area has not been an adequate zone for ecosystem management, either from the perspective of straddling stocks and highly migratory species or from the perspective of integrating coastal and marine management. Simply changing jurisdictional zones did not substantially benefit the resources.

The LOS Convention standards for coastal state conservation and utilization of EEZ fisheries are largely ambiguous, incredibly flexible, and virtually unenforceable. States have been particularly unsuccessful at meeting the clearest mandate of article 61 — the requirement to prevent overexploitation. While the ambiguity and flexibility of concepts such as MSY “as qualified by relevant environmental and economic factors”²³⁰ and consideration of “associated” species²³¹ create no enforceable management standards, they do, however, provide ample bases for incorporating in the context of article 61 new principles of international environmental law, including application of the precautionary approach and integrated coastal and marine ecosystem management. Moreover, in the *Case Concerning the Gabčíkovo-Nagymaros Project*,²³² the ICJ indicated that new environmental norms *must* be taken into account and given proper weight in applying a treaty that governs activities, like fishing, that affect the environment.²³³

During the 1990s, international environmental law was developing rapidly. In the area of fisheries management, not only did broad concepts like the precautionary principle and sustainable use of resources become relevant, but new regimes were also developing to respond to the problems identified by better reporting and monitoring of fisheries catch, by better understanding of the

229. See generally Rieser, *supra* note 66, at 257-59.

230. LOS Convention, *supra* note 6, art. 61(3).

231. *Id.* art. 61(4).

232. See *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25).

233. See *supra* text accompanying notes 111-19.

impacts of fishing,²³⁴ and by the acknowledgment of the incompleteness of the LOS Convention regime for fisheries management.

The LOS Convention does not appear to be an impediment to coastal state adoption of more recent approaches to fisheries management such as: applying a precautionary approach when data are inadequate; using MSY as a limiting reference point, rather than a target point; taking an ecosystem-based approach to management; designating MPAs where appropriate for ecosystem or species protection; and limiting access and overcapitalization in the fishing industry. Nevertheless, the Convention is not particularly useful for requiring implementation of these new norms and understandings. The degree of coastal state autonomy authorized by the LOS Convention and coastal state self-interest continue to support a "tragedy of the commons" situation. If trends in fisheries continue to indicate that not only are the primary commercial fish stocks not recovering, but also that they are unlikely to recover if current fishing practices are not revised, the self-interest of coastal states may become more enlightened and shift to more conservation-oriented and long-term management policies.

More widespread adoption of principles elaborated in Agenda 21, the FAO Code of Conduct, and the Jakarta Mandate may result in substantial changes in patterns of EEZ fisheries management in the future. None of these documents are binding, however, and at this point cannot be characterized as customary international law creating international minimum standards for EEZ management.²³⁵ This does not mean that these developments are of no consequence. Agenda 21, the FAO Code of Conduct, and the Jakarta Mandate have provided important regime linkages that are contributing to the operation and effectiveness of the LOS Convention and defining basic principles which form the foundation for new regimes, such as the U.N. Fish Stocks Agreement.²³⁶

Ironically, the U.N. Fish Stocks Agreement, a treaty primarily directed to management of high seas fisheries, seems to provide the incentives necessary for the most immediate changes in EEZ management. To require compatible management of fisheries in adjacent high seas areas, coastal states will have to adopt and apply strategies for straddling stocks within the EEZ that incorporate the

234. Not only on targeted species, but also on other species and on ecosystems.

235. See Hey, *supra* note 16.

236. See generally Olav Schram Stokke, *Governance of the High Seas Fisheries: The Role of Regime Linkages*, in ORDER FOR THE OCEANS AT THE TURN OF THE CENTURY 157, 159 (Davor Vidas & Willy Ostreng eds., 1999).

precautionary approach, protection of biodiversity, principles of sustainability, and ecosystem management. Not only is it unlikely that coastal states would adopt different management regimes for other fish stocks within the EEZ, it is virtually impossible to conceive how such an integrated management approach could not incorporate and positively affect management of all fisheries within the EEZ.

STRATEGIC MYOPIA: THE UNITED STATES, CRUISE MISSILES, AND THE MISSILE TECHNOLOGY CONTROL REGIME

MICHAEL DUTRA*

Table of Contents

I.	INTRODUCTION: STRATEGIC MYOPIA	37
II.	THE CRUISE MISSILE THREAT	40
	<i>A. Cruise Missiles: An Overview</i>	40
	<i>B. Motives for Proliferation and</i> <i>the Indirect Approach</i>	43
	<i>C. Pathways to Proliferation</i>	48
	<i>D. Cruise Missiles Today: A Threat Assessment</i>	56
III.	STOPPING PROLIFERATION: THE MISSILE TECHNOLOGY CONTROL REGIME	58
	<i>A. MTCR's Technology Controls</i>	59
	<i>B. MTCR's Focus on Ballistic Missiles</i>	62
	<i>C. Other Nonproliferation Tools: National</i> <i>Suppliers' Group and Codes of Conduct</i>	65
IV.	PROLIFERATION OF CRUISE MISSILES	66
	<i>A. Timeframe for Development</i>	67
	<i>B. Chokepoints: Fewer and Harder to Control</i>	68
	<i>C. Threats from within the MTCR: The Black Shaheen</i> ..	73
V.	DEALING WITH THE THREAT: BROAD-BASED POLICY ALTERNATIVES	75
	<i>A. Refocus the MTCR on Cruise Missiles</i>	75
	<i>B. Other Cruise Missile Nonproliferation Efforts</i>	82
VI.	CONCLUSION	85

I. INTRODUCTION: STRATEGIC MYOPIA

The year is 2009. The last American troops have withdrawn from Iraq after six years of occupation and reconstruction. As the final U.S. soldiers depart, sectarian violence erupts, crippling the divided and weak Iraqi regime; full-scale civil war results. As the Iraqi government crumbles, Iran intervenes and invades southern Iraq, threatening the Kuwaiti and Saudi oil fields so vital to the

* Associate, White & Case LLP, New York; J.D., *cum laude*, 2003, Georgetown University Law Center; B.A., *summa cum laude*, 2000, University of Southern California. The views expressed in this article are the author's personal opinion and are not those of any other group or organization. I would like to thank Professor David Koplow for his suggestions and comments; Gaurav Kampani, Tim McCarthy, Richard Speier, and especially Dennis Gormley, for sharing their insights and expertise; and Jacqueline Tully for tolerating me.

well-being of the American economy. The United States reacts by sending several fighter wings to Qatar to contain the conflict.

As the sun sets over the sands of the Qatari desert, scores of small, slow, remotely-piloted vehicles (RPVs) fly across the Persian Gulf towards the massive Al Udeid air base, where dozens of American military aircraft are dispersed on ramps around the airfield because there are not enough hardened shelters or bunkers for all the U.S. warplanes. American radar operators spot the incoming aircraft, and Patriot surface-to-air missile (SAM) batteries begin firing at the RPVs, but there are too many targets to shoot down. Even after the Patriot batteries expend their final missiles, more and more Iranian RPVs arrive in successive waves. Each RPV drops dozens of conventional submunitions on the runways, dispersal areas, and tent cities housing the hundreds of personnel needed to keep a modern air wing flying. After the smoke clears, the Al Udeid airfield is littered with wrecked F-15s and burning tanker aircraft, as well as hundreds of dead and wounded American military personnel. While the military losses to the U.S. forces are significant, the political damage is catastrophic, and the United States decides to withdraw its air assets from the Arabian Peninsula.

This nightmarish scenario is not so far-fetched as it might seem. It is loosely based upon RAND Corporation assessments of the vulnerability of American overseas bases to missile attacks, and how such attacks could threaten U.S. force projection capabilities.¹ It also illustrates the danger of the emerging cruise missile threat and the deficiencies of the Missile Technology Control Regime (MTCR) — the suppliers' group designed to prevent the proliferation of missiles and related technologies.² The MTCR is ill equipped to deal with the emerging threat of cruise missiles largely due to the reticence of its constituent members to recognize the cruise missile threat, as well as the regime's primary focus on stopping the spread of ballistic missiles.³

1. See DENNIS M. GORMLEY, DEALING WITH THE THREAT OF CRUISE MISSILES 48-50 (The International Institute for Strategic Studies, Adelphi Paper No. 339, 2001) [hereinafter GORMLEY, DEALING WITH THE THREAT]; JOHN STILLION & DAVID T. ORLETSKY, AIRBASE VULNERABILITY TO CONVENTIONAL CRUISE-MISSILE AND BALLISTIC-MISSILE ATTACKS: TECHNOLOGY, SCENARIOS, AND U.S. AIR FORCE RESPONSES 16-28 (RAND 1999) [hereinafter STILLION & ORLETSKY].

2. Missile Technology Control Regime: Agreement on Revised Guidelines for the Transfer of Equipment and Technology Related to Missiles, Apr. 16, 1987, 32 I.L.M. 1298, available at <http://www.mtcr.info> (last visited July 15, 2004) [hereinafter MTCR].

3. See Dennis M. Gormley, *The Neglected Dimension: Controlling Cruise Missile Proliferation*, 9 NONPROLIFERATION REV. 21, 22 (2002) [hereinafter Gormley, *Neglected Dimension*].

This article argues that although the cruise missile threat has not yet matured, the United States needs to adopt a hedging strategy to deal with the looming problem. The United States cannot afford to stick its proverbial head in the sand and wish the cruise missile threat away. Reinvigorating the MTCR and remedying its gaping deficiencies, so that the regime's provisions are effective at stopping the proliferation of both ballistic and cruise missiles, should be the United States' main priority. However, the United States should hedge its bets and accelerate plans to build a reliable theater anti-cruise missile defense system so that, should nonproliferation efforts fail, U.S. forces and allies will not be defenseless against cruise missile strikes.

Part II of this article discusses the military utility of cruise missiles and how they can be used to create parity between less-advanced states and those with modern militaries. The first section gives a brief historical background on cruise missile development. The second section discusses the military doctrine and motivations for obtaining cruise missiles. The pathways by which a state can obtain a cruise missile strike capability are addressed in the third section, while the final section of Part II provides an assessment of the current cruise missile threat.

Part III shifts the focus of the article to the MTCR, its regulations on cruise missiles and related technologies, and other international efforts to curb missile proliferation. The first section of Part III provides a historical account of the MTCR's creation and development. The MTCR's focus on ballistic missiles is discussed in the second section. Other missile nonproliferation mechanisms and their impact on cruise missile proliferation are examined in the final section of Part III.

The article then addresses the cruise missile proliferation threat in Part IV. The first section of this part explores the time frame and detectability of cruise missile proliferation. The second section discusses the technological chokepoints involved in indigenous cruise missile development. The third section of Part IV is a brief case study of Britain and France's sale of Black Shaheen cruise missiles to the United Arab Emirates (UAE), illustrating the dangers of selling complete cruise missile systems to non-MTCR members.

Part V sets forth policy prescriptions for the United States in dealing with cruise missile proliferation and addresses the need for redefining certain provisions of the MTCR, specifically its range and payload limits. Part V further explores other nonproliferation efforts outside the structure of the MTCR.

II. THE CRUISE MISSILE THREAT

Land-attack cruise missiles (LACMs) represent one of the most significant conventional weapons threats facing the world today. This article addresses how the United States should deal with the proliferation of land-attack cruise missiles and the technology needed to build them.⁴ The threat is magnified by the capability of cruise missiles to deliver chemical, biological, and nuclear weapons. This section examines the historical background of the cruise missile threat, the tactical and strategic motives for obtaining cruise missile attack capability, the pathways by which a state can acquire cruise missiles, as well as a current assessment of the cruise missile threat.

A. Cruise Missiles: An Overview

1. What is a Cruise Missile?

Cruise missiles are expendable, unmanned aircraft that sustain flight through the use of aerodynamic lift,⁵ have flight controls, are powered by one or more engines, and deliver a warhead or other payload to the intended target.⁶ Cruise missiles are powered by engines until they reach their designated target, unlike ballistic missiles, which are powered by engines only during the initial boost phase before entering an unpowered parabolic flight path.⁷ Most cruise missiles are guided by internal computer guidance systems, though remote control devices are used to guide some short-range cruise missiles.⁸

2. Historical Background

Following the Second World War, the United States and the Soviet Union focused their development efforts on ballistic missiles as a means of delivering weapons of mass destruction, devoting fewer resources to cruise missile development.⁹ This was the result

4. This article examines how the United States should seek to curtail the proliferation of LACMs. It does not specifically address the proliferation of anti-ship cruise missiles.

5. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, Dec. 8, 1987, U.S.-U.S.S.R., art. II, 1657 U.N.T.S. 2, available at <http://www.state.gov/www/global/arms/treaties/inf2.html> (last visited July 15, 2004). The Intermediate Range Nuclear Forces (INF) Treaty defines a cruise missile as “unmanned, self-propelled vehicle that sustains flight through the use of aerodynamic lift over most of its flight.” *Id.*

6. W. SETH CARUS, CRUISE MISSILE PROLIFERATION IN THE 1990S 7 (Center for Strategic and International Studies, The Washington Papers No. 159, 1992).

7. *Id.* at 8.

8. *See id.* at 7-8, 110.

9. Richard K. Betts, *Innovation, Assessment, and Decision, in* Cruise Missiles: Technology,

of major difficulties with the development of accurate guidance systems for second-generation cruise missiles, leading to diminished institutional enthusiasm for cruise missiles.¹⁰ For instance, the U.S. Snark cruise missile program was an absolute fiasco, with the missiles missing their targets by an average of over 1500 km.¹¹ During the 1970s, the United States, the Soviet Union, and their allies overcame the technological hurdles and developed reasonably accurate cruise missile guidance systems¹² that could hit targets the size of warships.¹³ This technological breakthrough led to the development of primitive, high-flying (and thus easily intercepted) anti-ship cruise missiles (ASCMs), which were widely sold around the globe in the following decades.¹⁴ The success with ASCM guidance systems led to the development of longer-ranged ground attack cruise missiles such as the U.S. Tomahawk.¹⁵ Both the United States and the Soviet Union continued their cruise missile programs and developed longer-range strategic versions that could travel intercontinental distances.¹⁶ Presently, only the United States and Russia deploy cruise missiles with intercontinental range.¹⁷ In recent years, the United States has used Tomahawk LACMs to attack difficult to reach targets in Iraq, Afghanistan, and Sudan.¹⁸ Cruise missiles have become a key tool of U.S. diplomacy and foreign policy because there is no risk of losing pilots or aircraft in LACM strikes.

3. Cruise Missile Varieties

Cruise missiles can take a great variety of different forms, but come in three major types: (1) short-range ASCMs; (2) tactical land-attack cruise missiles; and (3) strategic cruise missiles.¹⁹ This article concentrates primarily on the middle variety, LACMs, but

Strategy, Politics, 1, 3 (1981).

10. *Id.* at 3.

11. *Id.*

12. *Id.* at 4-5.

13. CARUS, *supra* note 6, at 7.

14. *Id.* at 2-3.

15. Tara Kartha, *The Rationale of Cruise Missiles I*, 22 STRATEGIC ANALYSIS 799 (1998), available at <http://www.idsa-india.org/an-aug8-9.html> (last visited Feb. 22, 2002) [hereinafter Kartha, *Rationale I*].

16. *Id.*

17. CARUS, *supra* note 6, at 13.

18. Kartha, *Rationale I*, *supra* note 15.

19. *Id.* This article classifies cruise missiles according to the types of targets they are intended to attack. Cruise missiles can alternately be classified by method of launch. Classified in that manner, there are three categories: Air-launched cruise missiles (ALCMs), sea-launched cruise missiles (SLCMs), and ground-launched cruise missiles (GLCMs). Dennis M. Gormley, *Hedging Against the Cruise Missile Threat*, 40 SURVIVAL 92, 96 (1998) [hereinafter Gormley, *Hedging*], available at <http://www.ceip.org> (last visited Feb. 24, 2002).

also considers the implications of converting ASCMs into LACMs.²⁰ First, ASCMs, designed to attack warships, have a relatively short range (usually less than 150 km) and are primarily deployed in coastal defense batteries or launched from strike aircraft, ships, or submarines.²¹ As most ASCMs are not covered under the MTCR because of their relatively short ranges, there are few restrictions on their sale, and thus, they have become an export staple for the defense industries of the United States, Italy, France, and Russia, among others.²² More than 70 countries around the world deploy at least 75,000 ASCMs, although many of them are older, obsolescent designs such as the Soviet SS-C-2 Styx and the Chinese HY-1 and -2 Silkworm variants.²³ However, significant numbers of more capable designs such as the U.S. Harpoon and French Exocet have been sold to Third World states.²⁴

LACMs are cruise missiles designed to penetrate air defenses and deliver their payloads to land targets that are too difficult or dangerous to attack with manned aircraft. The ranges of LACMs are variable, although not intercontinental; LACMs can be launched from strike aircraft, submarines, surface vessels, or mobile launchers and can be armed with various types of warheads, including weapons of mass destruction.²⁵ The performance of U.S. Tomahawk LACMs against Iraq in the 1991 and 2003 wars sparked increased interest in cruise missiles, making them one of the most sought after modern weapons systems because of their long-range attack capability and accuracy.²⁶ Although there have only been isolated incidents of the proliferation of complete LACM systems,²⁷ numerous states across the globe, ranging from India to the UAE, have sought to acquire such missiles.²⁸ Dual-use technologies that

20. Kartha, *Rationale I*, *supra* note 15. There is really no difference between LACMs and strategic cruise missiles except the range of the missiles and their warheads. *Id.* Strategic cruise missiles are armed with nuclear warheads, while LACMs usually have conventional high explosive warheads. *Id.* This article addresses LACMs because they are the most immediate proliferation threat to the United States' interests.

21. Gormley, *Hedging*, *supra* note 19, at 95.

22. See Kartha, *Rationale I*, *supra* note 15.

23. See CARUS, *supra* note 6, at 34; GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 30; Gormley, *Hedging*, *supra* note 19, at 97-98.

24. Gormley, *Hedging*, *supra* note 19, at 96; Kartha, *Rationale I*, *supra* note 15; see also Richard H. Speier, *The Missile Technology Control Regime: Case Study of a Multilateral Negotiation 7* (Nov. 1995) (unpublished manuscript, on file with The Florida State University Journal of Transnational Law & Policy) [hereinafter Speier Manuscript].

25. See Tara Kartha, *The Rationale of Cruise Missiles II*, 22 STRATEGIC ANALYSIS 841 (Sept. 1998), available at <http://www.idsa-india.org/an-sep8-3.htm> (last visited Feb. 22, 2002).

26. CARUS, *supra* note 6, at 1-2.

27. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 17-24. The sale of the Black Shaheen version of the French Apache LACM to the UAE is the most prominent example. *Id.* at 40. It will be discussed in Part V(C) of this article.

28. *Id.* at 25-28, 40.

could be used for indigenous LACM development have also proliferated.²⁹

B. Motives for Proliferation and the Indirect Approach

Although the world remembers the damage done to Britain by German V-1 cruise missiles in the closing months of the Second World War,³⁰ cruise missiles largely languished in an anti-ship role as the forgotten sibling of ballistic missiles until the 1990s.³¹ But in the last decade or so, cruise missiles have risen to new prominence as a tactically significant weapon for various reasons, including the increased diffusion of dual-use technology, the success of the MTCR in retarding the spread of ballistic missiles, as well as technological developments in anti-ballistic missile defenses.³²

Military doctrine has also shifted to reflect the constantly changing world in the form of the revolution in military affairs (RMA), a conceptualization of modern military strategy and tactics that emphasizes a more flexible approach to dealing with potential threats through the employment of advanced technologies.³³ As discussed in this article, the spread of advanced technologies has made it possible for states in the developing world to field weapons that can challenge the most technologically advanced military powers. Cruise missiles are one of those weapons systems whose

29. Gormley, *Hedging*, *supra* note 19, at 96.

30. See GORMLEY, *DEALING WITH THE THREAT*, *supra* note 1, at 9-10. Although the V-1s were essentially terror weapons because of their crude guidance systems, they, along with the V-2 (a first-generation ballistic missile), caused over 18,000 fatalities in Britain despite the fact that nearly seventy-five percent of the V-1s were shot down before reaching their targets. Gormley, *Hedging*, *supra* note 19, at 93. The V-1 attacks forced Britain to devote considerable resources to detecting and intercepting the missiles, diverting significant resources from the final drive into Germany. See Kartha, *Rationale I*, *supra* note 15. General Dwight D. Eisenhower claimed that had Germany perfected the V-1 and -2 six months earlier, D-Day and the invasion of Europe might have been impossible. *Id.*

31. Kartha, *Rationale I*, *supra* note 15.

32. See generally GORMLEY, *DEALING WITH THE THREAT*, *supra* note 1, at 43-58.

33. Theodor W. Galdi, *Revolution in Military Affairs?: Competing Concepts, Organizational Responses, Outstanding Issues* (Cong. Res. Serv. 95-1170, 1995), available at <http://www.fas.org/man/crs/95-1170.htm> (last visited May 6, 2002). The concept of the revolution in military affairs (RMA) is derived from an earlier concept — military technical revolution — used by Soviet military theorists in the 1970s. RMAs take place when a military incorporates new technology, organization, and doctrine to the extent that it forever alters the tactical and strategic environment for the future. Any other actors that wish to challenge the transformational state must match or counter the new technology, organization, or doctrine in order to compete on the same level. Admiral William Owens, former Vice-Chairman of the Joint Chiefs of Staff, has identified three areas where the most recent RMA has taken place: (1) intelligence, surveillance, and reconnaissance; (2) command, control, communications, and intelligence processing; and (3) precision force. LACMs fall into the latter category of precision force because they are tools for countering the qualitative superiority of advanced militaries. LACMs can be used to cripple the technology and infrastructure needed to maintain a modern military's edge in intelligence gathering and command and control. *Id.*

value has dramatically changed through the RMA, from a narrow anti-ship use to much wider, more flexible roles. Lawrence Freedman argues that “[c]ruise missiles . . . are to some extent the paradigmatic weapon of the RMA, as delivery systems that can be launched from a variety of platforms and strike in a precise manner.”³⁴ Cruise missiles are considered “transformational weapons” that can balance out the technological inferiority of Third World militaries in comparison to the more advanced armed forces of nations such as the United States.³⁵ Cruise missiles do not remedy the technological imbalance between Third and First World militaries, but rather provide less advanced countries with the capability to attack the most vulnerable parts of the complex logistical structures needed to support the weapons platforms of more advanced countries. The spread of cruise missiles with the capability to attack weak points in supply lines or vulnerable bases threatens to nullify the technological advantages of the United States in certain theaters, such as the Middle East or Korean Peninsula.³⁶ Andrew Krepinevich, Director of the Center for Strategic and Budgetary Assessments, has expressed that Third-World states could easily deny access to airfields needed to base short-range strike aircraft near potential battlefields by merely threatening possible cruise missile attacks.³⁷ There are also worries that the large static port facilities needed to unload heavy equipment, such as artillery pieces or tanks, and other supplies would be ripe targets for an adversary armed with cruise missiles.³⁸

Noted twentieth century military historian Basil Liddell Hart has championed the concept of the “indirect approach,” which can be summed up as attacking an adversary where it least expects an attack (and hence is the weakest) with the greatest amount of force that can be brought to bear.³⁹ In his seminal work, *Strategy*, Liddell Hart described the importance of the “indirect approach” by which an attacker is never justified in launching “a direct attack upon an

34. LAWRENCE FREEDMAN, *THE REVOLUTION IN MILITARY AFFAIRS* 70 (The International Institute for Strategic Studies, Adelphi Paper No. 318, 1998).

35. *See id.*; Greg Jaffe, *New and Improved?*, WALL ST. J., Mar. 28, 2002, at R5. Cruise missile proliferation entails the spread of certain key technologies needed to develop and deploy such missiles; however, the spread of LACM-related technology does not change the large-scale technological inequalities between Third-World states and modern militaries. For instance, the technologies needed to deploy cruise missiles have nothing to do with the superior command, control, communications, and intelligence capabilities that advanced military powers, such as the United States, use to coordinate their forces.

36. Jaffe, *supra* note 35.

37. *Id.*

38. *Id.*

39. *See* B.H. LIDDELL HART, *STRATEGY* 23-26 (2d rev. ed., Frederick A. Praeger, 1967) (1954).

enemy firmly in position. . . . [I]nstead of seeking to upset the enemy's equilibrium by one's attack, it must be upset before a real attack is, or can be successfully launched."⁴⁰ Implicit in Liddell Hart's conceptualization of the indirect approach is consideration of an adversary's strengths and turning them against him through strategic surprise and flexibility.⁴¹ Cruise missiles are weapons ideally suited to take advantage of the "indirect approach," as LACMs are particularly effective at striking logistical infrastructure, such as ports, supply dumps, and airfields,⁴² upsetting an adversary's equilibrium before a more conventional direct attack is launched. Even the threat of a cruise missile attack against such high-value, vulnerable targets can be enough to disrupt a modern military force.⁴³

Furthermore, LACMs can exploit weaknesses in modern air defenses to cause serious damage to other military targets and civilian infrastructure. Most modern air defenses and radars were originally designed to combat fast-moving strike aircraft flying at high altitude or missiles on a ballistic flight path, not low-flying cruise missiles.⁴⁴ Thus, it will be difficult to counter the cruise missile threat because extant defense systems were not originally designed for that purpose. Most advanced look-down radars for modern air defense systems have software that eliminates slow-moving targets near the ground to prevent their data systems from being overtaxed.⁴⁵ If LACMs were programmed to fly earth-hugging courses at speeds of approximately 150 km/hour, most modern air-defense radars would not detect the missiles, as their radar

40. *Id.* at 164.

41. *Id.* Liddell Hart's theory of the "indirect approach" is based on careful analysis of the weaknesses of an opponent's position and calculated attacks to catch the adversary off balance:

[T]hroughout the ages, effective results in war have rarely been attained unless the approach has had such indirectness as to ensure the opponent's unreadiness to meet it. The indirectness has usually been physical, and always psychological. . . . More and more clearly has the lesson emerged that a direct approach to one's mental object, or physical objective, along the 'line of natural expectation' for the opponent, tends to produce negative results. . . . In war, as in wrestling, the attempt to throw the opponent without loosening his foothold and upsetting his balance results in self-exhaustion, increasing in disproportionate ratio to the effective strain put upon him. . . . In most campaigns the dislocation of the enemy's psychological and physical balance has been the vital prelude to a successful attempt at his overthrow. This dislocation has been produced by a strategic indirect approach, intentional or fortuitous.

Id. at 25-26.

42. See Jaffe, *supra* note 35.

43. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 49-50.

44. *Id.* at 11.

45. *Id.*

signatures would be eliminated as ground clutter.⁴⁶ Even if air defense radars could detect cruise missiles, there would be a much smaller window of opportunity to intercept because, due to the earth's curvature, the missiles would only be detected at very close range (e.g. 35 km or less).⁴⁷ Additionally, even if effective anti-cruise missile detection systems are developed, cruise missiles are sufficiently cheap that successive saturation attacks could be used to overwhelm air defenses by depleting the missile inventories of surface-to-air missile batteries.⁴⁸ Thus, a Third-World state could potentially surprise or overwhelm modern air defenses with a large or successive cruise missile attack against a port, airfield, or staging area.⁴⁹

Liddell Hart argues that the most important aspect of the "indirect approach" is destroying an adversary's capabilities before an effective defense can be mounted.⁵⁰ A potential Third-World opponent could do exactly that with LACM attacks against U.S. bases or logistical facilities during a military build-up or deployment. Missile defenses will likely not be in place immediately to defend U.S. forces and require time and effort to set up and deploy.⁵¹ For instance, more than 16 C-5 transport aircraft sorties are required to move a single Patriot SAM battalion into a theater of operations.⁵² Cruise missile attacks against vulnerable targets with limited air defenses early in a campaign could be so catastrophic as to cause the United States to end its involvement or withdraw to safer, albeit less convenient, bases.⁵³

Cruise missiles represent a way for Third World states to offset the technological superiority of the United States and exploit the weaknesses of extant U.S. systems. The U.S. focus on building theater anti-ballistic missile systems such as the Theater High

46. *Id.* See generally STILLION & ORLETSKY, *supra* note 1. Modifications to the software for air defense systems can be made to allow for detection of low-flying objects. However, if the cruise missiles have stealth technology or are built with radar-absorbing materials it will be extremely difficult for them to be detected by extant radar systems.

47. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 10; DAVID ISENBERG, CENTER FOR DEFENSE INFORMATION TERRORISM PROJECT, THE REAL MISSILE THREAT: CRUISE NOT BALLISTIC (July 8, 2002), at <http://www.cdi.org> (last visited Aug. 11, 2003).

48. Owen Greene, *Missile Proliferation and Control*, in PROLIFERATION AND EXPORT CONTROLS: AN ANALYSIS OF SENSITIVE TECHNOLOGIES AND COUNTRIES OF CONCERN 55, 71 (1995). The cost of a Patriot SAM is approximately \$5 million, while crude LACMs based on kit aircraft or UAVs can likely be built for less than \$100,000. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 36, 107 n.22. The cost differential is clear, and the likelihood of saturation attacks with crude LACMs is obvious.

49. See Jaffe, *supra* note 35.

50. See LIDDELL HART, *supra* note 39, at 23-26.

51. See Jaffe, *supra* note 35.

52. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 47.

53. *Id.* at 49-50.

Altitude Area Defense (THAAD) program will only push nations such as North Korea and Iran, which have long sought to acquire long-range means to threaten U.S. interests, to look for an alternative to ballistic missiles. As the effectiveness of U.S. anti-ballistic missile defenses increases, potential foes are likely to turn to LACMs as an alternative.⁵⁴ In the 2003 war in Iraq, the effectiveness of U.S. Patriot SAMs at shooting down approximately fifty percent of Iraqi Scud ballistic missiles launched at U.S. forces should be contrasted with the failure of U.S. missile defenses to intercept any of the antiquated Iraqi Seersucker cruise missiles fired at U.S. forces.⁵⁵ David Tanks, an analyst with the Institute for Foreign Policy Analysis, notes that “[i]f we start fielding ballistic missile defense, other countries will start developing more cruise missiles. It is cheap and relatively easy.”⁵⁶ The logical choice for such nations is to start a cruise missile program, which is increasingly technologically feasible, or to try to obtain LACMs from another source. As cruise missiles are more accurate than first-generation ballistic missiles like the Scud, less technologically complex, and less expensive to develop, they are the most attractive choice for a state seeking long-range strike capability as the technology required for indigenous LACM development becomes easier to obtain.⁵⁷

Cruise missiles are also a cheaper and more survivable alternative to a modern air force, while providing a Third World state with a similar strike capability.⁵⁸ Compared with the enormous costs associated with building and maintaining a modern air force, missiles, particularly LACMs, are far more cost-effective in the long run. Cruise missile costs are variable, ranging from approximately \$1 million for indigenously produced missiles to as low as \$50,000 for modified kit aircraft converted into LACMs.⁵⁹ Although cruise missiles are expensive and difficult to develop or

54. Dennis M. Gormley, *New Developments in Unmanned Air Vehicles and Land-Attack Cruise Missiles*, in SIPRI YEARBOOK 2003: ARMAMENTS, DISARMAMENT AND INTERNATIONAL SECURITY 409, 411 (2003) [hereinafter Gormley, *New Developments*].

55. DENNIS M. GORMLEY, CENTER FOR NONPROLIFERATION STUDIES, NORTH KOREAN CRUISE MISSILE TESTS AND IRAQI CRUISE MISSILE ATTACKS RAISE TROUBLING QUESTIONS FOR MISSILE DEFENSES [hereinafter GORMLEY, NORTH KOREAN], at <http://cns.miis.edu> (Apr. 8, 2003).

56. Rick Newman, *Cruise Missiles, The Cheap, Easy Alternative*, 21 DEF. WK. 12 (Mar. 20, 2000).

57. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 9; cf. Savita Pande, *Missile Technology Control Regime: Impact Assessment*, 23 STRATEGIC ANALYSIS 923 (1999), available at <http://www.ciaonet.org> (last visited Feb. 22, 2002).

58. It should be noted that cruise missiles cannot completely replace a modern air force because they are incapable of some tasks. For instance, they cannot protect transport aircraft (or for that matter carry large payloads) or engage in aircraft-to-aircraft combat to gain air superiority.

59. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 72.

acquire, the costs decline once the missiles are deployed; whereas, maintaining the infrastructure to keep a modern air force effective is massively expensive. Furthermore, mobile missile launchers are also more difficult to track down and destroy, as opposed to fixed airfields, which are vulnerable to attack and require sophisticated (and expensive) defenses to protect them.⁶⁰ Iraq learned this lesson during Operation Desert Storm in 1991 as its air force was crippled on the ground; whereas, Iraqi mobile Scud ballistic missiles were far more effective at distracting U.S. air assets and causing terror in Israel and Saudi Arabia.⁶¹

All in all, it is logical for a state to seek a cruise missile capability considering the increasing hurdles and costs in acquiring and developing ballistic missiles imposed by the MTCR and the increased effectiveness of ballistic missile defenses. Cruise missiles provide a relatively inexpensive and effective way for a state to acquire a long-distance strike capability that most modern air defenses are ill-equipped to deal with. LACMs are ideally suited to exploit the weaknesses of modern militaries, the key to Liddell Hart's "indirect approach," because they can deny access to forward airfields and throw logistics into disarray. When properly integrated into existing force structures, cruise missiles can be transformational weapons that change the military balance in a conflict.

C. Pathways to Proliferation

Although LACMs have become among the most desired modern weapons because of their utility in exploiting the weaknesses of modern air defenses, it is still no easy task for a Third World state to obtain or develop a reliable cruise missile force. There are three major paths by which a state can take to develop a LACM capability: (1) Converting ASCMs from an anti-ship role to a land-attack role; (2) indigenous development; and (3) acquiring complete systems from states that produce LACMs.⁶² None of these paths are easy, as there are significant diplomatic, financial, and

60. Speier Manuscript, *supra* note 24, at 8-9.

61. PBS FRONTLINE, THE GULF WAR: AN IN-DEPTH EXAMINATION OF THE PERSIAN GULF CRISIS (citing THOMAS A. KEANEY & ELIOT A. COHEN, GULF WAR AIR POWER SURVEY SUMMARY REPORT (Bernan Assoc. ed., 1993)), at <http://www.pbs.org> (last updated July 2002) (web site first published with the original broadcast of "The Gulf War," on January 9, 1996).

62. *The Role of Bilateral and Multilateral Arms Control Agreements in Controlling Threats from the Proliferation of Weapons of Mass Destruction: Hearings before the International Security, Proliferation and Federal Services Subcommittee of the Committee on Governmental Affairs*, 107th Cong. 322-30 (2001-2002) (statement of Dennis M. Gormley, Senior Fellow, International Institute for Strategic Studies) [hereinafter Gormley Senate Testimony], available at 2002 WL 25098851 (last visited July 26, 2004).

technological hurdles to each. However, in a rapidly changing world where commercial interests have taken precedence over nonproliferation concerns and the diffusion of advanced technology to Third World states is increasingly common, it has become much easier for a state to acquire a cruise missile capability.⁶³ The MTCR's myopic focus on ballistic missile proliferation has compounded this trend.

First, there has been much diplomatic hand wringing over the prospect of states converting extant ASCMs into LACMs; however, this threat, although quite possible, has been somewhat overstated. Although the United States has converted extant ASCMs into LACMs by replacing guidance systems, warheads, and propulsion units, most Third World states do not yet have the technological capability to do so.⁶⁴ Modern U.S. and Russian ASCMs such as the Harpoon and the 3M-55 Club, which have been sold to various states around the world, are smaller in physical volume than earlier ASCMs and are densely packed with electronics and subsystems, making it difficult to change engines, add fuel to increase range, or modify the guidance systems.⁶⁵ Furthermore, any tinkering with the innards of modern ASCMs risks throwing off the trim of the missile, making it wildly inaccurate.⁶⁶ Further problems with converting ASCMs into LACMs are finding appropriate propulsion and guidance systems with which to retrofit the missiles — although these hurdles have become less significant in recent years with the diffusion of cheap GPS receivers, microprocessors, and small turbojet engines.⁶⁷ The timeframe for modifying ASCMs for use as LACMs is fairly short. Dennis Gormley, a senior consultant at the Center for Nonproliferation Studies, estimates that even with foreign assistance, it would take a state with a moderate-sized industrial and technological base, such as Iran, “between six and ten years to produce the kind of modifications . . . and to establish

63. See Ian Anthony, *The Conventional Arms Trade*, in *CASCADE OF ARMS* 15, 15-17 (Andrew J. Pierre ed., 1997).

64. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 29-30; Gormley, *Hedging*, *supra* note 19, at 96-98. The United States has converted the Harpoon ASCM into the SLAM LACM. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 29-30. Although technically a conversion of the Harpoon, the SLAM is more of a redesign, as no existing Harpoons were rebuilt into SLAMs. The two missile systems share only a common airframe and propulsion unit. *Id.*

65. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 30.

66. Telephone Interview with Timothy McCarthy, Director, Monitoring Proliferation Threats Project, Center for Nonproliferation Studies, Monterey Institute for International Studies (Feb. 22, 2002) (interview notes on file with author) [hereinafter McCarthy Interview].

67. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 31-32; Gormley, *Hedging*, *supra* note 19, at 95, 97-98.

the capacity to manufacture significant quantities of missiles.”⁶⁸ Furthermore, the costs of such a conversion program for modern ASCMs are not significant. The components needed to construct a moderately accurate LACM guidance system that could be mated to an extant missile cost in the neighborhood of \$40,000 in 2001 and were readily procurable from commercial sources.⁶⁹

Some of the older ASCMs such as the Chinese HY-1 and -2 Silkworm variants and Russian Styx are much larger than their more modern cousins, allowing for greater potential to change significant subcomponents within the missile.⁷⁰ Such ASCMs are inherently easier to modify because of their sheer size, large internal volume, and simplicity of design.⁷¹ Replacing bulky older guidance systems and propulsion units with smaller, more modern subsystems also frees up considerable space in the missile that can be used to carry fuel to extend its range or carry a larger warhead.⁷² There are reports that Iran and North Korea have already been able to extend the ranges of their Silkworms to as much as 500 km through such modifications.⁷³ In fact, David Kay, the head of the U.S. weapons hunting teams in Iraq following the 2003 Operation Iraqi Freedom, reported that Iraq also had launched a secret crash program to extend the range of old Soviet-era SA-2 SAMs and to convert Silkworm ASCMs into LACMs.⁷⁴

In fact, during the 2003 war in Iraq, at least five Chinese-made HY-2 ASCMs were fired at ground targets in Kuwait, one of which landed perilously close to an American military encampment and another near a Kuwaiti shopping mall.⁷⁵ Although it is not clear if these Iraqi cruise missiles were modified to attack land targets (and it seems unlikely that they were so modified considering their inaccuracy), the potential certainly exists.⁷⁶ Even more disturbing is that U.S. Patriot SAMs were not nearly as successful in detecting

68. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 32-33. Gormley suggests that the six to ten year estimated timeframe includes the time required to attain a modest level of system reliability and logistical support, as well as integrating the modified LACMs into an existing force structure. *Id.*

69. *Id.* at 31-32.

70. *Id.* at 30.

71. *Id.*

72. *Id.* at 27; Gormley, *Hedging*, *supra* note 19, at 97.

73. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 30; Newman, *supra* note 56.

74. Bob Drogin, *Botched Iraqi Arms Deal Is Detailed*, L.A. TIMES, Oct. 4, 2003, at A1; *see also* GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 30-31; Newman, *supra* note 56.

75. GORMLEY, NORTH KOREAN, *supra* note 55; *see also* Peter Baker & Susan B. Glasser, *Iraq Fires Missiles Toward Kuwait*, WASH. POST, Mar. 21, 2003, at A21.

76. GORMLEY, NORTH KOREAN, *supra* note 55.

and intercepting the obsolescent Iraqi Silkworms as the Iraqi Scuds that were fired during the course of the conflict.⁷⁷

Another area of growing concern is the conversion of unmanned aerial vehicles (UAVs) or RPVs into LACMs. Conversion of UAVs or RPVs into cruise missiles is technologically easier than converting ASCMs.⁷⁸ Many off-the-shelf UAVs are already equipped with GPS guidance systems and can carry small payloads long distances.⁷⁹ Indeed, at least 40 different countries manufacture 600 varieties of UAVs, the vast majority of which could be modified to deliver a warhead on a one-way trip over 300 km.⁸⁰ The ease of converting UAVs or RPVs into cruise missiles is apparent, as there are relatively few modifications needed other than attaching a warhead to the airframe.⁸¹ It should also be noted that UAVs and RPVs are ideally suited for the delivery of chemical or biological weapons because they fly at relatively low speeds and usually have greater aerodynamic flight stability than other LACMs⁸² because most UAVs have wings rather than winglets or fins like other LACMs. This flight stability allows for the more effective use of sprayers for disseminating chemical or biological agents from UAVs or RPVs.⁸³ UAVs and RPVs are quite vulnerable to anti-aircraft defenses compared to other LACMs, however, because they fly at relatively slow speeds and are easy targets for anti-aircraft guns, SAMs, and air-to-air missiles.⁸⁴ However, because of their small size and low speeds, UAVs and RPVs may be able to escape radar detection until they are quite close to their targets.⁸⁵

The conversion of small, manned kit aircraft into weapons-carrying LACMs is another worry, particularly with the availability of relatively inexpensive and accurate guidance systems.⁸⁶ One expert has called such kit aircraft “the poor man’s cruise missile” because of their low cost (approximately \$50,000) and general availability.⁸⁷ Most such kit aircraft have a range over 500 km and can carry a payload of 250 kg.⁸⁸ Nearly 100,000 copies of 425

77. *Id.*

78. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 33.

79. *Id.* at 33-34.

80. See Dennis M. Gormley & Richard Speier, *Controlling Unmanned Air Vehicles: New Challenges*, 10 NONPROLIFERATION REV. 66, 67 (2003) [hereinafter Gormley & Speier].

81. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 33-36.

82. *Id.* at 34.

83. Gormley, *Hedging*, *supra* note 19, at 96.

84. See *id.* at 102.

85. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 35; Gormley & Speier, *supra* note 80, at 68.

86. Gormley Senate Testimony, *supra* note 62, at 324.

87. *Id.*

88. *Id.*

different varieties of kit aircraft have been produced worldwide – truly mind-boggling numbers in terms of attempting to prevent the proliferation of possible weapons systems.⁸⁹ Like UAVs and RPVs, converted kit aircraft, if programmed to fly low and slow, could evade modern air defense radars as they could be lost in the ground clutter;⁹⁰ however, such aircraft are vulnerable to anti-aircraft defenses once detected. Because of their low cost and ease of construction and operation, the conversion of kit aircraft for use as UAVs to deliver chemical or biological weapons or to attack high-value targets is the most likely avenue for terrorist groups seeking to develop and use cruise missiles.⁹¹

Second, a state could indigenously develop LACMs with official or unofficial foreign assistance. But even with foreign assistance and the increasing diffusion of technology, indigenous development is still the most time-consuming method for developing a cruise missile capability.⁹² There are significant technological roadblocks that any Third World state seeking to obtain an indigenous cruise missile manufacturing capability must overcome. Even if a Third World state is able to develop a cruise missile on its own, it is unlikely that the state would progress “to true autarky or anything beyond low-tech designs.”⁹³

However, all this is changing. Third World states interested in developing cruise missiles have taken advantage of post-Cold War cuts in defense spending by purchasing technology and equipment that was previously unavailable to them, as many nations with extant cruise missile production capability are looking to export markets to offset sagging domestic demand.⁹⁴ A state could

89. Gormley, *Neglected Dimension*, *supra* note 3, at 23.

90. Gormley Senate Testimony, *supra* note 62, at 324. The 1987 flight of German teenager Mathias Rust from Hamburg to Moscow in a small Cessna proves the ineffectiveness of modern air defenses at detecting such small aircraft. The plane was not picked up by the Soviets’ layered air defense system until it landed in Red Square. Small, remotely piloted kit aircraft would have approximately the same radar signature as a Cessna and would possibly go undetected by air defense radars. The crash of another Cessna into the White House in 1994 further illustrates the potential of small aircraft to attack high value targets. *Id.* at 4.

91. *Cruise Missile and UAV Threats to the United States: Hearing before the International Security, Proliferation and Federal Services Subcommittee of the Committee on Governmental Affairs*, 107th Cong. 23-27 (2002) (statement of Vann H. Van Diepen, Acting Deputy Assistant Secretary, Bureau of Nonproliferation, U.S. Department of State), *available at* <http://www.state.gov> (last visited Aug. 11, 2003).

92. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 12.

93. *Id.*

94. See Aaron Karp, *The Maturation of Ballistic Missile Proliferation*, in *THE INTERNATIONAL MISSILE BAZAAR: THE NEW SUPPLIERS’ NETWORK* 1, 10-12 (William C. Potter & Harlan W. Jencks eds., 1994); David Hobbs, *The Impact of Technology Control Regimes*, in *ARMS AND TECHNOLOGY TRANSFERS: SECURITY AND ECONOMIC CONSIDERATIONS AMONG IMPORTING AND EXPORTING STATES* 225, 225-31 (Sverre Lodgaard & Robert L. Pfaltzgraff, Jr. eds., 1995) (discussing Malaysia’s acquisition of MiG-29 fighters, parts, and missiles from

purchase advanced engines, avionics, and other subsystems useful for building LACMs under the guise of upgrading existing systems or developing a manned-aircraft industry.⁹⁵ Furthermore, the increased dissemination of high-speed computer chips and miniaturized components has made the pathway to indigenous cruise missile development significantly easier for Third World states.⁹⁶ Only within the last decade has the technology needed to develop LACMs become available on the international marketplace.⁹⁷ Yet, despite increased access to technology, foreign assistance is crucial for indigenous development of LACMs.⁹⁸ Even nations with resources, such as India, have had to rely on Russian cruise missile expertise for their indigenous programs.⁹⁹ Because the airframes, propulsion units, and navigation systems used in cruise missiles are similar, and in some cases identical, to those used in manned aircraft, the spread of aircraft maintenance capability is another significant factor in a Third World nation's effort to indigenously produce cruise missiles.¹⁰⁰

Third, the quickest and easiest option for obtaining a cruise missile capability is for a state to acquire complete systems from states that indigenously produce LACMs.¹⁰¹ This pathway has become a more realistic option for obtaining a cruise missile capability within the recent years.¹⁰² Until the mid- to late-1990s, the U.S. and Russia were the only major producers of LACMs, and they were both reluctant to sell advanced cruise missiles to other states.¹⁰³ However, the list of producers has increased with China, Israel, South Africa, and several European consortiums producing advanced cruise missiles available for sale on the international

Russia and the impact of such sale on the air force modernization plans of surrounding countries).

95. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 86.

96. *Id.* at 17. Even relatively primitive computer technology, such as an Intel 486 processor chip with a 1Gb hard drive, could be used to power the guidance system of a modern cruise missile. *Id.*

97. Gormley, *Neglected Dimension*, *supra* note 3, at 24. Crucial technologies needed for LACM development such as GPS systems and integrated flight management systems have only become widely available over the past 10 years. *Id.*

98. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 24-26, 28.

99. *Id.* at 25. Russia is assisting India in the design and development of another LACM that is closely related to the Russian Kh-65. See GLOBAL SECURITY.ORG, INDIA MILITARY GUIDE: PJ-10 BRAHMOS FACTSHEET, at <http://www.globalsecurity.org> (last modified January 20, 2004). The Russo-Indian Brahmos missile represents the future of cruise missiles as it can be used in an anti-ship role, as well as against land targets. *Id.*

100. K. Scott McMahon, Cruise Missile Proliferation: Threats, Policy & Defenses, Presentation at American Institute of Engineers Conference on Missile Defense (Mar. 5, 1999), at <http://www.veridian.com> (last visited Feb. 24, 2002).

101. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 36.

102. See *id.*

103. *Id.*

arms market.¹⁰⁴ Furthermore, the dire fiscal straits of the Russian government and arms industry have resulted in increased efforts to market scaled-down (and supposedly MTCR compliant) versions of its strategic LACMs.¹⁰⁵ Russia has marketed a short-range version of the AS-15 LACM, which has a 3,000 km range, since the early 1990s.¹⁰⁶ Designated the Kh-65E, it has an advertised range of 280 km with a 410 kg warhead, thus making it technically MTCR compliant.¹⁰⁷ The sharp reduction in the size of the Russian military budget has left the Russian armaments industry with an overcapacity of cruise missile production capability and idle missile designers, which has led to more aggressive international efforts to market such weapons overseas.¹⁰⁸

China represents another potential major source for states seeking to purchase a cruise missile capability outright. Benefiting from Russian technological assistance, China is developing at least three different LACMs, with ranges up to 2,500 km.¹⁰⁹ The Chinese are also believed to have received at least one intact U.S. Tomahawk LACM recovered following the 1998 cruise missile attacks on terrorist camps in Afghanistan.¹¹⁰ There have been reports that China has been able to reverse engineer parts of the missile.¹¹¹

The sale of Chinese cruise missiles to Third World states is not an insignificant threat considering China's previous willingness to sell complete ballistic missile systems to Saudi Arabia and Pakistan, despite pledges that it would adhere to MTCR guidelines.¹¹² In 2000, China pledged not to export nuclear-capable ballistic missiles or provide technological assistance to states seeking to develop such missiles.¹¹³ The official Chinese statement adds that China will "take into account the relevant practices of other countries" in transferring other types of missiles.¹¹⁴ The range

104. *Id.*

105. *Id.* at 37-38.

106. *Id.* at 37.

107. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 37. It should be noted that it would be quite simple to convert the Kh-65E into a longer range LACM by reducing the payload or adopting a flight profile above sea level. *See id.*

108. McCarthy Interview, *supra* note 66.

109. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 38

110. *See* Clay Bowen, et al., *Nuclear- and Missile-Related Developments For Selected Countries, November 1998-February 1999*, 6 NONPROLIFERATION REV. 140, 140-41 (1999).

111. *See id.*

112. Hua Di, *China's Case: Ballistic Missile Proliferation*, in THE INTERNATIONAL MISSILE BAZAAR: THE NEW SUPPLIERS' NETWORK, *supra* note 94, at 163, 170.

113. J. Peter Scoblic, *China Issues Missile Export Pledge; US Says It Will Waive Sanctions*, ARMS CONTROL TODAY (Dec. 2000), available at <http://www.armscontrol.org> (last visited Feb. 20, 2002).

114. *Id.*

and payload guidelines specified in the statement generally mirror those of the MTCR.¹¹⁵ It is unclear whether China considers this pledge to cover LACMs. Dennis Gormley warned:

In becoming an ‘adherent’ to the MTCR’s guidelines in October 1994, China took the unusual step of formulating its own version of precisely what adherence meant. China agreed to ‘not export ground-to-ground missiles featuring the primary parameters of the MTCR’ — which suggests that its adherence applies only to . . . Category I [ground-to-ground ballistic missiles, and] not [to] air-to-ground cruise missiles. Moreover, this formulation does not acknowledge adherence to the MTCR’s extensive annex of Category II items. In effect, China has explicitly rejected all revisions to the original 1987 version of the MTCR, most importantly those made in 1993 to deal with controls over delivery systems for biological and chemical agents.¹¹⁶

There have been no reports of the sale of Chinese LACMs (although China has sold thousands of ASCMs that could be converted to LACMs); however, this is likely due to domestic demand from china’s military and not any unwillingness to transfer technology.¹¹⁷

A more disturbing trend has been the willingness of the French and English governments to allow Matra-BAe-Dynamics, the European consortium behind the Apache cruise missile, to sell long-range versions to Third World states.¹¹⁸ There have also been reports that the Spanish aerospace firm CASA is considering development of a cruise missile to compete with the Apache.¹¹⁹ Also of concern are reports that Turkey is pursuing Israel’s air-launched

115. *Id.*; see also PHILLIP C. SAUNDERS, CENTER FOR NONPROLIFERATION STUDIES, PRELIMINARY ANALYSIS OF CHINESE MISSILE TECHNOLOGY EXPORT CONTROL LIST 2-14 (Sept. 6, 2002), at http://cns.miis.edu/cns/projects/eanp/pubs/prc_msl.pdf (last visited July 15, 2004) (examining and analyzing the differences between the MTCR’s Annex and China’s list of controlled technologies that it has pledged not to export).

116. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 82.

117. See Geoffrey T. Lum, *China’s Cruise Missile Program*, MILITARY REV., Jan.-Feb. 2004, at 67, 71, available at <http://www.leavenworth.army.mil/milrev/download/english/JanFeb2004/lum.pdf> (last visited July 4, 2004). China is in the midst of a naval modernization program and a missile build-up along the Taiwan straits. See *id.* at 70, 72. It is likely that China will equip its own forces and ships before exporting LACMs to other countries. Thus, future Chinese LACM proliferation is a possibility.

118. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 38-40. The sale of the Black Shaheen variant of the Apache to the UAE is discussed at length in Part V.

119. Gormley, *Hedging*, *supra* note 19, at 99.

Popeye cruise missile with a range exceeding 300 km¹²⁰ and that South Africa has been vigorously marketing its Torgos LACM with an advertised range of 300 km with a 500 kg payload.¹²¹

Although the three different paths by which a Third World state could deploy LACMs are quite different, all of them are quite feasible, although two of them — indigenous development and converting ASCMs — require significant lead time and/or technological assistance.¹²² However, nonproliferation efforts can retard the spread of cruise missiles or make their acquisition prohibitively costly for Third World states.

D. Cruise Missiles Today: A Threat Assessment

Although military experts have warned of the growing threat of cruise missiles in the past,¹²³ it is clear that the next decade will be crucial in determining whether the dire predictions will come to fruition. If no changes in the nonproliferation regime take place, it is likely that the cruise missile threat will become as serious as the ballistic missile threat to U.S. interests abroad and at home.¹²⁴ Just as the maturation of the ballistic missile threat in the late-1970s and early-1980s led to the creation of the MTCR, the cruise missile threat has reached such a threshold period where a theoretical threat is fast becoming a reality.

Production of LACMs is confined to a relatively few states at present; however, a 1999 National Air Intelligence Command (NAIC) report concluded that as many as ten states would be able to indigenously produce LACMs by 2009.¹²⁵ The report also suggested that several of those states would likely export missiles.¹²⁶ A NAIC spokesman commented that LACMs will “be like Scuds,” and that “[i]n the old days just a few [states] had Scuds. Now everybody’s got them.”¹²⁷ It is likely that the world will see the

120. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 40. Turkey is seeking to buy Popeye missiles to counter Greece’s plans to purchase the British Storm Shadow variant of the Apache cruise missile. *Id.*

121. *Id.* at 26.

122. *See id.* at 28.

123. *See* Betts, *supra* note 9, at 6-7.

124. *See* Gormley, *Hedging*, *supra* note 19, at 92, 106-7. The MTCR has been effective at limiting the spread of advanced ballistic missiles; however, US forces are still threatened by older, more primitive ballistic missile designs, such as the Scud, which proliferated before the MTCR came into effect. *See* Newman, *supra* note 56.

125. *See* Mohammed Ahmedullah, *India Has Begun Cruise Missile Project, Official Says*, DEF. WK., Oct. 12, 1999. The states that the NAIC report concluded will have a LACM production capability in 2009 are: Sweden, Italy, Germany, South Africa, Israel, China, the United Kingdom, France, Russia, and the United States. *Id.*

126. Newman, *supra* note 56.

127. *Id.*

proliferation of LACMs and the emergence of a new missile threat if nothing is done.

The threat of cruise missile attack is most significant for the United States in the context of regional intervention. Although it is unlikely that any potential U.S. adversaries will develop intercontinental strategic cruise missiles anytime in the near future, U.S. forces will be vulnerable to cruise missile attacks when deployed in smaller theaters of operation, such as the Middle East or Taiwan.¹²⁸ National Intelligence Estimate 95-19, on missile proliferation, predicted that certain U.S. regional adversaries such as Iran and North Korea would be able to deploy short-range cruise missiles by 2005,¹²⁹ and that the cruise missile threat would increase over time from there as more and more states obtained cruise missiles.¹³⁰ Even short-range cruise missiles used in relatively small theaters of operation could pose serious threats to U.S. forces. The threat of a cruise missile attack could deter U.S. intervention and alter foreign policy objectives because of the increased risk of casualties. As the opening scenario to this article suggests, the RAND Corporation has simulated Iranian ballistic and cruise missile strikes against U.S. air bases in the Middle East.¹³¹ The results of the simulated attack suggested that up to 90% of all exposed aircraft would be destroyed on the ground and that there would be a significant loss of American lives and destruction of equipment.¹³²

Furthermore, the proliferation of cruise missiles, like other offensive weapons, leads to the increased probability of conflict in other parts of the globe, as well as potential fuel for arms races in volatile regions, such as South Asia and the Middle East. One example is the continuing arms race between Greece and Turkey,

128. See Jaffe, *supra* note 35.

129. DIRECTOR OF CENTRAL INTELLIGENCE, NATIONAL INTELLIGENCE ESTIMATE: PRESIDENT'S SUMMARY: EMERGING MISSILE THREATS TO NORTH AMERICA DURING THE NEXT 15 YEARS (Nov. 1995), available at <http://www.fas.org> (last visited July 4, 2004) (reproduction of an originally classified document published in The Washington Times, May 14, 1996, at A15). In fact, North Korea tested two cruise missiles over the Sea of Japan in February 2003. GORMLEY, NORTH KOREAN, *supra* note 55, at 1. It is believed that they were modified versions of the Chinese HY-2 Seersucker. *Id.*

130. See McMahon, *supra* note 100, at 9.

131. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 48-50; STILLION & ORLETSKY, *supra* note 1, at 16-28.

132. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 49. Even during Desert Storm, the risk of an Iraqi Scud attack on U.S. airbases was underscored by a statement from Air Force Lt. General Chuck Horner on January 21, 1990: "Last night could have been the turning-point of the war. If [Saddam Hussein] had hit Riyadh air base and destroyed six AWACS or put chemicals on the F-15s at Dhahran, think of how the attitude and support of the American people might have changed." *Id.* at 49-50.

both members of the North Atlantic Treaty Organization.¹³³ Soon after Greece announced that it would buy Storm Shadow LACMs from the Matra-BAe-Dynamics consortium, Turkey went shopping for LACMs and decided to purchase Israeli Popeye cruise missiles.¹³⁴ These arms races may not pose a direct threat to U.S. forces; however, it is almost a certainty that U.S. interests will be in some way affected by future cruise missile proliferation.

Finally, in the post-September 11th world, terrorist use of cruise missiles remains a definite possibility. In fact, in July 2002, the Defense Department warned that terrorists may use cruise missiles to attack targets in the continental United States.¹³⁵ It is possible that terrorist organizations such as al-Qaeda could obtain cruise missiles from a state that already possesses such weapons. The most discussed scenario involves terrorists launching an illicitly obtained cruise missile, most likely a Chinese HY-2 Silkworm, from a freighter in American territorial waters.¹³⁶ However, this scenario would be quite a technological feat for terrorists without advanced engineering skills.¹³⁷ More likely is the conversion of a kit aircraft into rudimentary cruise missiles that could be launched from within the continental United States.¹³⁸ Such missiles would admittedly be quite crude, but could still cause serious damage or inflict heavy civilian casualties if the terrorist group had access to chemical, biological, or radiological weapons.¹³⁹

III. STOPPING PROLIFERATION: THE MISSILE TECHNOLOGY CONTROL REGIME

The Missile Technology Control Regime (MTCR) remains the preeminent means for constraining the proliferation of cruise missiles and related technologies. Despite provisions that limit the transfer of certain key cruise missile technologies, the MTCR's members have not yet come to a consensus that cruise missiles are

133. *See id.* at 40.

134. *Id.*

135. Bradley Graham, *Cruise Missile Threat Grows, Rumsfeld Says*, WASH. POST, Aug. 28, 2002, at A1.

136. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 9, 74.

137. DENNIS M. GORMLEY, UAVS AND CRUISE MISSILES AS POSSIBLE TERRORIST WEAPONS 13, available at <http://cns.miis.edu> (Jun. 1-4, 2003) (on file with author).

138. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 35-36.

139. *See* Gormley, *New Developments*, *supra* note 54, at 411. The spread of dual-use technology has made the development of crude cruise missiles cheap and easy. In 2003, Bruce Simpson, a New Zealand engineer, set up a website chronicling his effort to build a cruise missile from off-the shelf parts for under \$5,000. Simpson posted updates as to his progress on the Internet until the New Zealand government stopped the project. BRUCE SIMPSON, A DIY CRUISE MISSILE, at <http://www.interestingprojects.com> (last updated July 6, 2004).

a significant threat.¹⁴⁰ This failure to recognize that LACMs represent a serious threat is compounded by certain provisions of the MTCR that are vague or unclear regarding cruise missiles and dual-use technologies.¹⁴¹ This section examines the relevant provisions of the MTCR, the focus of the regime and its members on ballistic missiles, and other nonproliferation efforts outside of the MTCR.

A. MTCR's Technology Controls

The MTCR¹⁴² is a multilateral informal missile technology suppliers' group with the goal of limiting the proliferation of complete ballistic and cruise missile systems, as well as missile-related dual-use technologies.¹⁴³ Announced in 1987 after years of secret negotiations spearheaded by the United States, the regime is designed to retard the spread of missiles and other weapons that can deliver a payload of 500 kg over a distance of 300 km.¹⁴⁴ In 1993, the 500 kg/300 km threshold was updated to take account of the ability to trade-off range and payload, thus taking into account the possible modification of missiles that fall under the set range and payload limits.¹⁴⁵ The MTCR officially seeks "to limit the risks of proliferation of weapons of mass destruction (i.e. nuclear, chemical and biological weapons), by controlling transfers that could make a contribution to delivery systems (other than manned aircraft) for such weapons."¹⁴⁶ The MTCR, with 33 signatories,¹⁴⁷ is the oldest and most comprehensive of the current international mechanisms to constrain the transfer of missile delivery systems and related material, equipment, and technology to non-member states.¹⁴⁸ Although the MTCR began with only seven members in

140. Wade Boese, *GAO Says Feds Lax in Countering Cruise Missile, UAV Threats*, ARMS CONTROL TODAY, Apr. 2004, available at <http://www.armscontrol.org>.

141. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 41.

142. MTCR, *supra* note 2. The MTCR has been updated several times, setting forth new export control lists in the Equip. & Tech. Annex. The MTCR's website has the full texts of the agreement, official statements and reports from the annual MTCR plenary sessions.

143. Pande, *supra* note 57.

144. MTCR, *supra* note 2, Item 1; see also Greene, *supra* note 48, at 62.

145. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 80.

146. MTCR, *supra* note 2. This language was added to the MTCR in 1993 to counter fears about the proliferation of delivery devices for chemical and biological weapons. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 80.

147. MTCR, *supra* note 2. The current membership of the MTCR includes: Argentina, Australia, Austria, Belgium, Brazil, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Russia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom and the United States. *Id.*

148. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 78. It should also be noted that there are several other states, including China, that "adhere" to all or a portion of the

1987, its membership has dramatically increased since the end of the Cold War, with much of the former Warsaw Pact and some South American countries becoming members.¹⁴⁹ The most important non-member is China, although it has conditionally agreed to support the MTCR despite its occasional sale of missiles and technology to non-MTCR states such as Iran, Pakistan, and Syria.¹⁵⁰

The export policy embodied in the MTCR is a two-tiered system.¹⁵¹ First, the Guidelines for Sensitive Missile-Relevant Transfers (Guidelines) articulate the MTCR's core tenets limiting the spread of certain missile-related technologies.¹⁵² Second, the Equipment and Technology Annex (Annex) restricts the sale of specific controlled items and technologies that fall within the 500 kg/300 km threshold.¹⁵³ The Guidelines delineate the factors that each MTCR signatory must consider in determining whether items listed in the Annex should be transferred to a non-MTCR state: (1) concerns about the proliferation of weapons of mass destruction; (2) degree of development and intentions of the space and weapons programs of the benefiting state; (3) significance of the transfer for prospective development of a delivery system for WMDs; (4) end use of the equipment, including assurances of the recipient state as to the end use; and (5) relevance of other multilateral agreements.¹⁵⁴ The Guidelines also set forth when the transferring country's government is required to obtain end use certification from the recipient country.¹⁵⁵

The Annex is divided into two categories that limit the export of certain items and technologies.¹⁵⁶ Category I covers items that could be used, directly or indirectly, to develop missiles capable of delivering WMDs.¹⁵⁷ Among the items included in Category I are complete missile systems, subsystems (including certain engines, re-entry vehicles, and warheads), UAVs, and specially-designed production equipment or technology designed for such systems.¹⁵⁸ The Guidelines suggest that there is a "strong presumption to deny" transfers or sales of items covered in Category I, regardless of the

MTCR. *Id.* at 79.

149. Pande, *supra* note 57.

150. See Hua Di, *supra* note 112, at 168; Scoblic, *supra* note 113.

151. MTCR, *supra* note 2.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. See *id.*

157. MTCR, *supra* note 2; GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 79-80.

158. MTCR, *supra* note 2.

recipient's intended end use.¹⁵⁹ Category I items may be exported on a case-by-case basis with the exporting state's approval conditioned upon assurances from the government of the recipient state as to the end use of the item or technology.¹⁶⁰ The exporting state "assumes responsibility for taking all steps necessary to ensure that the item is put only to its stated end use."¹⁶¹

Category II is much broader, covering dual-use components and technology that could be used to complete a missile system, including propellants, test equipment, and certain structural materials.¹⁶² Category II has been updated to include any unmanned aerial vehicle that can travel 300 km, even with a negligible payload.¹⁶³ This change was prompted by worries that missiles with the capability to carry only a few kilograms of biological or chemical weapons were not covered by the MTCR.¹⁶⁴ End use assurances are not required for Category II items if they are exported as part of a manned aircraft or as replacement parts for manned aircraft.¹⁶⁵ The lists of technology, materials, and equipment controlled by the Equipment & Technology Annex are updated at the MTCR's periodic technical meetings.¹⁶⁶

The MTCR does not have any formal enforcement provisions, but rather relies upon the individual signatories to enforce their obligations as to the common list of controlled systems, equipment, and technology.¹⁶⁷ The text of the MTCR encourages national legislation for enforcement of the agreement.¹⁶⁸ Although the regime does not mandate sanctions, each signatory state can enforce the regime unilaterally,¹⁶⁹ as the United States has done through the Arms Export Control Act¹⁷⁰ and the Export Administration Act.¹⁷¹ Because MTCR obligations are implemented according to national legislation, enforcement activities vary from state to state, thus creating inconsistent standards of enforcement — although all MTCR signatories are, in theory, held to minimum level of

159. *Id.*

160. *Id.*

161. *Id.*

162. *See id.*

163. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 80.

164. *Id.*

165. MTCR, *supra* note 2.

166. *See* K. SCOTT MCMAHON & DENNIS M. GORMLEY, CONTROLLING THE SPREAD OF LAND-ATTACK CRUISE MISSILES 31, 35 (American Institute for Strategic Cooperation, The AISC Papers, No. 7, Jan. 1995) [hereinafter MCMAHON & GORMLEY].

167. *See* MTCR, *supra* note 2.

168. *See id.*

169. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 81.

170. 22 U.S.C. §§ 2751-2796 (2001).

171. 50 U.S.C. app. §§ 2401-2420 (2001).

enforcement mandated by the agreement.¹⁷² Differing interpretations of the MTCR's requirements were the crux of the Black Shaheen LACM dispute between the United States, France, and Britain.¹⁷³

It should be noted that the MTCR has been quite successful in slowing the proliferation of ballistic missiles. Although it is impossible to completely stop proliferation, the MTCR has retarded the spread of ballistic missiles by limiting access to foreign assistance and technology, thus raising the already high costs of acquiring ballistic missile technology, even when obtained under the guise of developing a domestic space launch capability. For instance, the MTCR's effectiveness against the proliferation of ballistic missile technology caused the abandonment of the Argentine-Iraqi-Egyptian Condor II ballistic missile program because the consortium could not obtain the technology and materials needed to build a long-range ballistic missile.¹⁷⁴ The MTCR has not been as effective when dealing with cruise missiles.¹⁷⁵ In fact, the very success of the MTCR as to ballistic missile proliferation has created an incentive for states to develop cruise missiles. Because the MTCR has driven up the costs of acquiring ballistic missiles, developing or purchasing LACMs looks more attractive, particularly because of the MTCR's relatively weak controls on the technology needed to develop cruise missiles.

B. MTCR's Focus on Ballistic Missiles

When the MTCR was being negotiated in the early-1980s, it was designed to deal with the emerging ballistic missile threat from Third World states.¹⁷⁶ Although the MTCR's limits on transferring missiles and related technology to non-signatories also apply to cruise missiles, the structure of the MTCR and its specific provisions were negotiated with ballistic, not cruise, missiles in mind, reflecting the conventional thinking during the early-1980s that ballistic missiles were a more serious threat to international security.¹⁷⁷ For instance, the items and technology controlled in Categories I and II are heavily weighted towards those technologies

172. MCMAHON & GORMLEY, *supra* note 166, at 35.

173. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 40. The Black Shaheen LACM dispute is discussed below in Part IV(C).

174. Scott D. Tollefson, *El Condor Pasa: The Demise of Argentina's Ballistic Missile Program*, in THE INTERNATIONAL MISSILE BAZAAR: THE NEW SUPPLIERS' NETWORK, *supra* note 94, at 255, 258.

175. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 37.

176. Greene, *supra* note 48, at 55.

177. See Speier Manuscript, *supra* note 24, at 10-14.

and components required for building ballistic, not cruise, missiles.¹⁷⁸ Subsequent actions by MTCR members have confirmed the bias towards limiting the proliferation of ballistic missiles.

First, the events that precipitated the United States' initiation of the multilateral discussions that eventually became the MTCR were all tests of ballistic missiles or technologies vital for indigenous ballistic missile development.¹⁷⁹ These watershed events included South Korea's test of a ballistic missile based on the U.S. Nike-Hercules SAM in 1978, Iraqi efforts to purchase rocket stages from Italy in 1979, India's launch of a satellite in 1980, and Libya's testing of rocket stages (albeit unsuccessfully) in 1981.¹⁸⁰ These events served as notice to the United States and its allies that they had arrived at a threshold period with regards to the ballistic missile proliferation threat. There was no such warning that cruise missile proliferation in the Third World would become a threat at the time the MTCR was negotiated. However, there were several farsighted military officers on the American delegation who inserted language in Category I of the MTCR's Equipment & Technology Annex¹⁸¹ so that it would cover both cruise and ballistic missiles.¹⁸²

Second, the fact that ballistic missiles have traditionally been the delivery vehicle of choice for nuclear weapons led the United States and its allies to focus on them in the negotiations that led to the creation of the MTCR.¹⁸³ The growing shadow of the ballistic missile threat and potential nuclear annihilation focused the world's attention on those missiles as the greatest potential danger.¹⁸⁴ That then-President Ronald Reagan told the United Nations General Assembly "[t]he ballistic missile is the most awesome, threatening, and destructive weapon in the history of man" is illustrative of this focus on ballistic missiles as the most serious threat to peace.¹⁸⁵

178. See Gormley, *Neglected Dimension*, *supra* note 3, at 26-27.

179. Anastasia A. Angelova, *Compelling Compliance with International Regimes: China and the Missile Technology Control Regime*, 38 COLUM. J. TRANSNAT'L L. 419, 435 (1999).

180. See *id.*; Pande, *supra* note 57; Jurgen Scheffran & Aaron Karp, *The National Implementation of the Missile Technology Control Regime — The US and German Experiences*, in CONTROLLING THE DEVELOPMENT AND SPREAD OF MILITARY TECHNOLOGY: LESSONS FROM THE PAST AND CHALLENGES FOR THE 1990S 235, 240 (Hans Gunter Brauch et al. eds., 1992).

181. This language states that "unmanned aerial vehicle systems (including cruise missile systems, target drones and reconnaissance drones)" are covered under Category I of the MTCR. MTCR, *supra* note 2.

182. E-mail from Richard Speier, Independent Nonproliferation Consultant, to author (Mar. 6, 2002, 22:14 EST) (on file with author) [hereinafter Speier E-mail].

183. Speier Manuscript, *supra* note 24, at 8.

184. *Id.*

185. *Id.*

Moreover, the structural provisions of the MTCR were clearly designed to deal with the ballistic missile threat, despite the regime's avowed purpose to deal with both ballistic and cruise missiles. First, the regime's 500 kg/300 km limit on payload and range was clearly designed to deal with ballistic missiles, rather than cruise missiles. Those numbers represent a significant technological threshold for ballistic missiles in terms of guidance, but are purely arbitrary with regard to cruise missiles.¹⁸⁶ At ranges over 300 km, accurate ballistic missile guidance is much more difficult to attain.¹⁸⁷ Cruise missiles, on the other hand, can be reconfigured with ease so that payload and range can be traded-off, meaning that an LACM that nominally fell under the 500 kg/300 km guidelines could be modified to fly much farther than 300 km with a 250 kg warhead.¹⁸⁸ Unlike ballistic missiles, which do not have such clear payload/range trade-off capabilities, a cruise missile permissible to be exported under the MTCR could be converted within a matter of hours to one that was not.¹⁸⁹ Second, the MTCR does not contain any clear formulas or standards for calculating the ranges of the missiles covered by the agreement. This glaring omission does not make any difference for ballistic missiles, which must fly on a parabolic flight path where rocket engine efficiency is not a significant issue, but it is a major oversight with regards to cruise missiles.¹⁹⁰ Cruise missile ranges can vary widely depending upon the altitude at which the missile flies because of different engine efficiencies at various altitudes.¹⁹¹ The lack of standards for determining the range of cruise missiles for MTCR purposes would later become a serious problem, creating confusion and undermining the effectiveness of the regime.¹⁹² Although some language regarding cruise missiles is included in the Annex, the very structure and language of the MTCR, as well as other evidence, suggests that, for political reasons, the MTCR was primarily aimed to control the spread of ballistic missile technology and the cruise missile language was added to the MTCR at the behest of lower level diplomats.¹⁹³

186. See Greene, *supra* note 48, at 56.

187. See *id.*; Pande, *supra* note 57.

188. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 30.

189. McCarthy Interview, *supra* note 66.

190. See Gormley, *Neglected Dimension*, *supra* note 3, at 27.

191. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 37; Speier E-mail, *supra* note 182.

192. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 85-88; Greene, *supra* note 48, at 63.

193. Speier E-mail, *supra* note 182.

Finally, subsequent actions by MTCR members prove that the regime's purpose was to limit the spread of ballistic missile-related technologies. The official statements and rhetoric regarding the MTCR and the spread of missile technology have focused primarily on preventing the spread of ballistic missile technology. There was hardly a mention of cruise missiles in speeches, congressional testimony, or policy proclamations by high-level officials in the Clinton Administration when discussing U.S. missile non-proliferation policy.¹⁹⁴ This has changed in the second Bush Administration, as the cruise missile threat has received increased congressional and executive attention;¹⁹⁵ however, ballistic missiles still receive the lion's share of attention, as evidenced by increased funding for anti-ballistic missile defense, abrogation of the ABM Treaty, and fear of North Korea's ballistic missile program.¹⁹⁶ Furthermore, discussion at the MTCR annual plenary meetings tends to focus on the ballistic missile problem, even though some states do want to discuss cruise missile issues.¹⁹⁷ Although the delegates concede that the proliferation of cruise missile technology is a significant problem, the issue is regularly ignored as being too difficult to tackle.¹⁹⁸

C. Other Nonproliferation Tools: National Suppliers' Group and Codes of Conduct

Efforts outside the MTCR have been made to limit the proliferation of missiles; however, the majority of these efforts, like the MTCR, have focused their attention on limiting the spread of ballistic missiles and have largely ignored cruise missiles. The first missile-focused effort outside of the MTCR was Russia's 1999 proposal for the Global Control System for the Nonproliferation of Missiles and Missile Technologies (GCS).¹⁹⁹ A blatant attempt to undermine the United States-led MTCR by offering access to space-launch capabilities and other technologies, the GCS seeks to attract non-MTCR signatories into a competing arrangement.²⁰⁰ The GCS further seeks to put missile proliferation under the aegis of the United Nations rather than the exclusive group of technology

194. McMAHON & GORMLEY, *supra* note 166, at 76-78.

195. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 84, 118-19 n.17; Gormley, *Neglected Dimension*, *supra* note 3, at 21.

196. See, e.g., BAKER SPRING, KEEPING MISSILE DEFENSE AT THE HEART OF DEFENSE TRANSFORMATION: EXECUTIVE MEMORANDUM 874 (May 7, 2003), at <http://www.heritage.org>.

197. See Gormley, *Neglected Dimension*, *supra* note 3, at 26.

198. McCarthy Interview, *supra* note 66.

199. Yuri E. Fedorov, *The Global Control System and the International Code of Conduct: Competition or Cooperation?*, 9 NONPROLIFERATION REV. 30, 33 (2002).

200. See *id.* at 31.

suppliers that make up the MTCR's membership,²⁰¹ something that the United States considers anathema because of the UN's structural incapability to enforce this sort of regime.²⁰² Furthermore, the United States is leery of having the UN, composed mainly of nations that do not possess advanced missile technology, administering such a nonproliferation arrangement.²⁰³ Although the GCS embodies an alternate approach to dealing with missile proliferation on the demand-side of the equation rather than the supply-side view of the MTCR, the GCS also focuses primarily on ballistic missiles.²⁰⁴ The GCS completely ignores the threat of LACMs; whereas, despite its flaws, the MTCR at least addresses the problems.

The International Code of Conduct Against Ballistic Missile Proliferation²⁰⁵ was proposed in reaction to the Russian challenge to the MTCR's supremacy in regulating the proliferation of missile technology and international fears about national missile defense.²⁰⁶ In February 2002, a draft of the proposed code was reviewed by more than eighty nations.²⁰⁷ The proposed code called for signatories to declare their ballistic missile programs and inform all other signatories before conducting ballistic missile tests.²⁰⁸ It also offers an undefined case-by-case incentive system to encourage states to give up their missile programs.²⁰⁹

The most serious concern with both the GCS and the proposed ballistic missile code of conduct is their blatant disregard for the LACM threat. This egregious failure to consider the cruise missile threat reinforces the perception that states are primarily worried about the ballistic missile threat and are ignoring cruise missiles.²¹⁰

IV. PROLIFERATION OF CRUISE MISSILES

The threat of cruise missile proliferation is maturing, as the key technologies needed to develop and produce LACMs are becoming

201. *Id.* at 33.

202. *See* McCarthy Interview, *supra* note 66.

203. *See id.*

204. *See* Fedorov, *supra* note 199, at 33.

205. Draft Text of the Proposed International Code of Conduct Against Ballistic Missile Proliferation, at <http://www.projects.sipri.se/expcon/drafticoc.htm> (last visited Feb. 20, 2002) [hereinafter Draft Text]. *See generally* Jonathan Stoel, Note, *Codes of Conduct on Arms Transfers — The Movement Towards a Multilateral Approach*, 31 LAW & POL'Y INT'L BUS. 1285 (2000) (analyzing an array of proposed or enacted arms transfer codes of conduct).

206. DENNIS M. GORMLEY, A BALLISTIC MISSILE CODE OF CONDUCT: JUST HOW VALUABLE?, (Feb. 22, 2002), available at <http://www.iiss.org> (last visited Feb. 24, 2002).

207. *Id.*

208. Draft Text, *supra* note 205.

209. *Id.*

210. *Id.*

easier to obtain each year. However, policymakers around the world appear to be either oblivious to the cruise missile threat or believe that it will follow the same path as ballistic missile proliferation, giving them plenty of lead time to deal with the threat. Just as MTCR provisions tailored for ballistic missile proliferation are not effective at constraining the spread of cruise missiles, the very nature of the cruise missile threat is fundamentally different from the ballistic missile threat. There is significant potential for cruise missiles to be developed non-sequentially and within a short period of time. The technological chokepoints preventing indigenous LACM development will disappear without prompt action on the part of those that control access to the technology. Furthermore, there is the threat of states skirting the MTCR's guidelines and selling complete missile systems to Third World states.

A. *Timeframe for Development*

Unlike ballistic missile development, which is sequential and cannot be kept completely covert,²¹¹ the timeframe and sequence for developing and testing cruise missiles is not linear and can be conducted under the guise of domestic aircraft production or maintenance programs.²¹² LACMs are significantly easier than ballistic missiles to develop because of the general availability of the technology to build first-generation LACMs; a state committed to developing an indigenous production capability could do so in a far shorter span than developing ballistic missiles.²¹³ Cruise missile systems could conceivably spread fairly quickly, with states deploying relatively crude LACMs based on modified ASCMs or more sophisticated LACMs incorporating more sophisticated guidance systems and stealth technology.²¹⁴ The level of foreign assistance and access to technology are key determinants in how quickly a state can obtain LACMs.²¹⁵

The United States will have little advance warning as to the sale of complete LACM systems to any particular state, other than the sales announcement or intelligence regarding the transfer. The United States may hear rumors that a state is seeking to purchase cruise missile strike capability, but as the sale of the Black Shaheen to the UAE demonstrates, there is often little that can be done

211. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 11.

212. *Id.* at 11-12, 33-36.

213. CARUS, *supra* note 6, at 33-34, 70-83; GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 53-54.

214. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 11, 29-33.

215. *See id.* at 19-23, 28.

except make angry protests.²¹⁶ The United States may not discover the LACM capability of a state until the missiles are fully integrated into that nation's force structure.²¹⁷ This lack of advance warning and powerlessness to affect the sale make the direct acquisition pathway for obtaining LACMs particularly troubling for the United States.

The proliferation of cruise missiles will not follow the same course as ballistic missile proliferation.²¹⁸ Although there will undoubtedly be some cases where a state slowly develops an indigenous production capability over a period of years, it is far more likely that a state will either obtain foreign technological assistance and develop a production capability fairly rapidly or purchase missiles directly.²¹⁹ This means that the United States must be prepared to deal with quickly emerging threats. There will not be the luxury of lead time that the United States has enjoyed in its dealings with possible ballistic missile proliferators because it is much easier for states developing cruise missiles to develop or acquire such weapons without much, if any, advance warning.²²⁰

B. Chokepoints: Fewer and Harder to Control

The most likely means by which a state will be able to field a LACM capability is through indigenous development of a complete missile system. Fortunately, all the elements needed to develop a long-range LACM are not easily procured on the international market at this time; however, that will likely change in the future as the pathways to developing a cruise missile production capability shorten through the spread of dual-use technology and expertise. Cruise missiles have traditionally consisted of four major components — an airframe, a payload, a guidance and navigation

216. *Id.* at 11-12, 33-36; Pande, *supra* note 57; see also Nick Cook, *Dilemmas in the Desert — the Devil's in the Details*, JANE'S DEF. WKLY., Nov. 10, 1999, at 45-46, 48-49.

217. E-mail from Dennis M. Gormley, Senior Fellow, Center for Nonproliferation Studies, Monterey Institute of International Studies, to author (Mar. 28, 2002, 09:58 EST) (on file with author) [hereinafter Gormley E-mail].

218. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 11.

219. *Id.* at 12.

220. See *id.* at 11. An illustration of this point is the U.S. concern over North Korea's ballistic missile program. The United States has used satellite imagery to observe rocket tests, as well as the flights of North Korean ballistic missiles, as such tests are difficult to conceal. See CENTER FOR NONPROLIFERATION STUDIES, CHRONOLOGY OF NORTH KOREA'S MISSILE TRADE AND DEVELOPMENT, at <http://cns.miis.edu> (last visited July 5, 2004). Thus, the United States has an idea as to the extent of North Korean ballistic missile development and how close it is to fielding operational ICBMs. Cruise missile components are much easier to test surreptitiously, making it much for difficult to ascertain how advanced a LACM program might be. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 11.

system, and a propulsion unit.²²¹ Until the early-1990s, it was impossible for nations other than the United States, Russia, Britain, and France to even conceive of indigenously producing LACMs.²²² According to conventional wisdom, the guidance and navigation system and the propulsion unit were the chokepoint technologies that prevented other states from developing cruise missiles.²²³ However, the increased diffusion of advanced technologies, particularly in the field of navigation and guidance, has made it possible for a nation to develop a latent LACM production capability.²²⁴ Thus, the only technological chokepoint remaining is the propulsion unit. In addition to the four major cruise missile components mentioned above, this article addresses factors generally ignored by most of the extant literature: program management capacity and technological integration capability and what effect such factors have on cruise missile development.

First, the airframe is the easiest part of the LACM to obtain. Because cruise missiles do not fly particularly quickly or accelerate rapidly, airframes can be built out of normal aluminum.²²⁵ Any airframe that could be used for a normal aircraft could be employed in a cruise missile.²²⁶ Almost any metallurgical engineer could design and construct an LACM airframe.²²⁷ However, integrating radar cross-section-reducing materials or stealth designs for an LACM would require extensive computer modeling and access to composite radar-absorbing materials.²²⁸

The payload is the second major LACM component. Again, this is fairly straightforward, as LACMs can be armed with a variety of different payloads ranging from conventional high explosives to submunitions of different varieties to WMDs, depending upon the intended mission. One area of particular concern is that LACMs are ideally suited for dispensing chemical or biological weapons because of a cruise missile's inherent in-flight stability compared to ballistic missile delivery systems.²²⁹ However, it should be noted that

221. CARUS, *supra* note 6, at 70-79; GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 18; MCMAHON & GORMLEY, *supra* note 166, at 18-25.

222. See CARUS, *supra* note 6, at 15-16.

223. See, e.g., GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 18.

224. *Id.* at 18-21.

225. DEP'T OF DEF., OFFICE OF THE UNDER SEC'Y OF DEF. FOR ACQUISITION & TECH., MILITARILY CRITICAL TECHNOLOGY LIST, PART II: WEAPONS OF MASS DESTRUCTION TECHNOLOGIES, § 1.3 at 34 (1998) [hereinafter DOD REPORT], at <http://www.fas.org/irp/threat/mctl98-2/p2sec01.pdf> (last visited Feb. 20, 2002).

226. *Id.*

227. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 24.

228. See CARUS, *supra* note 6, at 74-76; GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 24; DOD REPORT, *supra* note 225.

229. CARUS, *supra* note 6, at 80.

because most cruise missiles are easier to intercept than ballistic missiles, a state with the choice of deploying its nuclear warheads on either type of delivery vehicle would likely choose ballistic missiles.²³⁰

The guidance and navigation system, the third major cruise missile component, was previously believed to be the most serious technological hurdle to the development of LACMs²³¹; however, that changed when GPS and its Russian equivalent, GLONASS, became available to users other than the U.S. and Russian militaries.²³² Prior to that time, LACMs relied upon rather inaccurate inertial guidance systems or terrain contour matching (TERCOM) for guidance and navigation to the intended target.²³³ Until alternatives to TERCOM and inertial guidance evolved, there were no other ways to provide long-range, accurate guidance for LACMs.²³⁴ Not surprisingly, TERCOM technology has been kept under the utmost secrecy.²³⁵ However, once cheap GPS systems became available, the guidance and control genie was out of the bottle and it became relatively easy for a state to develop guidance systems built around GPS receivers.²³⁶ The United States, recognizing this potential, introduced a policy of “selective availability” in which subtle errors were introduced into commercially available GPS receivers, which degraded the accuracy of the signal.²³⁷ However, the United States ended “selective availability” in May 2000 after it was revealed that the process could be easily circumvented.²³⁸

The widespread availability of cheap, accurate GPS receivers in conjunction with access to commercial satellite imagery makes the development of an LACM guidance system substantially easier.²³⁹

230. *Id.* at 79-81. It should also be considered that placing a nuclear warhead on a cruise missile might be easier because of the reduced stress on LACM warheads because they do not have to go through the changes in velocity and acceleration that a nuclear weapon mounted on a ballistic missile would have to go through. *Id.*

231. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 18.

232. *Id.* at 19-21.

233. *Id.* at 18. TERCOM involved a miniature radar receiver in the cruise missile nose to sense the terrain over which it is flying and compare it to a map that has been stored in the missile's guidance system. The system then makes course corrections based upon the comparison. The TERCOM system obviously required the existence of very detailed terrain maps of any potential theatre of operations, an expensive proposition in the days before commercial satellite photography. *Id.*

234. DOD REPORT, *supra* note 225, at 34-35.

235. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 18-20; DOD REPORT, *supra* note 225, at 35.

236. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 20-21.

237. *Id.* at 19-20.

238. *Id.*

239. *Id.* at 20-21.

Experts suggest that the widespread availability of GPS dramatically cut the costs required to develop an accurate guidance system.²⁴⁰ GPS/GLONASS receivers that can be used to build cruise missile guidance systems are available from commercial suppliers for as little as \$6,000 each.²⁴¹ A pure GPS-based guidance system would require that the LACM fly at a high enough altitude to miss all potential obstructions because GPS guidance systems follow a set of preprogrammed coordinates and do not take the terrain surrounding the target into account.²⁴² Combining satellite imagery mapping technology with GPS in a guidance system could result in a significantly more accurate and more survivable LACM, as it could be programmed to fly around obstacles or defenses revealed by the satellite imagery, while using GPS for course navigation.²⁴³ These developments have eliminated the guidance and navigation system as a major chokepoint in the technology needed for a Third World nation to develop a cruise missile capability.

The final structural component of a cruise missile is the propulsion unit, which is the sole remaining chokepoint technology preventing the widespread proliferation of LACMs through indigenous development.²⁴⁴ Small, efficient propulsion units represent the final key enabling technology for LACM production.²⁴⁵ Although turbojet engines are widely available from producers such as China, they are not sufficiently fuel efficient for use in longer-range LACMs.²⁴⁶ The engines of choice for modern LACMs are light turbfans, which are surprisingly difficult to produce without outside foreign assistance due to their intricate nature and the specialized materials and alloys needed to build them.²⁴⁷ The

240. *Id.* at 20; *see also* DOD REPORT, *supra* note 225, at 35.

241. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 31-32.

242. *See id.* at 19-21; DOD REPORT, *supra* note 225, at 35.

243. *See* DOD REPORT, *supra* note 225, at 35.

244. *See* GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 21-22.

245. *Id.* at 21.

246. *See* GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 21-22. Turbojet engines are used on most high performance aircraft; however, turbojets tend to be heavy and inefficient, burning large amounts of fuel to create thrust. Turbopan engines differ from turbojets as they are essentially propeller engines mounted inside a cowling with ducted exhaust to create thrust. *See* CISELUNAR AEROSPACE, INC., PRINCIPLES OF AERONAUTICS: PROPULSION, STRUCTURES AND CONTROLS: PROPULSION: TYPES OF AIR-BREATHING ENGINES, *at* <http://wings.avkids.com/Book> (last modified June 16, 1997). Although capable of producing far less thrust than turbojet engines, turbopans are much more efficient as they are able to suck four times as much air into the engine, improving fuel efficiency. *See id.* The increased fuel efficiency of turbopan engines make them the propulsion unit of choice for cruise missiles because they can vastly extend the range of a missile or allow for a larger warhead because the missile does not need to carry as much fuel.

247. *See* Rick Martin & Daniel Evans, *Reducing Costs in Aircraft: The Metals Affordability Initiative Consortium*, 52 JOM: THE MEMBER JOURNAL OF THE MINERALS, METALS & MATERIALS SOCIETY 24, 26 (2000) (discussing the high cost of exotic alloys needed to

greatest technological difficulty is designing a small, efficient turbofan engine, with enough thrust to power a cruise missile over long ranges.²⁴⁸ Considering the difficulties of developing such engines, states with active cruise missiles have sought to acquire complete engines from suppliers in the United States and Russia, but thus far have been unsuccessful in doing so in large numbers.²⁴⁹ However, it is possible for such engines to be cannibalized from commercial aircraft like the Cessna Citation, among others.²⁵⁰

As the propulsion unit is the final hurdle for most countries developing cruise missiles, they have become the final chokepoint technology that must be controlled to slow the spread of LACMs. It is certainly possible for a state to use less efficient turbojet engines for indigenously produced cruise missiles, but range would be limited accordingly. It is possible a nation could develop a turbofan engine and that nation might be willing to export such engines to potential cruise missile proliferators. This seems unlikely at the present time considering the technological constraints, but it is something that should be considered over the long term.

The final area limiting the spread of LACMs is the program management capacity and technical integration capability of a state seeking to build cruise missiles. A major indicator of a state's ability to develop an indigenous cruise missile production capacity is its experience in building technologically complex military systems.²⁵¹ A state that has some indigenous military production capacity and experience in integrating complementary foreign technology with domestically produced systems will have a great advantage in developing a cruise missile capability.²⁵² Having a domestic aircraft industry or substantial numbers of trained aircraft maintenance personnel can also affect the speed at which the missile program develops.²⁵³ The existence of a trained pool of engineers and scientists is also crucial.²⁵⁴ Having universities with significant engineering departments willing to work on the technological hurdles surrounding an LACM program would obviously be useful as well, especially if they have expertise with wind tunnels, computer design routines, and spray flow field modeling.²⁵⁵ Furthermore, if a state has a highly-trained cadre of key scientific

withstand the high temperatures of turbofan engines).

248. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 21-22.

249. *Id.*

250. *Id.* at 22.

251. *Id.* at 22-25.

252. McCarthy Interview, *supra* note 66.

253. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 24-25.

254. *Id.* at 22-25.

255. *See id.* at 25.

management personnel, so-called “program managers,” with experience in integrating military technology, the indigenous development pathway to a cruise missile capability is much shorter.²⁵⁶ There is nothing that can be done to limit the spread of such knowledge and expertise unless there is a comprehensive ban on access to certain engineering and management disciplines. That result is unlikely considering the intellectual freedom prized in most Western states and the virtual impossibility of enforcing such a policy.²⁵⁷

C. Threats from within the MTCR: The Black Shaheen

Although indigenous development or modification of LACMs by a Third World state is the most likely means by which such a state could obtain a cruise missile capability, acquisition of complete LACM systems from an MTCR member has become a worrisome possibility. The case of the Black Shaheen LACM epitomizes this threatening trend.

The UAE was able to do exactly that when it announced the purchase of the Black Shaheen variant of the Apache LACM in 1998 from the Anglo-French consortium Matra-BAE-Dynamics (MBD).²⁵⁸ Despite diplomatic protests from the United States and lengthy discussions in MTCR plenary meetings,²⁵⁹ the first of an undisclosed number of Black Shaheens was to be delivered to the UAE in 2003 or 2004.²⁶⁰ This questionable sale stems from the ambiguities surrounding determining the 300 km/500 kg threshold established by the MTCR.²⁶¹ Britain and France calculated the range of the Black Shaheen at sea level, where the range of the missile is 300 km when carrying a 450 kg warhead.²⁶² The United States calculated the range of the Black Shaheen using a flight profile at an altitude above sea level and determined that the missile clearly violated the 300 km/500 kg threshold level set by Category I of the

256. *Id.* at 23-24; McCarthy Interview, *supra* note 66.

257. *But cf.* Henry Sokolski, *Missile Nonproliferation and Missile Defense*, Heritage Lecture No. 761, delivered July 12, 2002, available at <http://www.heritage.org> (last visited Aug. 19, 2003) (calling for the United States and its allies to limit the access of foreign students to academic courses dealing with technologies relevant to missile production).

258. Paul Beaver, *USA Angry Over French Decision to Export Apache*, JANE'S DEF. WKLY., Apr. 8, 1998, at 4. The only difference between the French Apache and the UAE's Black Shaheen is reportedly the electrical and mechanical interfaces between the missiles and the aircraft that carry them.

259. *Id.*

260. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 40.

261. Mike Nartker, *International Response: MTCR Changes Address Cruise Missile Proliferation*, GLOBAL SECURITY NEWSWIRE, Oct. 28, 2002, at <http://www.nti.org> (last visited Aug. 13, 2003).

262. Gormley E-mail, *supra* note 217.

MTCR.²⁶³ Experts believe that the Black Shaheen has a range in excess of 300 km with a 450 kg warhead when flying at an altitude of several hundred meters.²⁶⁴ At the very least, the Black Shaheen should be classified under Category II of the MTCR as it would carry a negligible payload to a distance over 300 km, even at sea-level, requiring end-user certification and guarantees from the UAE.²⁶⁵ Yet, the British Defense Ministry denied that the sale of the Black Shaheen would violate the MTCR.²⁶⁶ This uncharacteristic struggle among the United States, Britain, and France — all founding members of the MTCR — stems from increased competition in the international arms market as export sales have become a way to subsidize domestic military research and development as well as reduce per unit costs of new missiles.²⁶⁷ The contract for the Black Shaheen missiles is reportedly worth in excess of \$1.3 billion.²⁶⁸ France and Britain were committed to selling the missiles to give their domestic defense industries a boost despite recommendations from within their own governments that selling the Black Shaheens would violate the terms of the MTCR.²⁶⁹ Although the UAE is an ally of the West and likely purchased the Black Shaheens to balance the Iranian modified Silkworm cruise missile threat, the sale is disturbing on several levels. First,

263. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 107-8 n.32. Lending further support to the U.S. position that the missiles violate the MTCR are reports that France's version of the Apache/SCALP, which is almost identical to the Black Shaheen, has an estimated range of at least 500 km. See NATIONAL AIR & INTELLIGENCE CENTER, BALLISTIC & CRUISE MISSILE THREAT: LAND ATTACK CRUISE MISSILES (NAIC-1031-0985-98), available at <http://www.fas.org> (last visited July 5, 2004). Britain's Storm Shadow variant of the Apache has a reported range in excess of 400 km. *Id.*

264. Gormley E-mail, *supra* note 217.

265. MTCR, *supra* note 2.

266. Gary Milhollin, Wisconsin Project on Nuclear Arms Control, Ballistic Missiles: Who Are The Future Suppliers?, Paper Presented at the CSIS/NIC Conference on the Alternative Futures for Missile Proliferation (March 2, 1999), at <http://www.wisconsinproject.org> (last visited July 13, 2004).

267. The UK-French decision to authorize the Black Shaheen sales to the UAE was closely intertwined with the proposed sale of Mirage jet fighters to the UAE. See *Anglo-French Matra BAE in Major UAE Missile Deal*, REUTERS, Nov. 24, 1998, available at <http://www.clw.org> (last visited July 14, 2004). Originally, the UAE sought to purchase F-16 fighters from the United States, but almost decided not to do so when the U.S. was unwilling to include long-range cruise missiles as part of a package deal. See Greg Seigle, *UAE Still Demands F-16 Codes*, JANE'S DEF. WKLY., Dec. 16, 1998, at 5. Alternately, the UAE sought to acquire the computer codes needed to integrate the Black Shaheen missiles for use on the F-16s. The U.S. almost balked at handing over the computer codes to the UAE, but because of the size of the order and political pressure from Lockheed Martin (the contractor for the F-16s), codes were given to the UAE. See Gilles Van Nederveen, *The F-16 Block 60: A High-Tech Aircraft for a Volatile Region*, 14 AIR & SPACE POWER J. 96 (2000), at <http://www.airpower.maxwell.af.mil> (last visited July 5, 2004).

268. Ian Parker, *UAE's Modernized Mirage*, AVIONICS MAG. (June 2000), available at <http://www.aviationtoday.com> (last visited July 13, 2004).

269. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 85, 119 n.19.

although the UAE has a fairly stable government, there are no guarantees that with a change in regime the United States and its allies (including Britain and France) will not have to worry about having the Black Shaheens turned against them. Second, there are no guarantees that the individuals in the UAE military or government will not hand over one or more Black Shaheens to nations that could reverse engineer the technologies used in constructing the Black Shaheen.

The sale of the Black Shaheen sets a dangerous precedent for the future, as it appears that MTCR nations may attempt to circumvent the regime's decidedly ambiguous rules for the benefit of their domestic arms industries. Britain and France's sale of the Black Shaheen LACM, in defiance of U.S. diplomatic pressure, undermines cruise missile nonproliferation efforts across the board, especially with respect to states such as Russia and China, which are far more likely to exploit the ambiguities inherent in the MTCR and export LACMs or useful technologies to Third World states.²⁷⁰ Thus, the direct purchase of LACMs could be a far more serious threat than previously envisioned.

V. DEALING WITH THE THREAT: BROAD-BASED POLICY ALTERNATIVES

Cruise missile proliferation is one of the most serious threats facing the United States in the coming decades. However, the United States is not powerless in shaping the future of that threat. The United States should begin by alerting the rest of the world to the dangerous potential of LACMs by changing its missile proliferation rhetoric to include cruise missiles, as well as ballistic missiles. Once the United States builds international consensus as to the threat, it should seek to tighten the provisions of the MTCR dealing with cruise missiles and related technologies. Concomitantly, the United States must also go outside the MTCR and engage other potential proliferators who are not party to the regime. Finally, recognizing that proliferation of LACMs may occur despite its best efforts, the United States must also develop anti-cruise missile defenses now so that adequate defenses can be deployed when U.S. forces confront a cruise missile threat.

A. *Refocus the MTCR on Cruise Missiles*

Despite its flaws and shortcomings, the MTCR is still the preeminent means for preventing the proliferation of cruise

270. *Id.* at 85.

missiles. It remains the only tool for slowing the spread of missiles and missile-related technologies because of its legitimacy and gradually increasing membership, which encompasses most LACM producers with the glaring exception of China.²⁷¹ As discussed above, although the MTCR was originally conceived as covering both ballistic and cruise missile proliferation, subsequent negotiations and practices have focused primarily on the ballistic missile threat. Now, as the shadow of the cruise missile threat grows larger, is the time for the MTCR to consider cruise missiles on an equal footing with ballistic missiles.

This article proposes four significant modifications to current U.S. policies that should be pursued to tighten up the MTCR's rules on cruise missiles: (1) promote consensus within the MTCR that LACMs are a serious proliferation threat; (2) create a generally accepted formula for calculating range and payload trade-offs for cruise missiles; (3) encourage stricter technology transfer restrictions on turbofan engines and materials used to construct stealth missiles; and (4) give further consideration to the potential conversion of UAVs and light kit aircraft for use as LACMs. Each of these proposals is relatively inexpensive and goes hand-in-hand with current U.S. efforts to improve homeland defense, as well as preserve U.S. force projection capability overseas.

First and foremost, the United States must build a consensus within the ranks of the MTCR signatories that cruise missile proliferation is a threat to international peace and that the MTCR must be updated to deal with this potential threat. This requires a fundamental shift in U.S. foreign policy rhetoric, which, up until this time, has primarily focused on the ballistic missile threat as the foremost problem.²⁷² This general tendency of concern with regard to the ballistic missile threat is reflected in the MTCR's current provisions.²⁷³

It would not be difficult for the United States to place the cruise missile threat on equal footing to the ballistic missile threat in its international and domestic rhetoric. Until recently, cruise missile proliferation received little or no attention in U.S. documents or congressional reports detailing the threat of missile proliferation.²⁷⁴ Giving equal attention to cruise and ballistic missiles is only the first step in the more difficult process of convincing other MTCR members that the cruise missile threat is indeed genuine. Things

271. See MTCR, *supra* note 2.

272. The United States did take a strong diplomatic stance on the sale of Black Shaheen LACMs to the UAE. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 40.

273. See MTCR, *supra* note 2.

274. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 84.

are beginning to move in the right direction under the current Bush Administration.²⁷⁵ For instance, Secretary of Defense Donald Rumsfeld's articulation of the United States military's post-September 11th agenda for dealing with future threats specifically mentions cruise missiles.²⁷⁶ After modifying its proliferation rhetoric to emphasize the LACM threat, the United States should attempt to raise awareness of the threat through quiet diplomatic discussions aimed at encouraging states to tighten their export restrictions and adhere to their obligations under the MTCR. Moreover, the United States can share intelligence with other MTCR members as to the states with indigenous LACM programs so that they can be particularly circumspect in transferring technology or equipment to those nations. Only after completing this groundwork and consensus-building can the United States initiate modifications to the MTCR. Admittedly, this will be a difficult proposition considering the damage to the U.S. foreign relations following Operation Iraqi Freedom and the failure to find WMDs in Iraq. Yet, the United States must make an effort to build a consensus on the cruise missile threat.

Second, the most glaring deficiency in the MTCR's controls on cruise missiles is the fact that there is no formula for determining the range/payload trade-offs for purposes of the regime.²⁷⁷ The 300 km/500 kg threshold works well enough for ballistic missiles, but such a vague standard is inadequate for dealing with cruise missile proliferation.²⁷⁸ This is a fundamental issue that must be addressed if the MTCR is ever to slow the proliferation of LACMs.

275. *Id.*

276. Donald H. Rumsfeld, *Transforming the Military*, FOREIGN AFF., May/June 2002, at 20, 24-25. Rumsfeld wrote that in considering how to defend against future threats, the United States must ascertain its weaknesses. This is essentially defending against Liddell Hart's "indirect approach."

Instead of building our armed forces around plans to fight this or that country, we need to examine our vulnerabilities – asking ourselves, as Frederick the Great did in his *General Principles of War*, 'What design would I be forming if I were the enemy?' – and then fashion our forces as necessary to deter and defeat that threat. For example, we know that because the United States has unparalleled power on land, at sea, and in the air, it makes little sense for potential adversaries to try to compete with us directly. . . . So rather than building up competing armies, navies, and air forces, they will likely seek to challenge us asymmetrically by looking for vulnerabilities and trying to exploit them. . . . Our job is to close off as many of those avenues of attack as possible. We must prepare for new forms of terrorism, to be sure, but also for attacks on U.S. space assets, cyber-attacks on our information networks, *cruise missiles*, ballistic missiles, and nuclear, chemical, and biological weapons.

Id. at 25 (emphasis added).

277. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 88.

278. *Id.*

In September, 2002, at the MTCR's annual plenary discussions in Warsaw, the members of the MTCR agreed that the range of all cruise missiles and UAVs covered under the regime would be calculated based on the maximum distance that the missile or UAV would be capable of flying at "range-maximizing capability," thus closing the loophole that cruise missile producers often invoked to circumvent the MTCR's range restrictions.²⁷⁹ By establishing a "range-maximizing" flight profile as the basis for calculating the MTCR's range limitations, cruise missile producers will no longer be able to calculate their products' ranges based on flight at sea level or just above it.²⁸⁰ As discussed above, turbofan or turbojet powered cruise missiles have greater fuel efficiency flying at altitude; thus LACMs range can be increased if those missiles fly at higher altitudes during the early part of their flights before dropping down to a terrain-hugging flight profile as they approach their targets.²⁸¹ The new formula for calculating the range of cruise missiles and UAVs will clear up some of the disputes as to which systems are covered under the MTCR and which are not.²⁸² But it should be noted that under the new formula for calculating range, the exporting state has the sole responsibility for making the determination — a classic case of the fox guarding the henhouse — as exporting states will have every incentive to mischaracterize the numbers so that the sale can be made.²⁸³

Additionally, the MTCR has yet to address the second (and more difficult) aspect of the range loophole — how range and payload trade-offs should be calculated. It is quite easy for an MTCR compliant cruise missile or UAV to violate the regime by decreasing the weight of the warhead and using the saved weight for increased fuel, thus increasing the missile's range beyond the 300 km limit.²⁸⁴ Further elements that must be considered include trade-offs as to fuel capacity, guidance systems, and the speed at which an LACM is designed to fly, all of which affect the range of cruise missiles and UAVs.²⁸⁵

279. Nartker, *supra* note 261. During the Warsaw plenary meeting, members of the MTCR also agreed on a more precise definition of "payload" so that the new definition encompasses support structures and countermeasures — not just the warhead itself. *Id.*

280. *Id.*

281. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 88, 119-120 nn.25-26. It should be noted that unless LACMs have stealth characteristics, they must drop down to a terrain-hugging flight profile before entering detectable radar range or else risk being detected and intercepted. *Id.* at 88. Stealthy LACMs can fly at altitude even when within radar range with minimal risk of detection. *Id.* at 119-120 n.26.

282. Nartker, *supra* note 261.

283. See Gormley & Speier, *supra* note 80, at 75.

284. See Greene, *supra* note 48, at 56; Nartker, *supra* note 261.

285. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 88, 120 n.27.

The ambiguities surrounding the range calculation formula and range/payload trade-off led to the diplomatic fracas surrounding the transfer of the Black Shaheen missiles to the UAE.²⁸⁶ While the MTCR has made a significant step forward by adopting a more precise (though hardly crystal clear) formula for calculating the range of cruise missiles, the regime's work is incomplete without addressing the remaining range/payload trade-off loophole and the need for MTCR member states (other than the exporter) to calculate the range of missile systems sold to non-MTCR states. The fact that determining such a formula is difficult and contentious does not mean it should be ignored. If a more precise definition cannot be reached, there is little that can be done to prevent the proliferation of LACMs, as some less scrupulous MTCR states will take advantage of the definitional ambiguities when it is in their commercial interests to do so.

Third, the United States should seek to tighten the rules on the transfer of certain key technologies that could be used to build complex LACMs — most specifically, small, efficient turbofan engines and technologies or materials that could be used to produce stealth LACMs.²⁸⁷ As discussed above, until recently, the major technological chokepoints for producing LACMs have been their guidance systems and propulsion units. It is too late to stop the proliferation of accurate guidance systems with the worldwide availability of cheap and reliable GPS systems. Thus, small, efficient turbofan engines are the last major chokepoint to indigenous cruise missile development. Turbofan engines are covered under Category II of the MTCR;²⁸⁸ however, considering their usefulness in building LACMs and their status as the last real chokepoint technology, they should be transferred to Category I.²⁸⁹ Once categorized under Category I, there will be a general presumption to deny applications to export small turbofan engines, although, admittedly, the United States would likely face objections from commercial aviation. Furthermore, commercial and military turbojets that generate more than 2,000 pounds of thrust are fully usable in LACMs, yet the MTCR does not exert even minimal controls over them.²⁹⁰ The United States should push for such engines to be classified under the strictures of Category II. Exporters of these types of engines would then be required to obtain some sort of end use verification to ensure that the engines are

286. See *id.* at 88; Nartker, *supra* note 261.

287. See Gormley, *Neglected Dimension*, *supra* note 3, at 27-28.

288. MTCR, *supra* note 2.

289. See GORMLEY, *DEALING WITH THE THREAT*, *supra* note 1, at 88-89.

290. See *id.* at 89-90; Gormley, *Neglected Dimension*, *supra* note 3, at 28.

actually installed on aircraft and not diverted to covert LACM programs.²⁹¹ The United States can also push for the inclusion of technology such as precision machine tools and certain materials needed to build turbofan engines under Category II of the MTCR.

The United States should also seek to have radar cross-section-reducing materials and stealth technologies and materials classified under Category I of the MTCR so that there is a general presumption to deny applications to export such technology. There have long been calls for limiting the diffusion of stealth technology under the MTCR, but the regime's members have been unable to precisely determine which technologies should be controlled and how to classify them.²⁹² The United States should seek to have these technologies classified as key missile subsystems or components with military uses under Category I of the MTCR.²⁹³ If the United States is obliged to compromise and cannot get the remaining MTCR members to agree to such a classification, the United States should adopt a firm stance that such stealth technology and materials should be classified at least under Category II.²⁹⁴ Had restrictions on the transfer of stealth technology been in place, the United States would have had alternate grounds to object to the sale of the Black Shaheens to the UAE because the Apache LACM, from which the Black Shaheen is derived, has stealth technology incorporated into its design.²⁹⁵

Next, the MTCR's current provisions do not recognize the potential of UAVs, RPVs and light kit aircraft to be converted into LACMs. Although almost all UAVs and RPVs fall under the MTCR's Category II restrictions because they can carry a minimal payload of at least 300 kg, there are some that should be classified under the more stringent requirements of Category I, particularly if the UAVs or RPVs have stealth characteristics. Although UAVs and RPVs that could fly 300 km on a one-way trip with a 500 kg payload are categorized under the MTCR's Category I and its "strong presumption to deny" language,²⁹⁶ other types of UAVs or RPVs, such as those equipped for combat use or capable of carrying biological or chemical agents, should also be included under Category I.²⁹⁷ While the MTCR has sought to tighten export controls

291. See MTCR, *supra* note 2; GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 89-90.

292. See GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 88; MCMAHON & GORMLEY, *supra* note 166, at 80-83.

293. Gormley, *Neglected Dimension*, *supra* note 3, at 27.

294. See *id.*

295. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 39.

296. See Gormley, *Neglected Dimension*, *supra* note 3, at 27-28; MTCR, *supra* note 2.

297. Gormley & Speier, *supra* note 80, at 76-77.

on UAVs and RPVs under Category II,²⁹⁸ the United States should make an effort to have the most dangerous UAVs and RPVs included under Category I.²⁹⁹

Light kit aircraft represent another serious problem for proliferation. Although easily convertible into LACMs, such aircraft are not covered by the MTCR at this time because they are not designed to be remotely piloted, and thus do not fall under its provisions.³⁰⁰ Despite the bureaucratic difficulties, the United States should also make an effort to expand Category II of the MTCR to include kit aircraft, thus requiring government approval before being exported to non-MTCR states;³⁰¹ again, admittedly, the United States would likely face objections from commercial aviation if kit aircraft were classified under Category II.

Another logical move in tightening up the MTCR would be to close up the intentional loophole that exempts subsystems and parts, which would otherwise be subject to Category II scrutiny, so long as they are intended for manned aircraft.³⁰² This loophole creates a significant proliferation risk, as so many key advanced technologies for building cruise missiles, such as propulsion units and guidance systems, are identical to those used in manned aircraft.³⁰³ Using this exemption, a state could covertly acquire key components and subsystems for a cruise missile program under the guise of a legitimate civilian manned-aircraft program.³⁰⁴ By eliminating this loophole and subjecting all such technology transfers to Category II scrutiny, MTCR members will have a better idea which countries are acquiring certain technologies, making the identification of emerging cruise missile threats much easier.³⁰⁵

The United States must play its cards carefully if it seeks to strengthen the provisions of the MTCR. Merely making the aforementioned proposals at the next MTCR plenary meeting will not work. The first proposal – promoting consensus that LACMs are genuine threats to global peace — will be difficult, but it is the key to achieving the other three proposed modifications to the MTCR. Changing the mindset of MTCR members regarding cruise missiles will require delicate diplomatic maneuvering before any of the suggested changes to the regime can be proposed. There will almost certainly be opposition from France, considering the revenues its

298. *Id.* at 76.

299. See Gormley, *Neglected Dimension*, *supra* note 3, at 27-28.

300. Gormley, *New Developments*, *supra* note 54, at 427.

301. Gormley, *Neglected Dimension*, *supra* note 3, at 27-28.

302. GORMLEY, *DEALING WITH THE THREAT*, *supra* note 1, at 86.

303. *Id.*

304. *Id.*

305. *Id.*

armaments industry may be obliged to forego, as well as its distaste for the United States in the wake of the U.S. decision to invade Iraq in 2003. Yet the MTCR remains the best available option for the United States to slow the proliferation of cruise missiles and develop an accurate LACM threat assessment. A revitalized MTCR with heightened restrictions on the export of cruise missiles and related technologies will push states to take a much longer path to develop a LACM capability, and an inferior one at that. These changes will make defending against the cruise missile threat a simpler task.

B. Other Cruise Missile Nonproliferation Efforts

Although the MTCR is the most important tool for containing the proliferation of LACMs, the United States cannot ignore the importance of nonproliferation efforts outside of the regime, particularly engaging states that are not party to it. The MTCR is not a panacea for cruise missile proliferation, and the United States must act accordingly. Ideally, the United States should seek to deal with the proliferation of LACMs within the context of the MTCR, but in some cases such an approach may not be feasible. If the United States cannot work within the MTCR suppliers' group framework, it should pursue a multilateral approach to stemming cruise missile proliferation. As discussed above, the United States has already gone outside the MTCR with the proposed International Code of Conduct Against Ballistic Missile Proliferation.³⁰⁶ It could do so again with regard to cruise missiles. Only as a last resort should the United States negotiate bilaterally on cruise missile proliferation with potentially threatening states. While the United States has negotiated bilaterally on proliferation issues with Third World countries in the past, the negotiations usually result in blackmail, with the United States making key concessions in return for dubious pledges. The U.S.-North Korea nuclear negotiations resulting in the 1994 Agreed Framework and the concessions granted after North Korea launched a medium-range ballistic missile in 1998³⁰⁷ are illustrative as to why the United States should not deal bilaterally with potential proliferators.

If the United States is unable to achieve its goals on limiting cruise missile proliferation through the MTCR, it can pursue a broader, multilateral approach to slowing proliferation. Having

306. See Draft Text, *supra* note 205.

307. See BENJAMIN FREEDMAN, CENTER FOR DEFENSE INFORMATION, FACT SHEET: NORTH KOREA'S NUCLEAR WEAPONS PROGRAM (Jan. 23, 2003), available at <http://www.cdi.org> (last visited July 5, 2004).

more countries involved in a different forum may give the United States a greater chance at building consensus. The most probable form of such an approach would be a code of conduct along similar lines to the proposed International Code of Conduct Against Ballistic Missile Proliferation.³⁰⁸ The major provisions of such a document cannot be predicted, but would likely employ language similar to that of the proposed ballistic missile code of conduct including discussions of cruise missile programs and civilian aviation, transparency measures, and notification requirements.³⁰⁹ Alternately, as the ballistic missile code of conduct is still in its formative stages and the language has not been finalized, the United States could push for the addition of provisions that cover both cruise missiles and ballistic missiles.

China is the most important potential proliferator of cruise missiles that the United States should actively engage outside of the MTCR, as it will have the capability to export significant numbers of LACMs in the next decade.³¹⁰ Although China has agreed to adhere to certain parts of the MTCR, it is unclear whether China would ever become a member of the regime.³¹¹ Despite previous U.S. diplomatic efforts to encourage China to join the MTCR, Beijing refused to join the regime as a matter of principle because the MTCR was originally negotiated by the G-7 countries, without Chinese participation.³¹² The United States could show considerable foresight by negotiating limits on Chinese cruise missile proliferation before China has the capability to export such missiles. China's current pledge not to export certain key technologies or equipment is a step in the right direction, but there are significant differences between the MTCR Annex and the list of equipment and technologies that China has pledged not to export.³¹³ The United States should attempt to engage China in a multilateral framework that deals specifically with cruise missiles. If such a multilateral framework or code of conduct on cruise missiles is to be negotiated, China will have to be given a major role in its formation. But, if the Chinese have a major voice in the formation of such a multilateral agreement, it will be diplomatically constrained to

308. See *supra* note 205 and accompanying text.

309. See Draft Text, *supra* note 205.

310. See Lum, *supra* note 117, at 70-72.

311. See Scoblic, *supra* note 113.

312. Pande, *supra* note 57; Scoblic, *supra* note 113.

313. Saunders, *supra* note 115, at 1-2; see also Gormley, *New Developments*, *supra* note 54, at 429 (discussing how China's export control list essentially conflated the MTCR's Categories I and II into one category, subjecting such technologies and systems to Category II equivalent case-by-case reviews before export, rather than the "strong presumption to deny" of Category I).

abide by the agreement's terms or else risk serious political and diplomatic embarrassment. Only as a last resort should the United States resort to bilateral negotiations with China regarding its export of cruise missiles.

There have been various other permutations on limiting missile proliferation through legally binding treaties that would ban certain categories of missiles.³¹⁴ However, most of them have been aborted before getting off the ground due to difficulties in enforcement or serious loopholes that would negate the value of any such treaty.³¹⁵ Most significant is the proposal to transform the U.S.-Soviet Intermediate-range Nuclear Forces (INF) Treaty into a global missile control treaty *à la* the Chemical Weapons Convention (CWC) or Biological Weapons Convention (BWC).³¹⁶ Although various academics have urged that negotiations be initiated, little has been done.³¹⁷ Considering the weaknesses of the CWC and BWC, and LACMs' inherent characteristics, such a treaty would likely be no better (and probably worse) than the MTCR at controlling cruise missile proliferation.

One immediate step that the United States can take to limit cruise missile proliferation is to tighten its own domestic export control policies to ensure that cruise missile-related technologies are not transferred to other countries. The United States needs to ensure that it regularly updates its lists of controlled technology. The current U.S. export control regime is disorganized.³¹⁸ Because the State and Commerce Departments have joint responsibility for enforcing items controlled under the United States' commitments to the MTCR, there have been protracted bureaucratic turf wars and internal bickering that have eroded the effectiveness of such export controls.³¹⁹ The United States needs to make sure that its lists of controlled technologies are continually updated to keep abreast of recent technological developments. According to a General Accounting Office report, as of November 2001, the State Department had not updated its list of technology controlled under the MTCR in "several years."³²⁰ Although the State Department has

314. GORMLEY, DEALING WITH THE THREAT, *supra* note 1, at 90.

315. *See id.* at 90-91.

316. *See id.* at 90.

317. *See id.* at 90-91; Greene, *supra* note 48, at 74.

318. *See* Boese, *supra* note 140.

319. *See id.* The Department of Commerce controls the licensing for dual-use technologies, while the State Department controls the licensing for everything else. Keith Stein, *Exports and Nuclear Proliferation Control Need Improvements*, SPACE & MISSILE, Nov. 22, 2001 (n.p.). However, of the 196 items controlled under the MTCR, 47 appear on both departments' lists, even though each one has different standards for ascertaining whether an export license should be granted. *Id.*

320. *Id.*

pledged to update the list, such a lag time between updates is unacceptable if the United States intends to keep its MTCR commitments and prevent the dissemination of key technologies useful for constructing cruise missiles.³²¹

VI. CONCLUSION

The proliferation of cruise missiles has become a genuine threat to international security, as the feasibility of indigenous production increases and opportunities for acquiring complete missile systems emerge. The MTCR has, thus far, been ineffective at preventing the spread of LACMs. But all is not lost. The cruise missile threat has not completely matured, giving the United States and the rest of the world time to head off or constrain the threat. After a period of ignoring the threat, it finally appears that the United States has realized the magnitude of the cruise missile threat and its impact on the ability of the U.S. military to project power around the world. The vulnerability of U.S. foreign policy interests to the mere threat of a cruise missile attack is reason enough for the United States to raise awareness of the threat and lead an effort to reinvigorate the MTCR to deal with cruise missile proliferation. The MTCR remains the United States' best hope to contain and manage the cruise missile threat.

321. *Id.*

**THE TIES THAT BIND: U.S. FOREIGN POLICY
COMMITMENTS AND THE CONSTITUTIONALITY
OF ENTRENCHING EXECUTIVE AGREEMENTS**

JUSTIN C. DANILEWITZ*

Table of Contents

I.	INTRODUCTION	88
II.	ENTRENCHMENT	90
III.	A CASE STUDY: BUSH, SHARON, AND ISRAELI “UNILATERAL DISENGAGEMENT”	93
IV.	THE CONSTITUTIONALITY OF ENTRENCHING EXECUTIVE AGREEMENTS	98
	<i>A. Constitutional Text</i>	98
	<i>B. Custom</i>	99
	<i>C. Case Law</i>	104
	<i>D. Framers’ Intent</i>	107
	<i>E. Establishing Constitutional Criteria for Executive Agreements</i>	115
V.	CONCLUSION	116
VI.	APPENDICES	
	<i>A. Letter from U.S. President George W. Bush to Prime Minister Ariel Sharon</i>	120
	<i>B. Letter from Prime Minister Ariel Sharon to U.S. President George Bush</i>	123
	<i>C. Letter from Dov Weissglas, Chief of Israeli Prime Minister’s Bureau to Dr. Condoleezza Rice, U.S. National Security Adviser</i>	126
	<i>D. Israeli Unilateral Disengagement Plan</i>	129

* David L. Boren Fellow and J.D.-M.A.L.D candidate, University of Pennsylvania Law School and the Fletcher School of Law and Diplomacy; A.B., Harvard (*magna cum laude*). This article is a revised version of a paper written for Professor Michael J. Glennon’s seminar on Foreign Relations and National Security Law at the Fletcher School of Law and Diplomacy. I wish to thank Professor Michael J. Glennon for an inspiring introduction to international law, for his mentorship, and for helping me to arrive at this topic, as well as the participants of his seminar for stimulating discussion. Thanks go as well to Rabbi Tzvi and Rebbetzin Chanie Backman for spiritual nourishment and for locating a Biblical source (in more than one sense), to Stephan Sonnenberg for allowing me to borrow a reference, to Eric Nelson for referring me to the Dulles-Eban letter, to Avi Davis for sharing thoughts on Israeli Prime Minister Ariel Sharon’s disengagement plan, and to Professor Pnina Lahav, Avi Bell, and Dan Markel for consistent friendship and mentorship. This paper is dedicated with much love to my parents, Ingrid and Mervyn, my grandparents, Sybil Danilewitz and Naomi and Jack Sussman, and my sisters Amy and Romy-Jo.

I. INTRODUCTION

Of late, Professors Eric Posner and Adrian Vermeule have made a controversial argument in support of the constitutionality of legislative entrenchment¹ — the ability of legislatures to bind their successors in ways that make entrenched legislation unusually difficult or impossible to repeal.² This iconoclastic view³ has, in turn, generated a spirited response on the part of Posner and Vermeule's opponents.⁴ With few exceptions, however, the

1. Statutory entrenchment is, of course, different from constitutional entrenchment. The latter is discussed with respect to constitutional amendments in 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 1-2 (3d ed. 2000). See also John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385, 389-90 (2003) (contending "that the Constitution prohibits legislative entrenchment but does allow constitutional entrenchment"). Perhaps one of the oldest forms of constitutional entrenchment is contained in the Biblical command to neither add to, nor subtract from, the written law, which has defined the permissible limits of interpretation for future generations of the Jewish people for thousands of years:

לא תספו על הדבר אשר אנכי מצוה אתכם ולא תגרעו ממנו
לשמור את מצותה: אלקיכם אשר אנכי מצוה אתכם. (דב' דברים)

("Ye shall not add unto the word which I command you, neither shall ye diminish from it, that ye may keep the commandments of the Lord your G[-]d which I command you.")

Deuteronomy 4:2., available at <http://www.mechon-mamre.org/p/pt/pt0504.htm> (last visited Oct. 15, 2004). Alterations to the original Hebrew text made in keeping with traditional respect for the holiness of the text and G-d's name.

2. In a nutshell, their argument is that the rule barring legislative entrenchment should be discarded; legislatures should be allowed to bind their successors, subject to any independent constitutional limits in force. The rule has no deep justification in constitutional text and structure, political norms of representation and deliberation, efficiency, or any other source. There just is no rationale to be found Entrenchment is no more objectionable in terms of constitutional, political, or economic theory than are sunset clauses, conditional legislation and delegation, the creation, modification, and abolition of administrative agencies, or any of the myriad of other policy instruments that legislatures use to shape the legal and institutional environment of future legislation.

Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1666 (2002).

3. As Posner and Vermeule's critics hasten to illustrate (and as Posner and Vermeule themselves concede), the mainstream consensus has long been that entrenchment is unconstitutional. *Id.* at 1665 ("the academic literature takes the rule as given").

4. See, e.g., McGinnis & Rappaport, *supra* note 1 (adopting an intermediate position excluding some entrenchments but permitting others when the same super-majority required for repeal is also required for entrenchment, making the process "symmetric"); John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773, 1777 (2003) (critiquing the position of Posner and Vermeule "both as a matter of constitutional law and as a matter of desirable policy" and defending the traditional anti-entrenchment position); Stewart E. Sterk, *Retrenchment on Entrenchment*, 71 GEO. WASH. L. REV. 231, 232 (2003) (faulting Posner and Vermeule for

discussion has focused largely upon legislative entrenchment.⁵ The purpose of this paper is, therefore, to both broaden and narrow the scope of the debate: in the first instance, to expand upon the hitherto limited focus of discourse by examining potential claims of a right of “executive entrenchment”; in the second, to focus upon executive entrenchment in the specific realm of foreign relations law.

The subject of executive entrenchment in foreign relations arises in the context of executive agreements — presidential foreign policy commitments⁶ that, while sometimes less formal than treaties, create legally binding international obligations upon the U.S. government.⁷ The relevant legal question is whether such agreements may be used by presidents to “entrench” certain foreign policy commitments in ways that bind future policy-makers — either members of Congress or the executive.

Entrenchment by executive agreement poses sharp dilemmas of both policy and law. On the one hand, these agreements serve the negotiating strategy of a particular administration, saving the time and unwanted publicity of more formal treaty ratification.⁸ The agreements may also convince friends and foes of the seriousness and durability of American commitments.⁹ On the other hand, executive agreements may be unaccommodating of “changed circumstances” in international relations and domestic policy,

“refusing to take a position on judicial enforcement of entrenched statutes”; incorrectly “claim[ing] that entrenchment is not materially different from other legislative actions that affect the future”; and “ignor[ing] the impact . . . entrenchment . . . would have on other forms of commitment currently available to legislatures”).

5. When executive entrenchment is mentioned at all in the debate, it is often in passing. Cf. Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557 (2003) (discussing entrenchment by executive agencies).

6. These come in two forms: “sole” executive agreements reached without congressional authorization and legislative-executive agreements (what Professor Louis Henkin calls “congressional-executive agreements”) that do entail congressional authorization. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 215-24 (2d ed. 1996).

7. Although the source of domestic constitutionality may be in question, the international legal obligation is assuredly not. Compare HENKIN, *supra* note 6, at 215 (observing that “[t]he authority to make such agreements and their permissible scope, and their status as law, continue to be debated”) with Vienna Convention on the Law of Treaties, May 23, 1969, art. 2, 8 U.N.T.S. 332, 333 (including within the scope of the treaty “an international agreement concluded between States in written form and governed by international law”).

8. “Entrenchment enables a government to make a credible commitment that it will not hold up a person (or firm or institution or country) from whom it seeks certain actions, and thus entrenchment makes it easier and cheaper for the government to control its relations with other entities.” Posner & Vermeule, *supra* note 2, at 1671.

9. See Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 390-91 (1987) (citing, among the benefits of entrenched provisions, that “[t]hey instill the confidence of other nations seeking to enter into long-term international agreements”).

unduly hampering the flexibility of an administration that neither sought nor signed the agreement in question. More to the point, executive agreements pose a danger of subverting the normal constitutional processes required for treaty ratification.¹⁰

How can we know whether a president's effort at entrenchment by executive agreement oversteps the latitude customarily afforded such agreements? Intuitively, entrenchment would likely be unconstitutional when it seeks to arrogate to the executive powers held concurrently by Congress. But such "inter-branch" entrenchment is distinguishable from the more challenging case of what I call "intra-branch" entrenchment, where the executive attempts to bind future administrations within the same branch of government. For reasons both practical and legal, I argue, intra-branch entrenchment will (and should) rarely prevent the revision or repeal of a foreign commitment in need of amendment.

This argument is developed in three parts. Part II places entrenchment of executive agreements within the context of the contemporary entrenchment debate. Part III presents a timely case study, the recent exchange of letters between Israeli Prime Minister Ariel Sharon and U.S. President George W. Bush pursuant to the Israeli plan for "unilateral disengagement" from Judea, Samaria, and the Gaza Strip. Part IV considers the constitutionality of entrenchment by executive agreement through analysis of the text of the Constitution itself. Secondary sources such as custom, case law, and Framers' intent, are used in order to more clearly define the constitutional limits of executive agreements.

II. ENTRENCHMENT

As applied to legislatures, entrenchment poses what Posner and Vermeule call "an intertemporal choice-of-law problem."¹¹ To paraphrase, the problem occurs when a legislature seeks to reverse a binding law adopted by its predecessors, forcing the courts to choose between the earlier entrenched provision and the later contradictory one.¹² In the first instance, the courts choose neither. This is because, as Posner and Vermeule correctly note, the

10. The preceding issues conflate legal and so-called "functional" elements that are in fact distinct. As will become clear, however, the legal and functional aspects of executive agreements are closely connected, if not inseparable.

11. Posner & Vermeule, *supra* note 2, at 1668.

12. See Eule, *supra* note 9, at 397 (posing the question "should a court recognize the validity of the earlier or the later statute?" and discussing the Roman law principle of *lex posterior derogat legi priori*).

intertemporal choice is only squarely posed once a “reconciliation” of the seemingly contradictory statutes proves impossible.¹³

But what if reconciliation *is* impossible? In that case, and assuming the earlier legislature’s intention to entrench is unclear, Posner and Vermeule are willing to apply the “last-in-time” rule. Professor Michael Glennon concurs: “The courts simply assume, quite reasonably, that Congress probably intended the latter.”¹⁴ But in the instance of a prior legislature’s explicit intent to supercede a later contradictory statute, Posner, Vermeule, and Glennon see no wrong in the first legislature making their intertemporal choice controlling. After all, the presumption that the legislature intended the later provision to prevail “is always rebuttable. If the evidence is clear that Congress intended the former, the first in time will prevail, the object being, again, simply to give effect to the will of Congress.”¹⁵

One notable example of Congress influencing later legislation through the passage of an earlier statute can be found in the War Powers Resolution.¹⁶ In section 1547 of that resolution, Congress constrained its successors by stating that authorization by the introduction of armed forces into hostilities could not be inferred from any *past or future* law, as long as that law is not “intended to constitute specific statutory authorization.”¹⁷ Of course, as Glennon

13. Posner & Vermeule, *supra* note 2, at 1668. The same rule has been applied to instances of seemingly conflicting domestic statutory and international legal obligations. *See, e.g., Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (supporting the view “that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”).

14. *Applying the War Powers Resolution to the War on Terrorism: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the Senate Comm. on the Judiciary*, 107th Cong. 54-68 (2002) [hereinafter *War Powers Hearing*] (testimony of Professor Michael J. Glennon), available at <http://judiciary.senate.gov> (last visited Apr. 25, 2004); *see also infra* Appendix A.; War Powers Resolution, 50 U.S.C. §§1541-1548 (1973).

15. *Id.* Curiously, Posner, Vermeule, and Glennon reach the same conclusion from different starting points. For Glennon, the earlier-in-time statute can prevail because “the so-called ‘last-in-time doctrine’ is not mandated or created by the Constitution. The doctrine is simply a canon of construction.” *Id.* For Posner and Vermeule, in contrast, “the last-in-time rule . . . is a rule of constitutional law rather than an interpretive canon.” Posner & Vermeule, *supra* note 2, at 1668.

16. War Powers Resolution, 50 U.S.C. §1547 (1973). This section is referred to as section 8 within the field due to its designation in the public laws.

Authority to introduce United States Armed Forces into hostilities or into situations where involvement in hostilities is clearly indicated by the circumstances shall not be inferred — (1) from any provision of law (whether or not in effect before November 7, 1973), . . . unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization. . . .

Id. §1547(a).

17. *Id.*

has noted, repeal of this section of the War Powers Resolution is still possible.¹⁸ For this reason, section 1547 is typical of what I call “weak” entrenchment as opposed to “strong” entrenchment.¹⁹ While weak entrenchment unquestionably constrains the freedom of successor bodies, unlike strong entrenchment, it does not irrevocably bind them.²⁰

In its power to influence the options of its successors, the legislature is not alone. *Stare decisis*, it will be recalled, is in some sense the judiciary’s mechanism for answering its own “intertemporal choice of law problem.”²¹ Like section 1547 of the War Powers Resolution, the doctrine of *stare decisis* constrains judicial discretion, contributing an element of stability to the system.²² Similarly, the executive is capable of entrenchment of its own. In the waning days of an administration the issuance of pardons, dedication of national lands and monuments, and even the choice of number plates for the presidential limousine, carry diverse implications felt long after a president has vacated the Oval Office.²³ Thus, despite what some view as a general prohibition on entrenchment at all levels of government,²⁴ it is clear that all three

18. “Any time Congress wishes to repeal section 8(a)(1) it can do so . . . using precisely the same procedure applicable to the repeal of any other statute. The Congress that enacted section 8(a)(1) thus did not in this sense ‘bind’ later Congresses . . .” *War Powers Hearing*, *supra* note 14. (50 U.S.C. §1547 is sometimes referred to as “section 8,” as it was designated in the public laws. *See, e.g.*, War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973).) For a contrasting view presumably questioning the ability of Congress to constrain the action of future legislatures even in this “weak” manner see PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: UNITED STATES FOREIGN RELATIONS LAW* 241 (2002), arguing that “[o]ne Congress of course cannot bind a subsequent Congress — statutes later in time always trump earlier inconsistent acts. Accordingly it seems doubtful that the 1974 Congress can limit the ability of subsequent Congresses to authorize military force in whatever ways they may then see fit to chose [sic].”

19. Note that my distinction bears some resemblance to that which Roberts and Chemerinsky attribute to Professor Julian N. Eule. *See* Roberts & Chemerinsky, *supra* note 4, at 1778 (citing Eule’s categories of “absolute,” “transitory,” “conditional,” and “procedural” entrenchment); Eule, *supra* note 9, at 384-85.

20. The “strength” of entrenchment might also be reflected in the political context of its adoption. Thus, weak entrenchment might also refer to entrenchment in the face of uncertain future policy preferences, whereas its stronger incarnation might stem from a deliberate effort to enshrine policy that would likely be met with future opposition. This possibility is raised by Mendelson, *supra* note 5, at 564.

21. Posner and Vermeule note that “[m]any political institutions are celebrated for their effect on the stability of government: Constitutionalism, *stare decisis*, representative government, and so forth are said to make government more predictable, and this makes it easier for individuals to arrange their affairs.” Posner & Vermeule, *supra* note 2, at 1672.

22. For multiple benefits of entrenchment see Posner & Vermeule, *supra* note 2, at 1670-72, for a listing of, *inter alia*, government commitment, agenda control, and predictability.

23. Mendelson, *supra* note 5, at 559-61.

24. “[T]he principle that one legislative body may not bind its successors is common to all levels of our government and applies to any democratically elected law-making body.” Roberts & Chemerinsky, *supra* note 4, at 1779.

branches engage in actions — whether intermittently or as a common practice — that affect their successors on a spectrum of influence ranging from “weak” to “strong.”

The preceding examples are primarily of a domestic focus, but the executive may theoretically also entrench his administration’s foreign policy commitments by embedding them in an executive agreement concluded with a foreign government. A recent example of such an exchange (although not, I argue, one of entrenchment) is presented in the next section.

III. A CASE STUDY: BUSH, SHARON, AND ISRAELI “UNILATERAL DISENGAGEMENT”

On December 18, 2003, Israeli Prime Minister Ariel Sharon announced plans for Israel’s unilateral “disengagement” from the Palestinians.²⁵ This step would be taken, as the disengagement plan later stated, because “Israel has come to the conclusion that there is currently no reliable Palestinian partner with which it can make progress in a bilateral peace process.”²⁶ As a corollary to the plan, Sharon sought certain diplomatic and security guarantees from President Bush.²⁷

The form the American commitments would take was, not surprisingly, the source of some speculation in the Israeli press. One editorialist wrote that “Bush is supposedly going to promise the borders and identity of the Jewish state to include the large settlement blocs in the West Bank and keep the Palestinian refugees away from the gates of Israel.”²⁸ The writer noted that “[n]ot since the Balfour Declaration has there been a document that has raised so many expectations as the one President George Bush is supposed to give Prime Minister Ariel Sharon.”²⁹ In his desire for

25. Sharon stated that “if in a few months the Palestinians still continue to disregard their part in implementing the Roadmap then Israel will initiate the unilateral security step of disengagement from the Palestinians.” Israeli Prime Minister Ariel Sharon, Address at the Fourth Herzliya Conference (Dec. 18, 2003), *available at* <http://www.mfa.gov.il> (last visited Oct. 13, 2004).

26. Press Release, Prime Minister’s Office, State of Israel, The Disengagement Plan — General Outline, section 1 (Apr. 18, 2004) [hereinafter Disengagement Plan] (attached as Appendix D.), *available at* <http://www.mfa.gov.il> (last visited Oct. 13, 2004).

27. *Id.*

28. Aluf Benn, *Balfour to Bush, Vietnam to Israel*, HA’ARETZ, Apr. 8, 2004, *available at* <http://www.haaretzdaily.com> (last visited Oct. 13, 2004).

29. *Id.* The Balfour Declaration, articulated in a letter from Foreign Secretary Arthur James Balfour to the Jewish leader Lord Rothschild, conveyed the position of the British Government that it

view[ed] with favour the establishment in Palestine of a national home for the Jewish people, and will use their best endeavours to facilitate the achievement of this object, it being clearly understood that nothing shall be done which may prejudice the civil and religious rights of existing non-

an American legal commitment Sharon was not alone, said the writer, but merely continuing “a tradition of many years — the desire for some kind of international ‘charter’ for Jewish settlement in the country has been embedded in Zionism since the days of Herzl.”³⁰ Given this historical desire for international legitimacy, coupled with the gravity of the topic of territorial concessions for Israelis, a presidential seal of approval for his plan was viewed by Sharon with great importance.³¹

Of course, the significance of the supposed American commitment from the Israeli perspective begged the question of its enforceability or legal “bindingness.” But on this essential issue the Israeli editorialist adopted a skeptical tone, recalling an earlier seeming commitment by a U.S. administration to a foreign government that subsequently “evaporated” when judged to be no longer in the American interest.³² Could Bush’s commitment to Sharon be merely a repeat of former President Richard Nixon’s guarantees to South Vietnamese President Nguyen Van Thieu?³³

Jewish communities in Palestine, or the rights and political status enjoyed by Jews in any other country.

Letter from Arthur James Balfour, British Foreign Secretary, to Lord Rothschild, Leader of British Jewish Community (Nov. 2, 1917), *available at* <http://www.yale.edu/lawweb/avalon/mideast/balfour.htm> (last visited Oct. 13, 2004). The significance of the pronouncement is discussed in ALAN DERSHOWITZ, *THE CASE FOR ISRAEL* 32-38 (2003).

30. Benn, *supra* note 28.

31. This is also the sense one gains from the disengagement agreement itself, which devotes a section to “U.S. obligations as part of the disengagement plan” and notes that “[t]he exchange of letters between President Bush and the Prime Minister, as well as the letter by the Chief of the Prime Minister’s Bureau to the U.S. National Security Adviser, are . . . an integral part of it.” Disengagement Plan, *supra* note 26.

32. Benn, *supra* note 28.

33. The author wrote:

[T]he U.S. abandoned its closest ally in Asia, South Vietnam, where so many tens of thousands of American Servicemen died fighting for its independence.

Presidents Nixon and Ford backed up the abandonment in a series of secret messages to the [P]resident of South Vietnam Nguyen Van Thieu, in which they reiterated over and over economic and military aid and assistance “to achieve our common goals” and spoke of vehement responses to violations of the peace agreement by the Communists of North Vietnam.

Thieu kept the 31 presidential documents in a secret case in his presidential palace in Saigon and regarded them as guaranteeing the survival of his country and his continued rule over it. He showed some of the letters to his subordinates, as an expression of the American empire’s support and the graciousness of its leaders.

But at the moment of truth, when the North embarked on its final campaign to take over the South, all the promises evaporated. America was fed up with Vietnam, and did not want to risk its prestige any longer in the Asian jungles.

Id.

Despite the obvious dissimilarities in the analogy,³⁴ the writer could not “ignore the historical lesson: political promises are meant to solve urgent political problems and are . . . only good for the moment they are made. Don’t regard them as a ‘political insurance policy’ as Dov Weisglass [sic], the [P]rime [M]inister’s lawyer and [B]ureau [C]hief has referred to the anticipated Bush letter.”³⁵ Moreover, with an American presidential election only months away, the writer noted, future administrations might not feel bound by Bush’s commitments.³⁶

Who is to be believed? Should Israelis follow the cautious realism of the editorialist, or the assurances of the Prime Minister’s lawyer, Mr. Weissglas? As a matter of American constitutional law, would the Bush letter indeed constitute a reliable “insurance policy” for the State of Israel, or would it be subject to unilateral revision or disposal at the whim of succeeding U.S. administrations (or even the Bush Administration itself) at a later date? Finally, is there some way for the Bush Administration to allay Israeli concerns of a repetition of the broken “promise” to South Vietnamese President Thieu by “entrenching” its commitment in a way that prevents easy repeal?

Before taking up these issues, it is worth considering more closely the nature of the alleged American commitment to Israel in light of the language of the actual letters that were eventually exchanged between Bush and Sharon on April 14, 2004.³⁷ What one finds from this examination, is that the talk about American commitments prior to the letter exchange now seems almost anticlimactic in retrospect. Indeed, the much anticipated Bush “commitments” are hard to discern from the American letter at all.³⁸ While Bush’s letter seeks to “reassure” Sharon of “several points” — language that seems to fall short of a binding legal commitment — the elements of reassurance are all stated in notably hortatory and aspirational terms.³⁹ The closest the U.S. comes to making a full-

34. The writer noted, *inter alia*, that “Israel has never asked America to fight for it and die for it.” *Id.*

35. *Id.*

36. “It is doubtful that a Democratic administration would honor the Bush letter.” *Id.*

37. Press Release, Prime Minister’s Office, State of Israel, Exchange of Letters Between Prime Minister Sharon and President Bush (Apr. 14, 2004), *available at* <http://www.mfa.gov.il> (last visited Oct. 15, 2004).

38. Letter from George W. Bush, President of the United States of America, to Ariel Sharon, Prime Minister of the State of Israel (Apr. 14, 2004) [hereinafter Bush Letter]; Letter from Ariel Sharon, Prime Minister of the State of Israel, to George W. Bush, President of the United States of America (Apr. 14, 2004) [hereinafter Sharon Letter]. The full texts of the letters are attached to this article as Appendix A and Appendix B, respectively, and are also on file at the website of the Israeli Ministry of Foreign Affairs, *at* <http://www.mfa.gov.il>.

39. For instance, referring to the so-called “Road map” plan, Bush’s letter states that “[t]he

fledged commitment of any sort is in the Bush letter's comment that "[t]he United States reiterates its steadfast commitment to Israel's security, including secure, defensible borders, and to preserve and strengthen Israel's capability to deter and defend itself, by itself, against any threat or possible combination of threats."⁴⁰ However, no actionable policy is attached to this reiterated commitment.⁴¹ Similarly, the comment that "Israel will retain its right to defend itself against terrorism"⁴² does not amount to an American commitment to come to Israel's defense but is, rather, merely an acknowledgement of a right that Israel enjoys antecedently to its relationship with the U.S.⁴³ Finally, even the two most eagerly anticipated aspects of the Bush letter noted by the Israeli editorialist — settlement of Palestinian refugees in a future Palestinian state rather than in Israel; another regarding the recognition of Israeli communities in the areas of Judea and Samaria — seem to state no more than an American perspective on the issue that might well be subject to future modification and that requires no policy action on the part of the United States.⁴⁴

In contrast to the formless and noncommittal language of the Bush letter, the weightier responsibilities, ironically, seem to have

United States will do its utmost to prevent any attempt by anyone to impose any other plan." Bush Letter, *supra* note 38.

40. *Id.*

41. I am reminded of a comment in a State Department airgram dispatched to American diplomatic outposts following the passage of the Case Act (discussed *infra* Part IV.E). The airgram proposed five separate criteria for defining an international agreement. In its discussion of "specificity," the airgram noted that "[i]nternational agreements require a certain precision and specificity setting forth the legally binding undertakings of the parties. Many international diplomatic undertakings are couched in legal terms, but are unenforceable promises because there are no objective criteria for determining enforceability of such undertakings." State Department Airgram to all Diplomatic Posts Concerning Criteria for Deciding What Constitutes an International Agreement, Dept. of State (Mar. 9, 1976) [hereinafter State Department Airgram], *reprinted in* THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS 462 (2d ed. 1993) [hereinafter FRANCK & GLENNON]. Although written nearly two decades prior to the Bush-Sharon exchange, I can hardly think of a more timely insight than the caution to judge alleged commitments on their enforceability and not on legalese.

42. Bush Letter, *supra* note 38.

43. See U.N. CHARTER art. 51 (affirming the "inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations"), *available at* <http://www.un.org/aboutun/charter> (last visited Oct. 15, 2004).

44. That said, as Avi Davis has pointed out to me, Bush's recognition of Israeli towns and villages ("settlements") in the areas of Judea and Samaria (the "West Bank") is certainly a departure from the policy of previous American administrations. My point, however, is that such policy commitments are not necessarily of legal significance. See Bush Letter, *supra* note 38 ("In light of new realities on the ground, including already existing major Israeli population[] centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949. . . ."). See my discussion, *infra* Part IV.B.4, regarding political versus legal considerations of executive agreements.

been undertaken by Sharon. Thus, for example, Sharon's letter states:

[W]e are fully aware of the responsibilities facing the State of Israel. These include limitations on the growth of settlements; removal of unauthorized outposts; and steps to increase, to the extent permitted by security needs, freedom of movement for Palestinians not engaged in terrorism. Under separate cover we are sending to you a full description of the steps the State of Israel is taking to meet all its responsibilities.⁴⁵

The importance of Sharon's acceptance of such responsibilities is suggested by the Bush letter's pointed reference to them.⁴⁶ Meanwhile, other references to responsibilities in the Bush letter refer to those of the "parties" to the conflict, and never to the responsibilities of the United States itself.⁴⁷

In short, the speculation surrounding the Bush-Sharon letters raised more interesting hypothetical questions concerning executive agreement commitments than has been borne out by the actual exchange. And while the Bush commitments may well be of great political significance, this is a separate issue from their legal significance.⁴⁸ On that score, my own reading suggests that the American letter fails to create legally binding American commitments to Israel, despite the representations of the Sharon government.⁴⁹ Nevertheless, the task of answering the original

45. Sharon Letter, *supra* note 38. The "separate cover" presumably refers to the letter from Dov Weissglas to Dr. Condoleeza Rice of April 18, 2004. See Letter from Dov Weissglas, Chief of the Prime Minister's Bureau, State of Israel, to Dr. Condoleeza Rice, National Security Advisor, United States of America (Apr. 18, 2004). The full text of the letter is attached to this article as Appendix C and is also on file at the website of the Israel Ministry of Foreign Affairs, at <http://www.mfa.gov.il>.

46. Bush's letter to Sharon states: "I know that, as you state in your letter, you are aware that certain responsibilities face the State of Israel." Bush Letter, *supra* note 38.

47. For instance: "[T]he United States believes that all states in the region have special responsibilities." *Id.*

48. This is suggested to me, in part, by Avi Davis' insight. See *supra* note 44.

49. Disengagement Plan, *supra* note 26 (listing "U.S. obligations as part of the disengagement plan"). Even assuming there is some American commitment arising from the Bush letter, this commitment will disappear if the Israeli government does not adopt Sharon's disengagement plan, upon which the supposed commitments are conditioned. See *id.* ("[T]hese understandings with the United States will only be valid if the disengagement plan is approved by Israel."); see also Mazal Mualem et al., *Olmert Slams Likud Ministers Who Pay Lip Service to Pullout*, HA'ARETZ, Apr. 22, 2004, available at <http://www.haaretzdaily.com> (last visited Oct. 15, 2004) (quoting Sharon admonishing Knesset members that "[w]hoever is opposed to the plan gives up all these achievements we've made . . . [and] will carry the responsibility of cancelling all the U.S. commitments"). In this sense the executive agreement

hypothetical questions remains. It is to that subject that I now turn.

IV. THE CONSTITUTIONALITY OF ENTRENCHING EXECUTIVE AGREEMENTS

In determining the constitutionality of entrenching executive agreements, I have adopted the interpretive approach advanced by Professor Glennon for answering similar questions in foreign relations law.⁵⁰ That methodology begins with the text of the Constitution itself. However, in the absence of a textual provision articulating a “clear” or “plain” meaning, interpretive refuge is to be found in a series of secondary sources including custom, case law, and Framers’ intent.⁵¹ These are each examined in turn in an effort to define the constitutional limits of executive agreements in general and entrenchment of those agreements in particular.

A. *Constitutional Text*

A natural place to begin the inquiry into the constitutionality of entrenching executive agreements is with the text of the U.S. Constitution itself. Alas, nowhere in that document can any reference to executive agreements be found.⁵² There is, however, mention of other types of contracts which are referred to, variously, as “agreements” and “compacts.”⁵³ Some have inferred from the use of these different terms the Framers’ recognition that treaties were not the only type of contract available for formalizing international

amounts to something like a non-self-executing treaty. The same argument has been made regarding American executive agreements. See HENKIN, *supra* note 6, at 226 (rejecting the view that, while “[executive] agreements, like treaties, are internationally binding, unlike treaties they are never self-executing and cannot be effective as domestic law unless implemented by Congress”).

50. In seeking out a sort of “doctrine of sources” analogous to that of Article 38 of the Statute of the International Court of Justice, Glennon establishes a hierarchy of what he calls “primary,” “secondary,” and “tertiary sources” useful for determining constitutionality in separation of powers disputes. MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 52-70 (1990).

51. Needless to say, how one chooses to order these sources is, to some extent, to admit to one’s constitutional politics. In the language of the late Professor John Hart Ely, “interpretivists” are inclined to situate the Framers’ intent at a higher point along the hierarchy than do “non-interpretivists.” JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1 (1980). I have not dealt with so-called “functional considerations” separately for reasons of space constraints and because I think these issues are largely revealed through the discussion of custom, case law, and intent.

52. “The Constitution does not expressly confer authority to make international agreements other than treaties, but such agreements, varying widely in formality and in importance, have been common from our early history.” HENKIN, *supra* note 6, at 215.

53. See, e.g., U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power. . .”).

obligations.⁵⁴ The implication is that something like executive agreements must surely have been contemplated by the Framers.

Although I find this textual explanation questionable (for reasons described in detail in Part IV.D),⁵⁵ it is in some sense also irrelevant.⁵⁶ This is because the constitutionality of executive agreements, within certain constraints, is beyond doubt. This we shall shortly see from an analysis of custom, which extends to the early days of the republic and continues to this day.

B. Custom

In light of a body of what may well be “many thousands”⁵⁷ of executive agreements concluded over the course of American history, this section can, at best, highlight only a few salient aspects of the custom and its relevance for the question of entrenchment. My focus is upon three relatively recent examples of agreements that provide important lessons for determining the constitutional limits of entrenching executive agreements.

1. *The Destroyers-for-Bases Deal*

In the early years of the Second World War, the United States concluded an executive agreement with Great Britain over the provision of aged American destroyer ships in exchange for basing rights in Great Britain. In a letter to President Roosevelt, then Attorney General Robert H. Jackson argued that the choice of executive agreement over treaty stood on firm constitutional

54. See FRANCK & GLENNON, *supra* note 41, at 411-12 (citing MARJORIE M. WHITEMAN, 14 DIGEST OF INTERNATIONAL LAW 193-216 (1970) (discussing the distinction)); GLENNON, *supra* note 50, at 178 (discussing Bodenheimer’s view that the Framers’ considered treaties to have greater significance).

55. Equally plausible, in my mind, is that the use of different terminology stemmed simply from either a desire for variation or from the verbosity common in formal prose at the time of the writing of the Constitution. (This is not, of course, to suggest that the Framers’ words were not chosen carefully.) Consider, for instance, the provision limiting the right of states to impose “Imposts or Duties” on imports and exports (U.S. CONST. art. I, § 10, cl. 2) alongside the provision that “No Tax or Duty” is to be imposed on state exports (U.S. CONST. art. I, § 9, cl. 5) and the reference to “Taxes, Duties, Imposts and Excises” (U.S. CONST. art. I, § 8, cl. 1). From this are we to infer (a) that the Framers intended “taxes,” “imposts,” “duties,” and “excises” all to be distinguishable categories and (b) that such distinctions are to be given interpretive weight? A more likely explanation is that the terms were used synonymously to alter the repetitiousness of constant reference to what all understood to mean, simply, “taxes.” See also discussion *infra* Part IV.D.1.

56. In another important sense it is not. For instance, if one accepts the idea that the Framers did not view “agreements,” “compacts,” and “treaties,” as significantly different, the constitutional limits they conceived for treaties should logically apply with as much force to the other types of agreements. This argument is discussed further *infra* Part IV.D.1.

57. HENKIN, *supra* note 6, at 215 (referring to international agreements generally, other than treaties, that have been made without Senate approval).

ground.⁵⁸ Jackson highlighted, inter alia, the following arguments: (1) a formal treaty would result in delay; (2) the executive agreement would “undertake[] no defense of the possessions of any country”; and (3) the acquisitions the executive proposed to accept were “without express or implied promises on the part of the United States to be performed in the future.”⁵⁹

At the time, Professor Edwin Borchard criticized Jackson’s view on the ground that the agreement was “so portentous in its facts and implications, it may be suggested that the transaction be regularized so far as and as soon as possible by act or resolution of Congress.”⁶⁰ Borchard said that “it has been the usual practice, aside from executive agreements on minor matters or under Congressional authority, to submit important matters to Congress or the Senate for approval.”⁶¹ This was so “particularly involving the question of war and peace, [which] shall not be concluded by Executive authority alone.”⁶² The concern, said Borchard, was that “[t]he treaty-making power could easily be circumvented if it were to become customary to make important matters affecting the fate of the country the subject of executive agreements.”⁶³

2. *Suez and the Dulles-Eban Letter*⁶⁴

By the conclusion of the Suez War of 1956, Gamal Abdel Nasser had been defeated, his nationalization of the Suez Canal reversed, and the previous Egyptian lock on the Straits of Tiran opened to Israeli shipping.⁶⁵ In the aftermath, American Secretary of State John Foster Dulles delivered a memorandum to Israel’s Ambassador to the United Nations, Abba Eban, making the Israelis several guarantees. According to Eban’s recollection,⁶⁶ the Americans promised Israel that its withdrawals would be met with the support of the United States in maintaining Israel’s right of access to the Straits of Tiran and that, in the event of Egypt’s repeat

58. 39 Op. Att’y Gen. 484 (1940), reprinted in FRANCK & GLENNON, *supra* note 41, at 449. The agreements exchanged between the American and British governments are available in the supplement to volume 34 of the *American Journal of International Law*, 34 AM. J. INT’L L. 183-86 (Supp. IV 1940).

59. See FRANCK & GLENNON, *supra* note 41, at 449-51.

60. Edwin Borchard, *Editorial Comment: The Attorney General’s Opinion on the Exchange of Destroyers for Naval Bases*, 34 AM. J. INT’L L. 690, 690 (1940), reprinted in FRANCK & GLENNON, *supra* note 41, at 454-57.

61. Borchard, *supra* note 60, at 691.

62. *Id.*

63. *Id.* at 692.

64. I wish to thank Eric Nelson for drawing my attention to this case.

65. ABBA EBAN, *PERSONAL WITNESS: ISRAEL THROUGH MY EYES* 260-85, (1992).

66. *Id.* at 280.

of the earlier blockade,⁶⁷ Israel would be entitled to invoke its inherent right of self-defense in accordance with Article 51 of the United Nations Charter.⁶⁸ These commitments were subsequently affirmed in a letter from President Eisenhower to Israeli Prime Minister David Ben-Gurion. According to Eban, “Ben-Gurion attached overriding importance to the Eisenhower signature. He would not in any conditions try to reassure the Israeli public on the basis of a Dulles signature.”⁶⁹

While this letter carried obvious political value for the Ben-Gurion government both at home⁷⁰ and abroad,⁷¹ it is notable that Eban made no mention of its legal significance. Admittedly, Eban’s silence on the legal question might be due to his primary professional interest, namely, the diplomatic and political aspects of the exchange. What is fairly certain, however, is that, had legal concerns been an important part of Israeli decision making, and if they had featured prominently in his discussions with his American counterparts, the issue would surely have played a more prominent role in Eban’s retelling of the episode.⁷²

3. *The Sinai Assurances*

Following the Yom Kippur War of 1973, Israel and Egypt began negotiations that would culminate in a peace agreement by the end of the decade.⁷³ Prior to reaching the agreement, the United States made a number of security guarantees (both military and

67. The subject arose again the following decade when Egyptian President Gamal Abdel Nasser announced the closing of the Strait of Tiran to Israeli-flagged ships and the ships of other nations carrying strategic cargo to Israel. Carl F. Salans, *Gulf of Aqaba and Strait of Tiran: Troubled Waters*, in *THE ARAB-ISRAELI CONFLICT: READINGS AND DOCUMENTS* 185 (John N. Moore ed., 1977). It was partly in response to this development that Israel launched its preemptive strike against the Egyptian air force. See EBAN, *supra* note 65, at 280.

68. *Id.* Interestingly, this recognition of Israel’s right of self-defense presages the similar recognition in the recent letter of President Bush to Prime Minister Sharon in which the United States notes Israel’s inherent right to respond in self-defense against terrorist attacks. See Bush Letter, *supra* note 38. This recognition must be more political than legal, for as I have argued above, the U.S. can neither enhance nor diminish a right that is in any case inherent.

69. EBAN, *supra* note 65, at 284.

70. The letter from Eisenhower must have played some role in helping “Ben-Gurion [to] convince[] his domestic opinion that the fight had not been in vain; that concrete results had ensued from it . . .” *Id.*

71. One of the American commitments promised Eban by Dulles was that “the U.S. would mobilize all the maritime nations to follow its lead in . . . the United Nations.” *Id.* at 282.

72. For the United States, recognition of the Straits of Tiran as international waters fit into a well-established legal policy. See Salans, *supra* note 67, at 185. Whether other legal concerns were contemplated by the U.S. at the time is a question that would require further research.

73. See Camp David Accords, Sept. 17, 1978, Egypt-Isr., 17 I.L.M. 1466, available at <http://www.yale.edu/lawweb/avalon/mideast/campdav.htm> (last visited Oct. 15, 2004).

economic) that were essential to Israel and, without which, the Camp David agreement might never have been reached.⁷⁴ The U.S. assurances to Israel were detailed in a memorandum exchanged by American Secretary of State Henry Kissinger, and Israeli Deputy Prime Minister and Minister of Foreign Affairs Yigal Allon.⁷⁵

The memorandum expressed a U.S. commitment “on an on-going and long-term[] basis to Israel’s military equipment and other defense requirements, to its energy requirements, [and] to its economic needs.”⁷⁶ While this forward-looking commitment has stood the test of now more than two decades, it is questionable whether it is legally binding. For instance, the memorandum states that the United States “will make every effort to be fully responsive, within the limits of its resources and Congressional authorization and appropriation” in order to fulfill the commitment.⁷⁷ As a subsequent report of the Senate Foreign Relations Committee made clear, these and other aspects of the agreement were “written in such broad and general terms that any attempt to determine the specific nature and scope of the United States commitments under such agreement is, in most instances, totally impracticable.”⁷⁸ As a result, the committee report noted that “[b]ecause of [its] vagueness and numerous uncertainties . . . it is difficult to predict the ultimate impact of the agreement.”⁷⁹

Importantly, the memorandum noted in its final paragraph that “entry into effect [of the Egypt-Israel Agreement] shall not take place before approval by the United States Congress of the United States role in connection with the surveillance and observation functions described in the Agreement and its Annex.”⁸⁰ As the committee report implies at various points, the requirement of Congressional approval in that one instance only makes more remarkable the fact that it was not required for other aspects of the

74. *Memoranda of Agreement Between the United States and Israel (Sinai Accords): Hearings Before the Senate Foreign Relations Committee*, 94th Cong., 1st Sess. 265-69 app. (1975) [hereinafter *Sinai Memorandum*], reprinted in FRANCK & GLENNON, *supra* note 41, at 470.

75. *Id.* at 471.

76. *Id.*

77. *Id.* Contrast the questionable strength of this commitment with the U.S. guarantee that it “will promptly make oil available for purchase by Israel” if Israel is unable to do so itself. *Id.* This, again, is different from the later weaker comment that the United States “will make every effort to help Israel” to transport such oil, again, if Israel is unable to do so itself. *Id.*

78. SENATE FOREIGN RELATIONS COMMITTEE MEMORANDUM OF LAW ON CHOICE OF INSTRUMENTS FOR SINAI ACCORDS (1980), reprinted in FRANCK & GLENNON, *supra* note 41, at 475, 475-76.

79. *Id.* at 478.

80. *Sinai Memorandum*, *supra* note 74, at 473.

agreement despite their seeming importance in matters relating to the U.S. provision of defense and economic support.⁸¹

In a separate memorandum exchanged between Kissinger and Allon relating to the Geneva peace conference, the United States committed itself to no recognition of, or negotiation with, the Palestine Liberation Organization (PLO) prior to the PLO's recognition of Israel's right to exist and its acceptance of Security Council Resolutions 242 and 338.⁸² While such a commitment was likely constitutional inasmuch as it related to the executive's plenary recognition power,⁸³ it is doubtful whether this commitment on the part of the Ford Administration could have constitutionally bound future administrations.⁸⁴

4. *Some Lessons from Custom*

The preceding examples offer several important lessons. First, from the Jackson-Borchard debate it appears that the importance of the subject plays a significant role in determining the appropriate instrument for an agreement. Jackson sought to distinguish the destroyer-for-bases deal on the grounds that it would not amount to an American commitment to come to Great Britain's defense, nor involve an American commitment of any kind requiring future action. Borchard, in contrast, felt that the importance of the deal required treaty ratification.

Second, as the Dulles-Eban exchange demonstrates, political exigencies can have a powerful impact upon executive agreements. This reality carries important implications when legally binding commitments are not clearly articulated. In those instances, political considerations may eclipse legal ones, with the resulting legal ambiguity leaving uncertain the nature of U.S. commitments to its negotiating partners.

The same could be said of the Sinai assurance contained in the memorandum from Kissinger to Allon. As the Senate Foreign Relations Committee report noted, seeming commitments need to be articulated in ways that make them actionable in order for them

81. *Id.* at 471, 473.

82. Memorandum of Agreement Between the Governments of Israel and the United States: Geneva Peace Conference, October 9, 1975, 14 I.L.M. 1469, *reprinted in* FRANCK & GLENNON, *supra* note 41, at 474 [hereinafter Geneva Conference Memorandum].

83. See discussion of *United States v. Belmont*, 301 U.S. 324 (1937), *infra* Part IV.C.2.

84. Professor Glennon's view is that it could not. GLENNON, *supra* note 50, at 165. This is based on a report of the Senate Foreign Relations Committee which said that "[a] President may voluntarily commit himself not to enter into certain negotiations, but he cannot circumscribe the discretion of his successors to do so, just as they may not be limited in doing so by treaty or by law." *Id.* at 164-65 (quoting Exec. Rep. No. 95-12 at 10 (1978) (Panama Canal Treaties)).

to be legally meaningful. Indeed, as noted above in Part III, this is a critical point at issue in the recent exchange of letters between Bush and Sharon.⁸⁵

Finally, by virtue of its plenary negotiating power the Ford Administration was able to make a credible commitment to Israel of not negotiating or recognizing the PLO. It is unclear, however, that the Ford Administration's plenary power could have trumped the same power of future administrations.

C. Case Law

Case law applicable to the constitutionality of entrenchment of executive agreements can be grouped in two broad categories: (1) general cases that have established important principles of constitutional law bearing upon separation of powers disputes; and (2) specific cases relating to the narrower subset of executive entrenchment of foreign policy commitments.⁸⁶ Each of these categories of case law is discussed below.

1. General Separation of Powers — the Steel Seizure Legacy

Although my discussion of generally applicable case law is necessarily limited by constraints of space, there is little doubt as to the most important separation of powers case decided by the U.S. Supreme Court: *Youngstown Sheet & Tube Co. v. Sawyer*,⁸⁷ or the so-called "*Steel Seizure Case*." Time and again, the conceptual framework articulated in Justice Jackson's concurring opinion has been the benchmark by which the constitutionality of executive action is measured.

Jackson's "tripartite analysis" of the zones of executive power envisioned three theoretical ambits in which executive power could be exercised. In the first case, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."⁸⁸ In the second case, "in absence of either a congressional grant or denial of authority, [the President] can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."⁸⁹

85. See *supra* note 38 and accompanying text.

86. My selection of cases for review has been influenced largely by those presented in FRANCK & GLENNON, *supra* note 41, at 405-47.

87. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

88. *Id.* at 635 (Jackson, J., concurring).

89. *Id.* at 637.

Finally, in the third instance, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”⁹⁰ As some of the more specific cases will make clear, the particular “zone” in which the executive acts when concluding an executive agreement is important for determining its constitutionality.

2. *Specific Executive Agreement Cases*

Although there is, as far as I can tell, no case law directly bearing upon the issue of entrenchment of executive agreements, it is nevertheless possible to gain insight into the issue through several indirectly related cases. One group of executive agreement cases involves inter-branch conflicts between the executive and the legislature. In *Weinberger v. Rossi*,⁹¹ for example, an executive agreement with the Philippines permitted favored employment of Filipinos at American military sites in conflict with a subsequent federal anti-discrimination statute.⁹² That statute forbade discrimination in employment at military bases *except* if it was permitted by treaty.⁹³ Justice Rehnquist, writing for the majority, construed “treaty” broadly to include the executive agreement in question.⁹⁴ This construction was based on the legislative record, which, he stated, left unclear Congress’ intent to limit the treaty provision solely to traditional “Article II treaties.”⁹⁵ In the absence of a clear congressional intent to violate the executive agreement, Rehnquist found no inter-branch conflict, and upheld the agreement.⁹⁶

90. *Id.*

91. *Weinberger v. Rossi*, 456 U.S. 25 (1982).

92. *Id.* at 27. Rehnquist found support for this argument in the *Charming Betsy* rule requiring a finding of explicit congressional intent to bring the United States into conflict with an international commitment. *Id.* at 32; *see also* *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804). It makes far more sense when viewed from the perspective of Congress’ own institutional interests that that body did *not* intend the word “treaty” to include executive agreements in the statute in question. By permitting only traditional treaties to override the non-discrimination provision of the statute, Congress would have assured itself the right of rebuttal (through advice and consent) to an executive effort to violate the statute. A sole executive agreement, in contrast, would permit the executive to violate the statute’s non-discrimination provision without reference to Congress.

93. *Rossi*, 456 U.S. at 26.

94. *Id.* at 36.

95. *Id.* at 32-36.

96. *Id.* See also the later opinion of Judge Palmieri in *United States v. Palestine Liberation Org.*, 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988): “Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence.”

A similar executive-legislative conflict arose from an executive agreement in *Consumers Union, Inc. v. Kissinger*.⁹⁷ At issue was whether the executive had violated the foreign commerce clause of the Constitution (Art. 1, Sec. 8, Cl. 3) as well as the Trade Expansion Act of 1962 through his agreements with foreign steel exporters on voluntary export reductions.⁹⁸ The circuit court found no violation, basing its holding partly on its conclusion that the agreements were conceived as a short term solution to a temporary problem, did “not purport to be enforceable,” and were of an “essentially precatory nature.”⁹⁹

A second category of cases involves the settlement of claims between governments through executive agreement, occasionally resulting in a denial of the competing claims of private nationals. In *Dames & Moore v. Regan*,¹⁰⁰ for example, the Court considered whether an executive agreement reached between President Carter and the Iranian government to settle conflicting claims by arbitration could, in effect, trump a prior judgment awarded the petitioner against the government of Iran.¹⁰¹ In holding for the petitioner, Rehnquist based this finding in part on “the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.”¹⁰² Rehnquist viewed as important the fact that “Congress has not disapproved of the action taken here[.]” noting that it “ha[d] not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement.”¹⁰³ From this, Rehnquist concluded that the Court was “clearly not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority.”¹⁰⁴

Rehnquist went to pains to emphasize that his holding in *Dames & Moore* should be construed narrowly. The opinion explicitly did not aim to establish “that the President possesses plenary power to settle claims, even as against foreign governmental entities.”¹⁰⁵ What justified the decision then, wrote Rehnquist, was a finding that “the settlement of claims has been determined to be a necessary incident to the resolution of a major

97. *Consumers Union, Inc. v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974).

98. *Id.* at 138.

99. *Id.* at 143.

100. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

101. *Id.* at 660.

102. *Id.* at 680.

103. *Id.* at 687.

104. *Id.* at 688. Conspicuously, Rehnquist avoided the question of how the Court would have ruled in light of such congressional opposition. *See id.*

105. *Id.*

foreign policy dispute between our country and another” and Congress’ acquiescence in the executive agreement.¹⁰⁶

In its privileging of an executive agreement over a competing private claim, *Dames & Moore* resembles the earlier case of *United States v. Belmont*.¹⁰⁷ In *Belmont*, an executive agreement had been concluded with the Soviet Union, resulting in a transfer to the U.S. government of private assets previously seized by the Soviet government following nationalization of the assets deposited in an American account.¹⁰⁸ Justice Sutherland, writing for the majority, held that the executive agreement trumped the private claim since it was reached pursuant to the executive’s plenary recognition power.¹⁰⁹

3. *Summary of Relevant Case Law*

Based upon the preceding analysis, a number of conclusions can be drawn. First, while the lawful limits of executive agreements may be unclearly defined, courts have generally found those agreements to be constitutional. Second, in the event of inter-branch conflict, weight has been attached to Congress’ acquiescence. Third, in upholding such agreements, consideration has also been given to their temporariness. Fourth, in settling inter-governmental claims, the interests of the executive have trumped those of private nationals. Fifth, in cases of executive agreements concluded pursuant to the exercise of a clear executive plenary power, the executive agreement has likewise prevailed.¹¹⁰

D. *Framers’ Intent*

It is worthwhile referring to the intent of the Framers of the Constitution for further insight into the constitutional bounds of executive entrenchment. The *Federalist Papers*, as always, provide useful indicia of intent. My discussion will focus upon three issues: (1) the Framers’ failure to distinguish meaningfully between various synonyms used to describe treaties; (2) their conception of the

106. *Id.*

107. *United States v. Belmont*, 301 U.S. 324 (1937).

108. *Id.* at 325-26.

109. *Id.* at 330-32.

110. This fits the intuition

that the President has sole power to enter into international agreements to carry out plenary powers — to negotiate and conclude cease-fires, recognition, pardons. But where no such power pertains, where the Senate has time to act, and where the agreement is one of unusual importance, arguments for an exclusive presidential prerogative are less persuasive.

GLENNON, *supra* note 50, at 183.

appropriate inter-branch balance of power in treaty making; and (3) their amendment philosophy.

1. *The Non-Meaningfulness of Treaty Synonyms*

It is not surprising, considering the Constitution's silence on the topic of executive agreements, that the Framers likewise seem to have made little or no mention of them.¹¹¹ Nevertheless, as I noted in Part IV.A, some argue that executive agreements — as distinct from generic treaties — were contemplated by the Framers as a distinct category of international agreement. Thus, the argument might continue, absence of the phrase “executive agreement” is attributable not to a failure to distinguish between these and other types of agreements, but perhaps only to the fact that the term was simply unknown to the Framers at the time.

I wish to argue, in contrast, that this silence was not only due to a limitation in vocabulary, but rather because the Framers did not imagine the distinctions in the various terms they employed for “treaties” to be meaningful.¹¹² To be clear, my argument is not that these terms are without distinctions — just that they are, to borrow the oft-quoted platitude, “distinctions without a difference.” Thus, to the extent the Framers' use of “compacts” rather than “treaties” is distinguishable at all, they evidently did not care to dwell upon the distinction at any length, suggesting the meaninglessness of whatever difference they themselves perceived.¹¹³ Prolixity and

111. I say “seem,” because my research of original intent has admittedly not been exhaustive. My conclusions are drawn from selective *Federalist Papers* that I thought would be most likely to deal with the topic, guided by the helpful index provided in *THE FEDERALIST PAPERS* (Clinton Rossiter ed., 1961).

112. My view is supported by the argument of Professor David Gray Adler, who writes that “[t]here was apparently no doubt among the Framers and ratifiers that the treaty-making power was omniscient in foreign affairs; its authority covered the field.” David G. Adler, *Court, Constitution, and Foreign Affairs*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 19, 27 (David G. Adler & Larry N. George eds., 1996). Similarly, Adler notes:

The text of the Constitution makes no mention of executive agreements. Moreover, there was no reference to them in the Constitutional Convention or in the state ratifying conventions. The *Federalist Papers* are silent on the subject as well. There is, then, no support in the architecture of the Constitution for the use of executive agreements.

Id.

113. Professor Louis Henkin evidently agrees: “The Framers did not stop to distinguish treaties from other international agreements or commitments.” HENKIN, *supra* note 6, at 175. But see Henkin's citation to the same sentence, noting that “[a] distinction between treaties and ‘Agreements or Compacts’ with foreign states is implied in the limitations imposed on the states.” *Id.* n* (citing U.S. CONST. art. 1, § 10). It is unclear to me, however, how art. I, § 10 makes any clearer the “distinction” between treaties and the various other types of international agreements.

verbosity are, after all, two words used interchangeably to refer to substantially the same thing.

It is quite plausible that the use of different terminology in the Constitution stemmed simply from either a desire for variation, or from the wordy style common in formal prose at the time of the writing of the text. Examples of this flowery convention are evident elsewhere in the document. Consider, for instance, the provision limiting the right of states to impose “Imposts or Duties” on imports and exports,¹¹⁴ the provision that “No Tax or Duty” is to be imposed on state exports,¹¹⁵ and the reference to “Taxes, Duties, Imposts and Excises.”¹¹⁶ From this are we to infer (a) that the Framers intended “taxes,” “imposts,” “duties,” and “excises” all to be distinguishable categories, and (b) that such distinctions are to be given interpretive weight? I think not. A far more likely explanation is that the terms were used synonymously to alter the repetitiousness of constant reference to what all understood to mean, simply, “taxes.”¹¹⁷

Outside the text of the Constitution itself, there is evidence to suggest that the Framers may have considered the various terms for treaties to mean largely the same thing. One example can be found in *Federalist No. 69*, where Hamilton seemed to use the words “treaty” and “compact” interchangeably in referring to the power of

114. U.S. CONST. art. I, § 10, cl. 2.

115. *Id.* § 9, cl. 5.

116. *Id.* § 8, cl. 1.

117. Property law furnishes a telling example of similarly superfluous holdovers of the past. For instance, “[a] deed might contain this all-embracing language: ‘By these presents the grantor does give, grant, bargain, sell, remise, demise, release, and convey unto the grantee, and to his heirs and assigns forever, all that parcel of land described as follows.’” JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 611 (5th ed. 2002). Dukeminier and Krier note that David Mellinkoff suggests that the language of “[g]rant, bargain, and sell” is “an archaic form, awaiting only interment. *Grant* is sufficient.” *Id.* (citing MELLINKOFF’S *DICTIONARY OF AMERICAN LEGAL USAGE* 129, 274 (1992)). PROFESSOR MELLINKOFF EXPLAINS:

A long habit of coupling synonyms persists in American legal usage, e.g., *authorize and empower, null and void, true and correct*. The habit is compounded of antiquated literary style, the mixture of languages we now call English, the lawyer’s gamble on venial repetition against mortal omission, and a misplaced reliance on the precision of what has endured.

The great mass of these coupled synonyms are simply redundancies, furnishing opportunity for argument that something beyond synonymy [sic] was intended. A handful have been so welded by usage as to have the effect, in proper context, of a single word, e.g., *aid and comfort, cease and desist* . . .

MELLINKOFF’S *DICTIONARY OF AMERICAN LEGAL USAGE* 129, 129 (1992). Mellinkoff’s list of redundancies in the American legal lexicon of course calls to mind some of the superfluous word pairings cited in the U.S. Constitution, noted above. Of particular interest and relevance to my topic, Mellinkoff includes on his list the phrase “*covenant and agree*.” *Id.* at 130.

the English monarch to conclude agreements with significantly less legislative concurrence than would be the case in the new union.¹¹⁸

In another case, Madison wrote in *Federalist No. 43* about the “compact” between the colonial states under the Articles of Confederation. For example, in discussing whether the Articles could be superceded by a subsequent legislative act (namely, the Constitution) without a unanimous vote of the colonial states, Madison wrote that “[a] compact between independent sovereigns, founded on ordinary acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties.”¹¹⁹ This comment could perhaps be understood to mean that the terms “compact” and “treaty” refer, respectively, to types of domestic and international contracts. A compact might, for instance, refer to a foundational or constitutive contract.¹²⁰ Madison did not elaborate, however, and I query whether there are grounds for giving the terms differential meaning for interpretive purposes.¹²¹

In a later paper, *Federalist No. 85*, Hamilton lent some support to the idea that a compact might have been understood by the

118. Hamilton wrote of “an established fact, that the prerogative of making treaties exists in the crown in its utmost plenitude; and that the compacts entered into by the royal authority have the most complete legal validity and perfection, independent of any other sanction.” THE FEDERALIST NO. 69, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

119. THE FEDERALIST NO. 43, at 279-80 (James Madison) (Clinton Rossiter ed., 1961). Tangentially, it is worth noting that Madison’s conception of the independent sovereignty of these states undercuts Justice Sutherland’s famous opinion in *United States v. Curtiss-Wright*, 299 U.S. 304, 316 (1936), which claimed that the source of sovereign power derived not from the states “since the states severally never possessed international powers, [and] such powers could not [therefore] have been carved from the mass of state powers but obviously were transmitted to the United States from some other source.” Compare this with Hamilton’s comment that

the [treaty-making] power of the federal executive would exceed that of any State executive. But this arises naturally from the exclusive possession by the Union of that part of the sovereign power which relates to treaties. If the Confederacy were to be dissolved, it would become a question whether the executives of the several States were not solely invested with that delicate and important prerogative.

THE FEDERALIST NO. 69, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Hamilton leaves his critical question unanswered.

120. There is some suggestion of this in Madison’s comment that “the Confederation . . . stands in the solemn form of a compact among the States.” THE FEDERALIST NO. 43, at 279 (James Madison) (Clinton Rossiter ed., 1961). By “Confederation” I presume, based upon context, that Madison was referring to the Articles of Confederation that preceded the adoption of the U.S. Constitution. See, for example, Madison’s discussion of a different formulation of what is now art. VI, cl. 1 of the Constitution (“all debts contracted and engagements entered into before the adoption of this Constitution [shall be as] valid against the United States under this Constitution [as] under the Confederation”). THE FEDERALIST NO. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961).

121. In the same paper, Madison introduced yet another term for “agreement” in his reference to the Articles as “the federal pact.” THE FEDERALIST NO. 43, at 280 (James Madison) (Clinton Rossiter ed., 1961). Here again, there is no further elaboration on the (non)meaningfulness of the distinction between “compact,” “treaty,” and “pact.” *Id.*

Framers as an internal or constitutive document rather than a treaty. For instance, Hamilton wrote of “[t]he compacts which are to embrace thirteen distinct States in a common bond of amity and union.”¹²² Yet Madison’s use of the same term to refer to an agreement “between independent sovereigns”¹²³ would seem to undermine the distinction between “compact” and “treaty.”

Finally, Professor David Gray Adler has cited a paragraph from Hamilton which, if read the way Adler reads it, would seem to put the issue entirely to rest. Hamilton wrote that:

it was understood by *all* to be the intent of the provision to give that power the most ample latitude — render it competent to all the stipulations which the exigencies of national affairs might require; competent to the making of treaties of alliance, treaties of commerce, treaties of peace, and *every other species of convention* usual among nations.¹²⁴

From this, in part, Adler deduces — and rightly, I believe — that the treaty-making power was “omnicompetent” in the view of the Framers.¹²⁵ In short, treaty-making power covered all manner of agreements without meaningful distinction.

If one accepts the view that the Framers’ failure to distinguish meaningfully between different types of international agreements implies no meaningful difference between executive agreements and other forms of international agreement, this of course does not mean that executive agreements are unconstitutional — the preceding discussion of custom and case law demonstrates the consensus on constitutionality. What it may suggest, however, is that the principles that guided the Framers’ conception of the constitutional limits on treaty making should be applied analogously to determine the limits for executive agreement making. With that in mind, I would now like to examine the Framers’ views on the concurrent treaty-making power.

122. THE FEDERALIST NO. 85, at 524 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

123. THE FEDERALIST NO. 43, at 280 (James Madison) (Clinton Rossiter ed., 1961).

124. Adler, *supra* note 112, at 27. Although Adler cites the source of the paragraph as Hamilton’s *Federalist No. 75*, I have been unable to locate it in that particular paper. Glennon, quoting the same paragraph in *supra* note 50, at 182 cites *Letters of Camillus*, 6A Hamilton, Works 183 (Lodge, ed. 1904). The more important point is Glennon’s agreement with Adler’s reading of the paragraph, for Glennon cites it as evidence that “Hamilton apparently regarded the advice-and-consent power of the Senate as encompassing every international agreement.” GLENNON, *supra* note 50, at 182.

125. Adler, *supra* note 112, at 27.

2. Treaty-Making Power

While the Framers were well aware of the special prerogatives of particular branches in treaty making (as in the executive's broad purview in negotiation), the sum total of plenary and concurrent rights created a balanced scheme of checked powers shared by the legislature and the executive. This is evident from *Federalist No. 75*, where Hamilton cautioned against locating sole treaty-making power exclusively in either the executive or the legislative branch and argued, instead, in favor of cooperation between them.¹²⁶

John Jay saw the intrinsic strengths of the executive (e.g., "secrecy" and "dispatch") as essential to the treaty-making process.¹²⁷ Interestingly, however, Jay seems to have distinguished between the value of these strengths early in the treaty-making process and later on. Thus, he wrote that "[t]hose matters which in negotiations usually require the most secrecy and the most dispatch are those preparatory and auxiliary measures which are not otherwise important in a national view, than as they tend to facilitate the attainment of the objects of the negotiation."¹²⁸ When viewed over the course of the entirety of the treaty-making process, however (from negotiation to ratification), the executive's plenary negotiating power, combined with the Senate's plenary power of advice and consent, resulted in a wisely overlapping framework of concurrent power. As Jay put it, "the Constitution provides that our negotiations for treaties shall have every advantage which can be derived from talents, information, integrity, and deliberate investigations, on the one hand, and from secrecy and dispatch on the other."¹²⁹

This balance was seen as preferable to the British model which had entrusted the weight of treaty power to the crown. Hamilton wrote that "there is no comparison between the intended power of the President and the actual power of the British sovereign. The one can perform alone what the other can only do with the concurrence of a branch of the legislature."¹³⁰ Thus, "[t]he one would

126. THE FEDERALIST NO. 75, at 451 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

127. THE FEDERALIST NO. 64, at 392-93 (John Jay) (Clinton Rossiter ed., 1961).

128. *Id.* at 393. This leads me to wonder whether executive agreements could, or should, be thought of more appropriately as "treaties in the making." According to this view, executive agreements could be considered draft treaties that would acquire the imprimatur of the law upon Senate advice and consent. This idea is in line with Glennon's suggestion that such agreements be accorded the status of treaties signed, but not yet ratified. See GLENNON, *supra* note 50, at 169-75. See also the Vienna Convention on the Law of Treaties, *supra* note 7, art. 18, 8 U.N.T.S. 332, 336, obliging parties "to refrain from acts which would defeat the object and purpose of a treaty when . . . [i]t has signed the treaty."

129. THE FEDERALIST NO. 64, at 393 (John Jay) (Clinton Rossiter ed., 1961).

130. THE FEDERALIST NO. 69, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

have a concurrent power with a branch of the legislature in the formation of treaties; the other is the *sole possessor* of the power of making treaties.”¹³¹

Although the Senate would enjoy the power of advice and consent, the Framers did not envision an executive entirely bereft of all legislative functions. Thus, in responding to the criticism that treaties, as laws binding upon the nation, should derive their legal obligation from a legislative body, Jay rejected out of hand the suggestion that executive involvement in treaty making would somehow diminish the legality of those treaties.¹³² The implication is that presidents do in fact enjoy some modicum of legislative power in the making of treaties and, by logical extension, in executive agreement making as well.

Another criticism leveled against the treaty mechanism that is relevant to the topic of entrenching executive agreements was that treaties should not be deemed the law of the land but only as “acts of assembly, . . . repealable at pleasure.”¹³³ Jay invited these critics to consider that a treaty is just “another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it.”¹³⁴ This was so, he said, because “treaties are made, not by only one of the contracting parties, but by both, and consequently, that as the consent of both was essential to their formation at first, so must it ever afterwards be to alter or cancel them.”¹³⁵ This language should, of course, not be understood as a broad endorsement of entrenchment, but rather as Jay’s recognition of the need to strike a balance between living up to our commitments and easy repeal of them.

It is also worth remembering that Jay’s concern, in my view, was primarily with treaties and not with executive agreements per

131. *Id.* at 422.

132. See, for example, the source of an excerpt which later appeared in Justice Douglas’ opinion in *United States v. Pink*:

All constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature; and therefore, whatever name be given to the power of making treaties, or however obligatory they may be when made, certain it is that the people may, with much propriety, commit the power to a distinct body from the legislature, the executive, or the judicial.

THE FEDERALIST NO. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961); *United States v. Pink*, 315 U.S. 203, 230 (1942).

133. THE FEDERALIST NO. 64, at 394 (John Jay) (Clinton Rossiter ed., 1961).

134. *Id.*

135. *Id.*

se. Should a president wish to formalize a “bargain” in the way Jay imagined, the option always remains for a president to do so with legislative consent. This is an issue to which I will return in the conclusion of this paper. For now, I would like to review some salient aspects of the Framers’ amendment philosophy in order to further clarify the constitutional bounds of executive entrenchment.

3. Amendment Philosophy

The Framers’ amendment philosophy is worth considering in light of the concept of entrenchment which, by definition, either precludes amendment or makes it very difficult.¹³⁶ The Framers’ views on amendment, as elsewhere, seem to have been a philosophy of the mean — of checked and balanced powers. Again in *Federalist No. 43*, for example, Madison commented approvingly on the power of amendment with the ratification of a supermajority of three-fourths of the states.¹³⁷ This was a mechanism, in Madison’s view, “stamped with every mark of propriety” because “[i]t guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults.”¹³⁸

For Hamilton, the amendment procedure would be the best antidote to the new Constitution’s imperfections, unlike those who sought perfection prior to ratification.¹³⁹ “How,” he wondered, “can perfection spring from such materials?”¹⁴⁰ According to this thinking, an amendment procedure was a requirement of both prudence and humility.¹⁴¹

136. This is, in some sense, like comparing apples and oranges, for the Framers had in mind the concept of *constitutional* amendment which may say little about their notion of *legislative* or *executive* entrenchment. For a discussion of the distinction between constitutional and legislative entrenchment see McGinnis & Rappaport, *supra* note 1. Despite the obvious differences, I believe the Framers’ philosophy of the mean inhered in their most fundamental conceptions of constitutional government and therefore remains relevant to executive entrenchment as well.

137. THE FEDERALIST NO. 43, at 278 (James Madison) (Clinton Rossiter ed., 1961).

138. *Id.*

139. He wrote: “I never expect to see a perfect work from imperfect man.” THE FEDERALIST NO. 85, at 523 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

140. *Id.* at 524. Hamilton was referring to “[t]he compacts which are to embrace thirteen distinct States in a common bond of amity and union must as necessarily be a compromise of as many dissimilar interests and inclinations.” *Id.*

141. Also interesting, although slightly tangential to my focus, is Hamilton’s response to the argument that advice and consent should be required of two thirds of those *present* rather than two thirds of the entire Senate body. Hamilton wrote that “[i]t has been shown . . . that all provisions which require more than the majority of any body to its resolutions have a direct tendency to embarrass the operations of the government and an indirect one to subject the sense of the majority to that of the minority.” THE FEDERALIST NO. 75, at 453 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

These comments, I believe, suggest an inherent skepticism for the notion of entrenchment which, in the Hamiltonian view, would wrongly presume the “perfection” of the entrenched provision or policy in question. With entrenchment, as with other issues, the Framers’ imparted “a lesson of moderation to all the sincere lovers of the Union.”¹⁴²

4. Summary of Intent

The preceding analysis reveals a number of insights. First, as I hope my discussion of the meaninglessness of treaty synonyms has shown, it is highly questionable whether the Framers intended their word choice to suggest meaningful distinctions among international agreements. The practical import of this observation is that the Framers must have intended for the constitutional limits applicable to treaties to apply similarly to all international agreements. Second, on the basis of that argument, I turned to a consideration of what constitutional limits the Framers intended to apply to treaty making. There, it is quite certain, the Framers had in mind a balanced framework that would moderate the excesses of the executive and legislative branches. Overwhelmingly, theirs seems to have been an argument for inter-branch cooperation. Indeed, the same theory of moderation that lies at the heart of the Framers’ general conception of constitutional government can be seen in their understanding of amendments and is applicable to my discussion of entrenchment.

E. Establishing Constitutional Criteria for Executive Agreements

The foregoing sections on custom, case law, and intent have each contributed to the effort to establish criteria for the executive’s authority to entrench executive agreements. In the last century this project gained impetus with Congress’ passage of key legislation. Not coincidentally, that legislation was promulgated in the era of the War Powers Resolution. It was, no doubt, like the War Powers Resolution, a product of the same political culture that had been jaded by the excesses of unfettered executive power.

In 1969, a report of the Senate Foreign Relations Committee proposed a resolution expressing “the sense of the Senate” that U.S. commitments to foreign powers required inter-branch consensus.¹⁴³ The version subsequently adopted (what became the National Commitments Resolution) noted “the sense of the Senate that a

142. THE FEDERALIST NO. 85, at 527 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

143. S. REP. NO. 91-129, at 1 (1969), *excerpted in* FRANCK & GLENNON, *supra* note 41, at 458.

national commitment by the United States results only from affirmative action taken by the executive and legislative branches of the United States Government by means of a treaty, statute, or concurrent resolution of both Houses of Congress specifically providing for such commitment.”¹⁴⁴ Although the resolution evidently was not intended to have the power of binding law,¹⁴⁵ it is an instructive example of the Senate’s views on the importance of inter-branch cooperation in concluding international agreements.

The Case Act of 1972 built upon the foundation of the National Commitments Resolution in restricting the ability of the executive to conclude international agreements without reference to Congress and established a reporting period within which the executive was required to notify Congress of such agreements.¹⁴⁶ The Case Act, in turn, prompted the U.S. Department of State to distribute an airgram to all diplomatic posts discussing in detail five criteria for determining what should be considered an “international agreement” according to the terms of the Act.¹⁴⁷ The criteria were: (1) the parties’ intention to be bound by international law; (2) the significance of the agreement; (3) the specificity of the agreement (“including objective criteria for determining enforceability”); (4) the involvement of two or more parties; and (5) the form of the agreement.¹⁴⁸

The criteria articulated by Congress and the State Department have established useful guidelines for determining the seriousness of executive agreements worthy of congressional review and have contributed greatly to the presumption in favor of inter-branch cooperation.

V. CONCLUSION

Entrenchment in all branches of government (judicial, legislative, and executive) and in all jurisdictions (domestic and international)¹⁴⁹ is positioned at a critical nexus between the

144. *Id.* at 459.

145. FRANCK & GLENNON, *supra* note 41, at 464.

146. 1 U.S.C.A. §112(b) (1979), *excerpted in* FRANCK & GLENNON, *supra* note 41, at 465-66.

147. State Department Airgram, *supra* note 41.

148. *Id.*

149. A fascinating case of potential international environmental entrenchment can be found in the impulse to preserve threatened species for the enjoyment or benefit or use of future generations. The concept of “intergenerational obligation” arose in the discussion of international environmental law in Professor Michael J. Glennon’s class on Public International Law (ILO-L201) at the Fletcher School of Law and Diplomacy (Apr. 27, 2004) (notes on file with author); *see also* Michael J. Glennon, *Has International Law Failed the Elephant?*, 84 AM. J. INT’L L. 1, 43 (1990) (noting that the effort to protect the elephant as “a battle to clarify our character, to define what we hold dear, for ourselves and our descendants”).

competing theories of legal realism and legal positivism. The tension is highlighted by the comment of Professor Julian Eule that “[n]o law is truly immutable.”¹⁵⁰ This statement begs an obvious question: Is the mutability of all law an essentially positivist principle, or a retreat to the pragmatic insight of realism? At one point, Eule seems to align himself with realism in a way that seems akin to a justification of civil disobedience.¹⁵¹ Elsewhere, however, Eule not only expresses a belief in the impracticality of entrenchment, but evinces an argument, on democratic grounds, that it is proper for it to be this way.¹⁵²

In the case of executive agreements, there are similarly compelling realist and positivist grounds for determining clearly the lawful limits of entrenchment. Realistically, as has been argued in the case of legislative entrenchment, future generations of congressional representatives or presidents are not likely see themselves as bound by the supposed “entrenchment” of executive agreements by an earlier executive.¹⁵³

Positively speaking, the established constitutional consensus seems to be that the president should enjoy no greater power in executive agreement making than he enjoys in treaty making. This is so for at least two compelling reasons. First, it is questionable whether the Framers intended for their different use of treaty terms to confer different legal status upon different types of international agreements. Thus, on the basis of original intent, I believe that executive agreements must be subject to the constitutional limits of treaties.¹⁵⁴ Second, as others have argued persuasively, it makes little sense for the executive to derive even more power from his executive agreement-making power (which he enjoys by custom)

150. Eule, *supra* note 9, at 384.

151. “When the need becomes compelling, succeeding generations will mold the law to the requirements of their age, even in the absence of the formal power to do so.” *Id.* Eule also notes that “[i]n the end, laws that purport to be unalterable ensure no more than that the struggle for change will occur outside the confines of the established legal structure. . . . If the entrenched legislation is threatening or grossly impractical, the inability to repeal it may lead to open defiance, affording dangerous precedent for the nonobservance of other legal arrangements.” *Id.* at 384, 387-88.

152. Eule believes that limits on the entrenchment power of legislatures stem, in part, from the value of democratic representation: “The recognition of the people as an external force from which all power originates severed the umbilical connection with the English vision of Parliament as the sovereign ‘We the People,’ was not merely flashy prose.” *Id.* at 396.

153. One of the criticisms that Roberts and Chemerinsky level against Posner and Vermeule is precisely that the latter “do not seem to recognize the political fact that future legislatures could simply ignore attempts to restrict their freedom of action, and that courts would almost certainly refuse to give such attempts binding force.” Roberts & Chemerinsky, *supra* note 4, at 1776.

154. And, there is little doubt as to the power of one Congress to repeal an earlier ratified treaty. See Eule, *supra* note 9, at 425 & n.213 (commenting on “Congressional repudiation of treaty obligations”).

than from his treaty-making power (an explicitly enumerated concurrent power).¹⁵⁵

For these two reasons it makes sense that the ready-made body of federal common law developed for treaties should be applied to executive agreements. Consider, for instance, the Supreme Court's holding that, in an irreconcilable conflict between a self-executing treaty and a statute, the last-in-time must control.¹⁵⁶ This doctrine of interpretation should be applied similarly to attempts at entrenchment of executive agreements. Thus, either the Congress (through passage of subsequent legislation making clear the legislature's intent to violate the agreement) or the president (through promulgation of an executive order or agreement having the same effect) could terminate an earlier "entrenched" executive agreement.

Does this mean that presidents are legally powerless to preserve their foreign commitments through agreements that will stand the tests of time? Surely not. Recall that a president who so wished could always opt for a legislative-executive agreement rather than a sole executive agreement. The former approach bears significant benefits. First, inter-branch agreement confers upon the executive greater insurance that the agreement will not be erased by a future unilateral act of either branch. At the same time, the acquiescence of the legislature which Justice Rehnquist found to be of consequence in *Dames & Moore* would be obvious.¹⁵⁷ In effect, this arrangement offers an alternative to both inter- and intra-branch conflict, substituting inter-branch consensus, and keeping the action within the first zone of Justice Jackson's tripartite structure.¹⁵⁸

What this means is that the executive's ability to entrench foreign commitments should be of the "weak" variety discussed above in Part II. Like section 1547 of the War Powers Resolution¹⁵⁹ and the judicial doctrine of *stare decisis*, the executive should be able to affect the conduct of future foreign policy, but not in a way that makes his own commitments irreversible. While presidents

155. See FRANCK & GLENNON, *supra* note 41, at 428 ("As for executive agreements that are inconsistent with the Constitution, it would be natural to assume that if treaties cannot abridge constitutional rights, neither can 'pure' executive agreements or executive-congressional agreements.")

156. *Eule*, *supra* note 9, at 425 n.213 (citing *Whitney v. Robertson*, 124 U.S. 190 (1888)).

157. *Dames & Moore*, 453 U.S. at 654.

158. *Youngstown Sheet & Tube Co.*, 343 U.S. at 579. ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.") *Id.* at 635.

159. War Powers Resolution, 50 U.S.C. §1547 (1973).

must have the authority to solidify foreign commitments, this power should not extend beyond the limits of their treaty-making power. This argument, like Professor Eule's, is both a prudent recognition of the past's inability to dictate the future, and a normative argument that it should be so.¹⁶⁰

160. Eule, *supra* note 9.

VI. APPENDICES

Appendix A.

*Letter from U.S. President George W. Bush to Prime Minister Ariel Sharon, April 14, 2004**

His Excellency Ariel Sharon
Prime Minister of Israel

Dear Mr. Prime Minister,

Thank you for your letter setting out your disengagement plan.

The United States remains hopeful and determined to find a way forward toward a resolution of the Israeli-Palestinian dispute. I remain committed to my June 24, 2002 vision of two states living side by side in peace and security as the key to peace, and to the Roadmap as the route to get there.

We welcome the disengagement plan you have prepared, under which Israel would withdraw certain military installations and all settlements from Gaza, and withdraw certain military installations and settlements in the West Bank. These steps described in the plan will mark real progress toward realizing my June 24, 2002 vision, and make a real contribution towards peace. We also understand that, in this context, Israel believes it is important to bring new opportunities to the Negev and the Galilee. We are hopeful that steps pursuant to this plan, consistent with my vision, will remind all states and parties of their own obligations under the Roadmap.

The United States appreciates the risks such an undertaking represents. I therefore want to reassure you on several points. First, the United States remains committed to my vision and to its implementation as described in the Roadmap. The United States will do its utmost to prevent any attempt by anyone to impose any other plan. Under the Roadmap, Palestinians must undertake an immediate cessation of armed activity and all acts of violence against Israelis anywhere, and all official Palestinian institutions must end incitement against Israel. The Palestinian leadership must act decisively against terror, including sustained, targeted, and effective operations to stop terrorism and dismantle terrorist capabilities and infrastructure. Palestinians must undertake a

* Available at <http://www.mfa.gov.il> (last visited Oct. 15, 2004). The letter has been reformatted for this appendix and minor typographical errors have been corrected. The substantive content, however, remains unchanged.

comprehensive and fundamental political reform that includes a strong parliamentary democracy and an empowered prime minister.

Second, there will be no security for Israelis or Palestinians until they and all states, in the region and beyond, join together to fight terrorism and dismantle terrorist organizations. The United States reiterates its steadfast commitment to Israel's security, including secure, defensible borders, and to preserve and strengthen Israel's capability to deter and defend itself, by itself, against any threat or possible combination of threats.

Third, Israel will retain its right to defend itself against terrorism, including to take actions against terrorist organizations. The United States will lead efforts, working together with Jordan, Egypt, and others in the international community, to build the capacity and will of Palestinian institutions to fight terrorism, dismantle terrorist organizations, and prevent the areas from which Israel has withdrawn from posing a threat that would have to be addressed by any other means. The United States understands that after Israel withdraws from Gaza and/or parts of the West Bank, and pending agreements on other arrangements, existing arrangements regarding control of airspace, territorial waters, and land passages of the West Bank and Gaza will continue.

The United States is strongly committed to Israel's security and well-being as a Jewish state. It seems clear that an agreed, just, fair and realistic framework for a solution to the Palestinian refugee issue as part of any final status agreement will need to be found through the establishment of a Palestinian state, and the settling of Palestinian refugees there, rather than in Israel.

As part of a final peace settlement, Israel must have secure and recognized borders, which should emerge from negotiations between the parties in accordance with UNSC Resolutions 242 and 338. In light of new realities on the ground, including already existing major Israeli populations centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949, and all previous efforts to negotiate a two-state solution have reached the same conclusion. It is realistic to expect that any final status agreement will only be achieved on the basis of mutually agreed changes that reflect these realities.

I know that, as you state in your letter, you are aware that certain responsibilities face the State of Israel. Among these, your government has stated that the barrier being erected by Israel should be a security rather than political barrier, should be temporary rather than permanent, and therefore not prejudice any final status issues including final borders, and its route should take

into account, consistent with security needs, its impact on Palestinians not engaged in terrorist activities.

As you know, the United States supports the establishment of a Palestinian state that is viable, contiguous, sovereign, and independent, so that the Palestinian people can build their own future in accordance with my vision set forth in June 2002 and with the path set forth in the Roadmap. The United States will join with others in the international community to foster the development of democratic political institutions and new leadership committed to those institutions, the reconstruction of civic institutions, the growth of a free and prosperous economy, and the building of capable security institutions dedicated to maintaining law and order and dismantling terrorist organizations.

A peace settlement negotiated between Israelis and Palestinians would be a great boon not only to those peoples but to the peoples of the entire region. Accordingly, the United States believes that all states in the region have special responsibilities: to support the building of the institutions of a Palestinian state; to fight terrorism, and cut off all forms of assistance to individuals and groups engaged in terrorism; and to begin now to move toward more normal relations with the State of Israel. These actions would be true contributions to building peace in the region.

Mr. Prime Minister, you have described a bold and historic initiative that can make an important contribution to peace. I commend your efforts and your courageous decision which I support. As a close friend and ally, the United States intends to work closely with you to help make it a success.

Sincerely,

George W. Bush

Appendix B.

*Letter from Prime Minister Ariel Sharon to U.S. President George W. Bush, April 14, 2004**

The Honorable George W. Bush
President of the United States of America
The White House
Washington, D.C.

Dear Mr. President,

The vision that you articulated in your 24 June 2002 address constitutes one of the most significant contributions toward ensuring a bright future for the Middle East. Accordingly, the State of Israel has accepted the Roadmap, as adopted by our government. For the first time, a practical and just formula was presented for the achievement of peace, opening a genuine window of opportunity for progress toward a settlement between Israel and the Palestinians, involving two states living side-by-side in peace and security.

This formula sets forth the correct sequence and principles for the attainment of peace. Its full implementation represents the sole means to make genuine progress. As you have stated, a Palestinian state will never be created by terror, and Palestinians must engage in a sustained fight against the terrorists and dismantle their infrastructure. Moreover, there must be serious efforts to institute true reform and real democracy and liberty, including new leaders not compromised by terror. We are committed to this formula as the only avenue through which an agreement can be reached. We believe that this formula is the only viable one.

The Palestinian Authority under its current leadership has taken no action to meet its responsibilities under the Roadmap. Terror has not ceased, reform of the Palestinian security services has not been undertaken, and real institutional reforms have not taken place. The State of Israel continues to pay the heavy cost of constant terror. Israel must preserve its capability to protect itself and deter its enemies, and we thus retain our right to defend ourselves against terrorism and to take actions against terrorist organizations.

Having reached the conclusion that, for the time being, there exists no Palestinian partner with whom to advance peacefully

* Available at <http://www.mfa.gov.il> (last visited Oct. 15, 2004). The letter has been reformatted for this appendix and minor typographical errors have been corrected. The substantive content, however, remains unchanged.

toward a settlement and since the current impasse is unhelpful to the achievement of our shared goals, I have decided to initiate a process of gradual disengagement with the hope of reducing friction between Israelis and Palestinians. The Disengagement Plan is designed to improve security for Israel and stabilize our political and economic situation. It will enable us to deploy our forces more effectively until such time that conditions in the Palestinian Authority allow for the full implementation of the Roadmap to resume.

I attach, for your review, the main principles of the Disengagement Plan. This initiative, which we are not undertaking under the Roadmap, represents an independent Israeli plan, yet is not inconsistent with the Roadmap. According to this plan, the State of Israel intends to relocate military installations and all Israeli villages and towns in the Gaza Strip, as well as other military installations and a small number of villages in Samaria.

In this context, we also plan to accelerate construction of the Security Fence, whose completion is essential in order to ensure the security of the citizens of Israel. The fence is a security rather than political barrier, temporary rather than permanent, and therefore will not prejudice any final status issues including final borders. The route of the Fence, as approved by our Government's decisions, will take into account, consistent with security needs, its impact on Palestinians not engaged in terrorist activities.

Upon my return from Washington, I expect to submit this Plan for the approval of the Cabinet and the Knesset, and I firmly believe that it will win such approval.

The Disengagement Plan will create a new and better reality for the State of Israel, enhance its security and economy, and strengthen the fortitude of its people. In this context, I believe it is important to bring new opportunities to the Negev and the Galilee. Additionally, the Plan will entail a series of measures with the inherent potential to improve the lot of the Palestinian Authority, providing that it demonstrates the wisdom to take advantage of this opportunity. The execution of the Disengagement Plan holds the prospect of stimulating positive changes within the Palestinian Authority that might create the necessary conditions for the resumption of direct negotiations.

We view the achievement of a settlement between Israel and the Palestinians as our central focus and are committed to realizing this objective. Progress toward this goal must be anchored exclusively in the Roadmap and we will oppose any other plan.

In this regard, we are fully aware of the responsibilities facing the State of Israel. These include limitations on the growth of settlements; removal of unauthorized outposts; and steps to

increase, to the extent permitted by security needs, freedom of movement for Palestinians not engaged in terrorism. Under separate cover we are sending to you a full description of the steps the State of Israel is taking to meet all its responsibilities.

The government of Israel supports the United States efforts to reform the Palestinian security services to meet their Roadmap obligations to fight terror. Israel also supports the American's efforts, working with the International Community, to promote the reform process, build institutions and improve the economy of the Palestinian Authority and to enhance the welfare of its people, in the hope that a new Palestinian leadership will prove able to fulfill its obligations under the Roadmap.

I want to again express my appreciation for your courageous leadership in the war against global terror, your important initiative to revitalize the Middle East as a more fitting home for its people and, primarily, your personal friendship and profound support for the State of Israel.

Sincerely,

Ariel Sharon

Appendix C.

*Letter from Dov Weissglas, Chief of the Prime Minister's Bureau, to U.S. National Security Adviser, Dr. Condoleezza Rice, April 18, 2004**

Dr. Condoleezza Rice
National Security Adviser
The White House
Washington, D.C.

Dear Dr. Rice,

On behalf of the Prime Minister of the State of Israel, Mr. Ariel Sharon, I wish to reconfirm the following understanding, which had been reached between us:

1. Restrictions on settlement growth: within the agreed principles of settlement activities, an effort will be made in the next few days to have a better definition of the construction line of settlements in Judea & Samaria. An Israeli team, in conjunction with Ambassador Kurtzer, will review aerial photos of settlements and will jointly define the construction line of each of the settlements.

2. Removal of unauthorized outposts: the Prime Minister and the Minister of Defense, jointly, will prepare a list of unauthorized outposts with indicative dates of their removal; the Israeli Defense forces and/or the Israeli Police will take continuous action to remove those outposts in the targeted dates. The said list will be presented to Ambassador Kurtzer within 30 days.

3. Mobility restrictions in Judea & Samaria: the Minister of Defense will provide Ambassador Kurtzer with a map indicating roadblocks and other transportational barriers posed across Judea & Samaria. A list of barriers already removed and a timetable for further removals will be included in this list. Needless to say, the matter of the existence of transportational barriers fully depends on the current security situation and might be changed accordingly.

4. Legal attachments of Palestinian revenues: the matter is pending in various courts of law in Israel, awaiting judicial decisions. We will urge the State Attorney's office to take any possible legal measure to expedite the rendering of those decisions.

* Available at <http://www.mfa.gov.il> (last visited Oct. 15, 2004). The letter has been reformatted for this appendix and minor typographical errors have been corrected. The substantive content, however, remains unchanged.

5. The Government of Israel extends to the Government of the United States the following assurances:

a. The Israeli government remains committed to the two-state solution — Israel and Palestine living side by side in peace and security — as the key to peace in the Middle East.

b. The Israeli government remains committed to the Roadmap as the only route to achieving the two-state solution.

c. The Israeli government believes that its disengagement plan and related steps on the West Bank concerning settlement growth, unauthorized outposts, and easing of restrictions on the movement of Palestinians not engaged in terror are consistent with the Roadmap and, in many cases, are steps actually called for in certain phases of the Roadmap.

d. The Israeli government believes that further steps by it, even if consistent with the Roadmap, cannot be taken absent the emergence of a Palestinian partner committed to peace, democratic reform, and the fight against terror.

e. Once such a Palestinian partner emerges, the Israeli government will perform its obligations, as called for in the Roadmap, as part of the performance-based plan set out in the Roadmap for reaching a negotiated final status agreement.

f. The Israeli government remains committed to the negotiation between the parties of a final status resolution of all outstanding issues.

g. The Government of Israel supports the United States' efforts to reform the Palestinian security services to meet their Roadmap obligations to fight terror. Israel also supports the American efforts, working with the international community, to promote the reform process, build institutions, and improve the economy of the Palestinian Authority and to enhance the welfare of its people, in the hope

that a new Palestinian leadership will prove able to fulfill its obligations under the Roadmap. The Israeli Government will take all reasonable actions requested by these parties to facilitate these efforts.

h. As the Government of Israel has stated, the barrier being erected by Israel should be a security rather than a political barrier, should be temporary rather than permanent, and therefore not prejudice any final status issues including final borders, and its route should take into account, consistent with security needs, its impact on Palestinians not engaged in terrorist activities.

Sincerely,

Dov Weissglas
Chief of the Prime Minister's Bureau

Appendix D.

*The Disengagement Plan — General Outline, April 18, 2004**

1. GENERAL

Israel is committed to the peace process and aspires to reach an agreed resolution of the conflict on the basis of the principle of two states for two peoples, the State of Israel as the state of the Jewish people and a Palestinian state for the Palestinian people, as part of the implementation of President Bush's vision.

Israel is concerned to advance and improve the current situation. Israel has come to the conclusion that there is currently no reliable Palestinian partner with which it can make progress in a bilateral peace process. Accordingly, it has developed a plan of unilateral disengagement, based on the following considerations:

- i. The stalemate dictated by the current situation is harmful. In order to break out of this stalemate, Israel is required to initiate moves not dependent on Palestinian cooperation.
- ii. The plan will lead to a better security situation, at least in the long term.
- iii. The assumption that, in any future permanent status arrangement, there will be no Israeli towns and villages in the Gaza Strip. On the other hand, it is clear that in the West Bank, there are areas which will be part of the State of Israel, including cities, towns and villages, security areas and installations, and other places of special interest to Israel.
- iv. The relocation from the Gaza Strip and from Northern Samaria (as delineated on Map) will reduce friction with the Palestinian population, and carries with it the potential for improvement in the Palestinian economy and living conditions.
- v. The hope is that the Palestinians will take advantage of the opportunity created by the disengagement in order to break out of the cycle of violence and to reengage in a process of dialogue.

* Available at <http://www.mfa.gov.il> (last visited Oct. 15, 2004). The outline has been reformatted for this appendix and minor typographical errors have been corrected. The substantive content, however, remains unchanged.

vi. The process of disengagement will serve to dispel claims regarding Israel's responsibility for the Palestinians in the Gaza Strip.

vii. The process of disengagement is without prejudice to the Israeli-Palestinian agreements. Relevant arrangements shall continue to apply.

When there is evidence from the Palestinian side of its willingness, capability and implementation in practice of the fight against terrorism and the institution of reform as required by the Roadmap, it will be possible to return to the track of negotiation and dialogue.

2. MAIN ELEMENTS

i. Gaza Strip:

1. Israel will evacuate the Gaza Strip, including all existing Israeli towns and villages, and will redeploy outside the Strip. This will not include military deployment in the area of the border between the Gaza Strip and Egypt ("the Philadelphi Route") as detailed below.
2. Upon completion of this process, there shall no longer be any permanent presence of Israeli security forces or Israeli civilians in the areas of Gaza Strip territory which have been evacuated.
1. As a result, there will be no basis for claiming that the Gaza Strip is occupied territory.

ii. West Bank:

1. Israel will evacuate an Area in the Northern Samaria Area (see Map), including 4 villages and all military installations, and will redeploy outside the vacated area.
2. Upon completion of this process, there shall no longer be any permanent presence of Israeli security forces or Israeli civilians in the Northern Samaria Area.
3. The move will enable territorial contiguity for Palestinians in the Northern Samaria Area.

4. Israel will improve the transportation infrastructure in the West Bank in order to facilitate the contiguity of Palestinian transportation.
5. The process will facilitate Palestinian economic and commercial activity in the West Bank.
6. The Security fence: Israel will continue to build the security fence, in accordance with the relevant decisions of the government. The route will take into account humanitarian considerations.

3. SECURITY SITUATION FOLLOWING THE DISENGAGEMENT

i. The Gaza Strip:

1. Israel will guard and monitor the external land perimeter of the Gaza Strip, will continue to maintain exclusive authority in Gaza air space, and will continue to exercise security activity in the sea off the coast of the Gaza Strip.
2. The Gaza Strip shall be demilitarized and shall be devoid of weaponry, the presence of which does not accord with the Israeli-Palestinian agreements.
3. Israel reserves its inherent right of self defense, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Gaza Strip.

ii. The West Bank:

1. Upon completion of the evacuation of the Northern Samaria Area, no permanent Israeli military presence will remain in this area.
2. Israel reserves its inherent right of self defense, both preventive and reactive, including where necessary the use of force, in respect of threats emanating from the Northern Samaria Area.
3. In other areas of the West Bank, current security activity will continue. However, as circumstances permit, Israel will consider reducing such activity in Palestinian cities.

4. Israel will work to reduce the number of internal checkpoints throughout the West Bank.

4. MILITARY INSTALLATIONS AND INFRASTRUCTURE IN THE GAZA STRIP AND NORTHERN SAMARIA

In general, these will be dismantled and removed, with the exception of those which Israel decides to leave and transfer to another party.

5. SECURITY ASSISTANCE TO THE PALESTINIANS

Israel agrees that by coordination with it, advice, assistance and training will be provided to the Palestinian security forces for the implementation of their obligations to combat terrorism and maintain public order, by American, British, Egyptian, Jordanian or other experts, as agreed with Israel. No foreign security presence may enter the Gaza Strip or the West Bank without being coordinated with and approved by Israel.

6. THE BORDER AREA BETWEEN THE GAZA STRIP AND EGYPT (PHILADELPHI ROUTE)

Initially, Israel will continue to maintain a military presence along the border between the Gaza Strip and Egypt (Philadelphi route). This presence is an essential security requirement. At certain locations security considerations may require some widening of the area in which the military activity is conducted.

Subsequently, the evacuation of this area will be considered. Evacuation of the area will be dependent, inter alia, on the security situation and the extent of cooperation with Egypt in establishing a reliable alternative arrangement.

If and when conditions permit the evacuation of this area, Israel will be willing to consider the possibility of the establishment of a seaport and airport in the Gaza Strip, in accordance with arrangements to be agreed with Israel.

7. ISRAELI TOWNS AND VILLAGES

Israel will strive to leave the immovable property relating to Israeli towns and villages intact. The transfer of Israeli economic activity to Palestinians carries with it the potential for a significant improvement in the Palestinian economy. Israel proposes that an international body be established (along the lines of the AHLC), with the agreement of the United States and Israel, which shall

take possession from Israel of property which remains, and which will estimate the value of all such assets.

Israel reserves the right to request that the economic value of the assets left in the evacuated areas be taken into consideration.

8. CIVIL INFRASTRUCTURE AND ARRANGEMENTS

Infrastructure relating to water, electricity, sewage and telecommunications serving the Palestinians will remain in place. Israel will strive to leave in place the infrastructure relating to water, electricity and sewage currently serving the Israeli towns and villages. In general, Israel will enable the continued supply of electricity, water, gas and petrol to the Palestinians, in accordance with current arrangements. Other existing arrangements, such as those relating to water and the electro-magnetic sphere shall remain in force.

9. ACTIVITY OF INTERNATIONAL ORGANIZATIONS

Israel recognizes the great importance of the continued activity of international humanitarian organizations assisting the Palestinian population. Israel will coordinate with these organizations arrangements to facilitate this activity.

10. ECONOMIC ARRANGEMENTS

In general, the economic arrangements currently in operation between Israel and the Palestinians shall, in the meantime, remain in force. These arrangements include, inter alia:

- i. The entry of workers into Israel in accordance with the existing criteria.
- ii. The entry and exit of goods between the Gaza Strip, the West Bank, Israel and abroad.
- iii. The monetary regime.
- iv. Tax and customs envelope arrangements.
- v. Postal and telecommunications arrangements.

In the longer term, and in line with Israel's interest in encouraging greater Palestinian economic independence, Israel expects to reduce the number of Palestinian workers entering Israel.

Israel supports the development of sources of employment in the Gaza Strip and in Palestinian areas of the West Bank.

11. EREZ INDUSTRIAL ZONE

The Erez industrial zone, situated in the Gaza Strip, employs some 4000 Palestinian workers. The continued operation of the zone is primarily a clear Palestinian interest. Israel will consider the continued operation of the zone on the current basis, on two conditions:

- i. The existence of appropriate security arrangements.
- ii. The express recognition of the international community that the continued operation of the zone on the current basis shall not be considered continued Israel control of the area.

Alternatively, the industrial zone shall be transferred to the responsibility of an agreed Palestinian or international entity. Israel will seek to examine, together with Egypt, the possibility of establishing a joint industrial area in the area between the Gaza Strip, Egypt and Israel.

12. INTERNATIONAL PASSAGES

i. The international passage between the Gaza Strip and Egypt

1. The existing arrangements shall continue.
2. Israel is interested in moving the passage to the “three borders” area, approximately two kilometers south of its current location. This would need to be effected in coordination with Egypt. This move would enable the hours of operation of the passage to be extended.

ii. The international passages between the West Bank and Jordan:

The existing arrangements shall continue.

13. EREZ CROSSING POINT

The Israeli part of Erez crossing point will be moved to a location within Israel in a time frame to be determined separately.

14. TIMETABLE

The process of evacuation is planned to be completed by the end of 2005. The stages of evacuation and the detailed timetable will be notified to the United States.

15. CONCLUSION

Israel looks to the international community for widespread support for the disengagement plan. This support is essential in order to bring the Palestinians to implement in practice their obligations to combat terrorism and effect reforms, thus enabling the parties to return to the path of negotiation.

U.S. obligations as part of the disengagement plan

1. On April 14, 2004, the United States, through a presidential letter, made the following commitments:

- Preserving the Government's fundamental principle, according to which no political process with the Palestinians will take place before the dismantling of terror organizations, as requested by the Roadmap.
- American commitment that no political pressure will be exerted on Israel to adopt any political plan, other than the Roadmap, and that there will be no political negotiations with the Palestinians as long as they do not fulfill their commitments under the Roadmap (full cessation of terror, violence and incitement; dismantling terror organizations; leadership change and carrying out comprehensive reforms in the Palestinian Authority).
- Unequivocal American recognition of Israel's right to secure and recognized borders, including defensible borders.
- American recognition of Israel's right to defend itself, by itself, anywhere, and preserve its deterrence power against any threat.
- American recognition in Israel's right to defend itself against terror activities and terror organizations wherever they may be, including in areas from which Israel has withdrawn.

- Unequivocal American stand regarding the refugees, according to which there will be no return of refugees to Israel.
- American stand that there will be no return to the 1967 borders, for two primary considerations: major Israeli population centers and the implementation of the term defensible borders.
- American stand, according to which the major Israeli population centers will be part of Israel, in any event. All the remaining areas in Judea & Samaria will be open for negotiation.
- The United States sets clear conditions for the establishment of a future Palestinian state and declares that the Palestinian state will not be created as long as the terror organizations have not been dismantled, as long as the leadership has not been replaced and no comprehensive reforms have been completed in the Palestinian Authority.

2. President Bush's letter to the Prime Minister and the Prime Minister's letter to President Bush constitute part of the overall disengagement plan, and these understandings with the United States will only be valid if the disengagement plan is approved by Israel. The exchange of letters between President Bush and the Prime Minister, as well as the letter by the Chief of the Prime Minister's Bureau to the U.S. National Security Adviser, are attached to this plan as an integral part of it.

3. According to the Roadmap adopted by the Government of Israel, Israel has undertaken a number of commitments regarding the dismantling of unauthorized outposts, limitations on settlement growth, etc. In the framework of the negotiations with the Americans, all of Israel's past commitments on these issues vis-à-vis the American administration, have been included in the letter by the Chief of the Prime Minister's Bureau to the U.S. National Security Adviser.

OUTSOURCING REFUGEE PROTECTION RESPONSIBILITIES: THE SECOND LIFE OF AN UNCONSCIONABLE IDEA

RONALD C. SMITH*

Table of Contents

I.	INTRODUCTION	137
II.	AN IDEA REVIVED	138
III.	SHADOWS OF EARLIER PROPOSALS BY SCHUCK, HATHAWAY AND NEVE	142
IV.	FERTILE GROUND FOR RADICAL THOUGHTS: THE TRASHING OF THE REFUGEE REGIME	144
V.	PROBLEMS WITH OUTSOURCING MORAL OBLIGATIONS ...	149
VI.	CONCLUSION	152

I. INTRODUCTION

For the second time in a decade a serious proposal has been put forward suggesting nations be allowed to pay other countries to take genuine refugees off their hands rather than honor their obligations to provide asylum within their borders. Then and now the proponents of this radical idea rely on funereal assessments of the state of the international refugee regime. Wrapped in these dire pronouncements, the idea this time around is floated as a natural outgrowth of other recent developments in the international community.

The particulars of the latest discussion of the market concept are outlined in Part II of this article. The close links of the idea to a British proposal to ship asylum seekers to processing centers outside United Kingdom borders are also explored. Part III looks at the earlier suggestion of a market in refugee protection quotas that grew up on the opposite side of the Atlantic following the peak of the Haitian refugee influx to the United States. Recent developments that provide fertile ground for those who argue for changes in the refugee convention and protocol are explored in Part IV. The author then takes the position in Part V that creating an international market to trade refugee protection responsibilities is both foolhardy and unconscionable: foolhardy because it is not even in the selfish best interests of nations to export this responsibility and

*. December, 2004, graduate of The Florida State University College of Law. The author and his wife, Jean, have served as sponsors of more than a dozen political refugees admitted into the United States.

unconscionable because even debating the concept debases one of the supreme achievements of international diplomacy, an accord reached in the chaotic aftermath of World War II that is certainly a watershed moment in collective recognition of human rights by the community of nations.

II. AN IDEA REVIVED

A stark new proposal to create an international market for refugee placement has been published as a working paper on new issues in refugee research by the Office of the United Nations High Commissioner for Refugees.¹ The author, Alexander Betts, presents the concept of paying other nations to relieve a country of its international obligation to provide asylum to eligible individuals as a natural outgrowth of current discussions in Europe.² He suggests the British government's proposal³ in 2003 that the European Union consider creating transit processing centers outside the borders of the European Union lends itself to the market concept.⁴

Under the British proposal those seeking asylum upon arrival in European Union nations would be transferred to these outside processing centers and their claims evaluated.⁵ The British proposal suggests the international handling of refugees can be improved through better regional management of migration and the introduction of processing centers in strategic locations outside the European Union.⁶ The stated goal is to deal with "irregular migrants" in their regions of origin by providing protection close to their home countries and developing legal means by which "genuine refugees" could be admitted into Europe "if the situation requires."⁷

The proposal describes four elements of regional intervention. These can be briefly detailed as:

1. Preventing mass movements of refugees through wiser distribution of development assistance to the

1. ALEXANDER BETTS, THE POLITICAL ECONOMY OF EXTRA-TERRITORIAL PROCESSING: SEPARATING 'PURCHASER' FROM 'PROVIDER' IN ASYLUM POLICY, UNHCR Working Paper No. 91 (2003), available at <http://www.unhcr.ch> (last visited Nov. 1, 2004).

2. *Id.* at 6.

3. U.K. HOME OFFICE, CONCEPT PAPER PRESENTED BY THE HOME SECRETARY TO THE EU JUSTICE AND HOME AFFAIRS COUNCIL MEETING: UK PROPOSALS ON ZONES OF PROTECTION: NEW INTERNATIONAL APPROACHES TO ASYLUM PROCESSING AND PROTECTION (2003) [hereinafter NEW APPROACHES], available at <http://www.parliament.the-stationery-office.co.uk> (last visited Oct. 30, 2004).

4. BETTS, *supra* note 1, at 3.

5. NEW APPROACHES, *supra* note 3, at 3.

6. *Id.* at 2.

7. *Id.*

poorest nations and enhancing the ability of the UN to respond rapidly to any emerging crisis.⁸

2. Providing better protection of refugees in regions close to the nations they are fleeing, thus reducing the incentive to move on to Europe.⁹

3. Processing asylum claims in these protected areas and managing limited resettlement in Europe on a quota basis when protection in the region is not appropriate for the long term.¹⁰

4. Signing readmission agreements if necessary to promote acceptance of responsibility by nations to accept the return of refugees.¹¹

The intervention plan would be complemented by the introduction of transit processing centers outside the European Union.¹² These are envisioned as protected zones in third countries. Asylum seekers arriving in European countries would be transferred to these centers and have their status considered there.¹³

The centers would be paid for by the participating nations and the European Commission.¹⁴ Those granted refugee status would be accommodated in Europe under a burden-sharing formula.¹⁵ The majority of those denied asylum would be returned to their countries of origin.¹⁶ Where that would be unsafe, refugees might be given temporary status in the European Union until the situation in their homeland improved.¹⁷

The British proposal is consistent with another important development in Europe's struggle to deal with refugees over the past two decades. The Council of Europe identified a need in the 1980s to harmonize asylum laws to combat a phenomenon where asylum seekers sought entry in one nation after another.¹⁸ Under a 1990

8. *Id.*

9. *Id.*

10. *Id.* at 2-3.

11. *Id.* at 3.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 3-4.

18. Joan Fitzpatrick, *Flight from Asylum: Trends Toward Temporary "Refuge" and Local*

agreement refugees get just “one bite at the apple.”¹⁹ They can gain access to the asylum adjudication process in only one member nation.²⁰ The latest British proposal simplifies the coordination of that effort.

The UK proposal prompted Betts to write because it attempts to “separate the concept of protecting asylum-seekers, to which the convention binds them [states], from that of admitting them to the country they want to go to.”²¹ If this split can be made, a nation can meet its obligations under international law while handing asylum-seekers over to another safe country for processing purposes.

Betts says processing in the region creates a purchaser of services and a provider of services.²² “It allows, at its most simple, one state to pay another to provide basic asylum services on its behalf, subject to a contractual relationship.”²³ He sees the leap from the already established asylum burden sharing (in the form of a European Refugee Fund) to extra-territorial processing as a jump from the transfer of money to the prospect of transferring people and money.²⁴ And once protection seekers are being moved, it is only a small step to incorporate a concept of “efficiency” in the form of payments to others to accept a country’s full resettlement obligations.²⁵

Betts acknowledges his conception puts the UK proposal in its “most extreme form” but sees the existing proposal as already separating a nation where an asylum claim is made from that nation’s obligations to directly supply certain social and legal services related to the processing of an asylum claim.²⁶ He sees the UK plan as a choice to contract out the traditional processing services to a hopefully more efficient provider.²⁷

The argument Betts makes is that contracting agreements such as these, when taken to their “logical extreme,” could incorporate more of a nation’s refugee obligations.²⁸

Responses to Forced Migrations, 35 VA. J. INT’L L. 13, 36-37 (1994) (referring to twin problems of “asylum shopping” and “refugees in orbit”).

19. *Id.* at 38.

20. *Id.* However, the 1990 agreement was limited to participating states. *Id.*

21. BETTS, *supra* note 1, at 3 (quoting *Special Report on Asylum*, THE ECONOMIST, Mar. 15, 2003, at 35-38) (brackets in original).

22. *Id.* at 9.

23. *Id.* Betts acknowledges that this division “exaggerates the extent of devolved power in the current proposals,” but argues that it fairly characterizes the overarching conceptual framework. *Id.* at 1.

24. *Id.* at 4.

25. *Id.*

26. *Id.* at 1.

27. *Id.*

28. *Id.*

While fiscal transfers can only offer financial compensation for non-financial costs, the human transfer allows the political, social and economic costs to be directly transferred. This is particularly politically expedient for states in which “cost” is not simply measured in terms of the provision of legal and social conditions, but extends to the marginal perceived cost of taking in another asylum-seeker.²⁹

Purchasing states would have to decide what they are willing to pay not to have to admit the qualified refugee and once other nations expressed a willingness to receive the refugees in return for compensation³⁰ a market would be born.³¹

Betts analogizes the “refugee market” to other “quasi-markets” created with some level of success in the United Kingdom since 1988.³² Although these markets will be discussed here only in passing, they are an important part of his argument for the viability of his international trade in refugee placements.

The British government retained public funding for portions of the national education and health systems but introduced market forces within the state system by forcing public providers of services to compete for the right to provide those services.³³ An education reform measure created such a quasi-market by encouraging a competition for pupils by giving parents a choice between schools.³⁴ A similar health service reform stimulated competition by creating contests between public agencies bidding to provide health and community care.³⁵

Betts sees an increased efficiency in these “quasi-markets” because he believes they allow for more appropriate and specialized services that provide incentives to reach required standards of quality at the lowest possible cost.³⁶ Extra-territorial processing of

29. *Id.* at 5. The author sees indirect costs in many areas including ethnic division and media portrayal. *Id.*

30. See Peter H. Schuck, *Refugee Burden Sharing: A Modest Proposal*, 22 YALE J. INT'L L. 243, 284 (1997) (explaining that cash, weapons, development aid or anything the receiving nation considers acceptable could serve as compensation).

31. BETTS, *supra* note 1, at 15.

32. *Id.* at 7. Betts notes that quasi-markets are “markets in which government agencies arrange care for their clients by placing contracts for the delivery of care with independent ‘arm’s length suppliers.’” *Id.* (quoting Carol Propper, *Quasi-Markets, Contracts, and Quality in Health and Social Care: The US Experience*, in QUASI-MARKETS AND SOCIAL POLICY 25-45 (Julian Le Grand & Will Bartlett eds., 1993)).

33. *Id.*

34. *Id.* at 8.

35. *Id.*

36. *Id.* at 9.

refugee claims would potentially create a quasi-market using third countries and international agencies as providers of asylum processing services. The final step toward the market system he envisions for refugee placements would eventually help nations overcome their “collective action failure associated with the burden-sharing debate.”³⁷ His conclusion is that “[t]he market incentives inherent in such a system would induce participation by allowing each state to maximize its own perceived interests.”³⁸

III. SHADOWS OF EARLIER PROPOSALS BY SCHUCK, HATHAWAY AND NEVE

The Betts proposal to a certain extent is a revival of an earlier suggestion of a market in refugee protection quotas. Though he gives no nod to the work of Peter H. Schuck,³⁹ Betts’ discussion echoes Schuck’s, and discussion of Betts’ ideas are informed by the debate that surrounded earlier suggestions.

Schuck wrote in response to a perceived refugee crisis on the other side of the Atlantic.⁴⁰ His proposal was born in the aftermath of a Haitian influx into the United States but also followed problems in Afghanistan, Bosnia and Rwanda.

One recent commentator linked the British proposal that provides the springboard for Betts to the U.S. response to Haiti.⁴¹ Jeff Crisp says that many proposals to deal with the refugee regime have been overshadowed by a newer and more radical approach based on extraterritorial processing and the notion of protection in regions of origin.⁴² He suggests such concepts are at least 10 years old and can be traced to the U.S. treatment of asylum seekers from Haiti in the early 1990s.⁴³ It is also interesting to note that where Betts analogizes to the quasi-markets in education and health care in the United Kingdom, Schuck relied on comparisons of his refugee protection market to trading in emissions rights under the U.S. Clean Air Act.⁴⁴ He also cited affordable housing quotas imposed on cities by the state of New Jersey and a system that allowed

37. *Id.* at 22.

38. *Id.* at 15.

39. Schuck, *supra* note 30, at 243.

40. *See id.* at 244.

41. JEFF CRISP, A NEW ASYLUM PARADIGM? GLOBALIZATION, MIGRATION AND THE UNCERTAIN FUTURE OF THE INTERNATIONAL REFUGEE REGIME 12 (2003), available at <http://www.unhcr.ch> (last visited Oct. 30, 2004).

42. *Id.*

43. *Id.* at 12. Crisp says Australia’s recent refusal to allow the disembarkation of refugees arriving the United States by boat and the U.K. proposal for extra-territorial processing revived the radical approach. *Id.*

44. Schuck, *supra* note 30, at 291.

municipalities to buy and sell their obligations to build housing for poor people.⁴⁵

Schuck's ideas reached the mainstream in an opinion piece he wrote for *The New York Times*.⁴⁶ After describing the international community as paralyzed in response to a worldwide tide of refugees and citing great differences in the willingness of nations to absorb refugees, Schuck offered a simplified version of his self-described "modest proposal" for the nations of the world.⁴⁷

Some are wealthy, others poor. Some are thinly settled, others overcrowded. Some have docile populations; others cannot protect refugees from violence.

Why not use these differences to promote burden-sharing? Usually, people with diverse preferences and assets turn those differences to mutual advantage by trading. When a buyer values a car more than cash, and a seller prefers cash to her car, they cut a deal and both benefit. Now apply the principle to refugees.⁴⁸

Schuck then presented what he called a "novel" idea: that the UN could establish refugee quotas for nations and permit countries to trade their quota obligations.⁴⁹ He said if these obligations and bargains were enforceable, rich but crowded countries like Japan would be likely to pay nations like Russia to relieve them of their refugee obligation.⁵⁰

Writing in much greater detail in the *Yale Journal of International Law*, Schuck said nations were already paying others to protect refugees when they contribute funds to help other countries handle "protection efforts in situ."⁵¹ He described this system as ad hoc, sluggish in response, highly political in nature and harmed by uneven contributions.⁵² He said these problems could be overcome with "[a] properly regulated market in refugee protection quotas."⁵³

45. *Id.*

46. Peter H. Schuck, *Share the Refugees*, N.Y. TIMES, Aug. 13, 1994, at A21.

47. *Id.*

48. *Id.*

49. Schuck, *supra* note 30, at 250.

50. Schuck, *supra* note 46.

51. Schuck, *supra* note 30, at 283.

52. *Id.*

53. *Id.*

Schuck opposed the idea of creating a centrally administered refugee protection fund as something that appears preferable only “at first blush.”⁵⁴ He saw two disadvantages to this method when compared to a market approach. He said a protection fund would necessarily restrict payments by nations to cash and a voluntary exchange between nations opens the door to debt relief, credit, commodities, technical advice, weapons and any combination of these that is acceptable to the parties.⁵⁵ He also believed a centralized system would have higher transaction costs.⁵⁶

Schuck, in turn, owes some debt to James C. Hathaway and R. Alexander Neve. Their studies covered a six-year process of consultation at York University that brought together government officials, academics and representatives of nongovernmental agencies and international organizations.⁵⁷ Their work has been described as similar in many ways to that of Schuck⁵⁸ because each proposes creating “interest convergence groups” of states who would allocate responsibility for protecting refugees.⁵⁹ Hathaway and Neve devoted much of their work to operational burden sharing and responsibility sharing among nations and these are incorporated into Schuck’s approach. Schuck, though, devoted less attention to durable solutions such as temporary protection of refugees. His work toward the creation of a market in refugee quotas is credited as an “innovation.”⁶⁰

IV. FERTILE GROUND FOR RADICAL THOUGHTS: THE TRASHING OF THE REFUGEE REGIME

Bleak assessments of the health of the international refugee regime are essential elements in peddling the idea of trading refugees. The opening statement of the British government’s concept paper that launched Betts’ purchaser-provider treatise is in keeping with this view: “We start from the premise that the current global system is failing.”⁶¹ The position paper says there are twelve million genuine refugees in the world; that the current asylum system usually requires those fleeing persecution to cross borders

54. *Id.* at 284.

55. *Id.*

56. *Id.*

57. James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115 (1997).

58. Deborah Anker et al., *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295 (1997).

59. *Id.*

60. *Id.* at 296.

61. NEW APPROACHES, *supra* note 3, at 1.

illegally; that the cost of support for asylum seekers is highly uneven across the globe; and support for refugees is badly distributed.⁶² The report says between half and three quarters of asylum seekers received by European countries do not meet the United Nations High Commissioner for Refugees (UNHCR) definition of a refugee. Because individual countries experience rapidly fluctuating numbers of refugees, there are resulting problems for genuine refugees and public concerns about the numbers of unfounded claims.⁶³

Bett's precursor, Schuck, also acknowledged the importance of the pessimistic view while repeating it. "My premise is that the current refugee regime is broke . . . and that it needs fixing."⁶⁴ He finds the existing system to be almost universally criticized.⁶⁵ In his "bill of particulars," Shuck says it was designed in the post-World War II era before the globalization of the world economy.⁶⁶ He says the distribution is "decidedly lumpy"⁶⁷ and free-riding by nations appears to be a rational strategy as nations decide how much help to provide refugees.⁶⁸ At one point he describes his work as an "effort to salvage a meaningful human rights regime from the carcass" of the present regime.⁶⁹

Hathaway and Neve started with the same basic building block: "International refugee law is in crisis."⁷⁰ They cite significant barriers erected to prevent refugees from reaching potential asylum and say refugees who get past the barriers are often dealt with in harsh ways that violate their human rights.⁷¹ They say states impose visa requirements and penalize airlines for transporting refugees in an effort to insulate themselves and that "warehousing" of refugees has become common. "[S]ummary removal to so-called 'safe third countries'" also denies those who have arrived by indirect routes any chance to pursue asylum claims, Hathaway and Neve say.⁷²

It must be said that the authors of the U.K. proposal and the champions of the refugee-marketing ideas we are examining here are not the architects of this dismal view of the present state of

62. *Id.*

63. *Id.*

64. Schuck, *supra* note 30, at 247.

65. *Id.* at 250.

66. *Id.* at 251.

67. *Id.* at 252.

68. *Id.* at 253.

69. *Id.* at 246.

70. Hathaway, *supra* note 57, at 115.

71. *Id.* at 119. They refer to these policies as non-entrée practices. *Id.* at 120.

72. *Id.*

worldwide practices regarding refugees. They have merely harnessed the negative findings of others to fuel their arguments.

There has been significant commentary on the ill-health of the refugee system over the past 15 years, perhaps accented by a flurry of articles published in anticipation of and in the aftermath of the 50th anniversary of the convention. Many of these included calls for changes in the treaty to address various concerns.

In her well-received⁷³ book, *Beyond Borders: Refugees, Migrants and Human Rights in the Post-Cold War Era*,⁷⁴ Elizabeth G. Ferris documented the early years of what is now often referred to as a crisis in the world response to refugees. Ferris traced a perceived breakdown in the system of protection to the end of the Cold War, and her view is widely shared.⁷⁵ But Ferris indicated that widespread recognition of the resulting impact didn't come until the end of the 1980s.⁷⁶ She cites a decision by *The Economist* to declare 1989 "the year of the refugee"⁷⁷ as a crystallizing moment.⁷⁸

By the late 1980s, it seemed that on every continent, refugee movements were challenging national structures and international norms. The system was being overwhelmed and could no longer cope. This was a problem not just for international lawyers and national bureaucrats working with immigration issues. It meant that the lives of millions of people were placed in jeopardy.⁷⁹

Ferris noted the numbers were increasing and the solutions were becoming more elusive.⁸⁰ Importantly, she also noted that the changing situation led to increasingly restrictive policies by many nations.⁸¹ Even in the earliest stages of the "crisis" the response by many governments was to make it more difficult for refugees to

73. Colin J. Harvey, Book Review, 6 INT'L J. OF REFUGEE L. 308 (1994) (reviewing ELIZABETH G. FERRIS, *BEYOND BORDERS: REFUGEES, MIGRANTS AND HUMAN RIGHTS IN THE POST-COLD WAR ERA* (1993)).

74. ELIZABETH G. FERRIS, *BEYOND BORDERS: REFUGEES, MIGRANTS AND HUMAN RIGHTS IN THE POST-COLD WAR ERA* (1993).

75. See, e.g., B. S. Chimni, *The Meaning of Words and the Role of UNHCR in Voluntary Repatriation*, 5 INT'L J. REFUGEE L. 442, 443-44 (1993) ("With the end of the Cold War the firm basis of interest in refugees, particularly from the developing world, has been removed: refugees no longer have ideological or geopolitical value.").

76. FERRIS, *supra* note 74, at 93.

77. See *The Year of the Refugee*, THE ECONOMIST, Dec. 23, 1989 at 17.

78. FERRIS, *supra* note 74, at 93.

79. *Id.*

80. *Id.* at 97.

81. *Id.* at 98.

receive asylum.⁸² She criticized governments for relying on ever more sophisticated methods to keep down the number of refugees reaching their borders.⁸³

Another scholar, Julie Mertus, has divided these methods into three distinct categories: direct measures, indirect measures and lowered standards.⁸⁴ Direct measures are those aimed at stopping refugees from crossing borders: This may involve physically turning them back or holding them in areas outside their own territory.⁸⁵ Indirect measures are those that constrain refugee movement.⁸⁶ These include visa requirements, carrier sanctions and empowerment of border guards to make virtually unreviewable decisions on asylum seekers' claims.⁸⁷ It can also include reducing appeal rights and shortening procedures.⁸⁸ Lowering the standard of treatment in the host country refers to anything designed to discourage refugees. This may involve denial of the right to work, reunite with family, or receive education, housing or other financial assistance.⁸⁹

Mertus described these methods as "a shift away from protection and asylum and toward containment and prevention" in defining who is aid-worthy.⁹⁰ She sees would-be receiving states sealing their borders while the international community accepts "first country resettlement," "safe areas," temporary protection and repatriation "as alternatives to asylum."⁹¹

One of the things that complicates this debate is the differing uses of the term refugee. Despite a very specific definition given in the convention, the popular use of the word covers all mass migration. In that context, some of the international responses discussed above are more defensible or at least understandable. It is a mistake for the difficulties associated with mass movements of economic refugees to be blamed on a convention never intended for that type of situation. It is not surprising countries would be unable to accommodate these greater numbers using the refugee regime intended for a narrower class deserving of individualized consideration.

82. *Id.*

83. *Id.*

84. Julie Mertus, *The State and the Post-Cold War Refugee Regime: New Models, New Questions* 20 Mich. J. Int'l L. 59, 77-78 (1998), also printed in 10 INT'L J. REFUGEE L. 321 (1998).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 86.

91. *Id.*

Clearly there are problems. That there is a new paradigm is hardly disputed. But it is rhetoric of others like Cornelius D. de Jong that “[t]he 1951 convention is alive but only just,”⁹² that fortify the arguments of Betts and Schuck. Because of their reliance on the gloom and doom reports, it is important to note that there are countervailing opinions on the health of the regime, even though most see a need for changes and improvements. The most pessimistic arguments are dismissed as “hysterical” by some⁹³ and the depiction of the current situation as a “crisis” is openly challenged.⁹⁴ Tamer academic treatments describe the situation as “providing an important challenge” to the international regime.⁹⁵ There seems to be no debating Jeff Crisp’s “central point”⁹⁶ that nations today are less willing to admit refugees or allow them to stay. He cites the end of the Cold War as a contributing factor to a declining interest in refugee programs by the West but attributes more of the changing mood to the dramatic fluctuation in numbers of refugees.⁹⁷ After accommodating about 150,000 applications for asylum each year in the early 1980s, the totals climbed to 850,000 in 1992 and have remained between 500,000 and 600,000 for the last several years.⁹⁸

The parties to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol have themselves responded by reconfirming their commitments to the treaties during a meeting of the parties in Geneva in December 2001.⁹⁹ The declaration of the parties cited the enduring importance of the convention as the primary refugee protection instrument and went on to acknowledge its continuing relevance and resilience.¹⁰⁰

In what can be seen as an acknowledgement of the concerns of many, there was agreement the convention should be further developed and strengthened.¹⁰¹ The parties also declared that regional strategies, coordinated efforts to prevent future refugee situations and voluntary repatriation consistent with the principle

92. Cornelius D. de Jong, *The Legal Framework: The Convention Relating to the Status of Refugees and the Development of Law Half a Century Later*, 10 INT’L J. REFUGEE L. 688, 98 (1998).

93. Fitzpatrick, *supra* note 18, at 27.

94. Anker, *supra* note 58, at 296.

95. CRISP, *supra* note 41, at 3.

96. *Id.* at 4.

97. *Id.* at 5-6.

98. *Id.* at 7.

99. *Declaration on International Protection Ministerial Meeting of States Parties to the 1951 Convention and or Its 1967 Protocol Relating to the Status of Refugees*, UNHCR, U.N. Doc. HCR/MMSP/2001/09 (2002), available at <http://www.unhcr.ch> (last visited Nov. 1, 2004).

100. *Id.* at 1.

101. *Id.* at 3.

of non-refoulement were preferred solutions for these mass movements.¹⁰²

V. PROBLEMS WITH OUTSOURCING MORAL OBLIGATIONS

The health of the international refugee regime and the nature of the challenges it faces can be debated interminably, but while the significance of those critiques to the viability of the refugee market concept cannot be overstated, there are more principled arguments to be made against such a market as a proposed solution to whatever problems do exist.

Some criticisms of these proposals include practical discussions of whether they would in fact work.¹⁰³ These problems are not addressed here because even if they could be cured, the market proposal must still be rejected on the basis of the remaining objections that cannot be redeemed.

Nor are the authors' efforts to temper their proposals through suggestions, such as considering languages spoken by refugees before shipping them to new lands, discussed at any length since they make the contemplated diminishment of moral responsibility for asylum seekers to one of simple financial obligation no more palatable.¹⁰⁴ Schuck's proposal was made in a broader context and included careful arguments preserving much of the refugee regime.¹⁰⁵ Betts is able to make a simpler and more direct bid, arguing that the British proposal on the table already separates purchaser and provider for some refugee services and that he is merely suggesting there are efficiencies that can be gained in going the rest of the way.¹⁰⁶

The greater concerns are the moral soundness of the idea and whether certain benefits from granting asylum and assimilating refugees have been lost in the analysis and whether some costs have been exaggerated in a way that has skewed perceptions.

The marketing of refugee quotas is simply repugnant.

A proper analogy might be to allow wealthy parents to hire a mercenary to serve in their child's place should he face a universal military draft. It can be assumed that any standard the military

102. *Id.*

103. Anker, *supra* note 58, at 301 ("Both proposals assume that financing transfers from the North to those states in the South providing physical protection to [the] refugees will be possible largely because of savings achieved by dismantling expensive non-entree and asylum adjudication systems."). The authors challenge whether these savings can in fact be realized. *Id.*

104. Schuck, *supra* note 46. The author suggests that efforts might be made to convince French-speaking countries to accept Haitians, for example. *Id.*

105. *See id.*

106. BETTS, *supra* note 1, at 9.

might set for physical prowess could be met by substitute soldiers and that a price agreeable to buyer and seller of military time served could be reached. But any such allowance can easily be seen to undermine the nation's solidarity due to the perceived unfairness to those not financially able to bypass the draft. Also missing would be the wealthy family's vested interest in the proper conduct of the war, the personal growth of the individual who escapes the service and the loss to the nation of the influence of the returning veteran who might contribute to the political debate over the justness of the conflict.

The losses from entering a market in asylum obligations would parallel those of a family buying its son out of the service of his country. There would be both a dehumanizing effect and a loss of unity and purpose.

Any view of proposed trafficking in human beings as a moral offense is dismissed by Schuck, though, as a familiar argument raised "whenever the market is used to allocate scarce goods or activities."¹⁰⁷ He then reverts to his argument that a new conception could hardly leave refugees worse off than they are in the existing "jerry-built" system.¹⁰⁸

Betts and Schuck necessarily build their arguments for a market on a platform of burden sharing. Before there can be any trading in refugee protection responsibilities nations must have a carefully calculated obligation to meet. Where the burden-sharing imperative is currently "precatory and hortatory"¹⁰⁹ each would substitute a more robust commitment. The Comprehensive Plan of Action in Southeast Asia and the 1989 Conference on Central American Refugees are cited as notable commitments of this type brought about "by manipulating the formidable carrots and sticks that the powerful states control."¹¹⁰

These same examples of extraordinary actions addressing refugee troubles on opposite sides of the globe are proof that the international community can still be rallied to supplement the convention if major players are motivated to do so. The 1967 Protocol is the ultimate proof that the international community can be rallied to adapt as necessary. That accord remedied the temporal and geographic limitations and demonstrated that this is a dynamic regime.¹¹¹

107. Schuck, *supra* note 30, at 296.

108. *Id.* at 297.

109. *Id.* at 272.

110. *Id.* at 275.

111. Guy Goodwin-Gill, *The International Protection of Refugees: What Future?* 12 INT'L J. REFUGEE L. 1, 3 (2000).

It is also important to note that even the term burden-sharing has been described as “problematic”¹¹² because it suggests that providing refugees with protection is necessarily burdensome. There is a serious case to be made that there are off-setting contributions that bring the cost-benefit equation back into balance and possibly swing it in favor of the refugee more than paying his keep. Costs are likely to outweigh benefits from the host nation’s perspective in the first few months after arrival, but this is not likely to be true in a majority of cases after assimilation.¹¹³

Additionally, the value of diversity in the workplace, higher education and any other setting has been demonstrated and celebrated in the past 30 years of national debates over racial integration and affirmative action. In much the same way, refugees broaden our experience as a nation. They open our eyes, educate us to political realities in other lands and in doing so make our lives richer.

This lesson has played out repeatedly in our international understanding. The presence of a significant Polish community in the United States helped make us sensitive to the struggles of Lech Walesa’s labor movement. The large Cuban community in Florida has helped Americans comprehend the shortcomings of the Fidel Castro regime and win support for U.S. policies toward the dictator. While life in many countries is inconceivable to us, a vivid portrait of life in those nations was before us because of our acceptance of refugees from those countries.

So one consequence of out-sourcing our asylum obligations to nations willing to accept these refugees in return for compensation would be the “muffling” of these voices that educate us to the persecution in their homelands.¹¹⁴

The negative side of this equation has been just as distorted. In the United Kingdom the battle is intensely political with the Labour Government attempting to deal with the populist threat of the Conservative Party to withdraw from the 1951 convention.¹¹⁵ An argument is made that the tabloid press in the United Kingdom has brought together concerns and fears over everything from radical Islam to falling property prices and associated them with the asylum issue.¹¹⁶ “There is something quite farcical about the

112. Gregor Noll, *Risky Games? A Theoretical Approach to Burden-sharing in the Asylum Field*, 16 J. REFUGEE STUD. 236, 237 (2003).

113. *Id.*

114. Anker, *supra* note 58, at 307-08. This would result in the “persistence rather than the removal of the root causes of forced migration.” *Id.* at 8.

115. BETTS, *supra* note 1, n.23.

116. CRISP, *supra* note 41, at 10.

frenzied way in which the British tabloids have treated the asylum issues.”¹¹⁷

A milder case can be made that similar fears fuel public opinion in the United States whenever it faces unusually high refugee flows.¹¹⁸ The growing negativity of recent attitudes toward asylum also can be linked to terrorism.¹¹⁹

VI. CONCLUSION

The framing of the refugee convention was a seminal moment in world history — one when leaders looked beyond their own nations’ narrow interests and to the greater good of mankind.

The horrors of the Holocaust so shocked and shamed world leaders that it consequently helped rally the world diplomatic community to one of its greatest achievements.¹²⁰ As the generation that was stunned by Adolph Hitler’s genocidal efforts dies out and we approach a point where there is no living witness to that unthinkable inhumanity, the positive legacy of the convention and its protocol must remain as a monument to the lessons learned and a motivator of humane treatment of refugees for generations to come.

The existence of this agreement, even if it were only aspirational, would be of primordial importance.¹²¹ An audit of the achievements since the refugee convention can be nothing but impressive.¹²² Such a study starts with the simple success of gaining acceptance of the idea that the international community is responsible for the protection of refugees.¹²³ The convention produced the fundamental guarantee of non-refoulement, and a comprehensive listing of rights and standards of treatment.¹²⁴ Once the scope of protection was agreed upon, the infrastructure would continue to evolve but the idea that each nation has a responsibility

117. *Id.* Some alarming examples of front-page headlines such as “Asylum blamed for AIDS crisis” and “Asylum threat to house prices” are reprinted as well. *Id.* at 3.

118. *Id.* at 8.

119. *Id.* at 8-9. “[I]t could be argued that an important connection exists between the ‘war on terror’ and the mounting challenge to asylum since the events of ‘9/11.’” *Id.* at 9.

120. See generally Karen Musalo, *British Nationality and Immigration*, 16 INT’L J. REFUGEE L. 165 (2004) (providing an overview of the history leading up to the 1951 Convention).

121. ROBERT F. DRINAN, *THE MOBILIZATION OF SHAME: A WORLD VIEW OF HUMAN RIGHTS* at i-xiii (2001). Drinan makes a similar argument in the broader context of the UN World Conference on Human Rights that whether the norms can be enforced or not they represent the public morality of the global village and even impotent international machinery would serve a powerful purpose. *Id.*

122. Goodwin-Gill, *supra* note 111, at 2.

123. See *id.*

124. *Id.*

to protect individuals who arrive at their borders and meet the refugee definition has remained at the forefront.

From an American perspective, the adoption of the treaty and the subsequent enacting legislation was meant to “insure a fair and workable asylum policy which is consistent with this country’s tradition of welcoming the oppressed of other nations.”¹²⁵ It is no more conceivable to unravel the refugee convention than it would have been to take a wrecking ball to the Statue of Liberty when that icon was decaying and in need of repair as it approached its centennial.

125. *Sofia Campos-Guardado v. INS*, 809 F.2d 285, 290 (5th Cir. 1987) (quoting H.R. 608, 96th Cong. (1st Sess. 1979)).

ABSTRACTS

IT DON'T COME EEZ: THE FAILURE AND FUTURE OF COASTAL STATE FISHERIES MANAGEMENT

Donna R. Christie

Early in the negotiations of the Third United Nations Conference on the Law of the Sea (UNCLOS III) there was widespread agreement that coastal states should exercise exclusive jurisdiction over fisheries in an extended economic zone (EEZ). By 1977, more than forty nations had extended sovereign or exclusive jurisdiction over fisheries to 200 miles, and by the conclusion of UNCLOS III negotiations in 1982, more than ninety nations had extended offshore jurisdiction over fisheries to 200 miles. This early consensus in the UNCLOS III negotiations, along with emerging state practice, reflected coastal states' concerns about escalation in distant water fishing, declining fish stocks, and the failure of international fisheries organizations to manage high seas fisheries effectively. This article discusses the continuing decline of the state of fisheries since the development in international law of coastal state management of fisheries within 200-mile EEZs, focusing on the role of international treaties and obligations, as well as other developments, such as market-based approaches, in improving fisheries management.

STRATEGIC MYOPIA: THE UNITED STATES, CRUISE MISSILES, AND THE MISSILE TECHNOLOGY CONTROL REGIME

Michael Dutra

Cruise missiles are one of the most serious, if overlooked, threats to the security of the United States and its ability to project power overseas. This article begins with an overview of what constitutes a cruise missile, defines the threat that such weapons pose to the United States and its interests, and discusses the motivations behind various states' pursuit of cruise missile strike capabilities. The Missile Technology Control Regime (MTCR) stands as the best tool for curbing the proliferation of cruise missiles; however, because the ballistic missile threat has long overshadowed cruise missiles, the pathways to cruise missile development and proliferation have remained largely unguarded. While some recent steps have been taken to close loopholes in the MTCR, this article analyzes the difficulties that have emerged in creating the consensus needed to tighten the relevant language in the MTCR, and the technical challenges to cruise missile non-proliferation efforts. This article concludes with a brief discussion of various policy

and legal alternatives for strengthening the MTCR and slowing the spread of cruise missiles and related technologies.

THE TIES THAT BIND: U.S. FOREIGN POLICY COMMITMENTS AND THE CONSTITUTIONALITY OF ENTRENCHING EXECUTIVE AGREEMENTS

Justin C. Danilewitz

Is it constitutional for American presidents to use executive agreements in order to “entrench” foreign policy commitments in ways that constrain the conduct of future policy? This inquiry is complicated by the lack of explicit textual reference to executive agreements in the U.S. Constitution, requiring an exploration of secondary sources of constitutional interpretation, including case law, custom, and Framers’ intent. These sources lead me to argue that executive entrenchment is likely unconstitutional when it seeks to arrogate to the executive powers held concurrently with the Congress. The more challenging question, however, is not the case of “inter-branch” entrenchment, but what might be called “intra-branch” entrenchment. In the latter instance, a president might seek to obligate, not Congress, but the executive branch itself, potentially binding a future administration different from the one entering into the agreement. Can entrenchment in this instance lawfully limit the flexibility of future administrations, or would a concept such as the “last-in-time” doctrine applicable to statutory interpretation apply here as well? If the last-in-time doctrine pertains, is this so as a matter of pragmatism or of law? I argue against the constitutionality of intra-branch entrenchment of executive agreements on both realist and positivist grounds. My claim is that little can (or should) prevent the revision or repeal of a foreign commitment seen by a future administration to be in need of review. Our allies should be on notice — as some evidently already are — that supposed “entrenchment” of mutual commitments through executive agreement is no more than a myth. This is so whether they consider the American commitments to be entrenched or not.

OUTSOURCING REFUGEE PROTECTION RESPONSIBILITIES: THE SECOND LIFE OF AN UNCONSCIONABLE IDEA

Ronald C. Smith

A stark new proposal to create an international market for refugee placement has been published by the Office of the United Nations High Commissioner for Refugees. The author of the proposal presents the concept of paying other nations to relieve a country of its international obligation to provide asylum to eligible individuals as a natural outgrowth of current discussions in Europe. This article explores the proposal and its close links to a British plan to ship asylum seekers to processing centers outside United Kingdom. This article then argues that creating an international market to trade refugee protection responsibilities is both foolhardy and unconscionable: foolhardy because it is not even in the selfish best interests of nations to export this responsibility and unconscionable because even debating the concept debases one of the supreme achievements of international diplomacy, an accord reached in the chaotic aftermath of World War II that is certainly a watershed moment in collective recognition of human rights by the community of nations.