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PUBLIC INTERNATIONAL LAW

Arms Control and Disarmament

PETER W. MASON*

I. The Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty)

A. TO DEPLOY OR NOT DEPLOY: THAT IS THE QUESTION . . .

On May 20, 1999, Congress passed the National Missile Defense Act of 1999 by overwhelming margins in both houses.¹ The operative provisions of the Act are simple. Section two of the Act states:

It is the policy of the United States to deploy as soon as is technologically possible an effective National Missile Defense system capable of defending the territory of the United States against limited missile attack . . . with funding subject to the annual authorization of appropriations and the annual appropriation of funds for National Missile Defense.²

Section three provides that “[i]t is the policy of the United States to seek continued negotiated reductions in Russian nuclear forces.”³

President Clinton signed the bill into law on July 22, 1999. At the signing ceremony, the President made the following statement:

I have signed into law H.R. 4, the “National Missile Defense Act of 1999.” My Administration is committed to addressing the growing danger that rogue nations may develop and

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1. National Missile Defense Act of 1999, Pub. L. No. 106-38, 113 Stat. 205 (1999). The Act was passed by unanimous consent in the Senate and by a vote of 345-71 in the House. Legislative history for H.R. 4 is available at <<http://loc.gov>>.

2. *Id.*

3. *Id.*

field long-range missiles capable of delivering weapons of mass destruction against the United States and our allies.

Section 2 of this Act states that it is the policy of the United States to deploy as soon as technologically possible an effective National Missile Defense (NMD) system with funding subject to the annual authorization of appropriations and the annual appropriation of funds for NMD. *By specifying that any NMD deployment must be subject to the authorization and appropriation process, the legislation makes clear that no decision on deployment has been made. This interpretation, which is confirmed by the legislative record taken as a whole, is also required to avoid any possible impairment of my constitutional authorities.*

Section 3 of the Act states that it is the policy of the United States to seek continued negotiated reductions in Russian nuclear forces. Thus, *section 3 puts the Congress on record as continuing to support negotiated reductions in strategic arms, reaffirming my Administration's position that our missile defense policy must take into account our arms control and nuclear nonproliferation objectives.*

Next year, we will, for the first time, determine whether to deploy a limited National Missile Defense, when we review the results of flight tests and other developmental efforts, consider cost estimates, and evaluate the threat. *Any NMD system we deploy must be operationally effective, cost-effective, and enhance our security. In making our determination, we will also review progress in achieving our arms control objectives, including negotiating any amendments to the ABM Treaty that may be required to accommodate a possible NMD deployment.*⁴

The president's signing statement identifies four factors that will be considered in determining whether to deploy a limited national missile defense: (1) the status of the NMD's technological development and testing; (2) the cost-effectiveness of the system; (3) the nature of the threat; and (4) the progress in achieving U.S. arms control objectives, including negotiating necessary amendments to the ABM Treaty. In light of these four factors, two other domestic developments should be noted: the Intelligence Community's release in September 1999 of its National Intelligence Estimate (NIE) on ballistic missile developments, and the NMD flight tests that were conducted in October 1999 and January 2000.

The September NIE was the first NIE to be issued following North Korea's test on August 31, 1998 of a Taepo Dong 1 missile that had been modified by adding a third stage in order to give it space-launch capability. Although the NIE itself is a classified document, the National Intelligence Council has published a report that summarizes the NIE in an unclassified form. The report contains a number of estimates that are relevant to the NMD debate. First, the report projects that during the next fifteen years the United States "most likely will face [Intercontinental Ballistic Missiles (ICBM)] threats from Russia, China, and North Korea, probably from Iran, and possibly from Iraq."⁵ Second, the report judges that North Korea, Iran, and Iraq "would view their ICBMs more as strategic weapons of deterrence and coercive diplomacy than as weapons of war."⁶ Third, the report finds that sales of ICBMs or space launch vehicles (SLV) could increase the number of countries able to threaten the United States, and notes that North Korea "continues to demonstrate a willingness to sell its missiles."⁷ Finally, the report states that

4. President William Clinton, Statement by the President (July 23, 1999) (emphasis added), *available at* <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/1999/7/26/9.text.1>>.

5. National Intelligence Council, *Foreign Missile Developments and the Ballistic Missile Threat to the United States Through 2015*, at 2 (Sept. 1999), *available at* <<http://www.cia.gov/cia/publications/nie/nie99msl.html>>.

6. *Id.*

7. *Id.* at 3.

[s]everal other means to deliver weapons of mass destruction to the United States have probably been devised, some more reliable than ICBMs that have not completed rigorous testing programs. . . . However these means do not provide a nation the same prestige and degree of deterrence or coercive diplomacy associated with ICBMs.⁸

On October 2, 1999, soon after the NIE warned of an increased ballistic missile threat to the United States, a Department of Defense "integrated flight test" resulted in an exo-atmospheric kill vehicle (KV) detecting its target, differentiating between the re-entry vehicle (RV) and a decoy, and then intercepting the RV approximately 100 miles above the Pacific Ocean.⁹ In a similar test in January 2000, the KV failed to destroy the RV, apparently due to a leak or a constriction in a pipe that cooled the KV's infrared sensors.¹⁰ On March 20, 2000, Pentagon officials said that Air Force Lt. Gen. Ronald T. Kadish had decided to postpone the next test, originally scheduled for April 2000, until late June.¹¹

B. THE ABM TREATY AND STRATEGIC ARMS LIMITATIONS

Ratification of the treaty between the United States and the Russian Federation on Further Reductions and Limitations of Strategic Offensive Arms (START II)¹² remains the most immediate obstacle to progress in the area of strategic arms limitations. The Treaty, which was signed by Presidents Yeltsin and Bush on January 3, 1993, received U.S. Senate advice and consent to ratification in 1996.¹³ On September 26, 1997, Secretary of State Albright and Russian Foreign Minister Primakov signed a Protocol to the treaty that was designed to facilitate Russian Duma ratification by, inter alia, extending the reduction deadlines set forth in the Treaty. The Protocol is subject to ratification.¹⁴ The Clinton admin-

8. *Id.* Other delivery systems could include short- or medium-range ballistic missiles mounted on forward based ships or other platforms, placing a weapon of mass destruction on board a commercial ship or aircraft, or smuggling such a weapon across the border. *See id.* at 12–13.

9. *See* Ballistic Missile Defense Organization (BMDO), BMDO Fact Sheet JN-00-10, *National Missile Defense Integrated Flight Test Three (IFT-3)*, at 2 (Jan. 2000). For an overview of the entire U.S. NMD program, *see* BMDO, BMDO Fact Sheet JN-00-05, *National Missile Defense Program* (Jan. 2000); and BMDO, BMDO Fact Sheet JN-00-04, *National Missile Defense Evolution* (Jan. 2000). All of these fact sheets are available at <<http://www.acq.osd.mil/bmdo/bmdolink/html/factsheet.html>>.

10. *See* Tom Raum, *Top Official Says Meeting Missile-Defense Deadline Will Be Tough*, ASSOC. PRESS, Feb. 17, 2000, available in LEXIS, NEWS Library, AP File.

11. *See* Roberto Suro, *Missile Defense Test Postponed*, WASH. POST, Mar. 21, 2000, at A8.

12. Treaty on Further Reductions and Limitations of Strategic Offensive Arms, Jan. 3, 1993, U.S.-Rus. Fed., S. Treaty Doc. 1, 103rd Cong., 1st Sess. (1993) [hereinafter START II]. Once it enters into force, START II will require each side to reduce the total number of deployed strategic warheads to between 3,000 and 3,500 warheads. It will eliminate heavy intercontinental ballistic missiles and all other multiple-warhead ICBMs. In addition, START II limits the number of warheads that can be deployed on submarine-launched ballistic missiles (SLBMs) to between 1,700 and 1,750, although multiple-warhead SLBMs are not prohibited. *See* Department of State, Fact Sheet, *Treaty Between the United States of America and the Russian Federation on Further Reduction and Limitation of Strategic Offensive Arms* (Jan. 30, 1995), available at <<http://www.state.gov/www/global/arms/factsheets/wmd/nuclear/start2/start-95.html>>; *see also* The White House, Fact Sheet, Background Information: START II Ratification (Jan. 26, 1996), available at <<http://www.state.gov/www/global/arms/factsheets/wmd/nuclear/start2/strtrat.html>>.

13. START II, *supra* note 12.

14. *See* Department of State, Fact Sheet, *ABM/TMD Agreements, START II Protocol and Letters on Early Deactivation* (Sept. 26, 1997), available at <<http://www.state.gov/www/global/arms/factsheets/wmd/nuclear/start2/abmtmd.html>>.

istration has stated its intent to submit the Protocol to the Senate for advice and consent once Russia ratifies the treaty and its Protocol.

Despite efforts during 1998 by President Yeltsin, committees in the State Duma (the lower house of the Russian Parliament), and other sectors of the Russian government, to prepare for and secure START II ratification, the Duma decided in December of that year to postpone consideration of the treaty until mid-1999. The reason cited for the postponement was the U.S. and British air strikes on Iraq in December.¹⁵

In January 1999, Secretary of Defense Cohen announced that the Administration pledged to spend \$6.6 billion over five years to field a missile defense system and indicated that it would seek unspecified amendments to the ABM Treaty.¹⁶ Alexei Podberiozkin, a Communist Party member of parliament who supported START II ratification, stated "the U.S. decision to build a missile defense system could be the death knell of the strategic arms treaty."¹⁷

When the U.S. Congress signaled its support for a NMD system by passing the National Missile Defense Act in March, the Duma reacted by enacting legislation that called for Russia to ratify START II on the condition that the United States continues to abide by the ABM Treaty.¹⁸ President Yeltsin approved the bill and the Duma scheduled a START II debate for early April.¹⁹ Nevertheless, the Duma debate on ratification was once again postponed on March 27, 1999 as a protest against NATO air strikes on Yugoslavia.²⁰

On April 14, 1999, the Russian Deputy Minister for Foreign Affairs, G.E. Mamedov, and the Chinese Assistant Minister for Foreign Affairs, Wang Guangya, issued a joint press communiqué following consultations in Moscow. In the communiqué, both sides "voiced their grave concern at the fact that plans announced by the United States to prepare a national anti-missile defense system for deployment are currently posing a serious threat that the ABM Treaty may be undermined."²¹ The communiqué asserted that "implementation of such plans would constitute a violation of a fundamental obligation under the ABM Treaty," and that implementation "would lead to a series of negative consequences: the emergence of new factors which could destabilize the international situation both at the global and the regional level, and of conditions for the resumption of the arms race and for the creation of additional obstacles to the process of disarmament."²² China declared its "solidarity with the efforts being made by Russia to prevent the Treaty from being undermined or circumvented," and both sides "expressed their concern" over plans

15. See Theodore M. Hirsch & Bonnie D. Jenkins, *Arms Control and Disarmament*, 33 INT'L LAW. 473, 478 (1999).

16. See David Hoffman, *Russia Says START II Is Imperiled*, WASH. POST, Jan. 22, 1999, at A16.

17. *Id.*

18. See *World: Europe Russian Parliament To Start Debates On START II*, BBC NEWS, Mar. 16, 1999, available at <http://news.bbc.co.uk/hi/english/world/europe/newsid_297000/297725.stm>.

19. See *Yeltsin OKs Duma Conditions for Ratification of START II*, SALT LAKE TRIB., Mar. 23, 1999, available at <http://www.sltrib.com/1999/mar/03231999/nation_w/92416.htm>.

20. See *Russian Duma Wants to Delay Ratification of START II Treaty*, AGENCE FRANCE PRESS, Mar. 27, 1999, available at <<http://www.nandotimes.com/kosovo/story/0%2C32136-51737-384356-0%2C00.html>>.

21. *Letter Dated 28 April 1999 from the Permanent Representative of the Russian Federation and the Acting Head of Delegation of China to the Conference on Disarmament Addressed to the Secretary-General of the Conference Transmitting a Joint Press Communiqué on Issues Related to the ABM Treaty*, U.N. Conference on Disarmament (CD), 55th Sess., U.N. Doc. CD/1584 (1999), available at <<http://www.unog.ch/disarm/curdoc/1584.htm>>.

22. *Id.*

for the creation and deployment of an ABM system by countries in the Asia and Pacific region.²³

A presidential summit in Cologne, Germany in June 1999 seemed to break the impasse with respect to Russian ratification of START II. At a meeting between Yeltsin and Clinton, Yeltsin indicated that Russia remained committed to START II and Foreign Minister Ivanov predicted that the Duma would return to consideration of the treaty later in the year. The meeting also yielded an agreement between the two presidents to resume parallel discussions on a START III Treaty and the ABM Treaty. National Security Advisor Samuel Berger, who briefed the press on the meeting, noted that

this is very significant because for the first time the Russians have agreed to discuss changes in the ABM Treaty that may be necessitated by a national missile defense system were we to decide to deploy one. At the same time, we've indicated that we will continue the discussions that have been going on at an expert level on what a START III package might look like. . . .²⁴

Berger then added, “. . . these are not really negotiations, these are essentially consultations or discussions preliminary to negotiations on START III, so that if START II is ratified the two sides will be able to move very swiftly towards a formal START III negotiation.”²⁵

The meeting resulted in a Joint Statement Concerning Strategic Offensive and Defensive Arms and Further Strengthening of Stability. The statement provided a road map for the continuation of the two countries' strategic arms control efforts and, in doing so, highlighted the complex interrelationships between the ratification and entry into force of START II, the negotiation of further reductions under a START III treaty, and the amendment of the ABM Treaty. With respect to START II, the two governments undertook to “do everything in their power to facilitate the successful completion of the START II ratification process in both countries.”²⁶ The statement announced that discussions on START III and the ABM Treaty would begin later in the summer and reaffirmed the two countries' readiness

to conduct new negotiations on strategic offensive arms aimed at further reducing for each side the level of strategic nuclear warheads, elaborating measures of transparency concerning existing strategic nuclear warheads and their elimination, as well as other agreed technical and organizational measures in order to contribute to the irreversibility of deep reductions. . . .²⁷

Turning to the ABM Treaty, the statement provided the following:

Proceeding from the fundamental significance of the ABM Treaty for further reductions in strategic offensive arms, and from the need to maintain the strategic balance between the United States of America and the Russian Federation, the Parties reaffirm their commitment to that Treaty, which is a cornerstone of strategic stability, and to continuing efforts to strengthen the Treaty, to enhance its viability and effectiveness in the future.²⁸

23. *Id.*

24. Samuel Berger, Press Briefing (June 20, 1999), available at <<http://www.pub.whitehouse.gov/uri-res/1...pdi://oma.eop.gov.us/1999/6/20/3.text.1>>.

25. *Id.*

26. *Joint Statement Between the United States and the Russian Federation Concerning Strategic Offensive and Defensive Arms and Further Strengthening of Stability* (June 20, 1999), available at <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/1999/6/20/1.text.1>>.

27. *Id.*

28. *Id.*

The statement also included an affirmation by the parties of “their existing obligations under article XIII of the ABM Treaty to consider possible changes in the strategic situation that have a bearing on the ABM Treaty and, as appropriate, possible proposals for further increasing the viability of this Treaty.”²⁹ At the same time, the statement called for the “earliest possible ratification and entry into force” of the 1997 package of ABM agreements, including the Memorandum of Understanding on Succession (MOUS), and the First and Second Agreed Statements that address theater ballistic missile defense systems.³⁰

Since the signing of the ABM-related agreements on September 26, 1997, the Clinton administration has stated as policy that it would not transmit these agreements to the Senate for advice and consent until after Russian ratification of START II and its Protocol. The U.S. Congress has, for fiscal years 1999 and 2000, prohibited the Administration from using appropriated funds to participate in meetings of the Standing Consultative Commission (SCC), established under article XIII of the ABM Treaty, prior to Senate advice and consent to the MOUS, unless the president certifies to Congress that the United States is not implementing the MOUS.³¹ Article XIII of the ABM Treaty establishes the SCC as the forum in which the parties “will: . . . (f) consider, as appropriate, possible proposals for further increasing the viability of this Treaty; including proposals for amendments in accordance with the provisions of the Treaty.”³²

Subsequent discussions in August between John Holum, Senior Advisor for Arms Control and International Security, U.S. Department of State, and Grigory Berdennikov, Director of the Russian Foreign Ministry’s arms control department, concluded with a joint statement indicating that the two sides “exchanged views and reaffirmed their readiness to begin START III talks after Russia’s lower house of parliament ratifies the 1993 START II treaty.”³³ The statement said “the ABM Treaty continues to be the cornerstone of strategic stability,” and added that no specific proposals for changing it had been discussed.³⁴

In September, Russian Foreign Minister Ivanov made the following statement at a joint press conference with Secretary of State Albright in Auckland, New Zealand:

Under the agreement between the two Presidents reached in Cologne, consultations are now underway between the Russian and American experts on the issues related to the ABM and START issues. Understandably, the subject matter is extremely sensitive. On the one hand it

29. *Id.*

30. *Id.* at 2; see Memorandum of Understanding Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, Sept. 26, 1977; First Agreed Statement Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972, Standing Consultative Commission (SCC) (Sept. 26, 1997); Second Agreed Statement Relating to the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972, SCC (Sept. 26, 1997). All three documents are available at <http://www.state.gov/www/global/arms/factsheets/missdef/scc_page.html>; see also Department of State, Fact Sheet, *Memorandum of Understanding on Succession* (Sept. 26, 1997), available at <<http://www.state.gov/www/global/arms/factsheets/missdef/mou.html>>; *ABM/TMD Agreements*, *supra* note 14.

31. See Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, § 625, 112 Stat. 2681, 2681-116 (1998); Consolidated Appropriations Act, Pub. L. No. 106-113, § 629, 113 Stat. 1501, 1501A-60 (1999).

32. Treaty on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, U.S.-U.S.S.R., art. XIII(1)(f), 24 U.S.T. 3435, 944 U.N.T.S. 13.

33. Peter Heinlein, *Correspondent Report Number 2-252933*, VOICE OF AMERICA, Aug. 19, 1999, available at <<http://sun00781.dn.net/nuke/control/start2/news/990819-russia1.htm>>.

34. *Id.*

is absolutely clear that one should continue with the process of reducing strategic arms. I here would like to stress once again that the leadership of Russia is a staunch supporter and has all intentions to see the START II Treaty ratified and to launch the negotiating process in connection with START III. We believe it quite realistic to reach a considerably lower level of nuclear weapons. And regarding the ABM Treaty, as Secretary Albright has just mentioned, it represents a core of the strategic stability. Should this core be disrupted, then the strategic stability could also be disrupted. That is why we attach such great importance to this issue. And today, during our discussions tonight, we will comprehensively develop and explore the matter.³⁵

Following a second Holum-Berdennikov meeting in Moscow on October 21–22, 1999, the Russian Foreign Ministry issued a statement on October 28, 1999. The statement asserted that: “Russia is not conducting any negotiations with the United States on amendments to the ABM Treaty, much less so with the aim of ‘adjusting’ it to the plans the Americans are known to have to create and deploy a national anti-missile defense system, which is banned under the Treaty.”³⁶ It also indicated that

Moscow is deeply worried about the adoption in the United States of a law that proclaims the deployment of a national ABM system to be United States Policy. The deployment of such a system is incompatible with a key provision of the ABM Treaty, indeed its very essence: the commitment of each party not to deploy ABM systems for defense of the territory of its country and not to provide a base for such defense. Abandoning that commitment would, in effect, ‘turn the ABM Treaty inside out’ . . .³⁷

The statement noted that “discussions on START-3 and the ABM Treaty are continuing between Russia and the United States,” but then added that “[n]o one should equate Russia’s agreement to hold such discussions with agreement to the (adaptation) of the ABM Treaty.”³⁸ Finally, the statement concluded with the following:

Changes in the strategic situation require that every measure should be taken to strengthen the ABM Treaty. It is on this basis, and not on the “ruins” of this treaty (and consequently on the “ruins” of the START, INF, CTBT, NPT and other treaties), that the new challenges should be met. Russia is prepared to continue the process of reduction of strategic offensive arms on this basis, in particular START-2 and START-3. It proposes discussing the creation of a global system to monitor the proliferation of missiles and missile technologies, and furthering cooperation with the United States and other States in areas connected with ABM systems, without breaching the limitations imposed by the ABM Treaty.³⁹

In December, Russian Parliamentary leaders reluctantly agreed to discuss the START II Treaty, after hearing a plea from Defense Minister Igor Sergeev. The Duma’s managing council subsequently reversed this decision. Communist leader Gennady Zyuganov indicated that the question had not been prepared and was not ready for debate. This decision

35. Secretary of State Madeleine K. Albright and Russian Foreign Minister Igor Ivanov, Joint Press Availability (Sept. 10, 1999), available at <http://www.state.gov/www/global/arms/speeches/albright/albright_990910.html>.

36. *Letter Dated 3 November 1999 from the Permanent Representative of the Russian Federation Addressed to the Secretary-General of the Conference on Disarmament Transmitting the Text of a Statement Made by an Official Representative of the Russian Foreign Ministry*, U.N. Conference on Disarmament (CD), 55th Sess., U.N. Doc. CD/1599 (Nov. 4, 1999), available at <<http://www.unog.ch/disarm/curdoc/1599.htm>>.

37. *Id.*

38. *Id.*

39. *Id.*

ensured that the Treaty would not be taken up in advance of a newly elected Duma taking office in January.

On March 3, 2000, the Russian Foreign Ministry issued a statement indicating that Russia, during arms talks held in Geneva from February 29 to March 2, 2000, had ruled out any discussions on changing the ABM Treaty. The statement included the following: “[t]he Russian side demonstrated that the changes in this [ABM] treaty proposed by the U.S. would make it senseless, unable to limit offensive strategic arms, so it cannot be considered a subject of negotiations.” In addition, the statement said any progress on the START III talks was linked to the ABM question.⁴⁰

On April 14, 2000, the Russian Duma approved the START II Treaty.⁴¹ The Duma’s approval, however, included a provision indicating that Russia intends to withdraw from the Treaty if the United States builds a strategic missile defense in violation of the ABM Treaty.⁴² That same day, President Putin stated: “[i]f . . . the United States Destroys the ABM treaty . . . [we] will withdraw not only from START II but also from the entire system of treaty relations on the limitation and control of strategic and conventional armaments.”⁴³

II. The Comprehensive Nuclear Test-Ban Treaty

On September 24, 1996, President Clinton was the first world leader to sign the Comprehensive Test Ban Treaty (CTBT) when it was opened for signature by the Secretary General of the U.N. in New York.⁴⁴ Pursuant to article I of the Treaty, each state party undertakes not to carry out any nuclear weapon test explosion or any other nuclear explosion; to prohibit and prevent any nuclear explosions at any place under its jurisdiction or control; and to refrain from causing, encouraging, or in any way participating in the carrying out of any nuclear weapon test explosion or any other nuclear explosion.⁴⁵ The opening for signature of a treaty banning all nuclear weapon test explosions and any other nuclear explosions, wherever they might be carried out, represented the culmination of nearly four decades of efforts that began with the Eisenhower administration.⁴⁶

President Clinton transmitted the CTBT to the Senate for advice and consent to ratification on September 22, 1997.⁴⁷ The president noted, in his Letter of Transmittal, that U.S. support for a “zero yield” CTBT had been linked to the establishment of “concrete, specific safeguards that define the conditions under which the United States can enter into a CTBT. . . .”⁴⁸ Those safeguards are: (1) the conduct of a Science Based Stockpile Stewardship program to ensure a high level of confidence in the safety and reliability of nuclear

40. See *Russia Rejects Changes in ABM Treaty*, WASH. POST, Mar. 4, 2000, at A14.

41. Maura Reynolds & Norman Kempster, *Russia's Duma Passes START II Arms Treaty But it Threatens to Withdraw if U.S. Breaks ABM Pact*, L.A. TIMES, Apr. 15, 2000, available at <<http://www.sgate.com/cgi-bin/article.cgi?file+/chronicle/archive/2000/04/15/MN108256.TL>>.

42. *Id.*

43. *Id.*

44. Department of State, Fact Sheet, *Comprehensive Nuclear Test-Ban Treaty Signatories/Ratifiers* (Feb. 23, 2000), available at <<http://www.state.gov/www/global/arms/factsheets/wmd/nuclear/ctbt/ctbtsigs.html>>.

45. See Message from the President of the United States Transmitting Comprehensive Nuclear Test-Ban Treaty, S. Treaty Doc. No. 105–28, at 124 (1997), available at <<http://www.ctbto.org/ctbto/treaty.shtml>> [hereinafter Message].

46. See *id.* art. IX.

47. See *id.* art. III.

48. *Id.* arts. IV–V.

weapons in the active stockpile; (2) the maintenance of modern nuclear laboratory facilities and programs; (3) the maintenance of the basic capability to resume nuclear testing activities prohibited by the Treaty; (4) the continuation of a comprehensive research and development program to improve U.S. treaty monitoring capabilities and operations; (5) the continuing development of a broad range of intelligence gathering and analytical capabilities and operations; and (6) the understanding that if the president is informed by the Secretary of Defense and the Secretary of Energy

that a high level of confidence in the safety and reliability of a nuclear weapon type that the two secretaries consider to be critical to our nuclear deterrent could no longer be certified, the president, in consultation with Congress, would be prepared to withdraw from the CTBT under the standard 'supreme national interests' clause in order to conduct whatever testing might be required.⁴⁹

The letter concluded by urging the Senate to "give early and favorable consideration to the Treaty and its advice and consent to ratification as soon as possible."⁵⁰

Despite this and other requests by the Administration, members of Congress, and CTBT proponents for rapid Senate action, the Senate Foreign Relations Committee (SFRC) did not schedule hearings on the Treaty. Calls for Senate action continued through 1998 and into 1999. On January 19, 1999, President Clinton again urged the Senate to take action in his State of the Union Address, and a White House Fact Sheet issued in conjunction with the speech noted that the Treaty provided for a conference of ratifying states to be convened three years after the opening for signature if the Treaty had not yet entered into force.⁵¹ If the United States failed to ratify the Treaty before September 1999, it would not be eligible to participate other than as an observer. In July, SFRC Chairman Helms responded to a letter signed by forty-five Senate Democrats calling for SFRC action by September with his own letter, indicating the Committee would not take up the Treaty until it had considered and reported on the 1997 ABM-related agreements and the Kyoto Protocol to the U.N. Convention on Climate Change.⁵²

On October 2, 1999, the Senate agreed by unanimous consent to: discharge the Treaty from the SFRC; hold fourteen hours of floor debate, beginning October 8 (the final day of the ratifiers conference); consider only two amendments to the resolution of ratification (one from each side); and, after an additional eight hours of floor debate on the amendments, vote.⁵³ This agreement was based upon the Republicans' assessment that they had sufficient votes to block advice and consent, and the Democrats' assessment that this was the only opportunity the 106th Congress would have to consider the Treaty. As it quickly became clear that the Treaty would be rejected, the leadership began to search for a way to avoid the vote.

49. *Id.* arts. V-VI. Paragraph two of article IX provides "Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests." *Id.* at 164.

50. *Id.* art. VIII.

51. The White House, Fact Sheet No. 32, *President Urges Senate to Approve CTBT Now: More States Ratify* (Jan. 28, 1999), available at <<http://dosfan.lib.uic.edu/acda/ctbtpage/tbn32.htm>>.

52. See John M. Broder, *Quietly and Dexterously, Senate Republicans Set a Trap*, N.Y. TIMES, Oct. 14, 1999, at A16.

53. See Unanimous Consent Agreement—Comprehensive Nuclear Test-Ban Treaty, 145 CONG. REC. S11820 (1999).

The Conference on Facilitating the Entry into Force of the Comprehensive Nuclear Test-Ban Treaty (Conference) convened on October 6, 1999. Although the Final Declaration adopted by the Conference merely noted the ratification by two nuclear weapon states (France and the United Kingdom), and called upon the remaining three (China, the Russian Federation, and the United States) to “accelerate their ratification processes with a view toward their successful conclusion,” participants in the Conference and world leaders elsewhere made it very clear that the world was watching events in Washington.⁵⁴ In an unprecedented move, British Prime Minister Tony Blair, French President Jacques Chirac, and German Chancellor Gerhard Schroeder issued a joint appeal to the Senate, urging it to postpone its scheduled vote. They warned that rejecting the Treaty would “expose a fundamental divergence within NATO” and that “Disarmament negotiations would suffer.”⁵⁵

On October 13, despite sixty-two Senators signing a letter to Senate Majority Leader Lott urging delay and a personal appeal by President Clinton, the Senate was unable to reach unanimous consent to call off the vote. A last-ditch effort by Senate Democrats to postpone the vote by objecting to Senator Lott’s motion to move to executive session (required for the consideration of treaties) was defeated by a vote of fifty-five to forty-five.⁵⁶ That same day, the Senate, by a vote of fifty-one to forty-eight, failed to grant its advice and consent to ratification of the CTBT.⁵⁷ The United States is one of forty-four countries listed in annex 2 to the Treaty, each of which must deposit its instrument of ratification before the Treaty can enter into force.⁵⁸ Thus, the Senate’s vote effectively prevents entry into force of the Treaty for an indefinite period of time.

Following the vote, President Clinton announced that the United States would continue its policy of not conducting nuclear tests, and that the Administration would continue to seek Senate advice and consent to ratification.⁵⁹ Several weeks later, Secretary of State Albright sent a letter to several of her counterparts, in which she stated that the United States will “continue to act in accordance with its obligations as a signatory under international law.”⁶⁰

The Senate vote produced varying degrees of disappointment and concern in the international community. On October 14, the Executive Secretary of the Preparatory Commission for the CTBT Organization issued a press release that stated,

we are aware that the United States Senate voted yesterday not to give its advice and consent for ratification of the [CTBT]. We have noted, however, that President Clinton announced

54. *Report of the Conference, Conference on Facilitating the Entry Into Force of the Comprehensive Nuclear-Test-Ban Treaty, CTBT-Art.XIV/1999/5* (Oct. 8, 1999), available at <http://www.ctbto.org/ctbto/article_xiv/contents.shtml>.

55. *World: Americas—Europe’s Plea to Save Nuclear Treaty*, BBC NEWS, Oct. 9, 1999, available at <http://news.bbc.co.uk/1/hi/english/world/americas/newsid_469000/469226.stm>.

56. See Motion to Resume Executive Session, 145 CONG. REC. S12504 (1999).

57. See Helen Dewar, *Senate Rejects Test Ban Treaty; Nuclear Pact Falls 51 to 48 as GOP Deals Clinton Major Defeat*, WASH. POST, Oct. 14, 1999, at A1.

58. See Message, *supra* note 45, at 175.

59. The White House, Press Conference by The President (Oct. 14, 1999), available at <<http://www.pub.whitehouse.gov/uri-res/12R?urn:pd:oma.eop.gov.us/1999/10/15/1.text.1>>.

60. Bill Gertz, *Lott Hits Clinton’s Stance on Nuke Pact*, WASH. TIMES, Nov. 3, 1999, at A1. Customary international law, as codified in article 18 of the Vienna Convention on the Law of Treaties, obligates signatory states to refrain from acts that would defeat the object and purpose of the treaty. Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF.39/27 (1969).

that the United States will maintain the moratorium on nuclear tests and continue to press for ratification of the CTBT⁶¹

China expressed its “deep regret” and said it hoped to accelerate its own ratification, but warned that this would depend on “sufficient deliberations [being given] to the treaty and the international situation.”⁶² A spokesman for the Russian Ministry of Foreign Affairs issued a statement that expressed “disappointment and serious concern at the United States Senate’s refusal to ratify.” While taking note of President Clinton’s statement that the Administration would abide by the testing moratorium, the statement asserted that “[t]his decision delivered a serious blow to the entire system of agreements in the field of nuclear disarmament and nonproliferation, and particularly to the prospects for the Treaty on the NonProliferation of Nuclear Weapons.”⁶³

On November 23, 1999, the Russian Ministry of Foreign Affairs issued a statement that noted President Yeltsin had submitted the CTBT to the State Duma for ratification and expressed hope that the Duma would “give favourable consideration to this matter in the nearest future.”⁶⁴ It also stated: “In accordance with the undertakings it made, Russia has not carried out nuclear tests since October 1990 and does not intend to resume such tests provided, of course, that the other nuclear States also follow this path.” On May 16, 2000, Russia’s upper house of Parliament, the Federation Council, ratified the CTBT, following Duma ratification in April.⁶⁵

The CTBT will remain on the Executive Calendar of the Senate until the conclusion of the 106th Congress, unless Congress passes a resolution instructing the Secretary of the Senate to return the treaty to the President.⁶⁶ Assuming that such a resolution is not passed, the treaty will revert back to the SFRC at the end of the 106th Congress.

III. The Treaty on Conventional Armed Forces in Europe

On November 19, 1999, all thirty states parties to the Treaty on Conventional Armed Forces in Europe (CFE) signed the Agreement on Adaptation of the Treaty on Conventional Armed Forces in Europe (Adaptation Agreement) at the Istanbul Summit. As adapted, the CFE retains the key objectives of the original CFE (transparency, predictability, and establishment of a stable balance of forces at lower levels) but modifies the original CFE

61. Wolfgang Hoffman, Press Statement by the Executive Secretary of the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (Oct. 14, 1999), available at <<http://www.ctbto.org/announcements/0067.html>>.

62. Ian Traynor & John Gittings, *Dismay and Anger Abroad at U.S. Action*, GUARDIAN OBSERVER, Oct. 15, 1999, available at <<http://www.guardianunlimited.co.uk/Archive/Article/0,4273,3912640,00.html>>.

63. *Note Verbale Dated 28 October 1999 from the Permanent Mission of the Russian Federation Addressed to the Secretary of the Conference on Disarmament Transmitting a Statement made by a Spokesman for the Ministry of Foreign Affairs of the Russian Federation on 14 October 1999*, U.N. Conference on Disarmament (CD), 55th Sess., U.N. Doc. CD/1598 (Nov. 1, 1999), available at <<http://www.unog.ch/disarm/curdoc/1598.htm>>.

64. *Letter Dated 26 November 1999 from the Permanent Representative of the Russian Federation Addressed to the Secretary-General of the Conference on Disarmament Transmitting the Text of a Statement made by the Official Representative of the Russian Federation on 23 November 1999 in Connection with the Submission of the Comprehensive Nuclear-Test-Ban Treaty, Signed by Russia on 24 September 1996, to the State Duma of the Federal Assembly of the Russian Federation for Ratification*, U.N. Conference on Disarmament (CD), 55th Sess., U.N. Doc. CD/1600 (Nov. 29, 1999), available at <<http://www.unog.ch/disarm/curdoc/1600.htm>>.

65. *See Russian Upper House Ratifies Nuclear Test Ban Pact*, REUTERS, May 17, 2000, available at <<http://www.cnn.com/2000/WORLD/europe/05/17/bc.arms.russia.reut/index.html>>.

66. See 14 WHITEMAN DIGEST §§ 8, 61 (1963).

in several ways. First, the adapted CFE replaces the NATO-Warsaw Pact block-to-block structure with nationally-based limits on battle tanks, armored combat vehicles, artillery pieces, combat aircraft, and attack helicopters (treaty-limited equipment or TLE), while at the same time providing limited exceptions to enable parties to meet operational needs and deal with possible future contingencies. Second, the adapted CFE requires each state party to accept a greater number of inspections and to submit additional information on its TLE holdings, locations, and military activities that involve TLE. Third, the adapted CFE strengthens the CFE's requirement for a host-nation's consent to the presence of foreign forces on its territory, including notification to all parties as to whether such consent has been granted. Finally, the adapted CFE will now be open to accession by other European states that are members of the Organization for Security and Cooperation in Europe.⁶⁷

At the Istanbul Summit, on November 19, 1999, President Clinton stated that "the adapted Treaty will enhance peace, security and stability throughout Europe. Therefore, it is in America's national interest to sign it now, and to lock in the commitment of other nations to its terms."⁶⁸ At the same time, because of the fact that the Russian Federation was in violation of the CFE due to excess deployments of TLE in the Flank zone, the president indicated that he would only submit the Adaptation Agreement to the Senate for advice and consent once Russian forces were reduced to the Flank levels set forth in the adapted CFE.⁶⁹

IV. Nuclear Doctrines

At NATO's 50th Anniversary Summit on April 23–24, 1999, NATO Heads of State and Government approved the Alliance's new Strategic Concept. In addition to expanding NATO's role beyond the traditional collective defense of its members to include conflict prevention and crisis management through article 5 crisis response operations, the new Strategic Concept indicates that nuclear weapons "will continue to fulfil an essential role by ensuring uncertainty in the mind of any aggressor about the nature of the Allies' response to military aggression."⁷⁰ The document notes that the Allies consider that "NATO's ability to defuse a crisis through diplomatic and other means, or should it be necessary, to mount a successful conventional defense has significantly improved," and that they recognize that "the circumstances in which any use of nuclear weapons might have to be contemplated by them are therefore extremely remote."⁷¹ Nevertheless, the concept indicates that NATO will maintain, "at the minimum level consistent with the prevailing security environment," both "sub-strategic forces" based in Europe as well as strategic nuclear forces.⁷²

67. See Department of State, Fact Sheet, *Adapted CFE Treaty Addresses NATO and Russian Security Concerns* (Dec. 9, 1999), available at <<http://www.usinfo.state.gov/products/pdq.wfarchive.htm>>.

68. William Clinton, Statement on Conventional Armed Forces in Europe Treaty (Nov. 19, 1999), available at <<http://www.usinfo.state.gov/products/pdq.wfarchive.htm>>.

69. See *id.*

70. North Atlantic Treaty Organization, Press Release NAC-S(99)65, *The Alliance's Strategic Concept: Approved by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Washington D.C. on 23rd and 24th April, 1999*, para. 62 (Apr. 24, 1999), available at <<http://www.nato.int/docu/pr/1999/p99-065e.htm>>.

71. *Id.* para. 64.

72. *Id.* For discussion of the relationship between the new NATO Strategic Concept and the Proliferation Treaty, see Thomas Graham, Jr. & Jack Mendelsohn, *NATO's Nuclear Weapons Policy and the No-First-Use*

On April 29, 1999, Russian Security Council Secretary Vladimir Putin announced that President Yeltsin had approved “a blueprint for the development and use of non-strategic nuclear weapons.”⁷³ In May, Russia produced its own revised military doctrine, albeit in draft form, that includes a first-use clause that reserves Russia’s right to use nuclear weapons in any situation it deems critical to its national security.⁷⁴

On August 17, 2000, India released its own draft Nuclear Doctrine based on “credible nuclear deterrence.”⁷⁵ The document states that “[t]he fundamental purpose of Indian nuclear weapons is to deter the use and threat of use of nuclear weapons by any State or entity against India and its forces. India will not be the first to initiate a nuclear strike, but will respond with punitive retaliation should deterrence fail.”⁷⁶ The document also indicates that “India will not resort to the use or threat of use of nuclear weapons against states which do not possess nuclear weapons, or are not aligned with nuclear weapon powers.”⁷⁷ Finally, the document asserts that implementation of the doctrine will require: “(a) sufficient, survivable and operationally prepared nuclear forces, (b) a robust command and control system, (c) effective intelligence and early warning capabilities, (d) comprehensive planning and training for operations in line with the strategy, and (e) the will to employ nuclear forces and weapons.”⁷⁸

Pakistani Ambassador Akram, responding to the Indian pronouncement in a speech at the Conference on Disarmament, said “India has declared that it will establish ‘sufficient, survivable and operationally prepared nuclear forces.’ Thus, despite the best endeavours made by Pakistan for strategic restraint, India is likely to go ahead with the deployment and operationalization of its nuclear weapons and delivery systems.”⁷⁹ Akram also asserted that “India’s ‘no first use’ declaration is, in fact, designed to secure for itself ‘recognition’ as a nuclear-weapon State, which would flow from the ‘acceptance’ of its ‘no first use’ and non-use ‘assurances.’”⁸⁰

V. Treaty on the Proliferation of Nuclear Weapons

The third Preparatory Committee (PrepCom) meeting of the parties to the Treaty on the Proliferation of Nuclear Weapons (NPT) was held in New York from May 10–21, 1999.⁸¹ The NPT is the preeminent international legal instrument of proliferation, with a

Option, INTERNATIONAL SPECTATOR, Oct.-Dec. 1999, at 7; Thomas Graham, Jr., *The Relationship Between Proliferation and Nuclear Weapons Use Doctrine*, LAWS OCCASIONAL PAPER No. 2–1999 (July 1999).

73. Yeltsin OKs Plan to Take Old Nukes Out of Motbballs, SALT LAKE TRIB., Apr. 30, 1999, available at <http://www.sltrib.com/1999/apr/04301999/nation_w/101842.htm>.

74. See Jill Dougherty, *New Russian Military Doctrine Casts Critical Eye at “Global Monopoly,”* CNN, May 5, 1999, available at <<http://cnn.com/WORLD/europe/9910/15/russia.defense.doctrine/index.html>>.

75. Draft Report of National Security Advisory Board on Indian Nuclear Doctrine, para. 2.1 (Aug. 17, 1999), available at <<http://www.meadev.gov.in/govt/indnucl.htm>>.

76. *Id.* para. 2.4.

77. *Id.* para. 2.5.

78. *Id.* para. 2.6.

79. *Final Record of the Eight Hundred and Thirty-Third Plenary Meeting of the Conference on Disarmament*, U.N. Conference on Disarmament (CD), 55th Sess., U.N. Doc. CD/PV.883, (Aug. 19, 1999), available at <<http://www.unog.ch/disarm/pvs/pv833.pdf>>.

80. *Id.*

81. See Rebecca Johnson, *The NPT Third PrepCom: What Happened and How*, 37 DISARMAMENT DIPLOMACY, available at <<http://www.acronym.org.uk/37npt.htm>>.

membership that includes every nation in the world except India, Israel, Pakistan, and Cuba. At the 1995 Review Conference (RevCon), participating states decided to extend indefinitely the NPT's duration and to "strengthen" its review process, directing the PrepCom to recommend to the next RevCon ways to "promote the full implementation of the Treaty."⁸² Under the terms of the treaty, a RevCon of the parties is convened every five years, with the PrepCom meeting in each of the four years preceding the RevCon.

Although PrepCom III was able to adopt a report that contained the essential procedural decisions for the next RevCon, the PrepCom was unable to reach agreement on any substantive recommendations to the RevCon. The next RevCon will take place in New York from April 24 to May 19, 2000, and will conduct its substantive work in three Main Committees (MC): MC I on nuclear disarmament; MC II on safeguards and nuclear-weapon-free zones; and MC III on nuclear energy.⁸³

VI. Iraq

On December 17, 1999, the U.N. Security Council approved Omnibus Resolution 1284, by a vote of eleven (Argentina, Bahrain, Brazil, Canada, Gabon, Gambia, Namibia, Netherlands, Slovenia, the United Kingdom, and the United States) to zero with four abstentions (China, France, Malaysia, and Russia).⁸⁴ The resolution establishes a U.N. Monitoring, Verification and Inspection Commission (UNMOVIC) to ascertain Iraqi compliance with disarmament provisions established after the 1991 Persian Gulf War as a condition to the lifting of sanctions imposed on Iraq. The resolution also reaffirms previous resolutions that established the criteria for Iraqi compliance; affirms that the obligation of Iraq with respect to the U.N. Special Commission (UNSCOM), i.e., cooperation, unrestricted access, and provision of information, will apply to UNMOVIC; and

decides in particular that Iraq shall allow UNMOVIC teams immediate, unconditional and unrestricted access to any and all areas, facilities, equipment, records and means of transport which they wish to inspect in accordance with the mandate of UNMOVIC, as well as to all officials and other persons under the authority of the Iraqi Government whom UNMOVIC wishes to interview. . . .⁸⁵

UNMOVIC will be a subsidiary body of the Security Council and will retain UNSCOM's mandate, rights, privileges, facilities, and immunities. The Secretary General of the U.N. will nominate, and the Security Council must approve, the UNMOVIC Executive Chairman, who will set up the new entity. UNMOVIC and the International Atomic Energy Agency (IAEA) will draw up a work program for the approval of the Council that will include both the implementation of the system of monitoring and verification as well as a

82. Hirsch, *supra* note 15, at 475 (citing 1995 Review and Extension Conference of the Parties to the Treaty on the Proliferation of Nuclear Weapons: Final Document, May 11, 1995, 34 I.L.M. 961, 968 (1995)).

83. See Johnson, *supra* note 81. For additional discussion of the 2000 Review Conference, see Madeleine Albright, *Time to Renew Faith in the Nuclear Proliferation Treaty*, INT'L HERALD TRIB., Mar. 7, 2000, at 8; George Bunn, *Does NMD Stand for 'No More Disarmament' as Well as 'National Missile Defence'?* 42 DISARM. DIPLOMACY, available at <<http://www.acronym.org.uk>>.

84. See *Security Council Establishes New Monitoring Commission for Iraq Adopting Resolution 1284 (1999) by Vote of 11-0-4*, U.N. SCOR, 54th Sess., U.N. Press Release SC/6775 (Dec. 17, 1999), available at <<http://www.un.org/peace/19991217.sc6775.doc.html>>.

85. *Id.* para. 4.

“clearly defined and precise” enumeration of the key disarmament tasks to be completed by Iraq. If Iraq fulfills these tasks and cooperates with inspectors for 120 days after the reinforced monitoring is fully operational, the Council may act to suspend sanctions. The Executive Chairman is directed to report, through the Secretary General, to the Council every three months on the work of UNMOVIC.

On January 27, 2000, Secretary General Kofi Annan announced that the Security Council had approved his appointment of Hans Blix of Sweden as Executive Chairman of UNMOVIC.⁸⁶ As of February 1, 2000, Iraqi officials continued to refuse to permit any resumption of international weapons inspections by UNMOVIC.⁸⁷

86. *Secretary-General Appoints Hans Blix of Sweden Executive Chairman of UN Monitoring, Verification and Inspection Commission*, U.N. Press Release SG/A/721 (Jan. 27, 2000), available at <<http://www.un.org/russian/question/sga721.htm>>.

87. See Steven Lee Myers, *Signs of Iraqi Arms Buildup Bedevil U.S. Administration*, N.Y. TIMES, Feb. 1, 2000, at A1.

