

FROM THE UNITED NATIONS ARMS REGISTER TO AN ARMS TRADE TREATY—WHAT ROLE FOR DELEGATION AND FLEXIBILITY?

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I. INTRODUCTION

The scholarship on conventional disarmament, especially vis-à-vis the trade in conventional weapons, is surprisingly scarce. Whether the vacuum in the literature results from a focus on nuclear proliferation (or for that matter, on weapons of mass destruction), or alternatively, whether scholars chose to emphasize the problem of small arms and light weapons, the reality remains: on the eve of the official negotiations on an arms trade treaty, it is disappointing to see how little attention academic circles have paid to the topic. In this paper, I rely on the international relations literature on legalization and regime design to analyze the international trade on conventional weapons as an issue area, and the regulatory environment within which the relevant actors interact.

As we approach the moment to launch the official negotiation of an arms trade treaty, it is important to refine our understanding of the regime that has been in place since 1992, in light of lessons learned from other negotiations.

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Without denying the role of prior arms control efforts, this paper focuses on the process that initiated with United Nations General Assembly Resolution 46/36 [L] of 9 December 1991.¹ This document establishes a non-legally binding obligation whereby states agree to report on their international trade in conventional weapons to the United Nations Register on Conventional Arms.² The paper is organized as follows: section two reviews assessments of the current regime; section three discusses several academic literatures that can shed light on treaty negotiation, in particular, international law and international relations; section four studies the empirical legacy of the UN Register in light of this literature; section five concentrates on the prospects of an arms trade treaty; and section six offers concluding remarks.

II. AN ASSESSMENT OF THE UNITED NATIONS REGISTER

The UN Register began to operate in 1992, the first year for which official information on arms transfers is available.³ As of 2006, 172 states have submitted information at least once.⁴ The UN Register covers seven categories of weapons: battle tanks, armored combat vehicles, large-caliber artillery systems, combat aircraft, attack helicopters, warships, and missiles (as well as missile-launchers).⁵ The launching of the UN Register met with a great deal of expectation within various policy circles. As time went on, some of the initial optimism had waned. In one of the first assessments of the institution, Siemon T. Wezeman supports an overhaul of the UN Register.⁶ For him, the institution so far has succeeded in establishing a global norm for transparency in arms transfers, but failed in its more ambitious objectives:

1. G.A. Res. 46/36[L], U.N. Doc. A/RES/46/36 (Dec. 6, 1991). Richard Betts refers to the Brussels Act of 1890 as the first multilateral effort to regulate the international trade in conventional arms. Richard K. Betts, *The Tragicomedy of Arms Trade Control*, 5 INT'L SEC. 80, 83 (Summer 1980). In 1919, twenty-three states negotiated the Convention for the Control of the Trade in Arms and Ammunition, which never entered into effect. *Convention for the Control of the Trade in Arms and Ammunition*, 15 AM. J. INT'L L. 297, 297 (1921) (not entered into force) [hereinafter *Convention*]. More recently, states negotiated the non-binding 1996 Wassenaar Arrangement. *See generally* Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, July 11, 1996, <http://www.wassenaar.org/docs/IE96.html> (last visited Mar. 22, 2008).

2. G.A. Res. 46/36[L], U.N. Doc. A/RES/46/36 (Dec. 6, 1991).

3. U.N. OFFICE FOR DISARMAMENT AFFAIRS [UNODA], UNITED NATIONS' REGISTER OF CONVENTIONAL ARMS: PATTERN OF REPORTING BY STATES 1992-2006 2, available at http://disarmament.un.org/cab/register_files/Registerdatabooklet1992-2005.doc (last visited Mar. 22, 2008).

4. *Id.*

5. *Id.* at 5.

6. Siemon T. Wezeman, *The Future of the United Nations Register of Conventional Arms*, SIPRI, at 24, August 2003, <http://books.sipri.org/files/PP/SIPRIPP04.pdf> (last visited Mar. 22, 2008).

[T]he UN Register has performed worse than the great majority of . . . other initiatives both in terms of reaching its targets, and of capacity for self-reform and adaptation. After its initial success in securing near universal acceptance of the principle of transparency in armaments, it failed to secure comprehensive participation and consistent observance; to harvest genuinely useful data; to analyse it; or to achieve practical follow-up in terms of identifying and correcting potentially destabilizing build-ups of arms.⁷

Stephanie G. Neuman offers a more balanced view of the arms control initiative.⁸ Writing in the aftermath of the 1991 United Nations Conference on the Illicit Trade of Small Arms and Light Weapons in All Its Aspects and the coming into force of the UN Register in 1992, she analyses the historical circumstances that favorably impact the notion of arms control.⁹ Among those, the end of the Cold War features quite prominently, especially if we consider government-to-government arms transfers.¹⁰ In her view, the economic context and the move toward democratization in various countries constitute another set of positive forces:

In sum, we are witnessing a structural form of conventional arms control caused by economic factors that makes arms-control initiatives potentially more attractive to recipients and suppliers. In response to the deflating arms trade, some supplier states have found it possible to initiate more restrictive arms export policies without paying a political price domestically. Many governments find themselves freer to respond to advocates for arms control in a situation in which military industries, weakened by falling orders and their own declining numbers, are able to fight less fiercely for permissive export legislation.¹¹

Nevertheless, the picture is not entirely optimistic. Neuman points to technological advances and to the increased mobility of former scientists and arms experts as a cause for concern.¹² In addition, the rise in the illicit trade

7. *Id.* at 3.

8. Stephanie G. Neuman, *Controlling the Arms Trade: Idealistic Dream or Realpolitik?*, 16 (No. 3) WASH. Q. 53 (1993), reprinted in *WEAPONS PROLIFERATION IN THE 1990S* 327–42 (Brad Roberts ed., 1989).

9. *See id.*

10. Stephanie G. Neuman, *The Arms Trade, Military Assistance, and Recent Wars: Change and Continuity*, 541 ANNALS AM. ACAD. POL. & SOC. SCI. 47, 54 (1995).

11. Neuman, *supra* note 8, at 335.

12. Neuman, *supra* note 8, at 339.

and the challenges that effective monitoring presents¹³ contribute to a skeptical view of the prospects for the commitments embedded in the UN Register. In retrospect, Neuman's preoccupation was not unfounded. The 2003 assessment sponsored by the Stockholm International Peace Research Institute (SIPRI) rebuts the favorable economic context thesis and offers a rather pessimistic view of the future for market constraints on the arms trade.¹⁴

In contrast to Wezeman's view, most recently, the Group of Governmental Experts (GGE) expresses a rather positive attitude in relation to the UN Register and the prospects for further developments.¹⁵

The overall optimistic tone of the 2003 Report is balanced by concerns with inconsistency on reporting by states, which the Report suggests may be attributed to international security problems.¹⁶ There is an emphasis on the goal of universal membership, which reinforces the role of "nil" reports.¹⁷ Confidence building and transparency depend on universality and the practice of submitting "nil" reports contribute to both.¹⁸ The report acknowledges the GGE discussion of the small arms and light weapons issue.¹⁹ To that end, revising category III²⁰ of weapons currently covered by Resolution 46/36 [L] could be an effective mechanism to extend the reach of the UN Register over some light weapons. The 2003 GGE appears to struggle with divergent positions on the expansion proposal, and ultimately recommends lowering the range threshold from 100mm to 75mm.²¹ This is an important development because it contemplates the inclusion of small arms and light weapons under the UN Register. Concurrently, the GGE welcomes member-states' voluntary submission of data on small arms and light weapons and encourages the initiative.²²

Three years later, the GGE reevaluated the performance of the UN Register. The 2006 Report offers a positive assessment but acknowledges that

13. Neuman, *supra* note 8, at 341–42.

14. Wezeman, *supra* note 6, at 24.

15. The Secretary-General, Report on the Continuing Operation of the U.N. Register of Conventional Arms and its Further Development, 2, delivered to the General Assembly, U.N. Doc. A/58/274 (Aug. 13, 2003) [Hereinafter 2003 Report]; The Secretary-General, Report on the Continuing Operation of the U.N. Register of Conventional Arms and its Further Development, 2, delivered to the General Assembly, U.N. Doc. A/61/261 (Aug. 15, 2006) [hereinafter 2006 Report].

16. 2003 Report, *supra* note 15, at 17.

17. *See id.* at 19–20.

18. *Id.* at 19.

19. *Id.* at 30.

20. Category III nowadays comprises 75mm and above large-caliber artillery systems. *Id.* at 28.

21. 2003 Report, *supra* note 15, at 28.

22. 2003 Report, *supra* note 15, at 33–34. This pronouncement was key in institutionalizing formal reporting mechanisms on small arms and light weapons under the UN Register. Nowadays, member-states dispose of forms designed exclusively for this category, which was never a part of Resolution 46/36[L].

the institution has not addressed states' concerns in certain parts of the world effectively.²³ Specifically, the scope of the UN Register continues to exclude small arms and light weapons, except for voluntary and erratic submissions from state members.²⁴ An important development in the 2006 Report dealt with the institutionalization of an eighth category of covered weapons to encompass small arms and light weapons, even if the obligation to report would have a differentiated character when compared to reporting on the existing seven categories.²⁵ The absence of consensus on the matter prevented uniformity in reporting instruments for such weapons.

Given the views in the literature and the contrastingly optimistic outlook prevalent among the Group of Governmental Experts,²⁶ it is important to analyze the issue within the rigor of recent international relations scholarship. Research on international agreements and the phenomenon of legalization in world politics has enhanced our understanding of states behavior within an increasingly institutionalized society of nations. International relations theory has finally moved beyond the question of *whether* international institutions matter to the pressing inquiry as to *how* they matter.

III. DESIGN AND ARCHITECTURE OF AN ARMS CONTROL REGIME

In 2000 and 2001, two groups of scholars made a significant contribution to our understanding of international agreements along the lines of legalization and design, respectively.²⁷ In both instances, researchers analyze subjects that have been historically within the realm of international legal scholarship through political science lenses. Common to their initiatives is a set of theoretical understandings and assumptions. First, institutions matter. These two groups of scholars believe that institutions reflect states' capabilities, thereby they are created as a means to pursue state interest. Second, in the pursuit of their self-interest, states act as rational decision-makers. They process information related to preferences and attempt to maximize benefits in a strategic context. While the first group of scholars focuses on the movement toward the legalization in international politics, the second concentrates on certain features that are prominent within international agreements. The two

23. 2006 Report, *supra* note 15, at 35.

24. *Id.* at 15–16.

25. *Id.* at 26–27.

26. *See generally* 2003 Report, *supra* note 15; 2006 Report, *supra* note 15.

27. *See generally* Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 (No. 3) INT'L ORG. 385 (2000); Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 (No. 4) INT'L ORG. 761 (2001); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 (No. 2) INT'L ORG. 217 (2000).

literatures have an important contribution for a prospective arms trade treaty that I articulate in the next paragraphs.

Goldstein et al., introduce a journal issue dedicated to the study of legalization as an important phenomenon in international politics.²⁸ They provide a definition of legalization and caution against any value judgment with respect to the superiority of one form of legalization over another (for example, is hard law better than soft law?).²⁹ Their goal is to better understand different forms of legalization and, in the process, to offer guidance to individuals negotiating or revising international regulatory arrangements. For the authors, legalization encompasses three aspects: obligation, or the degree to which commitments are legally binding; precision, or the degree to which the content of commitments clearly identifies the conduct that is required, authorized, or proscribed; and delegation, or the degree to which the interpretation, the monitoring, and/or the implementation of commitments is transferred to a third party.³⁰ Hard law corresponds to high levels of obligation, precision, and delegation.³¹ In contrast, soft law stands for institutional arrangements where low levels of obligation, precision, and delegation dominate.³² The phenomenon of legalization has been a trademark of the twentieth-century, but the expansion itself remains uneven. For example, the authors acknowledge that “major arms control treaties are stalled by domestic political opposition.”³³ One goal of this research agenda is to identify the characteristics of a particular issue area in order to devise the form of legalization that best suits the problem. It is with this goal in mind that I proceed from here.

Abbott and Snidal propose a set of variables that are expected to influence states’ choice for soft law or hard law.³⁴ Five among those are directly relevant to the arms trade issue: credibility problems with respect to commitments, transaction costs, sovereignty costs, uncertainty, and discount rates.³⁵ By reviewing the hypothesized relationships between each one of these variables and the occurrence of hard law, this paper unveils some of the obstacles that the pursuit of further legalization—through the negotiation of an arms trade treaty—will encounter.

28. Goldstein et al., *supra* note 27, at 387.

29. *Id.* at 387–88.

30. *Id.* at 387.

31. *Id.* at 396.

32. *Id.* at 394. The authors treat hard law and soft law as ideal types. It is common to encounter norms that vary within a spectrum of legalization, for example an agreement that incorporates high levels of obligation and precision, but provides for no delegation. Goldstein et al., *supra* note 27, at 394.

33. *Id.* at 386.

34. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 (No. 3) INT’L ORG. 421, 423 (2000).

35. *Id.* at 429.

Credibility problems with respect to commitments arise in situations where states negotiate agreements which have fewer chances of generating compliance. This is often the case “when the benefits of cooperation are great but the potential for opportunism and its costs are high.”³⁶ Here, recourse to hard law rewards compliance by increasing the costs associated with renegeing on commitments. An arms trade treaty is likely to embed incentives to defect from a cooperative arrangement. States often like to have access to information on other states’ arms trade transactions better than they like to share data on their own dealings in weapons. This preference results from the Prisoner’s Dilemma structure of incentives associated with the arms trade. The problem is aggravated by the understanding that states will think alike and defect from the cooperative arrangement in large numbers, ultimately compromising the overall goal of transparency. The choice for hard law will counter the trend toward defection, thereby enhancing the credibility of commitments. Also adding to the advantages of hard law, in face of commitment problems, is the fact that noncompliance may be difficult to detect. Here, the delegation aspect of hard agreements can empower institutions to monitor behavior. An arms trade treaty will possibly lead to more reporting (formal aspect) and less underreporting (substantive aspect), especially if the treaty designates a dedicated bureaucracy to oversee implementation.

Transaction costs refer to the efforts associated with the management and implementation of international agreements. More specifically, the managerial process encompasses the application and elaboration of the rules, while implementation deals with monitoring, enforcement, and dispute settlement. Abbott and Snidal suggest that agreements that take the form of hard law entail lower transaction costs because they operate within a predictable institutional context.³⁷ For example, disputes born out of hard legal agreements are governed by specialized procedures and are usually resolved through legal discourse. It follows that non-legal or illegal means to settle differences, such as reprisal and unilateral retaliation, are not tolerated. Once more, the delegation aspect of hard legalization takes a prominent role, because short of dispute settlement mechanisms, an arms trade treaty could very well transfer powers to manage and to implement the agreement. Indeed, managerial authority can even work to update the terms of the treaty in order to adapt the language to new challenges and developments.³⁸

36. *Id.*

37. *Id.* at 436.

38. A useful analogy is the Appellate Body of the World Trade Organization, which has interpreted the covered agreements in a somewhat extensive manner, arguably creating new law.

Sovereignty costs, together with uncertainty and variations in states' discount rates make up what Abbott and Snidal refer to as contracting costs.³⁹ While hard legalization is expected to reduce post-agreement costs (or transaction costs), soft law does arguably better at reducing contracting costs—or the costs associated with the negotiation of an agreement in the first place.⁴⁰ Of concern here is the characterization of the arms trade as an issue area where high contracting costs prevail. Sovereignty costs are high because conventional arms holdings remain an important aspect for the national security of states. Thereby, transparency on arms trade may be perceived as jeopardizing states' national security interests. Uncertainty is also high in this realm, mainly because power imbalances among states are constantly shifting. For this reason, transparency today may be acceptable, given a specific context of relative power, but it may become cumbersome once this balance of power is upset. Finally, states care about the future in quite distinct ways (they have different discount rates). In particular, democracies tend to value the future more than non-democracies; nevertheless, an effective instrument should be as inclusive as possible. If states negotiate an arms trade treaty through hard law, pursuant to the General Assembly Resolution 61/89⁴¹ mandate, how can we mitigate the influence of contracting costs?

Research by the second group of scholars mentioned above can shed light on the contracting costs problem. Koremenos et al., propose that five aspects of treaty design are prominent among the 34,000 plus international agreements registered with the United Nations between 1946 and 1986: membership, scope, centralization, control, and flexibility.⁴² Membership indicates the total number of states that the agreement seeks to include as participants; scope refers to the number and breadth of issues contemplated by the agreement; centralization stands for whether the agreement establishes an institution charged with monitoring, interpreting, and possibly adjudicating related matters; control refers to the decision-making rules that will govern implementation of the agreement; and flexibility deals with whether the agreement leaves room for exceptional clauses, such as reservations, declarations, and understandings.⁴³ Flexibility can also involve the use of escape clauses, withdrawal clauses and limits on agreement duration.⁴⁴ These five characteristics vary from treaty to treaty, contingent upon the nature of the issue area. In this paper I chose to focus on flexibility, leaving the analysis of the other four

39. Abbott & Snidal, *supra* note 34, at 436.

40. *Id.* at 434.

41. G.A. Res. 61/89, U.N. Doc. A/RES/61/89 (Dec. 18, 2006).

42. Koremenos et al., *supra* note 27, at 763.

43. *Id.* at 770–73.

44. *Id.* at 773.

design elements (i.e., membership, scope, centralization, and control) for a later moment in time.

With respect to flexibility, there are four aspects of international politics that this literature suggests will influence how flexible agreements are.⁴⁵ Uncertainty and distribution problems are of special interest in the context of an arms trade treaty,⁴⁶ given the discussion above on the challenges to negotiate hard law agreements in the presence of high contracting costs. Distribution problems associated with an arms trade treaty may involve specification of weapons, the level of detail required of reported weapons, and the like. The distribution problem arises because there are multiple institutional arrangements and states have different preferences in regards to each combination. Flexibility can enable distinct combinations to co-exist, thereby maximizing the depth of the commitments made by states.⁴⁷ On that note, flexibility can be said to avoid establishing a commitment that reflects the lowest possible common denominator.⁴⁸

Flexibility can also mitigate contracting costs associated with uncertainty. Here, tools such as the imposition of limits on agreement duration, escape clauses, and withdrawal clauses may facilitate agreement where otherwise states see little room for compromise.⁴⁹ Limits on agreement duration allow states to revisit the terms of the agreement periodically in order to adjust for new circumstances. The successive rounds of negotiation under the GATT/WTO⁵⁰ agreements constitute an example of flexibility through limits on duration.⁵¹ Koremenos finds significant statistical evidence for the effects of uncertainty on the duration of international agreements: “[a]ll else equal,

45. *Id.* at 771–73.

46. *Id.* at 773. The other two aspects, discussed in the literature as independent variables, are enforcement problems and number of actors (number of actors refers to all entities that have an interest in the issue, whether or not they are taking part in the negotiations or are a party to the agreement). Koremenos et al., *supra* note 27, at 773.

47. Gilligan challenges the common belief that there is a “broader v. deeper” tradeoff inherent to the negotiation of international multilateral agreements. Michael J. Gilligan, *Is There a Broader-Deeper Trade-off in International Multilateral Agreements?*, 58 (No. 3) INT’L ORG. 459, 460 (2004). He proposes a formal model where states can set policy at different levels, thereby relaxing the single policy assumption. In these cases, broad membership can be found to promote even deeper cooperation. *Id.* at 462.

48. This literature proposes three conjectures bearing on the flexibility aspect of international agreements: 1) flexibility increases with uncertainty (uncertainty about the state of the world); 2) flexibility increases with the severity of the distribution problem; 3) flexibility decreases with number. Koremenos et al., *supra* note 27, at 793–94.

49. *Id.* at 773.

50. World Trade Organization/General Agreement on Tariffs and Trade

51. Koremenos et al., *supra* note 27, at 773.

agreements with high levels of uncertainty are about 44.0% more likely to be finite than are agreements with low levels of uncertainty.”⁵²

With respect to an arms trade treaty, the flexibility story is not all good news. In fact, another hypothesis that is confirmed by Koremenos research deals with the number of participants. As the number of participants increases, renegotiation costs also increase and, as a consequence, the probability of a finite agreement decreases.⁵³ Thus, in a hypothetical arms trade treaty the incidence of uncertainty and of a large number of participants is pulling the flexibility solution in two different directions.

Unfortunately, research on flexibility tools that take the form of escape clauses is not abundant. Rosendorff and Milner provide a detailed analysis of the role of escape clauses in multilateral trade agreements, such as the GATT/WTO.⁵⁴ Because trade liberalization benefits are usually excludable, not all the rationale behind their formal model applies to the arms trade issue, where the benefits associated with disarmament are generally non-excludable. With that caveat in mind, a key feature of escape clauses is that they are costly.⁵⁵ The benefits from suspending the terms of an agreement during a time period must be accompanied by a penalty which the “escaping” state agrees to ex ante, so that in theory, “policymakers should attempt to design efficient escape clauses; they should act so that the incentive to exercise relief is balanced with the gains from cooperation.”⁵⁶ The authors suggest that escape clauses may be especially beneficial to democracies,⁵⁷ given the distinct role that domestic constituencies play in politics, while discounting the need for flexibility arrangements of this kind in arms control agreements. With respect to the latter, disarmament through the reduction of stockpiles (nuclear and non-nuclear) is said to be of limited interest to constituents outside of the security/military circles.⁵⁸

In conclusion, our limited understanding of escape clauses suggests that they may be useful as an incentive for democracies, who will encounter obstacles in the idea of a legally binding treaty. Otherwise, it is unclear whether escape clauses or limits on duration can effectively counter the uncertainties specific to the arms trade issue. In the next section, I explain why

52. Barbara Koremenos, *Contracting Around International Uncertainty*, 99 (No. 4) AM. POL. SCI. REV. 549, 558 (2005).

53. *Id.* at 557 n.22.

54. See generally B. Peter Rosendorff & Helen Milner, *The Optimal Design of International Trade Institutions: Uncertainty and Escape*, 55 (No. 4) INT’L ORG. 829 (2001).

55. *Id.* at 847.

56. *Id.* at 835.

57. *Id.* at 843.

58. *Id.* at 845.

democracies are expected to resist a legally binding treaty in light of the literature on legalization of world politics.

IV. THE UN REGISTER: FEATURES AND EXPECTATIONS

According to the discussion of legalization offered in the literature, the UN Register resulted from a soft legal document, wherein the levels of obligation, precision, and delegation are relatively low.⁵⁹ With respect to the level of obligation, states are encouraged to report on arms transfers but nevertheless have the legal prerogative not to do so, given the common understanding that General Assembly Resolutions are not legally binding.⁶⁰ The analysis of the levels of precision and delegation presents a more mixed picture. In fact, the language of Resolution 46/36 [L] clearly lists the seven categories of equipment that states are requested to report to the UN Register despite critics' demands for more precise definitions of terms and more detailed descriptions of reported weapons.⁶¹ Moreover, a definition of arms "exports and imports" is offered as well as the start date and other arrangements pertaining to the logistics of the UN Register.⁶² Pursuant to the reports submitted to the General Assembly by the Group of Governmental Experts, further refinements on the categories of weapons covered were offered.⁶³ Finally, regarding the level of delegation, the very institutionalization of an arms register entails a measure of monitoring and interpretation (implementation). Surely, the other two aspects of delegation, namely enforcement and adjudication, are absent. As states move toward the negotiation of an arms trade treaty, advances in the level of legalization will be contingent upon the existence of adequate solutions for some of the problems that prevented states from going beyond the UN Register regime in the first place. It is important to decompose the document's legal structure in order to enhance our understanding of states strategic positions toward the issue. To that end, I next review some of the predictions of the literature in light of the empirical record of the UN Register from 1992 to 2006.

A. Goldsmith and Posner, *The Limits of International Law*

Goldsmith and Posner analyze states' choices with respect to the legal form that international commitments assume.⁶⁴ In their view, the characteristics

59. Goldstein et al., *supra* note 27, at 394.

60. JEFFREY L. DUNOFF, STEPHEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW NORMS, ACTORS, PROCESS* 187 (2d ed. 2006).

61. Wezeman, *supra* note 6, at 7–8.

62. G.A. Res. 46/36[L], U.N. Doc. A/RES/46/36 (Dec. 6, 1991), at 75–76.

63. 2003 Report, *supra* note 15, at 33; 2006 Report, *supra* note 15, at 26.

64. See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

of a particular issue, given states' interests and capabilities, determines whether regulation will be governed by soft law or hard law, and whether states will choose to negotiate treaties or to sponsor the development of a norm of customary international law.⁶⁵ In a nutshell, because negotiation is costly, unless states have specific reasons to enter into treaties (in the form of hard or soft law), they will choose to regulate behavior through customary international law. What then is the rationale behind the negotiation of international commitments like the one called for under Resolution 46/36 [L]? For Goldsmith and Posner, the logic involves two steps: first, states feel the need to coordinate behavior, and second, they see value in creating compliance-enhancing mechanisms.⁶⁶

This two-step logic derives from Goldsmith and Posner's understanding of state behavior as strategic and self-interested.⁶⁷ For them, interactions among states follow four identifiable patterns: coincidence of interest, coercion, coordination, and cooperation.⁶⁸ Of relevance to the UN Register are the last two, wherein coordination can be equated to instances where states have a common interest but still need to agree on the path toward that outcome. Situations that involve cooperation are more complex, because they present states with high benefits associated with cooperation but even higher profits associated with defection, when other states remain cooperative. This is the classic Prisoner's Dilemma game. Goldsmith and Posner go further to suggest that situations involving repeated bilateral instances of cooperation can lead to compliance,⁶⁹ which is clearly not the case of the UN Register.

If on one hand the establishment of the UN Register resolves the coordination problem (step 1)—on the other hand, a legally binding document would not counter the incentives to defect that are inherent to the arms trade issue (step 2)—because this is by definition a multilateral rather than a bilateral case. By negotiating a hard law document, states would have increased the costs associated with defection for no reason.⁷⁰ It appears that Goldsmith and Posner's model would predict the establishment of the UN Register as we know it today. Nevertheless, there are countless multilateral treaties that incorporate legally binding commitments. It is the rationale behind these documents that will eventually shed some light on the prospects of a legally binding arms trade treaty.

65. *Id.* at 3. The authors prefer the term "nonlegal agreements" when referring to soft law. *Id.* at 81.

66. *Id.* at 87.

67. *Id.* at 225.

68. *Id.*

69. GOLDSMITH & POSNER, *supra* note 64, at 88.

70. I assume that non-compliance with a legally binding document brings more damage to state reputation than defection from soft law.

There are three aspects to (hard) multilateral treaties that deserve attention. Firstly, once states agree on a set of treaty provisions, renegotiation is costly. Especially when dealing with treaties that aim at universal membership, states hesitate to re-open the document for fear that a Pandora Box may ensue. Secondly, states may choose the hard law option in order to engage domestic audience concerns more directly, through the ratification process. Finally, states may choose the hard law venue as a mechanism to delay commitment, because soft legal documents are a lot easier to negotiate. Regarding the latter, as time passes, the status quo may become more receptive of a given state's preferred propositions. As the negotiation toward a legally binding treaty is launched, it is important to maximize the role of incentives that work to promote harder legal commitments.

B. Andrew Moravcsik, The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe

One example relating to the origins of (hard) multilateral regimes is discussed in Moravcsik, who analyzes the birth of the European human rights framework to reveal the puzzling disinterest that long-standing European democracies in the 1950s had in the creation of a strong legal instrument.⁷¹ Rather, it was the several newly established democracies who rallied behind the idea of a treaty which would contemplate the right to individual petition and empower a judicial body to enact binding rulings.⁷² The solution to this puzzle carries applications to the negotiation under analysis here, as I articulate next.

Moravcsik sets out to analyze states' support for the creation of a human rights regime in Europe after World War II.⁷³ His research seeks to identify patterns of support/opposition among different regime types, given the encroachments that international human rights law present for sovereign nations.⁷⁴ To that end, European countries are classified into three categories: democracies, newly established democracies, and non-democracies (or unstable democracies).⁷⁵ Subsequently, their attitude toward a hard legal option—a convention on human rights that included the right to individual petition and compulsory jurisdiction—is analyzed.⁷⁶ The results confirm Moravcsik's hypothesis that newly established democracies were the main force to support a harder document, whereas all European democracies at that time, with the

71. Moravcsik, *supra* note 27, at 232.

72. *Id.*

73. See generally Moravcsik, *supra* note 27.

74. *Id.* at 219–220.

75. *Id.* at 231–33.

76. *Id.* at 230–31.

exception of Belgium, opposed inclusion of the right to individual petition as well as compulsory jurisdiction.⁷⁷

From a theoretical standpoint, Moravcsik proposes that newly established democracies have an incentive to “lock in” any gains from their recent experience with democratization.⁷⁸ For fully established democracies, this concern is not prominent, whereas for non-democracies it runs counter to their goals of political survival.⁷⁹ Moravcsik suggests that this theoretical framework and empirical findings may shed light on the dynamics of other international regimes.⁸⁰ Based on the discussion offered in the article, I extend the framework to analyze the patterns of support associated with the UN Register in an effort to derive lessons for an arms trade treaty.

This exercise requires some adaptation of Moravcsik’s framework: if on one hand, the European Convention on Human Rights turned out to be a hard legal document, on the other hand the UN Register remains a soft law instrument. Therefore, the expectations with respect to the UN Register should be reversed: democracies should lend greater support to the Register, while newly established democracies will display relatively lower levels of engagement. Consistent with Moravcsik’s predictions, non-democracies (or unstable democracies) will be the least involved.⁸¹ These expectations reflect states’ motivations regarding one of the main goals of the UN Register: to promote a culture of transparency over the arms trade issue.

For democracies, fostering transparency does not entail an unnecessary encroachment on their sovereignty, precisely because of the soft nature of the obligation. There are strategic reasons that lead democracies to support the UN Register: transparency may potentially reveal valuable information regarding arms transfers to and from non-democracies. On the other hand, transparency is a practice usually well known to democracies, given that domestic constituents demand accountability as part of the democratic game. For newly established democracies the story is slightly different, because there are no “lock in” mechanisms to guarantee commitments to transparency in the long

77. *Id.* at 233 tbl.2.

78. Moravcsik, *supra* note 27, at 243–44.

79. *Id.* at 220.

80. *Id.*

81. Here the following disclaimer is in order: Moravcsik’s research design focuses on the origins of a particular regime—the European human rights regime. The UN Register can be interpreted as a regime in itself, and to that end, the negotiation that led to Resolution 46/36[L] would be the subject of analysis. In my view, the UN Register can also be understood as a step toward the formation of an arms trade regime, whereby attitudes of states in relation to the UN Register (report or not report) work as a proxy to the negotiation of this other—more encompassing—regime that seeks to regulate the international trade on conventional arms. I proceed with the analysis under the assumption that Resolution 46/36[L] marks an important step toward the goal of an arms trade treaty.

haul; after all, this is a soft law agreement. In the absence of the benefits associated with hard law commitments, newly established democracies only see the costs that transparency involves—for example, the timely production and dissemination of data on arms trade—in a context of growing domestic demands for accountability. For non-democracies, the demand for transparency in the arms trade is a losing proposition, because it may compromise their strategies for political survival. These nations often attempt to maintain their military might by keeping their actual arms capabilities secret.

The data present a number of non-democracies that have submitted reports several times. I consider those false positives, that is, countries that actually report for reasons other than transparency. For example, Russia, the Ukraine, and China are among the top twenty arms exporters.⁸² The first two have reported every year since 1992, whereas China has reported six times between 1992 and 2006.⁸³ I argue that pressure from the marketplace and the understanding that the choice to report may actually be a good business strategy, motivate these countries to comply with Resolution 46/36 [L]. A similar explanation may account for the behavior of some non-democracies that fall within the top twenty arms importers category. Cases such as Pakistan and Turkey, both having reported every year since 1992,⁸⁴ can be explained by the fact that the two countries have increasingly been under the influence of the U.S. and the EU, respectively.

A closer look at states' reporting behavior to the UN Register between 1992 and 2006 confirms the expectations laid out above. Table 1 presents the average score for the three categories of regime type. I calculate the scores by counting the number of reports that states submitted during the period analyzed, so that a score of fifteen means that a particular state reported every year, whereas a score of zero means that no report was submitted during the same time period. In order to categorize countries according to regime type I rely on Freedom House's *Freedom in the World* classification, which proposes three aggregate measures: "free," "partly free," and "not free."⁸⁵ Countries that are consistently coded as "free" by Freedom House between 1972 and 2006 make up the group of established democracies.⁸⁶ Countries that are consistently

82. STOCKHOLM INT'L PEACE RESEARCH INST., THE TOP-20: ARMS IMPORTERS AND EXPORTERS 1977–2006, http://www.sipri.org/contents/armstrad/output_examples.html#twenty (last visited Mar. 15, 2008).

83. See U.N. REGISTER OF CONVENTIONAL ARMS, DATABASE 1996–2006, http://disarmament.un.org/UN_REGISTER.NSF [hereinafter Register Database] (last visited Mar. 13, 2008).

84. *Id.*

85. Arch Puddington, *Freedom in Retreat: Is the Tide Turning? Findings of Freedom in the World 2008*, FREEDOM HOUSE, at 3, 2008, <http://www.freedomhouse.org/uploads/fiw08launch/FIW08Overview.pdf> (last visited Mar. 22, 2008).

86. *Id.* at 4.

coded as “partly free” by Freedom House represent the newly established democracies.⁸⁷ Countries that are “not free” correspond to the non-democracies (or unstable democracies).⁸⁸

Table 1—Average Number of Reports to the UN Register (1992–2006)⁸⁹

	Number of countries	Average number of reports; Reporting scores
Democracies	36	12.8
Newly established democracies	47	9.9
Non-democracies	106	5.7
Top twenty arms exporters*	18	13.7
Top twenty arms importers**	20	8.7

* The majority of the top twenty (18) exporters consist of democracies. There are two newly established democracies (Brazil and Poland) and four non-democracies (Russia, Ukraine, China, and North Korea).

** The majority of the top twenty importers consist of non-democracies. There are two newly established democracies (India and South Korea) and six democracies (Israel, Spain, the U.K., Australia, Greece, and Japan).

The results are consistent with the predictions in the literature. Newly established democracies report less often than democracies. In fact, their reporting score is twenty-three percent lower than that of democracies. Also consistent with the literature, non-democracies report significantly less often than both democracies and newly established democracies. The overall score of non-democracies is probably inflated by false positives, such as the cases discussed in the previous paragraphs. It is important to note that countries that qualify as major arms exporters and importers, on average, report more often than their counterparts in the same regime type category. This is of special relevance for the top twenty arms importers, which consist primarily of non-democracies. Their propensity to report is substantially higher when compared

87. *Id.* at 3.

88. *Id.*

89. STOCKHOLM INT’L PEACE RESEARCH INST., *supra* note 82; Register Database, *supra* note 83; Puddington, *supra* note 85.

to that of non-democracies that are not major arms importers (a score of 8.7 as opposed to 5.7).

The balance of the UN Register is not as grim as many suggest. It has managed to gather support among democracies as well as newly established democracies. It has also attracted several non-democracies, even if for unanticipated motivations. The world is slightly more transparent with respect to transfers of conventional arms today than it was in 1991. More importantly, states are more welcoming of a norm of transparency and accountability in that area than they have ever been before. As we move towards an arms trade treaty, what recommendations can we make based on this analysis?

1. Leverage support among democracies

Negotiators should be attentive to democracies and their preferences in regards to an arms trade treaty. The literature predicts that the move toward a harder legal regime will ignite skepticism among democracies, given their resistance to the idea of encroachments on their sovereignty. So far, the United States position with respect to an arms trade treaty confirms that preoccupation.⁹⁰ Here, the principle of “common but differentiated responsibilities,” which has guided several environmental protection negotiations since the 1994 Framework Convention on Climate Change,⁹¹ may offer a template for creative solutions that would address these countries’ resistance to what they perceive as an unnecessary trespassing of the boundaries of state sovereignty. To that end, while the U.S. was a strong force behind Resolution 46/36 [L], it remains skeptical of the notion of an arms trade treaty, as reflected in the voting record of General Assembly Resolution 61/89 of 6 December 2006.⁹²

2. Create selective incentives for non-democracies

Because non-democracies feature prominently in most instances of armed conflict and human rights violations in the world, they are a natural concern for the debate on arms trade. Aside from that, non-democracies clearly outnumber democracies and newly established democracies in the world today. This aggravates the collective action problem that permeates any attempt to control the international trade in conventional weapons. Indeed, it is common wisdom

90. UNITED NATIONS, GENERAL ASSEMBLY, FIRST COMMITTEE: MEETING #21, RECORDED VOTE: TOWARDS AN ARMS TRADE TREATY, U.N. Doc. A/C.1/61/L.55 (Oct. 26, 2006), [hereinafter Recorded Vote], available at <http://www.reachingcriticalwill.org/political/1com/1com06/votes/L.55vote.pdf> (last visited Mar. 22, 2008).

91. Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 10, Dec. 10, 1997, 37 I.L.M. 22 [hereinafter Kyoto Protocol].

92. G.A. Res. 61/89, U.N. Doc. A/RES/61/89 (Dec. 18, 2006); Recorded Vote, *supra* note 90. Of the 192 countries that took part in the vote, 153 voted yes, 1 voted no, 24 abstained, and 14 did not vote. *Id.*

in the academic literature that the opportunities for collective action dwindle as the number of actors increases.⁹³ One of the proposed solutions to address the provision of public goods by large groups lies with the institutionalization of selective incentives. In other words, if the large contingent of non-democracies can be offered perks in exchange for their participation in the arms regulation effort, there is now an excludable benefit associated with cooperation.⁹⁴ Aid, technology transfer, and preferential trade status feature as good candidates.⁹⁵

3. Alleviate cooperation costs for newly established democracies as well as for non-democracies

The literature predicts that newly established democracies will favor hard legal commitments because these agreements enable states to “lock in” any gains from the democratization process.⁹⁶ Nevertheless, compliance still entails costs, and in the context of an arms trade regime, reporting costs are prominent. In fact, transparency measures affect newly established democracies and non-democracies alike, because these states are newcomers to accountability and participatory practices that are deeply rooted among democracies. One way to counter these disincentives associated with an arms trade treaty is to make institutional assistance available to member states.

Beyond these recommendations, some general guidance can be extracted from the theoretical analysis offered in the previous sections. In particular, delegation and flexibility appear to have a prominent contribution to the treaty. In the next section I expand the discussion on delegation and flexibility in order to arrive at more specific propositions.

V. THE PROSPECTS OF AN ARMS TRADE TREATY

Establishment of a dedicated bureaucracy to which powers to monitor, interpret, and implement an arms trade treaty would be delegated will be key to an effective agreement. This group of individuals can improve on the accomplishments of the UN Register without the requirements of periodical consensus reviews by a Group of Governmental Experts. Moreover, a dedicated bureaucracy can devise selective incentives and mobilize domestic constituencies as a means to promote compliance. With respect to selective

93. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 9 (reprint 1982) (1965).

94. Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 *INT'L ORG.* 593, 624 (2005).

95. Hafner-Burton finds significant evidence that preferential trade agreements containing hard commitments with respect to human rights policies have actually improved a country's record with respect to repression. *Id.*

96. Moravcsik, *supra* note 27, at 243–44.

incentives, this bureaucracy could explore excludable benefits to an arms trade treaty. For example, preferential trade status could be subordinated to membership and fulfillment of treaty obligations by the recipient state. Whereas this strategy relies primarily on coercion, there is also a role for persuasion through the mobilization of political elites and domestic constituents.⁹⁷

There are several other reasons for emphasizing delegation. In particular, newly established democracies will be more attracted to the treaty if it contemplates “locking in” mechanisms. After all, this is the main motivation for joining among this category of states. Alongside, a dedicated bureaucracy might be better equipped to tackle connected problems, such as the diversion of licit transfers.⁹⁸

The gains from delegation are not perceived equally by states. In fact, democracies (as opposed to newly established democracies) are more resistant to encroachments upon their sovereignty. Here, flexibility of commitments may help to reconcile states interests, thereby facilitating universal membership. I foresee a role for two forms of flexibility: time limits and escape clauses. As explained before, scholars have found a negative correlation between the number of participants and the imposition of limits on agreement duration.⁹⁹ As the number of participants approaches universality, we tend to observe less, if any, limits on agreement duration, due to the presence of renegotiation costs. A possible compromise would establish relatively long limits on duration, much like the institutional features of the 1997 Kyoto Protocol.¹⁰⁰

Finally, escape clauses will appeal to democracies as well as non-democracies. The latter may temporarily withdraw from treaty obligations when facing a national security crisis. Interestingly, because escape clauses are costly, “escaping” from the treaty may expedite the resolution of crises that would otherwise linger in time. Democracies may see escape clauses as a suitable counterweight to agreement rigidity, especially when there is resistance by organized interest groups domestically. For example, the armament industry is likely to be more accepting of an arms trade treaty that allows for temporary withdrawal. It is important to keep in mind that organized interest groups perceive costs and benefits associated with regulation in a concentrated manner, as opposed to less organized groups within society, such as voters and

97. The distinction between coercion and persuasion is made by Hafner-Burton in the context of enforcement of human rights obligations. She reminds us that coercion and persuasion are not mutually exclusive. Hafner-Burton, *supra* note 94, at 599–600.

98. During an informal conversation with a government intelligence analyst, it was explained to me that a major limitation of the current regime is the underlying assumption that the contents of licit transfer do actually reach its intended destination. In certain parts of the world this is seldom the case. Corruption fuels a black market, channeling some of these weapons to embargoed countries.

99. Korememos, *supra* note 52, at 557 n.22.

100. Kyoto Protocol, *supra* note 91.

policymakers. Therefore, resistance from organized interests is much more effective at influencing governments.¹⁰¹

It will be challenging to create escape clauses that balance costs and benefits adequately. Escape clauses must impose a burden so as to deter unwarranted withdrawal; but if these clauses are excessively costly, their function as guarantors of agreement survival will be at stake. With respect to an arms trade treaty, engineering escape clauses is no easy task. I leave further thinking on this issue for future research.

Overall, recourse to delegation and flexibility mechanisms will contribute to a strong and universal treaty. It will be helpful to assess what role these mechanisms have played in similar treaties. For now, the scholarship on legalization and regime design call attention to these two features of international agreements as prominent aspects for successful negotiation and enforcement.

VI. CONCLUSION

In this paper I discussed the prospects of an arms trade treaty in light of predictions from the literature on legalization and regime design. The role of delegation and flexibility emerged prominently in the analysis, which offers specific justifications for various forms of flexibility as well as the functions of a dedicated bureaucracy. The paper took a closer look at the reporting record of states between 1992 and 2006 in order to assess theoretical expectations with respect to regime type. Confirming the predictions of the literature, states reveal reporting patterns associated with the degree to which they have developed into fully established democracies. This exercise promotes a better understanding of the distinct challenges each identified category will present during the negotiation of an arms trade treaty.

Several analyses of the arms trade issue were discussed, including the two most recent reports by the Group of Governmental Experts.¹⁰² From that overview, a mixed picture emerges: observers, from academia and think tanks, do not match the optimism displayed by the GGE. The two extreme positions seem to agree, however, on the need to address the issue of small arms and light weapons. So far, the GGE has made progress in the debate but no strong reform proposal was able to reach consensus among participants. As the negotiation of an arms trade treaty progresses, these unresolved issues are likely to resurface. To that end, the *Small Arms Survey 2007*¹⁰³ continues to raise

101. James Q. Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 357, 358 (James Q. Wilson ed., 1980).

102. See generally 2003 Report, *supra* note 15; 2006 Report, *supra* note 15.

103. See GRADUATE INST. OF INT'L STUDIES, *SMALL ARMS SURVEY 2007: GUNS AND THE CITY* (2007).

awareness to the implications of the trade in these weapons for human rights and humanitarian law obligations.

Finally, areas that are ripe for further research were identified. More work on the notion of flexibility is needed. Given the universe of multilateral treaties that exists today, it is important to draw lessons in an attempt to engineer optimum design mechanisms. Especially for treaties that aim at universal membership, escape clauses, limits on agreement duration, and/or the admissibility of different policy levels may offer the key to self-enforcing institutional arrangements.

In 1919, twenty three states signed the Convention for the Control of the Trade in Arms and Ammunition, which never entered into force because states failed to ratify the document.¹⁰⁴ This treaty incorporated several design elements: limits on duration (seven year renegotiation rounds), majority rule for decisions on renegotiation, the creation of a dedicated bureaucracy (the Central International Office), and provisions for arbitration of differences.¹⁰⁵ The challenges we face in the new millennium are greater in many aspects. It is imperative to find the right institutional recipe this time.

104. *Convention, supra* note 1.

105. *Id.* at 310.