constraints were legally binding, they did say that they had decided to adhere to them, and their declarations to this effect have been published by the IAEA, so that there are now certain political limitations on their departing from those standards.

Another point is that many important elements of the regime, including the itemization of materials that will not be exported without safeguards and including the physical protection standards that were worked out as part of these Nuclear Suppliers guidelines, have been incorporated into domestic laws and regulations. For instance, these elements were comprehensively adopted by the Non-Proliferation Act of 1978 in the United States, which then tried to push them farther than the limits that had been agreed upon; and they, as well as the requirements for physical protection of sensitive nuclear materials, are incorporated in export control regulations of the United States and most other participating countries. Thus, many elements of the regime are in concrete domestic laws and regulations that cannot be dropped instantaneously, but that obviously could be changed by any country that changed its mind.

Thirdly, the developments by various groups that I have discussed have played an important role in the evolution of several elements in the international nonproliferation regime. I have mentioned that the Western Suppliers Group led to Article III(2) of the NPT, while the Zangger Committee helped to clarify and particularize the implementation of Article III(2) and to establish mechanisms for arriving at common standards for its implementation and for updating those standards from time to time, as conditions change. The Nuclear Suppliers guidelines brought France into line with the standards developed by the Zangger Committee, helped lay the groundwork for the Convention on the Physical Protection of Nuclear Material, helped sensitize countries to the problem of exports related to nuclear technology, and led them to begin to develop controls on technology exports. While the process that led to the guidelines failed at the time to achieve a consensus on full-scope safeguards as a supplier requirement, it did help build the consensus that eventually led to the adoption of that requirement.

Finally, I would like to point out two important limitations to this approach of erecting further limitations on exports related to weapons of mass destruction. The Nuclear Suppliers guidelines are in tension with Article IV of the NPT regarding furthering exchanges, and as a result they have come in for a great deal of criticism at the review conferences concerning the NPT and have exacerbated feelings among non-nuclear-weapons states that the NPT is discriminatory. The resulting complaints may come to haunt us in the 1995 conference that has the crucial task of extending the Non-Proliferation Treaty beyond 1995, so these parties’ resentments are an important consideration. If the obstructionist approach of denial of exports is carried too far, it could create very great political tension with the Third World and lead to a political backlash that could seriously damage the nonproliferation regime. I would therefore urge caution and restraint in taking this obstructionist approach and especially in intensifying it so as to become more and more restrictive. That approach very definitely has a down-side.

Remarks by Elizabeth Verville*

I am very pleased to be here today to talk about efforts to control weapons proliferation—more particularly, proliferation of missiles and chemical and biological weapons. I have spent a good deal of time in the past two years formulating

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U.S. nonproliferation policy in these areas, including our policy toward the Missile Technology Control Regime (MCTR) and the so-called Australia Group. It is an urgent and very timely issue, and since I am absorbed on a daily basis with its operational aspects, it is good to have this opportunity to reflect on where we are and to explore the possibility of more appropriate or useful approaches than we now employ.

As you know, I have spent most of my career at the office of the Legal Adviser of the Department of State trying to ensure that, wherever appropriate, important commitments are embodied in binding legal obligations, and that those obligations are stated as clearly and comprehensively as possible. Strictly from a lawyer’s perspective, there may be a tendency or a temptation to view legally binding obligations as more solemn and effective, particularly where their breach may give rise to a particular remedy. At the same time, I think that there is ample precedent, even outside the arms control area, for extremely significant, even hallmark international meetings-of-the-minds to be recorded in nonbinding international documents. I have in mind such hallmark international achievements as the three historic communiqués between the United States and the People’s Republic of China. When viewed as solemn political undertakings by the governments concerned, nonbinding political commitments can be highly effective in governing important relationships and actions. In the nonproliferation regimes, we have a slightly different genre, not just broad policy statements but very detailed practical arrangements that are consensual and nonbinding.

As usual, I believe our distinguished Chair has insightfully framed the critical issues. Is Mr. McNeill right that nonbinding does not mean Quixotic? Are the regimes effective despite their lack of legal formalism? Have they created a false sense of security? One could boil down the questions even more simply: Are the regimes broken, so as to require fixing? Would attempting to make them legally binding be likely to enhance or to detract from their effectiveness? One could even go beyond these questions, and ask whether and to what extent these nonbinding regimes may have created or may be in the process of creating international norms.

The MTCR and Australia Group have certain elements in common and certain differences. Before taking them up individually, I would like to make some general observations: (1) neither is a treaty or a binding international instrument, although there are underlying universal treaty bans pertaining to chemical and biological weapons, but not to missiles; (2) neither has a secretariat or formal organization, although both have informal administrative arrangements that are becoming more dynamic, initiating such efforts as the employment of experts’ advisory groups; (3) both represent arrangements to coordinate national export control policies of participating countries, while leaving implementation to sovereign decision; (4) both have been significantly reenergized in the wake of the Gulf war—they have been expanded and strengthened, reflecting an increased determination of member states to ensure that they are comprehensive, effective and up-to-date; (5) both are reaching out with vigor to nonmember countries in an effort to prevent proliferators from seeking new sources of supply as new states emerge and as long-term states change and adopt new systems. Let me present a brief overview of the history, most important features, goals and achievements of these regimes and then state some conclusions about where I think they are headed and where I think they should be headed.

To start with the less formal, the Australia Group is a very informal group of countries that cooperate against chemical and biological weapons (CBW) proliferation. It started as a gathering of a few allies in 1984 under Australian aus-
pices—hence the name “Australia Group.” It was spurred by the use of chemical weapons (CW) in the Iran-Iraq War, and it has always been characterized as an interim measure in support of a Chemical Weapons Convention. It became an ongoing enterprise in 1985 with seventeen members: the EC twelve, the United States, Canada, Australia, Japan and New Zealand. Membership has expanded to twenty-two, as Norway, Australia, Switzerland, Finland and Sweden joined by 1991.

The controls implemented by Australia Group members have also expanded significantly. Starting with four chemical weapons precursor-materials under control in 1984, this has grown to fifty in 1991. Controls on CW equipment have recently been instituted and are in the process of being finalized. The group has expanded to include biological weapons (BW) controls on microorganisms, toxins and BW-related equipment, which are being developed for a hoped-for decision at the next plenary meeting in June.

These achievements largely make multilateral the unilateral controls adopted by the United States in the past eighteen months under the Enhanced Proliferation Control Initiative to ensure that U.S. controls are as effective as possible in these areas. The procedures in the Australia Group remain informal at the members’ insistence; there is a common control list, but no written charter or guidelines, and each member is responsible for its own implementation, recognizing Australia as the informal coordinator.

The Australia Group has, however, become increasingly effective. Information is exchanged, and consultations are conducted on policy and on individual cases. European sources instrumental in helping Libya and Iraq build CW capabilities have dried up. It would be much harder now for new would-be Iraqs to acquire the technology to create major CW programs. Other countries are increasingly adopting controls comparable to those in the Group’s standards. The Soviet Union (now Russia), Bulgaria, Czechoslovakia, Hungary, Israel, Poland, Romania, and, to a lesser extent, China and India are moving to adopt some, if not all, of its controls. Argentina and Brazil are moving in this direction. The Group is also finding a receptive audience in the newly emerging Commonwealth of Independent States.

What would a treaty do? It would certainly make a lot of work for a lot of lawyers for a lot of years; but it would be unlikely to succeed in implementing CBW export controls. There is no enthusiasm for a treaty among the Australia Group members, who oppose institutionalization of any sort, partly to preserve national discretion and partly because they believe that the Chemical Weapons Convention under negotiation is the ultimate solution to CW proliferation. Moreover, Third World countries would regard a more formal regime as a permanent institution discriminating against them. In any case, I consider it doubtful that a treaty regime would work better than informal cooperation. If controls and procedures were made binding, countries would naturally tend to reduce them to the lowest common denominator. Some countries would even refuse to join; this would mean a lower overall effectiveness.

The Missile Technology Control Regime is similar in its informality, but slightly different. Again, it is a voluntary arrangement among countries that share a common interest in arresting proliferation of missiles capable of delivering weapons of mass destruction. It started three years later, in 1987, with an agreement among the Economic Summit Seven: Canada, France, Germany, Italy, Japan, the United Kingdom and the United States. After five years of growth, it has expanded to include eighteen countries, soon to be twenty, including most of the EC, NATO...
The MTCR consists of a common export control policy, written guidelines that are applied to a common written list, and an annex list of controlled items including virtually all equipment and technology needed for missile development, production and operation. In this sense, it is more formal than the Australia Group.

It has succeeded in slowing the proliferation of missile technology to other countries. Controls adopted under the MTCR prevented Iraq from producing the Condor ballistic missile, which would have had a far more devastating impact than the SCUD in the Gulf war. In 1990, the Soviet Union endorsed the MTCR guidelines, and the Russians have told us they continue to honor this endorsement. In 1991, Argentina announced the termination of its ballistic missile program and an intention to adhere to the MTCR guidelines. Israel has also announced its adherence to the MTCR guidelines, and South Africa may be moving in that direction. In February 1992, China announced that it would observe the MTCR guidelines and parameters. Today, in effect, North Korea is the only country worldwide that still exports complete MTCR-class missile systems. I have just returned from a meeting in Warsaw, sponsored by the MTCR, which the United States led; it was attended by Eastern European countries, some representatives of the Commonwealth of Independent States and Russia. Clearly there is receptivity among these newly emerging states and these changing states to the idea of joining the bandwagon and at least accepting the standards of this regime.

The MTCR is not a treaty, nor a convention, nor an international organization. Its commitments are not binding under international law, and it does not have a permanent secretariat. It is, however, dynamic, and it is voluntary—an arrangement among like-minded countries to coordinate their controls, with each nation retaining the sovereign right to decide whether to permit exports in specific cases. In fact, there is a high degree of peer pressure; the controls exercised by most partners are actually stronger than required by a narrow reading of the text.

As in the Australia Group, the partners have agreed to a higher standard and level of commitment under a voluntary arrangement than I believe they would have agreed to under a legally binding regime. Only five years after the founding of the regime, the most important supplier countries are now committed in one way or another to this international standard of export controls. Interestingly, in the considerable interchange among the partners, I have never heard a single country in a case that was disputed or under discussion argue that it was not legally bound by the standards of the regime. Instead, there is characteristically discussion about whether a particular transaction or activity is in fact covered by the regime.

My experience of two years of leading the U.S. delegation to these regimes has led me to make some conclusions, as follows.

(1) The regimes deal with urgent problems that need to be addressed in an ongoing, energetic process. These regimes are therefore becoming more dynamic. Even if we thought it would be better to have them legally binding, to attempt to make them so would be to institute a distracting and probably highly contentious process that could weaken rather than strengthen them. What countries are eager to do and agree to do on a national sovereign basis in order to prevent proliferation, they would be much more reluctant to do, were they binding themselves legally in the traditional sense. As for the possible overarching structure mentioned by our panel Chair, I am not persuaded that it would improve the functioning of the existing regimes; it might simply add a new layer of bureaucracy that would divert
and distract them from the issues. There is no substitute for the work being done by each of these regimes.

(2) The regimes need to stay dynamic and under constant review because of changes in technology and circumstances. By their very nature, the regimes are difficult to codify.

(3) Even without formal legal commitments, or perhaps because of their absence, the countries involved regard these commitments as solemn and proceed by consensus and collaboration. They look to the substance of the commitments rather than their form.

(4) In these circumstances, we should continue to address our energies to further strengthening and expanding these regimes, rather than to seeking new structures and mechanisms that might undercut them. We should supplement our efforts, as appropriate, with such initiatives as the President’s Five Power arms control talks now focused on the Middle East.

(5) The increasing acceptance, even by states not belonging to the regimes, of the standards embraced by the members may be said to be creating international norms of some sort. Although I certainly would not say that they are customary international law at this time, they are serving as the basis for national action by increasingly large numbers of states going far beyond the so-called like-minded originators of these regimes, including even newly emerging states and states undergoing revolutionary political changes. In my view, this bodes well for the role of international practice and is a phenomenon for international lawyers to watch—not necessarily to seek to reform.

(6) What is to be done about the “pariah” states? Should we, as the Chair proposes, consider new treaties? I think that we should first keep up the pressure on the pariahs to adhere to the norms that are embodied in the existing regimes. What reason do we have for believing that they would be more likely to adhere to a new treaty than to adhere to current standards? We should seek to use all our influence on them in practical ways, as we have done in the nuclear area with North Korea, making clear that there are high costs of continuing to be isolated and to proliferate weapons of mass destruction in the world.

Finally, I do not believe that we are being lulled into a false sense of security by the activities of these regimes. I think that the participants in these regimes realize that it will take rededication, both bilaterally and multilaterally, in order to increase the regimes’ effectiveness. Proliferators are becoming ever more creative in their search for technology and components. It will take all the efforts of all the countries concerned—an increasingly wide circle of countries—in order to be truly effective.

Remarks by Abram Chayes*

As I am the only nonofficial person here, I can speak freely. My subject is the nuclear nonproliferation regime and the Non-Proliferation Treaty (NPT).

Thomas Reed Powell, who was an old and crusty constitutional law professor when I arrived at Harvard (and when the issue of loyalty oaths was on the front burner), was asked whether he would take an oath to support the Constitution. He answered, “Why shouldn’t I? It’s always supported me.” And that’s how I feel about the NPT sometimes; I have been involved with it in one way or another for quite a while.

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