AN EVALUATION OF MULTILATERAL EXPORT CONTROL REGIMES AGAINST WEAPONS OF MASS DESTRUCTION PROLIFERATION UNDER INTERNATIONAL LAW

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Abstract

The present paper evaluates the desirability of multilateral export control regimes under international law. Sections II to V of the paper describes and analyses the four prominent export control regimes of the Nuclear Suppliers Group, Wassenaar Arrangement, Missile Technology Control Regime and Australia Group. Some pertinent but often overlooked successes and failures of some of these multilateral export control regimes are enumerated. The method in which these regimes operate and the standards for State level participation in these regimes are also discussed. Section VI evaluates the international legal framework behind these regimes and their legality under international law. Some relevant enforcement measures such as the Proliferation Security Initiative and the Container Security Initiative are briefly described. India's policy towards these regimes and possible membership to some of these multilateral export control regimes are also analysed in this Section. This research paper is primarily a descriptive analysis of multilateral export control regimes supplemented with a brief analysis of the legal framework behind the same

Keywords: Fissile Material Control, Nuclear non-proliferation, export control, multilateral, Security initiatives

Introduction

Four multilateral export control regimes exist pertaining to the control of technologies that can be used to create 'weapons of mass destruction'. These are the Nuclear Suppliers Group (NSG), the Wassenaar Arrangement (WA), the Missile Technology Control Regime (MTCR) and the Australia Group (AG). The Nuclear Suppliers Group deals with control of the export of nuclear materials, the Wassenaar Arrangement pertains to control of conventional weapons systems as well as dual-use technologies, the Missile Technology Control Regime controls the export of missile delivery systems while the Australia Group concerns itself with the control of technologies which can be used for chemical and biological weapons.

At the outset, before evaluating these regimes and examining their relevance to India's foreign policy, it is pertinent to mention the context in which the relevance of these regimes has exponentially increased in the past few years. *Firstly*, the proliferation or attempted proliferation of nuclear weapons by various States such as India, Pakistan, North

Korea, Libya, Iran and Israel has been a cause of concern to the international community in consideration of the implications for international security[1]. There are major concerns in the international community about the threat or use of nuclear weapons by States such as North Korea, which obtained sensitive nuclear technology from informal channels based in Pakistan.[2] *Secondly*, India has sought to regularise its status as a non-NPT nuclear weapons State from the first decade of the 21st century, internationally. *Thirdly,* the 2015 NPT Review Conference failed because the participating States were unable to reach an agreement about the substantive part of the draft Final Document[3]. It is important to keep these facts in active consideration while analysing the system of multilateral export control regimes. This paper engages in descriptive analysis of the four export control regimes and seeks to address the issues of India's membership to the three remaining regimes.

Nuclear Suppliers Group (NSG)

The Nuclear Suppliers Group was formed in 1974 following the peaceful nuclear explosion (PNE) by India.[4] Canada, West Germany, France, Japan, the USSR, the UK and the US were the first seven members of the group.[5] Initially, it was known as the London Club because the first few meetings for its establishment were held in London.[6] The NSG's objective is "to contribute to the non-proliferation of nuclear weapons through the implementation of two sets of Guidelines for nuclear exports and nuclear-related exports."[7] There are 48 nation States which are presently members of the NSG.[8] Two sets of NSG guidelines are operative, one pertaining to the exports of nuclear related items and the other pertaining to dual-use technologies. A lot of the work done by the NSG is similar to the work done by the Zangger Committee. The Zangger Committee has been in existence since 1971, *i.e.* it is older than the NSG. It is named after Professor Claude Zangger of Switzerland, who led efforts by 15 supplier

[1] Barnaby, Frank, *How Nuclear Weapons Spread: Nuclear-weapon proliferation in the 1990s* (2005 Repr., Routledge, 1993).
[2] *See, See generally*, Corera, Gordon, *Shopping for Bombs: Nuclear Proliferation, Global Insecurity, and the Rise and Fall of the A. Q. Khan Network* (Oxford University Press, 2006).
[3] 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), 27 April to 22 May 2015, United Nations Website, available at: http://www.un.org/en/conf/npt/2015/ (last accessed 12th of May, 2021 at 12:39).
[4] Rajagopalan, Rajeswari Pillai and Arka Biswas, "India's membership to the Nuclear Suppliers Group", No. 141 ORF Issue Brief, Observer Research Foundation (May 2016).
[5] *Ibid.*
[6] Rajagopalan, Rajesh and Atul Mishra, *Nuclear South Asia Keywords and Concepts* (Routledge, New Delhi, 2014) at 212.
[7] Chair's Corner, Nuclear Suppliers Group Website, available at http://www.nuclearsuppliersgroup.org/en/chair-s-corner (last accessed 12th of May, 2021 at 20:53)
[8] *Ibid.*

States to make a list of materials and technologies which would be subjected to export controls in view of prevention of nuclear proliferation by non-nuclear weapons States (NNWS).[9] This is presently known as the "Trigger List", so called because their export to any NNWS would lead to the trigger of the International Atomic Energy Agency (IAEA) safeguards mechanisms.[10] The Zangger Trigger List is maintained and regularly updated by the IAEA in the form of an information circular document INFCIRC/209[11]. The same IAEA information circular document also explains the Zangger Understandings. In brief, the Zangger Understandings are a set of three conditions for the supply of materials on the list: an assurance that the items would not be used for explosives, a commitment to fulfil the IAEA safeguards requirements and a provision which mandates the receiving State to apply the same conditions when re-exporting these items.[12]

The mechanism of the NSG is different from the Zangger Understandings. While the Zangger Committee regularly met from its inception, the NSG members were unable to meet from 1978 to 1990 because of disagreements pertaining to the updating of guidelines. In the 2001 Aspen Plenary, the NSG adopted a "Procedure for NSG membership after an Implementation Working Group (IMP) set up by the 2000 Paris Plenary presented a draft paper on how a restructured NSG might operate."[13] The factors for membership of the NSG as a Participating Government include: ability to supply items covered by the Guidelines[14]; "adhere to, and act in accordance with, the Guidelines"[15]; "have in force a legally-based domestic export control system which gives effect to the commitment to act in accordance with the Guidelines"[16]; "be a party to the NPT, the Treaties of Pelindaba, Rarotonga, Tlatelolco or Bangkok or an equivalent international nuclear non-proliferation agreement, and be in full compliance with the obligations of such agreement(s), and, as appropriate, have in force a full-scope safeguards agreement with the IAEA"[17]; "be supportive of international efforts towards

[9] *Supra* note 6 at 286.
[10] *Ibid.*
[11] *The Nuclear Suppliers Group: Its Origins, Role and Activities,* IAEA Information Circular INFCIRC/539/Rev.6 available at: https://www.iaea.org/sites/default/files/infcirc539r6.pdf (last accessed 13th of May, 2021 at 12:21).
[12] *Ibid.*
[13] Balachandran, G., "Why India should apply for NSG membership?", *IDSA Comment*, Institute of Defence Studies and Analyses, July 20, 2015 available at: http://www.idsa.in/idsacomments/WhyIndiashouldapplyforNSGmembership_gbalachandran_200715 (last accessed 13th of May, 2021 at 16:24).
[14] "Participants", Nuclear Suppliers Group Website, available at http://www.nuclearsuppliersgroup.org/en/participants1 (last accessed on 15th of May, 2021 at 00:30)
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*

non-proliferation of weapons of mass destruction and of their delivery vehicles."[18]

Furthermore, "[t]he participation procedure adopted by the Aspen Plenary required that the government concerned should have adhered to the Guidelines, is interested in becoming a Participating Government of the NSG, and has indicated its desire to do so to the current NSG Chair directly or through the Point of Contact."[19]

While it has been contested that the requirements enumerated in the Aspen Plenary are indicative and not mandatory[20], India has fulfilled all the criteria[21] for consideration for full membership except for being a party to the NPT or having "a full-scope safeguards agreement with the IAEA."[22] Since the proposal for a South Asian Nuclear Weapon Free Zone was never actualised, India does not have the advantage of a regional Nuclear Weapon Free Zone Treaty.

Rajeswari Rajagopalan and Arka Biswas[23] establish that India fulfils four of the five technical criteria for NSG membership. "The only factor which India does not meet is that of adherence to the NPT or other international non-proliferation treaties."[24] However, it is observed that even the US Government opined that this "should not be looked upon as *mandatory* criteria."[25] India's legal fulfilment of NSG entry requirements are discussed in details in Section VI.

Wassenaar Arrangement (WA)

The Wassenaar Arrangement was preceded by the Coordinating Committee on Multilateral Export Controls (COCOM). COCOM has been described as an attempt to prevent the transfer of dual-use technology to the USSR and its allies.[26] There were 17 members in the COCOM which was headquartered in Paris.[27] After the disintegration of the USSR, COCOM was considered to be redundant and was ultimately disbanded in 1994.[28] The Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies was established through

[18] *Ibid.*
[19] *Ibid.*
[20] *Supra.* note 13.
[21] *Supra.* note 4.
[22] *Ibid.* The 2008 waiver given by NSG to India allows for engagement in nuclear commerce without submitting to the full scope safeguards of the IAEA. Resultantly, India has to submit all its civilian nuclear facilities to the IAEA safeguards while the military nuclear facilities remain out of the IAEA scope – this is at par with other nuclear weapons States under the NPT.
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*
[26] *Supra.* note 6 at 284.
[27] Rajagopalan, Rajeswari and Arka Biswas, *Wassenaar Arrangement: The Case of India's Membership,* ORF Occasional Paper (Observer Research Foundation, May 2016).
[28] *Supra.* note 6 at 284.

meetings on the 18th and 19th of December 1995.[29] It started functioning in 1996.

There are 42 participating States in the Wassenaar Arrangement.[30] India became the latest entrant on 7 December 2017. Two sets of lists are used to implement the regulations of the Wassenaar Arrangement: "the Munitions List that tracks conventional weapons, and the Dual-Use Goods and Technologies List."[31] The criteria for being accepted into the Wassenaar Arrangement include consideration of the following: (a) "[w]hether it is a producer/exporter of arms or industrial equipment (*sic.*) respectively"[32]; (b) "[w]hether it has taken the WA Control lists as a reference in its national export controls"[33]; (c) "[i]ts non-proliferation policies and appropriate national policies, including: Adherence to non-proliferation policies, control lists and, where applicable, guidelines of the Nuclear Suppliers Group, the Zangger Committee, the Missile Technology Control Regime and the Australia Group; and through adherence to the Nuclear Non Proliferation Treaty, the Biological and Toxicological Weapons Convention, the Chemical Weapons Convention and (where applicable) START I, including the Lisbon Protocol"[34]; and, (d)"[i]ts adherence to fully effective export controls."[35]

The unique feature of the Wassenaar Arrangement is that it is voluntary and encourages transparency without forcing any of the participating countries to comply or enforce its standards. It is also pertinent to mention here that the Wassenaar Arrangement is the most comprehensive export control regime in terms of the scope of its application, whether it be Dual-Use Goods and Technologies[36], "Small Arms & Light Weapons (and related ammunition); Tanks and other Military Armed Vehicles; Armoured/Protective Equipment, Aircraft & Unmanned Airborne Vehicles, Aero Engines

[29] Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies Founding Documents, Volume I, available at http://www.wassenaar.org/wp-content/uploads/2015/06/WA-DOC-17-PUB-001-Public-Docs-Vol-I-Founding-Documents.pdf (last accessed 15th of May, 2021 at 00:38)

[30] *Supra.* note 6 at 284.

[31] *Supra.* note 27.

[32] Appendix 4, Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, Public Documents, Volume I, Founding Documents, Compiled by the Wassenaar Arrangement Secretariat February 2021 (WA-DOC (17) PUB 001) available at: http://www.wassenaar.org/wp-content/uploads/2015/06/WA-DOC-17-PUB-001-Public-Docs-Vol-I-Founding-Documents.pdf (last accessed 13th of May, 2021 at 23:50)

[33] *Ibid.*

[34] *Ibid.*

[35] *Ibid.*

[36] The Wassenaar Arrangement's *List of Dual-Use Goods and Technologies* include: Category 1 Special Materials and Related Equipment, Category 2 Materials Processing, Category 3 Electronics, Category 4 Computers, Category 5 - Part 1 Telecommunications, Category 5 - Part 2 "Information Security", Category 6 Sensors and "Lasers", Category 7 Navigation and Avionics, Category 8 Marine, Category 9 Aerospace and Propulsion, Sensitive List, and Very Sensitive List.

& related equipment"[37]. India's potential membership to the Wassenaar Arrangement is discussed in details in Section VI.

Missile Technology Control Regime (MTCR)

The Missile Technology Control Regime (MTCR) is an informal, political arrangement between 35 nations to prevent the proliferation of unmanned delivery systems for nuclear weapons.[38] The United States, the United Kingdom, Canada, France, Germany, Italy and Japan founded the MTCR in 1987. The MTCR presently has 35 member States and India became the latest entrant to the regime in 2016. Initially the MTCR concerned itself with the export controls of goods and technologies related to ballistic missile proliferation, however, "[i]n 1992, the MTCR mandate was expanded to also cover Unmanned Aerial Vehicles (UAVs)."[39] The expanded scope of the MTCR includes all forms of delivery systems for nuclear warheads "other than manned aircraft."[40]

China failed to gain the consensus required for becoming a member of the MTCR in 2004, in spite of having agreed to abide by the MTCR limits in 1992 and reiterating its position in 1994 and 1997.[41] The probable reason for China's failure to become a member of the MTCR could be the fact that it transferred M-Series missiles to Pakistan in 1980s and 1990s; it has been asserted that the M-11 missile was supplied to Pakistan by China (the transfer of M-11 would not violate the MTCR guidelines because of its short range), it is also alleged that China may have transferred the M-18 missile to Pakistan, which, if proven to be true, would be in flagrant violation of the MTCR Guidelines.[42]

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[37] Battle tanks, armored combat vehicles (ACVs), large-caliber artillery, military aircraft, military helicopters, warships, missiles or missile systems, and small arms and light weapons are also included. *Supra* note 32 at Appendix 3. Also, See Standalone Munitions List of the Wassenaar Arrangement available at: http://www.wassenaar.org/wp-content/uploads/2021/02/Stand_Alone_Munitions_List_WA_2016.pdf (last accessed: 14th of May, 2021 at 00:18)

[38] *Supra.* note 6 at 185.

[39] *Ibid.; "Originally, the MTCR was limited to stopping the proliferation of nuclear-capable missiles, which was defined as a missile able to travel at least 300 kilometers with a 500-kilogram payload. Five hundred kilograms was considered the minimum weight of a first generation nuclear warhead, while 300 kilometers was believed to be the minimum distance needed to carry out a strategic strike. Members agreed in the summer of 1992 to expand the regime's objective to also apply to missiles and related technologies designed for chemical and biological weapons. That change took effect in January 1993. The move effectively tasked members with a making a more difficult and subjective assessment about an importer's intentions, as opposed to denying a specific capability (a missile able to deliver a 500-kilogram payload at least 300 kilometers), because many more missiles and unmanned delivery vehicles could be adapted to deliver lighter chemical and biological weapons payloads."* See Note 2 of Davenport, Kelsey, *The Missile Technology Control Regime at a Glance,* Arms Control Association website available at https://www.armscontrol.org/factsheets/mtcr (last accessed 14th of May, 2021 at 12:55).

[40] *Ibid.*

[41] *Ibid.*

[42] *Id.* at 186.

The MTCR Guidelines operate though the "Equipment, Software and Technology Annex" (hereinafter, EST Annex). The export controls mechanism for the EST Annex comprises of two categories of items: Category I and Category II. Category I enumerates the most sensitive items and there is a "strong presumption of denial" of these items for export, regardless of the purpose for export[43]. Furthermore, the export of production facilities for Category I items are absolutely prohibited.[44] Category II items comprise of dual-use technologies and the restrictions on their export are less stringent.[45] There is a "no undercutting" provision in the MTCR, similar to that of the Australia Group. This provision mandates that "if any member has denied a non-member access to any item not on the trigger list, other members will adhere to the same prohibition."[46] As per the *Missile Technology Control Regime (MTCR) Annex Handbook*[47]:

> "[t]he MTCR does not take export licensing decisions as a group. Rather, individual partners are responsible for implementing the Guidelines and Annex on the basis of sovereign national discretion and in accordance with national legislation and practice.
>
> All MTCR decisions are taken by consensus, and MTCR partners regularly exchange information about relevant national export licensing issues in the context of the Regime's overall aims."

The MTCR is a non-discriminatory regime, *i.e.* it does not have separate criteria for exports to members and non-members; there also exists no obligation to supply any item to any member by other members, since members do not have any special entitlements under the regime.

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[43] Frequently Asked Questions (FAQs), Missile Technology Control Regime Website, available at http://mtcr.info/frequently-asked-questions-faqs/ (last accessed 14th of May, 2021 at 13:19) *"Category I items include complete rocket and unmanned aerial vehicle systems (including ballistic missiles, space launch vehicles, sounding rockets, cruise missiles, target drones, and reconnaissance drones), capable of delivering a payload of at least 500 kg to a range of at least 300 km, their major complete subsystems (such as rocket stages, engines, guidance sets, and re-entry vehicles), and related software and technology, as well as specially designed production facilities for these items. Pursuant to the MTCR Guidelines, exports of Category I items are subject to an unconditional strong presumption of denial regardless of the purpose of the export and are licensed for export only on rare occasions. Additionally, exports of production facilities for Category I items are prohibited absolutely."*

[44] *Ibid.*

[45] *Ibid. "Category II items include other less-sensitive and dual-use missile related components, as well as other complete missile systems capable of a range of at least 300 km, regardless of payload. Their export is subject to licensing requirements taking into consideration the non-proliferation factors specified in the MTCR Guidelines. Exports judged by the exporting country to be intended for use in WMD delivery are to be subjected to a strong presumption of denial."*

[46] Saran, Shyam, "*India May Have to Wait for a Possible Opening in the Future"* 11 *Indian Foreign Affairs Journal* (2016) 188-195 at 190.

[47] Missile Technology Control Regime (MTCR) Annex Handbook – 2010, (available at http://mtcr.info/wordpress/wp-content/uploads/2016/04/MTCR_Annex_Handbook_ENG.pdf last accessed 14th of May, 2021 at 14:41).

International code of conduct against ballistic missile proliferation

Hague Code of Conduct against Ballistic Missile Proliferation (HCoC), also known as the International Code of Conduct against Ballistic Missile Proliferation (ICoC) was adopted in The Hague on 25th of November, 2002. It has similar objective as the MTCR, however, it limits itself to voluntary annual declaration of arsenals of ballistic missiles maintained by signatory States, voluntary annual declaration of space launch vehicles maintained by signatory States and the disclosure of pre-launch notifications of launches and test-flights of ballistic missiles and space launch vehicles.[48] There are presently 138 States which are signatories to the International Code of Conduct against Ballistic Missile Proliferation[49].

It is believed that the MTCR and the HCoC regimes have stopped many "indigenous and multilateral missile development programs including the Argentinian-Egyptian-Iraqi Condor-2 missile program."[50] However, the transfer of M-series missiles by China to Pakistan couldn't be stopped, neither could it prevent India's indigenous missile development program nor could it stop the North Korea-Pakistan-Iran missile development efforts.[51]

Australia Group (AG)

The Australia Group (AG) was established in 1985, as a measure to impede those exports which could lead to the proliferation of chemical or biological weapons. This group was formed in the aftermath of the use of chemical weapons by Iraq in 1984, during the Iran-Iraq war.[52] It has been asserted that the first meeting of the group took place only in 1989,[53] when 15 countries met at Brussels in Belgium. There are presently 42 members of the Australia Group, including the European Union. The members include France, the United Kingdom and the United States, but curiously, China and Russia are not members.[54] It is very clearly stated that the Australia Group does not create legally binding obligations on the participating

[48] International Code of Conduct Against Ballistic Missile Proliferation, 2002 available at: http://www.hcoc.at/documents/Hague-Code-of-Conduct-A_57_724-English.pdf (last accessed on 14th of May, 2021 at 14:55).

[49] List of HCoC Subscribing States, Hague Code of Conduct Website, available at: http://www.hcoc.at/?tab=subscribing_states&page=subscribing_states (last accessed on 14th of May, 2021 at 14:59)

[50] *Supra.* note 6 at 186.

[51] *Ibid.*

[52] Khurana, Gurpreet S., *Porthole: Geopolitical, Strategic and Maritime Terms and Concepts*, National Maritime Foundation, (Pentagon Press, New Delhi, 2016) at 21.

[53] *Supra*. note 46 at 189.

[54] A perusal of the Australia Group's website confirms this statement. "Australia Group Participants", Australia Group Website available at: http://www.australiagroup.net/en/participants.html (last accessed 13th of May, 2021 at 19:09).

States.[55] The main objective of the Australia group is to prevent the proliferation of Chemical and Biological Weapons (CBW) by calibrating national export licensing regimes to the Common Control Lists maintained by the Australia Group. Thus, any country which wishes to demonstrate its willingness to commit to the provisions of the Chemical Weapons Convention and Biological Weapons Convention can join the Australia Group. The Common Control Lists include those pertaining to the following[56]: "(a) Chemical Weapons Precursors, (b) Dual-use chemical manufacturing facilities and equipment and related technology and software, (c) Dual-use biological equipment and related technology and software, (d) Human and Animal Pathogens and Toxins, and (e) Plant pathogens". Some of the salient features of the Australia Group are the "no undercut requirement" and the "catch-all provision." The "no undercut requirement" is a feature due to which, if any member country denies the export of an item to a third country, any other member country which intends to export the item to the third country, must consult the member country which had denied such an export (in the first instance) to the third country before exporting the concerned item. The "catch-all" provision allows member countries to restrict the export of even those items which are not enumerated in the Common Control Lists in order to ensure non-proliferation of CBWs. While membership of the Australia Group might possibly demonstrate India's commitment to the non-proliferation of Chemical and Biological Weapons, other benefits remain unclear.

Legal implications of multilateral export control regimes

These have two serious implications for international law, firstly, the multilateral export control measures are not mandated by any particular international legally binding instrument which commands universal compliance (the Treaty on the Non-Proliferation of Nuclear Weapons, 1968 may endorse these measures, but it does not command universal compliance)[57] and

[55] "The Australia Group : An Introduction", Australia Group Website, available at: http://www.australiagroup.net/en/introduction.html (last accessed 13th of May, 2021 at 19:14).

[56] "Australia Group Common Control Lists", Australia Group Website, available at: http://www.australiagroup.net/en/controllists.html (last accessed 13th of May, 2021 at 19:25).

[57] Art. III.2 is often cited as the source of legal duty on States to put in place multilateral export control mechanisms. Art. III of the NPT states:
"Article III

1. Each non-nuclear-weapon State Party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with the International Atomic Energy Agency in accordance with the Statute of the International Atomic Energy Agency1 and the Agency's safeguards system, for the exclusive purpose of verification of the fulfilment of its obligations assumed under this Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Procedures for the safeguards required by this Article shall be followed with respect to source or

secondly, it allows for derogation from the general principles of free trade as enunciated in the General Agreement on Tariffs and Trade, 1994 (GATT).

Former Foreign Secretary of the Government of India, Shyam Saran is of the view that these multilateral export control regimes "operate outside the formal multilateral or United Nations system and have no sanction under international law."[58] This view is, in all likelihood, erroneous; since all multilateral export control regimes are subject to Article XXI[59] of GATT, 1994. Article XXI provides for exceptions on the basis of which the general principle of free trade may be derogated from. These exceptions can be broadly enumerated as: goods relating to essential security interests, goods relating to fissionable material, supply of arms, ammunitions or implements of war, and those materials which directly or indirectly supply the military establishment, and restrictions imposed vide certain obligations under the United Nations Charter.

It is contestable whether international law mandates for multilateral export control

special fissionable material whether it is being produced, processed or used in any principal nuclear facility or is outside any such facility. The safeguards required by this Article shall be applied on all source or special fissionable material in all peaceful nuclear activities within the territory of such State, under its jurisdiction, or carried out under its control anywhere.
2. Each State Party to the Treaty undertakes not to provide: (a) source or special fissionable material, or (b) equipment or material especially designed or prepared for the processing, use or production of special fissionable material, to any non-nuclear-weapon State for peaceful purposes, unless the source or special fissionable material shall be subject to the safeguards required by this Article.
3. The safeguards required by this Article shall be implemented in a manner designed to comply with Article IV of this Treaty, and to avoid hampering the economic or technological development of the Parties or international
co-operation in the field of peaceful nuclear activities, including the international exchange of nuclear material and equipment for the processing, use or production of nuclear material for peaceful purposes in accordance with the provisions of this Article and the principle of safeguarding set forth in the Preamble of the Treaty.
4. Non-nuclear-weapon States Party to the Treaty shall conclude agreements with the International Atomic Energy Agency to meet the requirements of this Article either individually or together with other States in accordance with the Statute of the International Atomic Energy Agency. Negotiation of such agreements shall commence within 180 days from the original entry into force of this Treaty. For States depositing their instruments of ratification or accession after the 180-day period, negotiation of such agreements shall commence not later than the date of such deposit. Such agreements shall enter into force not later than eighteen months after the date of initiation of negotiations."

[58] *Supra.* note 46 at 188.

[59] Art. XXI of GATT, 1994 states:
"Article XXI
Security Exceptions
Nothing in this Agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
(i) relating to fissionable materials or the materials from which they are derived;
(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
(iii) taken in time of war or other emergency in international relations; or
(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

regimes, the reason being that the United Nations Charter does provide for "partial interruption of economic relations"[60] and Article 39 empowers the United Nations Security Council to take such measures in cases pertaining to "threat to the peace, breach of the peace, or act of aggression"[61]. Thus there are various United Nations Security Council Resolutions which might seem to endorse the idea of multilateral export control regimes. The most prominent amongst these is the United Nations Security Council Resolution 1540 (2004). This resolution, *inter alia*, established the 1540 Committee and is described as[62]:

> "[t]he resolution obliges States…to refrain from supporting by any means non-State actors from developing, acquiring, manufacturing, possessing, transporting, transferring or using nuclear, chemical or biological weapons and their delivery systems.
>
> Resolution 1540 (2004) imposes binding obligations on all States to adopt legislation to prevent the proliferation of nuclear, chemical and biological weapons, and their means of delivery, and establish appropriate domestic controls over related materials to prevent their illicit trafficking. It also encourages enhanced international cooperation on such efforts. The resolution affirms support for the multilateral treaties whose aim is to eliminate or prevent the proliferation of WMDs and the importance for all States to implement them fully."

The mandate of Resolution 1540 (2004) was expanded vide UNSC Resolution 1673 (2006), UNSC Resolution 1810 (2008), and UNSC Resolution 1977 (2011). UNSC Resolution 2055 (2012) increased the number of expert members assisting the 1540 Committee to nine (the number of expert members was 8 under the immediately preceding resolution). The latest United Nations Security Council resolution is Resolution 2325 (2016) which reaffirms the importance of Resolution 1540 (2004) and includes the latest international security developments.

Container Security Initiative (CSI)[63]

[60] *See,* Art. 41 of the United Nations Charter.
[61] *See,* Art. 39 of the United Nations Charter.
[62] General Information, United Nations Security Council Resolution 1540 (2004), United Nations Website, available at http://www.un.org/en/sc/1540/about-1540-committee/general-information.shtml (last accessed 14th of May, 2021 at 17:17).
[63] Das, Abhirup, *The Laws of Naval Warfare* (Unpublished Dissertation, Indian Law Institute, 2016), at 37.

The CSI was initiated in January 2002 to screen all containers at foreign ports by the US Customs officials along with their host nation counterparts before shipping to the US ports. This was done to protect the US mainland from shipments of materials that may be potentially a threat to the US security. For imports into the US the goods have to be shipped from the CSI compliant ports. The CSI mandates automated screening procedures, detection equipment and integrated intelligence mechanisms to ensure the integrity of the contents of the containers that have to be shipped to the US mainland.

Proliferation Security Initiative (PSI)[64]

The PSI was initiated by the US in May, 2003. This was aimed at preventing illegal trafficking of Weapons of Mass destruction through land, sea or air routes. The PSI's primary focus is the maritime domain to intercept any suspect vessel through Visit, Board, Search and Seizure Operations. The PSI operations do not take into consideration the nationality of the vessels or its geographical position. The legality and legitimacy of the PSI in terms of the UNCLOS and the laws regarding use of force are widely contested. Consequently, the US brought out Statement of Interdiction Principles and clarified that PSI operations shall occur within the confines of international law and that interdiction of vessels in international waters would be undertaken only with the consent of the vessel's flag State. Bilateral arrangements in this regard were made by the US with those States which offered Flags of Convenience registrations to commercial vessels worldwide. The US and allied States have continued to conduct combined naval exercises to further the objectives of PSI.[65]

India's policy towards multilateral export control regimes

India has not signed or ratified the NPT and declared itself a non-NPT nuclear weapons State by way of the Pokhran-II nuclear tests from 11th to 13th of May 1998. While this is true and does hamper India's chances of membership of the Nuclear Suppliers Group, it must also be taken into consideration that India was one of the first and leading countries to lobby for complete nuclear disarmament. Although in 1974 a peaceful nuclear explosion was conducted by India, there were no intentions for weaponisation expressed by India. Even as late as 1987, the highest levels of the Indian Government continued to outline international roadmaps for complete nuclear disarmament. On the other hand, India has Indian Trade Clarification based on Harmonized System of Coding Classification

[64] *Id.* at 38.

[65] *See generally, Supra.* note 52.

also known as ITC(HS) Classification. Appendix 3 of Schedule 2 to the ITC (HS) Classification contains the Export Controls list of India. This is known as the Special Chemicals, Organisms, Materials, Equipment and Technologies List (SCOMET List). All that is required for compliance to the norms of multilateral export control regimes such as Nuclear Suppliers Group, the Wassenaar Arrangement, Missile Technology Control Regime and the Australia Group is to ensure that the SCOMET List contains all the materials enumerated in the aforementioned regimes' export controls list. This is especially relevant for India's potential membership to the NSG. The Wassenaar Arrangement requires "adherence" to non-proliferation goals and treaties. The word adherence can be construed to mean voluntary compliance instead of a restrictive interpretation meaning treaty based legally binding compliance. The NSG entry requirements clearly state that a potential entrant is required "to be a party" to the NPT, or a Nuclear Weapons Free Zone Treaty. This certainly is not in favour of India's candidature. It is not a mere matter of garnering consensus by the members of the NSG, there is a serious legal impediment to India's NSG membership without a change in the rules of entry or a consensus based interpretation that the entry criteria to NSG are indicative and not mandatory. Although such an interpretation would be in India's favour in the immediate term, in the long run, it would dilute the standards of NSG and potentially it would open doors of the NSG even to all those countries which engage in illicit trade in nuclear materials and technology.

Conclusion

The analysis indicates that multilateral export control regimes have diverse entry criteria and derive their legal validity from international law. The United Nations Charter is the basis of the *lex lata* that provides justification for the multilateral export control mechanisms vide the provisions pertaining to the United Nations Security Council's actions under Chapter VII in case of "threats to peace, breach of peace or acts of aggression." It was also examined whether international trade which generally encourages free trade has special provisions pertaining to multilateral export control regimes for the prevention of WMD proliferation. It was found that Article XXI of the General Agreement on Tariffs and Trade, 1994 specifically provides for such situations. Article III of the Treaty on Non-Proliferation of Nuclear Weapons, 1968 mandate the existence of such regimes.

The success rate of multilateral export control regimes are undoubtedly high, but in exceptional cases, WMD proliferation or the proliferation of weapons delivery systems could not be prevented by these regimes. This does not indicate that these regimes are

unsuccessful; rather, this indicates that these regimes are largely successful. It is, however, a matter of grave importance to understand that well-motivated proliferators would be successful regardless of the existence or absence of such regimes. The multilateral export control regimes can impede proliferation efforts and in ordinary circumstances, even detect proliferation efforts. Such proliferation efforts can be discouraged at an early stage using diplomatic means.

The membership of multilateral export control regimes have been of interest to India. In the present analysis, there are no substantial or tangible material gains from the membership of any organisation such as the MTCR, the Wassenaar Arrangement or the Australia Group. Only international goodwill, diplomatic posturing and the ability to build consensus for other members hoping to join these regimes are to be gained. The membership of the Nuclear Suppliers Group seems to be the only objective worth pursuing, considering the continued material gains (in the form of uninterrupted fuel supply) that would accrue from membership in the NSG and the fact that India would no longer have to worry about any potential reversal in the NSG's position on the 2008 waiver to India through any future amendment in NSG Guidelines.

In conclusion, it may be stated that there is a necessity to look beyond multilateral export control regimes to bring non-NPT nuclear weapons States into the mainstream of the international political order. By ending diplomatic isolation of non-NPT nuclear weapons States, and progressively regularising their status in the international political order, the international community can enhance the effectiveness of existing safeguards. The case of India can serve as an example to other non-NPT nuclear weapons States, and redemption is possible for all State proliferators of WMDs. This is the only way forward to curtail future proliferation