

THE COMPREHENSIVE NUCLEAR TEST BAN
TREATY: CURRENT LEGAL STATUS IN THE
UNITED STATES AND THE IMPLICATIONS
OF A NUCLEAR TEST EXPLOSION

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I.	INTRODUCTION	1008	R
II.	BACKGROUND	1010	R
	A. <i>Brief History of Nuclear Non-Proliferation and Nuclear Testing Treaties</i>	1010	R
	B. <i>The Principal Provisions of the CTBT</i>	1016	R
III.	SIGNIFICANT U.S. ACTIONS PERTAINING TO THE CTBT	1019	R
	A. <i>Attempt to Obtain the Advice and Consent of the Senate</i>	1019	R
	B. <i>Shalikhvili Report and Statements in Support of the CTBT</i>	1026	R
IV.	CURRENT LEGAL STATUS OF THE CTBT IN THE UNITED STATES	1028	R
	A. <i>The Object and Purpose of the CTBT</i>	1029	R
	B. <i>Contrast to Actual Withdrawal from a Ratified Treaty</i>	1041	R
	C. <i>"Unsigning" of Other Treaties</i>	1042	R

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D. Undue Delay of Entry into Force of the CTBT?.....	1045	R
E. Withdrawal from the Senate Calendar	1045	R
V. CONCLUSION	1046	R

I. INTRODUCTION

The Comprehensive Nuclear Test Ban Treaty (CTBT)¹ prohibits states party to the treaty from conducting any nuclear test explosions or any other nuclear explosions and establishes a comprehensive worldwide verification regime to monitor compliance.² Although 176 nations have signed the CTBT and 136 have ratified it, the treaty still has not entered into force.³

Ten years after the United Nations (UN) General Assembly Resolution on the CTBT,⁴ many are calling for its entry into force (EIF) with renewed urgency. The UN has called on states to adopt the CTBT in a number of recent reports regarding efforts to reform the UN. For example, former Secretary-General Kofi Annan's 2005 UN Report calls for states to continue the moratorium on nuclear weapons testing until the CTBT enters into force.⁵ The report of the High-Level Panel on Threats, Challenges, and Change also urged ratification of the CTBT as part of a general commitment to non-proliferation and disarmament.⁶

1. Comprehensive Nuclear Test Ban Treaty, Sept. 24, 1996, S. TREATY DOC. NO. 105-28 (1997), 35 I.L.M. 1439 [hereinafter CTBT]; see also draft text as contained in U.N. Doc. A/50/1027 (Aug. 26, 1996), adopted in G.A. Res. 50/245, U.N. Doc. A/RES/50/245 (Sept. 17, 1996).

2. *Id.*; see also Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 102, 137 (2000).

3. For current state signatories, see Preparatory Comm'n for the Comprehensive Nuclear-Test-Ban Treaty Org., <http://www.ctbto.org> (last visited June 26, 2007).

4. The United Nations General Assembly adopted the CTBT on Sept. 10, 1996 and opened it for signature on Sept. 24, 1996. *Id.*

5. The Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 98, delivered to the General Assembly, U.N. Doc. A/59/2005 (Mar. 21, 2005).

6. The Secretary-General, *A More Secure World: Our Shared Responsibility, Report of the High Level Panel on Threats, Challenges, and Change*, ¶ 124, delivered to the General Assembly, U.N. Doc. A/59/565 (Dec. 2, 2004); see also Kofi Annan, UN Sec'y Gen., Statement to the Conference on Facilitating Entry into Force of CTBT (Sept. 21, 2005), available at <http://www.acronym.org.uk/>

Pursuant to CTBT article XIV, treaty EIF is predicated on ratification by the forty-four states that formally participated in the 1996 UN Conference on Disarmament⁷ (CD) negotiations.⁸ These states are listed in the International Atomic Energy Agency's (IAEA) 1996 edition of "Nuclear Power Reactors in the World"⁹ as demonstrating nuclear capabilities. Three of the five Nuclear Nonproliferation Treaty (NPT)¹⁰ nuclear weapon states (NWS) have ratified the CTBT: France, Russia, and the United Kingdom.¹¹ The other two NWS—China and the United States—have signed but not ratified the treaty.¹² Other important states such as Iran and Israel have signed but

docs/0509/doc10.htm#top (urging all states to ratify the CTBT without delay and to maintain testing moratoria until ratification).

7. The Conference on Disarmament is the single forum for the negotiation of multilateral arms control agreements. It is located in Geneva, Switzerland in the building formerly occupied by the League of Nations. Conference on Disarmament. See United Nations Office at Geneva, Conference on Disarmament, [http://www.unog.ch/80256EE600585943/\(httpPages\)/2D415EE45C5FAE07C12571800055232B?OpenDocument](http://www.unog.ch/80256EE600585943/(httpPages)/2D415EE45C5FAE07C12571800055232B?OpenDocument) (last visited June 26, 2007).

8. These states are: Algeria, Argentina, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Democratic People's Republic of Korea, Democratic Republic of the Congo, Egypt, Finland, France, Germany, Hungary, India, Indonesia, Iran, Israel, Italy, Japan, Mexico, Netherlands, Norway, Pakistan, Peru, Poland, Romania, Republic of Korea, Russian Federation, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States, and Vietnam. See CTBT, *supra* note 1, Annex 2.

9. See CTBT, *supra* note 1, Annex 2; Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 92 AM. J. INT'L L. 44, 64 (1998) (citing International Atomic Energy Agency [IAEA], *Nuclear Power Reactors in the World*, IAEA Doc. IAEA-RDS-16 (Apr. 1996)).

10. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT]; see also G.A. Res. 1380, U.N. Doc. A/RES/1380(XIV) (1959).

11. Ambassador Jaap Ramaker, Special Rep. to Promote the Ratification Process of the CTBT, Report to the Conference on Facilitating Entry into Force of the CTBT (Sept. 21, 2005), *available at* <http://www.acronym.org.uk/docs/0509/doc12.htm>.

12. See *id.* The fact that the CTBT has not yet entered into force indicates how difficult the problem is, but it also proves that the negotiators made a terrible strategic error in drafting the treaty with such an inflexible entry into force provision. Other equally important treaties, such as the Partial Test Ban Treaty (PTBT), the NPT, and the Convention on the Prohibition of Chemical Weapons (CWC), did not require such unanimity in order to become binding. Those treaties succeeded in gradually attracting additional adherents, which the CTBT should have done as well.

not ratified, while India, North Korea, and Pakistan have not signed.¹³ Achieving these final signatures and ratifications is essential to the CTBT's entry into force.

The fact that the CTBT has not entered into force ten years after being opened for signature is indicative of the problems faced by the international nuclear nonproliferation regime. These problems include compliance and enforcement, issues of regional security, and the desire of some nations and non-governmental organizations to make the CTBT a "litmus test of commitment" to the disarmament obligation undertaken by the five NPT NWS.¹⁴

This paper first provides historical context on the CTBT and gives an overview of its main provisions. It then considers why the United States has not ratified the CTBT. Additionally, it analyzes the ambiguous legal status of the CTBT in the United States and the possibility for future ratification. It considers, in hypothetical terms, the legality of U.S. resumption of nuclear testing.¹⁵ Finally, the paper argues that the potential obligations of the United States as a signatory to the CTBT would not preclude all nuclear testing for all purposes.

II. BACKGROUND

A. *Brief History of Nuclear Non-Proliferation and Nuclear Testing Treaties*

The United States conducted its first nuclear test detonation on July 16, 1945 near Alamogordo, New Mexico and conducted over fifty more tests before the end of 1953. The goal of prohibiting nuclear testing was first advanced in the early 1950s as a result of public apprehension over radioactive fallout from atmospheric nuclear tests.¹⁶

13. See Acronym Institute for Disarmament Diplomacy, Comprehensive Test Ban Treaty, <http://www.acronym.org.uk/ctbt/index.htm> (last visited June 26, 2007).

14. Patricia Hewitson, *Nonproliferation and Reduction of Nuclear Weapons: Risks of Weakening the Multilateral Nuclear Nonproliferation Norm*, 21 BERKELEY J. INT'L L. 405, 448 (2003) (citing Jayantha Dhanapala, UN Under-Sec'y Gen for Disarmament Affairs, Statement on the Occasion of the Launching of the Joint Ministerial Statement on the CTBT (Sept. 14, 2002), available at <http://disarmament.un.org/speech/14sept2002.htm>).

15. I am unaware of any plan to conduct such a test.

16. PREPARATORY COMM'N FOR THE COMPREHENSIVE NUCLEAR-TEST-BAN TREATY ORG., BASIC FACTS 1: THE COMPREHENSIVE NUCLEAR-TEST-BAN

With thermonuclear test explosions increasingly impacting international opinion, Indian Prime Minister Jawaharlal Nehru called in 1954 for the worldwide termination of nuclear tests.¹⁷ In October 1958, President Eisenhower announced a unilateral testing moratorium.¹⁸ The Soviet Union temporarily halted its nuclear testing in 1958, but then resumed testing with the largest nuclear tests ever conducted in September 1961.¹⁹ Since the Soviet Union resumed testing at the height of the Cold War, the United States also began testing in 1961 at its Nevada Test Site in “Operation Nougat.”²⁰

Shortly thereafter, the 1962 Cuban Missile Crisis led the Soviet Union and the United States to the brink of nuclear war.²¹ In 1963, after abandoning an effort to achieve a full testing ban, progress was made in limiting nuclear testing with the signing of the Partial Test Ban Treaty (PTBT),²² which prohibited nuclear tests in the atmosphere, in space, and underwater, but not underground. The PTBT provided a limited degree of confidence that the radioactive products of a nuclear test would remain contained underground rather than be released into the atmosphere.²³ In his radio and television address to the American people at the conclusion of the negotiations of the treaty, President John F. Kennedy said:

In these years, the United States and the Soviet Union have frequently communicated suspicion and warnings to each other, but very rarely hope. Our representatives have met . . . in Washington and in

TREATY (CTBT) AT A GLANCE 1 (2001), *available at* <http://www.ctbto.org/reference/outreach/booklet1a.pdf> [hereinafter CTBT AT A GLANCE].

17. *Id.*

18. Gallery of U.S. Nuclear Tests, <http://nuclearweaponarchive.org/Usa/Tests/index.html> (last visited June 26, 2007) [hereinafter Gallery].

19. *Id.*

20. *Id.*

21. Physicians for Social Responsibility [PSR], PSR Analysis of the Comprehensive Nuclear Test Ban Treaty, http://www.psr.org/site/PageServer?pagename=security_nonproliferation_disarmament_ctbt_history (last visited June 26, 2007).

22. Treaty Banning Nuclear Weapons in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43. This treaty is also known as the Partial Test Ban Treaty or the Limited Test Ban Treaty.

23. CTBT AT A GLANCE, *supra* note 16, at 1. The United States ratified the PTBT in 1963. U.S. Department of State, Limited Test Ban Treaty, <http://www.state.gov/t/ac/trt/4797.htm>.

Moscow; in Geneva and at the United Nations. But too often these meetings have produced only darkness, discord, or illusion. Yesterday a shaft of light cut into the darkness. Negotiations were concluded in Moscow on a treaty to ban nuclear tests in the atmosphere, in outer space, and underwater. For the first time, an agreement has been reached on bringing the forces of nuclear destruction under international control²⁴

Five years later, in 1968, the NPT²⁵ was signed. It remains the most widely subscribed arms control treaty in history with 189 states party. Only four states—India, Israel, North Korea, and Pakistan—are currently outside of the NPT framework.²⁶

The “Grand Bargain” of the NPT guarantees all Non-Nuclear Weapon States (NNWS) party to the NPT the benefits of the peaceful uses of nuclear energy so long as they refrain from nuclear weapons development and requires the NWS to commit to eventual nuclear disarmament.²⁷ The preambular language of the NPT recalls the PTBT of 1963 in its aspiration to continue negotiations that would end nuclear test explosions in all environments.²⁸

In 1974, the United States and the Soviet Union signed the Threshold Test Ban Treaty (TTBT).²⁹ The TTBT limited nuclear test explosions to 150 kilotons and presaged similar

24. President John F. Kennedy, Radio and Television Address to the American People on the Nuclear Test Ban Treaty (July 26, 1963), *available at* <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+esk/Speeches/JFK/Nuclear+Test+Ban+Treaty+Speech.htm>. This address was delivered on the evening of the conclusion of the negotiations for the PTBT.

25. NPT, *supra* note 10.

26. For an article presenting possible scenarios for bringing India, Israel, Pakistan, and North Korea into the NPT see David S. Jonas, *Variations on Non-Nuclear: May the “Final Four” Join the Nuclear Nonproliferation Treaty as Non-Nuclear Weapon States While Retaining their Nuclear Weapons?*, 2005 MICH. ST. L. REV. 417.

27. John Harrington, *Arms Control and National Security*, 38 INT’L LAW 391, 398 (2004).

28. NPT, *supra* note 10.

29. Treaty on the Limitation of Underground Nuclear Weapon Tests, U.S.-U.S.S.R., July 3, 1974, 13 I.L.M. 906.

requirements in the Peaceful Nuclear Explosion Treaty.³⁰ Interestingly, these treaties were not ratified by the United States until 1990, following the negotiation of verification protocols.³¹

In 1992 President George H.W. Bush announced a second unilateral moratorium on nuclear testing.³² It was subsequently extended by Presidents Clinton and Bush and remains in effect.³³ The U.S. Congress also played a vital role in establishing the nuclear testing moratorium.³⁴

With the end of the Cold War came a sea change in U.S.-Russian relations, and the two nations began to cooperate in the arms control sphere. One of the first post-Cold War international agreements concluded was the Convention on the Prohibition of Chemical Weapons (CWC).³⁵ This landmark agreement banned chemical weapons and provided for on-site inspections of chemical production sites declared pursuant to

30. Treaty on Underground Nuclear Explosions for Peaceful Purposes, U.S.-U.S.S.R., May 28, 1976, 15 I.L.M. 891 (1976), 1714 U.N.T.S. 387.

31. See U.S. DEP'T OF STATE, NARRATIVE: TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE UNION OF SOVIET SOCIALIST REPUBLICS ON THE LIMITATION OF UNDERGROUND NUCLEAR WEAPON TESTS (1990), *available at* <http://www.state.gov/t/ac/trt/5204.htm>.

32. Gallery, *supra* note 18.

33. See *id.*

34. The Hatfield-Exon-Mitchell Amendment to the Fiscal Year (FY) 1993 Energy and Water Appropriations Bill established a nine month moratorium on nuclear testing and imposed certain conditions for a resumption of testing prior to Jan. 1, 1997, such as testing by a foreign state. See Energy and Water Development Appropriations Act of 1993, Pub. L. No. 102-377, §507, 106 Stat. 1315, 1343-44 (1992). See also Daryl G. Kimball, *U.S. Nuclear Weapons Policy at the End of the Century: Lost Opportunities and New Dangers*, FOREIGN POL'Y IN FOCUS, Sept. 1999, *available at* <http://www.fpiif.org/pdf/vol4/25ifnuc.pdf> (noting that, after 1000 nuclear tests, in 1992 Congress mandated a nine month test moratorium and pursuit of a comprehensive ban on nuclear testing).

35. Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, Sept. 3, 1992, S. TREATY DOC. NO. 103-21, 1974 U.N.T.S. 45 (entered into force Apr. 29, 1997). Both the Intermediate-Range Nuclear Forces Treaty and the Strategic Arms Reduction Treaty also had robust on-site inspection regimes. See Treaty on the Elimination of Intermediate-Range and Shorter-Range Missiles, U.S.-U.S.S.R., Dec. 8, 1987, S. TREATY DOC. NO. 100-11, 27 I.L.M. 90; Treaty on the Reduction and Limitation of Strategic Offensive Arms, U.S.-U.S.S.R., July 31, 1991, S. TREATY DOC. NO. 102-20.

the treaty.³⁶ Successful negotiation of the CWC fueled optimism that a comprehensive ban on nuclear testing was attainable.³⁷ For the first time since the Carter Administration, the possibility of a robust multilateral regime that would ban nuclear testing emerged along with the possibility of additional nuclear arms control agreements. The pressure of the NNWS on the NWS increased as the NPT Review Conference approached in 1995.³⁸ Signatories to the Partial Test Ban Treaty convened and discussed a recommendation to transform the PTBT into a more ambitious treaty that would prohibit all nuclear tests. Finally, negotiations for the CTBT began in earnest in 1993 at the Conference on Disarmament and continued for two and a half years,³⁹ concluding in 1996.⁴⁰

The negotiations raised several controversial questions, including whether NWS would be permitted to conduct tests to ascertain the safety and reliability of their nuclear weapons through “low-yield” tests or “hydronuclear experiments.”⁴¹ China also sought to preserve the option of conducting peaceful nuclear explosions (PNEs), which, by definition, are for non-military purposes.⁴² The United States originally argued that “low-yield tests” that released nuclear energy up to 1.8 kilograms should not be deemed a violation of the CTBT, but backed away from this stance when a U.S. Department of En-

36. *Id.*; see also KEITH A. HANSEN, *THE COMPREHENSIVE NUCLEAR TEST BAN TREATY: AN INSIDER'S PERSPECTIVE* 15 (2006).

37. HANSEN, *supra* note 36, at 15.

38. Indeed, a strong linkage between the CTBT and NPT had already been expressed at earlier NPT Review Conferences (RevCons). The failure to conclude a comprehensive test ban treaty was a primary reason why some of the pre-1995 RevCons had been unable to agree on a Final Document. See 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Decision 2: Principles and Objectives for Nuclear Non-Proliferation and Disarmament*, NPT/CONF.1995/32 (Part I), Annex (May 11, 1995), available at <http://disarmament2.un.org/wmd/npt/1995dec2.htm> [hereinafter 1995 RevCon].

39. RODNEY W. JONES & MARK McDONOUGH, *TRACKING NUCLEAR PROLIFERATION: A GUIDE IN MAPS AND CHARTS* app. at 289 (1998), available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=125>.

40. *Id.*

41. *Id.*

42. *Id.*

ergy report concluded that such tests would have little validity in demonstrating the dependability of nuclear weapons.⁴³

In the latter part of the CTBT negotiations, one of the most divisive issues involved the EIF provisions of the treaty. China, Russia, and the United Kingdom were adamant that the treaty could only enter into force upon the accession of India, Israel, and Pakistan, while the United States preferred less onerous EIF provisions in order to obtain its early ratification.⁴⁴ As a compromise, Dutch Ambassador Jaap Ramaker, then the Chairman of the CD, proposed that forty-four “nuclear-capable” states, including the five NWS and the three “nuclear threshold”⁴⁵ states of India, Israel, and Pakistan, should be required to ratify the treaty before it would take effect. If, after three years of the treaty being open for signature, an insufficient number of nations had ratified the treaty to permit its EIF, the states that had already ratified it could hold a conference to attempt to expedite EIF.⁴⁶

India objected to this EIF provision on sovereignty grounds.⁴⁷ It also sought treaty language requiring the NWS to commit to a “time-bound” disarmament plan.⁴⁸ Due to India’s opposition, no consensus could be reached either to

43. *Id.*

44. *Id.* at 290.

45. The term “threshold,” as applied to India and Pakistan, is now obsolete since those states have already tested nuclear weapons, thus demonstrating a nuclear weapons capability. Israel continues its policy of deliberate ambiguity. See DAVID SHUKMAN, *TOMORROW’S WAR: THE THREAT OF HIGH-TECHNOLOGY WEAPONS* 25 (1996).

46. JONES & McDONOUGH, *supra* note 39, at 290.

47. India believed that CTBT art. XIV violated its sovereignty and did not wish to subscribe to the CTBT, but the entry into force article made India’s ratification essential. India viewed it as “unprecedented in multilateral negotiations and international law that any sovereign country should be denied its right of voluntary consent on adherence to an international treaty.” Dinsham Mistry, *Domestic-International Linkages: India and the Comprehensive Test Ban Treaty*, *NONPROLIFERATION REV.*, Fall 1998, at 25, 31, available at <http://cns.miis.edu/pubs/npr/vol06/61/mistry61.pdf> (quoting Statement by India on August 8, 1996, at the Conference on Disarmament, in *STATEMENTS BY INDIA ON COMPREHENSIVE NUCLEAR TEST BAN TREATY (CTBT) 1993-1996* 127 (1996)).

48. *Id.* at 33 (quoting All India Radio, June 25, 1995). Nuclear disarmament in a time-bound framework is not required by the NPT but has been a consistent goal of many NNWS and particularly of the so-called “Non-Aligned Movement” states in the UN context.

adopt the language of the CTBT or to officially send it to the UN General Assembly (UNGA) at the conclusion of the negotiations in August 1996.⁴⁹

In August 1996, Australia moved that the UNGA adopt the CTBT.⁵⁰ On September 10, 1996, the UNGA adopted the treaty⁵¹ by a vote of 158 to 3⁵² with 5 abstentions.⁵³ Shortly thereafter, on September 24, 1996, it was opened for signature and seventy-one nations signed the CTBT, including all of the NWS.⁵⁴

B. *The Principal Provisions of the CTBT*

As its name implies, the CTBT prohibits all nuclear test explosions as well as any other nuclear explosions. The treaty contains no military exception, but the term "other nuclear explosions" is understood not to encompass the use of nuclear weapons in war, which is not per se illegal.⁵⁵ This reservation for military use was noted in President Clinton's transmittal letter referring the CTBT to the Senate.⁵⁶

The text of the treaty consists of the preamble, seventeen articles, a protocol, and two annexes.⁵⁷ Pursuant to article I of the CTBT, states party agree "not to carry out any nuclear weapon test explosions or any other nuclear explosion, and to prohibit and prevent any such nuclear explosion at any place under [their] jurisdiction or control." States party also commit to "refrain from causing, encouraging, or in any way par-

49. See JONES & McDONOUGH, *supra* note 39, at 290.

50. *Id.*

51. See G.A. Res. 50/245, *supra* note 1.

52. *Id.*

53. See JONES & McDONOUGH, *supra* note 39, at 290.

54. CTBT AT A GLANCE, *supra* note 16, at 1.

55. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 266 (July 8) (holding that the use or threat of nuclear weapons is not illegal under customary or conventional international law); see also Darren Mitchell Baird, Note, *The Changing Posture of the International Community Regarding the Threat or Use of Nuclear Weapons*, 22 SUFFOLK TRANSNAT'L L. REV. 529, 547 (1999) (discussing the implications of the International Court of Justice's Advisory Opinion).

56. Comprehensive Nuclear Test-Ban Treaty, Sept. 24, 1996, Letter of Transmittal, S. TREATY DOC. NO. 105-28 (1997) [hereinafter Letter of Transmittal]. The CTBT Preamble also reflects this understanding of a reservation for military use in not addressing the use of nuclear weapons.

57. CTBT, *supra* note 1.

ticipating” in nuclear weapon test explosions or any other nuclear explosions.⁵⁸

Article II establishes the Comprehensive Nuclear Test-Ban Treaty Organization (CTBTO) comprising all states party to the treaty. Located with the International Atomic Energy Agency (IAEA) at the Vienna International Center in Vienna, Austria, the CTBTO is tasked with a number of duties related to the implementation of the treaty, including the requirement of international verification detailed in article IV.⁵⁹

Article III of the CTBT requires states party to agree to take any steps necessary to implement the CTBT and to prevent individuals from engaging in actions in contravention of the treaty.⁶⁰ Article IV is an important section of the treaty containing provisions regarding verification. These verification measures include an International Monitoring System (IMS), consultation and clarification processes, and on-site inspections and confidence-building measures. Verification is to be limited to the scope of the treaty, implemented with full respect for the sovereignty of states party, and conducted in the least intrusive manner possible while ensuring the confidentiality of civil and military data.⁶¹

States party must assist in the verification of the treaty by creating national mechanisms to comply with verification measures, providing data to the IMS, and allowing on-site inspections. All states party are to share in equal rights of verification regardless of their technological and financial capacities. States have the right to maintain and protect proprietary and sensitive data and facilities and to prevent disclosure unrelated to the CTBT.⁶²

The IMS contains mechanisms capable of seismological, hydroacoustic, infrasound, and radionuclide monitoring as well as certified laboratories. The Technical Secretariat of the CTBTO manages the IMS and oversees monitoring facilities; states party to the CTBT own and operate them. All states

58. *Id.* at art. I. Of course, with regard to military use of nuclear weapons, it is safe to assume that a state would not employ such weapons at any place under their jurisdiction or control.

59. *Id.* at art. II.

60. *Id.* at art. III.

61. *Id.* at art. IV, ¶¶ 1-2.

62. *Id.* at art. IV, ¶¶ 3-7.

party may share data and obtain access to the International Data Centre.⁶³

Article IV also encourages states party to resolve concerns about suspected non-compliance with the treaty among themselves or with the CTBTO before seeking on-site inspections in another nation.⁶⁴ For a state party to request on-site investigations, the purpose must be to determine whether a nuclear test explosion has been conducted in violation of the CTBT and to identify who may have conducted the test.⁶⁵

To help build confidence among the parties, the treaty requires states to notify the CTBT Technical Secretariat of any single chemical (non-nuclear) explosion in their territories or under their jurisdictions involving more than 300 tons of TNT-equivalent. This confidence-building measure is designed to help resolve possible misinterpretation of verification results and avoid frivolous on-site inspections.⁶⁶

Article V of the treaty describes means of promoting compliance with treaty obligations, including suspension of treaty rights and privileges for states that fail to address compliance measures within a specified time.⁶⁷ The dispute resolution clause in article VI permits the Conference on Disarmament and the CTBTO Executive Council to request an advisory opinion from the International Court of Justice in the event of a dispute regarding the application or interpretation of the treaty.⁶⁸

The EIF provision of the CTBT is found in article XIV. This section provides that the treaty will enter into force 180 days after all forty-four states listed in Annex 2⁶⁹ deposit their instruments of ratification with the UN Secretary-General.⁷⁰ To date, thirty-four of these forty-four states have ratified the treaty.⁷¹ Ten key states have not ratified,⁷² however, including China, India, Israel, Pakistan, and the United States as well as

63. *Id.* at art. IV, ¶ 14.

64. CTBT, *supra* note 1, at art. IV, ¶ 29.

65. *Id.* at art. IV, ¶ 35.

66. *Id.* at art. IV, ¶ 68, Protocol, Part III.

67. *Id.* at art. V.

68. *Id.* at art. VI, ¶ 5.

69. *Id.* at Annex 2.

70. *Id.* at art. XIV, ¶ 1.

71. Daryl Kimball, *Keeping the Test Ban Hopes Alive: The 2005 CTBT Entry-Into-Force Conference*, DISARMAMENT DIPLOMACY (Acronym Inst. for Disarma-

North Korea, which was a party to the NPT and subsequently withdrew.⁷³

III. SIGNIFICANT U.S. ACTIONS PERTAINING TO THE CTBT

A. *Attempt to Obtain the Advice and Consent of the Senate*

President Clinton was the first head of state to sign the CTBT when the UN opened it for signature on September 24, 1996. In order to monitor the reliability of the U.S. nuclear weapons arsenal without testing, his Administration committed \$4.5 billion annually for computer simulations and weapon inspection and surveillance.⁷⁴

President Clinton transmitted the CTBT to the Senate for its advice and consent in 1997. His letter of transmittal included “safeguards” which would presumably have made the treaty more palatable to the Senate. These included the Stockpile Stewardship Program,⁷⁵ maintenance of the nuclear weapons labs, maintenance of the capability to conduct nuclear tests, continued research and development on treaty monitoring capabilities, continuing development of intelligence capabilities, and the understanding that the President would withdraw from the CTBT if the Secretaries of Defense and Energy jointly informed the President that the safety and reliability of

ment Dipl., London, UK), Winter 2005, *available at* <http://www.acronym.org.uk/dd/dd81/81dk.htm>.

72. *See id.*; Jonas, *supra* note 26, at 418.

73. Some commentators argue that the CTBT is superfluous for NNWS party to the NPT since such states have already agreed not to seek or manufacture nuclear weapons, let alone detonate them. Others continue to argue for its importance, pointing to the international legitimacy that is accorded to agreements that are universally applied. Masahiko Asada, *CTBT: Legal Questions Arising From Its Non-Entry-Into-Force*, 7 J. CONFLICT & SEC. L. 85, 87 (2002).

74. *See* Michael R. Gordon, *Report to Clinton Asks U.S. To Ratify Test-Ban Treaty*, N.Y. TIMES, Jan. 5, 2001, at A1.

75. The Stockpile Stewardship Program was established pursuant to the FY 1994 National Defense Authorization Act, P.L. 103-160. This program acknowledged the need, in the absence of nuclear testing, for increased understanding of the nuclear weapons stockpile, evaluation of potential problems as the stockpile ages, refurbishing nuclear weapons, and maintaining the science required to support the U.S. nuclear deterrent. *See* Stockpile Stewardship, <http://www.nv.doe.gov/nationalsecurity/stewardship/default.htm>.

the nuclear stockpile could no longer be certified without testing.

Even with these assurances, the treaty languished in the Senate Foreign Relations Committee (SFRC). Its chairman, Senator Jesse Helms, opposed a number of other international agreements that the Clinton Administration favored, including the Anti-Ballistic Missile (ABM) Treaty and the Kyoto Global Warming Agreement.⁷⁶ Senator Helms wanted to dispose of those agreements prior to Senate consideration of the CTBT.⁷⁷

Congressional Democrats and the Clinton Administration pressed the SFRC for months to hold Senate hearings on the CTBT to no avail. Finally, with little notice, Republican Senate Majority Leader Trent Lott agreed on September 30, 1999 to allow ten hours of debate prior to a vote on the CTBT.⁷⁸

The Senate failed to grant advice and consent to ratification of the treaty for political and substantive reasons. Some Republican opposition to Senate action was undoubtedly political—President Clinton had touted ratifying the CTBT as one of his principal foreign policy goals.⁷⁹ The main substantive arguments against the CTBT pertained to the enforcement and verifiability of treaty obligations⁸⁰ and the effectiveness of the U.S. nuclear deterrent in a non-testing environment.⁸¹

With regard to the Senate's concern about the U.S. nuclear deterrent, certifying the reliability of the nuclear weapons stockpile is an incredibly complex task that could be made more difficult in the absence of testing. U.S. nuclear weapons are extremely sophisticated, with thousands of parts. Some of the materials in a nuclear weapon (e.g. plutonium, highly en-

76. John M. Broder, *Defeat of a Treaty: The Tactics, Quietly and Dexterously, Senate Republicans Set a Trap*, N.Y. TIMES, Oct. 14, 1999, at A16.

77. Eric Schmitt, *Senate G.O.P. to Allow Vote on Pact to Ban Nuclear Tests*, N.Y. TIMES, Oct. 1, 1999, at A8 [hereinafter Schmitt, *Senate G.O.P.*].

78. *Id.*

79. Marc Lacey, *Clinton Kicks off Campaign to Pass Nuclear Test Ban*, N.Y. TIMES, Oct. 5, 1999, at A1.

80. Michael R. Gordon & Judith Miller, *U.S. and Russia Seek New Ways to Detect Cheating on Test Ban*, N.Y. TIMES, Oct. 4, 1999, at A1.

81. Schmitt, *Senate G.O.P.*, *supra* note 77, at A8.

riched uranium, and tritium) decay and change the properties of other materials in the weapon.⁸²

Indeed, given the relative novelty of nuclear weapons, the United States (and all other NWS) lacks experience in predicting the effects of aging on nuclear weapons, most of which were designed to have a shelf life of about twenty years.⁸³ Some argue that many of the “pits”⁸⁴ in U.S. nuclear weapons were designed to last only thirty-five years and are therefore becoming less reliable over time. However, it is difficult to demonstrate that they will work as effectively as their predecessors without nuclear testing.⁸⁵ Another concern raised by opponents of the CTBT is the safety of weapons in the absence of testing.⁸⁶

The Senate was also concerned with treaty enforcement and verifiability. Meaningful verification is generally accepted to mean that the treaty would provide a high level of confidence that militarily significant treaty derogation would be detected shortly after it occurred.⁸⁷ The likelihood of detection, of course, is an effective deterrent to cheating.

It is conceivable that states could conduct testing without regard to CTBT obligations by conducting sub-kiloton underground tests with low yields undetectable with the equipment

82. *FY 2000 Energy and Water Appropriations: Hearing Before the Subcomm. on Energy and Water Development of the S. Comm. on Appropriations*, 106th Cong. 7 (1999) (statement of Victor H. Reis, Assistant Secretary of Energy for Defense Programs).

83. Senator Jon Kyl, *Maintaining “Peace Through Strength”: A Rejection of the Comprehensive Test Ban Treaty*, 37 *HARV. J. ON LEGIS.* 325, 328 (2000). New reports indicate that nuclear weapons may have a much longer shelf life than previously anticipated. See *Morning Edition: U.S. Nuclear Weapons More Stable Than Expected* (NPR radio broadcast Nov. 30, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6559214>.

84. A pit of a nuclear weapon is the plutonium component in a warhead primary. It is surrounded by highly explosive material which, when imploded, goes supercritical and provides yield sufficient to “start” the secondary, which consists of fusion and fission materials.

85. See *Comprehensive Test Ban Treaty: Hearings Before the S. Comm. on Armed Services*, 106th Cong. 128 (1999) (statement of James Schlesinger, former Secretary of Energy and former Secretary of Defense).

86. Kyl, *supra* note 83, at 332.

87. Angeliqne R. Kuchta, *A Closer Look: The U.S. Senate’s Failure to Ratify the Comprehensive Test Ban Treaty*, 19 *DICK. J. INT’L L.* 333, 350 (2001).

available today.⁸⁸ The recent North Korean test, however, was detected with a reported yield under one kiloton.⁸⁹ Nonetheless, newly designed weapons could possibly be tested below the detectable yield range, and the technology that would enable detection of such testing is still on the horizon.⁹⁰ In contrast with the North Korean experience, experts were uncertain whether seismic activity near a Russian test site in 1999 was due to nuclear testing or a natural event.⁹¹ Despite such doubts, when the Russian submarine Kursk tragically exploded in August 2000, the IMS identified two explosions from that event: one very small explosion, followed by a much larger blast a few minutes later. The larger explosion was 250 times more powerful than the first explosion, but even that larger explosion was less powerful than the smallest of India's nuclear tests—yet the IMS identified it.⁹²

Another concern about the CTBT was the procedural requirement for thirty states to agree to an on-site inspection of a suspected testing site. The United States or any other state seeking an on-site inspection might find it politically difficult to attain the requisite number of concurrences to conduct such an inspection.⁹³ It was also argued that the U.S. Stockpile Stewardship efforts had been effective in holding the United States to a moratorium on testing, mooted the necessity for CTBT ratification.⁹⁴ However, the converse of that argument

88. *Id.*; see also Kathleen C. Bailey, *The Comprehensive Test Ban Treaty: The Costs Outweigh the Benefits* (Cato Inst., Wash., D.C.), Jan. 15, 1999, at 12.

89. William J. Broad & Mark Mazzetti, *Small Blast May Be Only a Partial Success, Experts Say*, N.Y. TIMES, Oct. 10, 2006, at A8; see also Press Release, Office of the Director of National Intelligence, ODNI News Release No. 19-06 (Oct. 16, 2006), available at http://nuclearweaponarchive.org/DPRK/20061016_release.pdf (confirming a North Korean underground nuclear explosion on October 9, 2006 and noting that the yield was "less than a kiloton").

90. Kuchta, *supra* note 87, at 351; see also Suzanna van Moyland & Roger Clark, *The Paper Trail*, BULL. OF THE ATOMIC SCI., July/Aug. 1998, at 26 (1998).

91. *Id.*

92. Damien J. LaVera, *Looking Back: The U.S. Senate Vote on the Comprehensive Test Ban Treaty*, ARMS CONTROL TODAY, Oct. 2004, at 46.

93. See *id.*

94. See Lacey, *supra* note 79 (pointing to opponents' concern that CTBT will disadvantage the United States while enabling others to cheat); see also U.S. DEP'T OF ENERGY, FY 2000 STOCKPILE STEWARDSHIP PLAN, EXECUTIVE OVERVIEW 17 (1999).

would be that the United States would lose nothing by binding itself to the CTBT and would in fact gain by binding other states.

Finally, opponents argued that the CTBT would not stop nuclear proliferation as promised for two reasons. First, the NPT already obliged NNWS not to pursue nuclear weapons programs. Therefore, NNWS would be pledging not to test nuclear weapons that they were not supposed to develop in the first place.⁹⁵ Second, even if rogue states adhered to the CTBT mandates, the United States would not be safer because rogue states, which could presumably only develop crude nuclear weapons, would likely choose not to test before deployment.⁹⁶ South Africa, while hardly a rogue state, developed and manufactured six nuclear weapons (all of which were subsequently declared and dismantled) without conducting any nuclear tests.⁹⁷ Moreover, rogue states often violate international obligations, vividly illustrating the limits of international law. For example, while an NPT party in 1990, Iraq violated virtually all of its NPT obligations.⁹⁸ Despite its lack of compliance with the NPT, Iraq's assent to the treaty was a useful factor in pursuing inspections and enforcement under the authority of the UN Security Council. However, NPT violations alone may not be sufficient to stir the Security Council to action. In the case of the Iraqi nuclear weapons program prior to the first Gulf War, the UN Security Council only acted after

95. Kyl, *supra* note 83, at 333.

96. *Id.*; see also John M. Deutsch, *The New Nuclear Threat*, FOREIGN AFFAIRS, Fall 1992, at 120, 120.

97. See David Albright, President, Inst. for Science and Int'l Security, Address at the Massachusetts Institute of Technology's Security Study Program's Wednesday Seminar Series: South Africa's Nuclear Weapons Program (Mar. 14, 2001), available at http://web.mit.edu/ssp/seminars/wed_archives_01spring/albright.htm. It should also be noted that the CTBT cannot stop non-state actors from acquiring fissile material or nuclear weapons.

98. See Vejay Lalla, *The Effectiveness of the Comprehensive Test Ban Treaty on Nuclear Weapons Proliferation: A Review of Nuclear Non-Proliferation Treaties and the Impact of the Indian and Pakistani Nuclear Tests on the Non-Proliferation Regime*, 8 CARDOZO J. INT'L & COMP. L. 103, 117-19 (2000); see also Robert Bork, *The Limits of International Law*, NAT'L INT., Winter 1989/90, at 3; Jeanne Kirkpatrick, *Law and Reciprocity*, 78 AM. SOC'Y INT'L L. PROC. 59, 67 (1984).

Iraq invaded Kuwait, thus providing independent justification for military intervention.⁹⁹

Proponents of the CTBT countered this multifaceted opposition by arguing that ratification of the treaty was an essential component of the nuclear non-proliferation regime and would demonstrate progress towards U.S. NPT article VI obligations.¹⁰⁰ They also argued that failure to ratify the treaty would relinquish U.S. leadership in that arena, undermine the international nuclear non-proliferation structure, weaken the U.S. strategic advantage over China, and threaten U.S. nuclear superiority.¹⁰¹ Without the treaty, emerging nuclear states such as India and Pakistan could continue testing and potentially develop more powerful nuclear weapons.¹⁰² Additionally, it was expected that if the United States ratified the treaty, other nations that had not yet done so would follow and reduce or cease testing.¹⁰³

Despite intensive lobbying on behalf of the CTBT, by October 9, 1999, President Clinton acknowledged that he lacked sufficient Senate support to obtain advice and consent and urged the Senate to delay the vote.¹⁰⁴ By this point, even political opponents of President Clinton were concerned about the potential diplomatic repercussions of Senate failure to provide advice and consent to ratification of the treaty.¹⁰⁵

To this end, Senator John Warner disseminated a memo to his Republican colleagues in the Senate urging them to refrain from voting on the treaty rather than defeat it and ad-

99. See Patrick McLain, *Settling the Score with Saddam: Resolution 1441 and Parallel Justifications for the Use of Force Against Iraq*, 13 DUKE J. COMP. & INT'L L. 233, 241 (2003) (reviewing Security Council actions after Iraq invaded Kuwait in 1990).

100. See, e.g., Letter from Nobel Laureates to Congress Supporting CTBT, available at <http://www.carnegieendowment.org/npp/resources/ctbtnobel.htm>.

101. Schmitt, *Senate G.O.P.*, *supra* note 77, at A8.

102. *Id.*

103. Gordon & Miller, *supra* note 80, at A1. Of course, that logic works only in certain situations. No state would disarm completely in the hopes that all other states would do likewise. Setting the example may well be a basic tenet of personal leadership, but the concept may not apply quite so well to states. In this context, it may well be viewed as somewhat quixotic.

104. John M. Broder, *President Asking Senate to Delay Votes on Test Ban*, N.Y. TIMES, Oct. 9, 1999, at A1.

105. *Id.*

versely impact global American interests.¹⁰⁶ Four Republican Senators actually supported U.S. ratification of the treaty: Senators Chaffee, Jeffords, Specter, and Smith.¹⁰⁷ General Colin Powell also encouraged U.S. ratification of the CTBT.¹⁰⁸

To urge the Senate to delay the vote until the next administration, President Clinton wrote the Senate a letter stating:

I believe that proceeding to a vote under these circumstances would severely harm the national security of the United States, damage our relationship with our allies, and undermine our historic leadership over 40 years, through administrations Republican and Democratic, in reducing the nuclear threat.¹⁰⁹

Despite these efforts, the Senate ultimately rejected the treaty on October 14, 1999 by a vote of fifty-one “ayes” to forty-eight “nays” (sixty-seven votes were required for advice and consent to ratification of the CTBT).¹¹⁰ In a press conference after the defeat, President Clinton stated: “[B]y this vote, the Senate majority has turned its back on 50 years of American leadership against the spread of weapons of mass destruction.”¹¹¹ In a separate press event, Senate Majority Leader Lott expressed concern about whether other nations such as Russia could be trusted not to conduct nuclear tests under the CTBT.¹¹²

The Senate’s failure to give its advice and consent to ratification of the CTBT was the “[m]ost explicit repudiation of a major international agreement in 80 years”¹¹³—that is, since

106. *Id.*

107. Lacey, *supra* note 79 (identifying Senators Specter and Jeffords as openly supporting the treaty); Eric Schmitt, *Defeat of a Treaty: The Overview: Senate Kills Test Ban Treaty in Crushing Loss for Clinton; Evokes Versailles Pact Defeat*, N.Y. TIMES, Oct. 14, 1999, at A1 (citing Senators Smith, Specter, Jeffords, and Chafee as being in favor of the treaty) [hereinafter Schmitt, *Defeat*].

108. Broder, *supra* note 104, at A1.

109. Eric Schmitt, *A Plan is in Works to Put off a Vote on Test Ban Pact*, N.Y. TIMES, Oct. 12, 1999, at A1.

110. *Lott’s View: “It Was Not About Politics, It Was About the Substance,”* N.Y. TIMES, Oct. 15, 1999, at A15 [hereinafter *Lott’s View*] (containing excerpts from a news conference).

111. *Clinton at New Conference: “Troubling Signs of New Isolationism,”* N.Y. TIMES, Oct. 15, 1999, at A14.

112. *Lott’s View, supra* note 110, at A15.

113. R.W. Apple Jr., *The G.O.P. Torpedo*, N.Y. TIMES, Oct. 14, 1999, at A1.

1920, when the Senate refused to approve the Treaty of Versailles creating the League of Nations.¹¹⁴ At the time of its defeat, the CTBT represented only the twenty-first time that the Senate declined to grant its advice and consent to ratification of a treaty that the President or another U.S. official negotiated. By contrast, the Senate granted advice and consent to ratification for 1,523 treaties during the same period of time.¹¹⁵

B. *Shalikashvili Report and Statements in Support of the CTBT*

In another attempt to coalesce Congressional support for the treaty after the initial Senate defeat, President Clinton named General John M. Shalikashvili, former Chairman of the Joint Chiefs of Staff, as his Special Advisor on the CTBT and requested that the General conduct an in-depth study of the CTBT.¹¹⁶

General Shalikashvili engaged in extensive information gathering in preparation for drafting the report. As part of this research, the General conducted site visits at three nuclear weapons laboratories.¹¹⁷ He met with a variety of experts on the issue, including national security experts, former heads of non-governmental organizations, and former nuclear weapons designers. His colleagues visited the Air Force Technical Applications Center that monitors compliance with nuclear test ban treaties, and he visited the CTBTO, which was in the process of creating the international verification system for the CTBT.¹¹⁸

General Shalikashvili issued his report on January 4, 2001. In the report, he concluded that the United States should support the treaty and that the benefits of the CTBT outweighed any of its negative aspects. He stated:

114. Schmitt, *Defeat*, *supra* note 107, at A1.

115. Apple, *supra* note 113, at A1.

116. Gordon, *supra* note 74, at A1.

117. General John M. Shalikashvili, Letter to the President and Report on the Findings and Recommendations Concerning the Comprehensive Nuclear Test Ban Treaty (Jan. 4, 2001), *available at* http://www.state.gov/www/global/arms/ctbtpage/ctbt_report.html. The report was co-authored by Ambassador James Goodby.

118. *Id.*

[M]y discussions over the last ten months have only strengthened my view that the Treaty is a very important part of global non-proliferation efforts and is compatible with keeping a safe, reliable, U.S. nuclear deterrent. I believe that an objective and thorough net assessment shows convincingly that U.S. interests, as well as those of friends and allies, will be served by the treaty's entry into force.¹¹⁹

General Shalikhvili noted that the United States would always require dependable data about nuclear testing, pointing out that the United States possesses the world's most refined nuclear monitoring system, including that of the U.S. Atomic Energy Detection System.¹²⁰ He discussed the international political benefits of ratification and opined that ratifying the CTBT would allow the United States to use its mandatory on-site inspection capability to complement its pre-existing ability to detect nuclear tests.¹²¹ In this vein, General Shalikhvili noted that "anyone who is concerned about what might occur under the Test Ban Treaty should also worry about what might happen without it."¹²² He further stated that the CTBT provides other ancillary benefits, including the fact that the ban on testing would prevent NWS such as China from further developing their already existing nuclear arsenal.¹²³

Since the time of the Shalikhvili report, other states have continued to express their displeasure with the nuclear status quo. In September 2002, eighteen Foreign Ministers from a broad range of states issued a statement calling on all nations that had not signed and ratified the CTBT, and particularly those whose ratification was essential for EIF, to do so as soon as possible.¹²⁴ The statement noted that "[v]oluntary adherence to such a moratorium is of the highest importance,

119. *Id.*

120. *Id.*

121. *Id.* at 10.

122. *Id.* at 11.

123. *Id.*

124. See Foreign Ministers of Australia, Canada, Chile, France, Hungary, Japan, Jordan, the Netherlands, New Zealand, Republic of Korea, Nigeria, Peru, the Philippines, Russia, South Africa, Sweden, Turkey, and the United Kingdom, Joint Ministerial Statement on the CTBT (Sept. 14, 2002), *available at* <http://www.acronym.org.uk/docs/0209/doc07.htm>.

but cannot serve as a substitute for entry into force of the Treaty."¹²⁵

This dissatisfaction is due to a widespread recognition that a political commitment or policy may cease due to a shift in national priorities. In contrast, deposit of an instrument of ratification of a treaty creates a legally binding commitment. Although it is, of course, possible to withdraw from a treaty, mere shifts in policy do not accomplish that, and withdrawal from treaties is avoided as a general rule.

However, the current Bush Administration does not favor ratification of the CTBT. The Administration has made statements indicating its willingness to maintain the nuclear testing moratorium, but only so long as it remains in the U.S. interest to do so.¹²⁶ President Bush has indicated that the United States will adhere to the no-testing policy, but also that the country will never rule out the possibility of a nuclear weapons test to ensure the reliability of the stockpile.¹²⁷ Similarly, the Administration's Nuclear Posture Review (NPR) noted that the United States might require a resumption of nuclear testing to develop new nuclear weapons and to certify existing weapons.¹²⁸ In this vein, the NPR bolstered the mandate for the Secretaries of Defense and Energy to make annual recommendations to the President on the need to resume nuclear testing, making this certification a legal requirement.¹²⁹

IV. CURRENT LEGAL STATUS OF THE CTBT IN THE UNITED STATES

The U.S. Constitution requires the President to obtain the advice and consent of the Senate by two-thirds majority vote before he may ratify treaties.¹³⁰ As a result, President Clinton

125. *Id.*

126. See Hewitson, *supra* note 14, at 454-57.

127. *Speculation over Possible Return to US Nuclear Testing*, DISARMAMENT DIPL. (Acronym Inst. for Disarmament Dipl, London, UK) Jan.-Feb. 2002, available at <http://www.acronym.org.uk/dd/dd62/62nr03.htm>.

128. U.S. Dep't of Defense, Nuclear Posture Review Report (Jan. 8, 2002), available at <http://www.defenselink.mil/news/Jan2002/d20020109npr.pdf>.

129. 42 U.S.C. § 7274p(a)(11) (2000).

130. U.S. CONST. art. II, § 2, cl. 2. I would note that it is an extremely common misunderstanding that the Senate ratifies treaties. In fact, the Senate provides its advice and consent and the President ratifies treaties. This is one of the lesser known of the remarkable system of checks and balances in

never gained the opportunity to ratify the CTBT. However, once the Senate rejected the CTBT, President Clinton made clear that the United States would continue to work towards CTBT ratification, making public statements to that effect and continuing the nuclear testing moratorium already in place.¹³¹ Secretary of State Albright made similar statements.¹³² However, Senate Majority Leader Trent Lott opposed the treaty, calling it “ineffectual, unverifiable, and unenforceable.”¹³³ Although the Clinton Administration continued to endorse CTBT ratification, the vote in the Senate clearly demonstrated a lack of support.¹³⁴

In spite of such efforts and intentions, ratification of the CTBT appears unrealistic at present. U.S. ratification would require an Administration and two-thirds of the Senate fully supportive of the CTBT. Such a scenario is certainly conceivable, but is not an immediate possibility.

A. *The Object and Purpose of the CTBT*

The CTBT exists in somewhat of a legal limbo in the United States. The U.S. signature on the treaty arguably creates some obligation under customary international law, but the CTBT has been rejected by the Senate and there are no immediate plans for Senate reconsideration. Meanwhile, the United States continues its unilaterally-imposed nuclear test-

the U.S. Constitution and system of government. If the President disapproves of any reservations or understandings which the Senate attaches to its advice and consent, the President still holds an ace, since he may simply not ratify the treaty. That is fully appropriate since the Constitution charges the President, not the Congress, with the treaty making power.

131. William J. Clinton, President of the United States, Remarks on Senate Action on the Comprehensive Nuclear-Test-Ban Treaty and an Exchange with Reporters (Oct. 13, 1999), *available at* <http://www.access.gpo.gov/nara/nara003.html>.

132. After the Senate vote, Secretary Albright informed her foreign counterparts that as additional states ratified the CTBT, it would make favorable Senate action in the future more likely. *See* John R. Bolton, *Should We Take Global Governance Seriously?*, 1 *CHI. J. INT'L L.* 205, 212 (2000).

133. *Lott's View*, *supra* note 110, at A15.

134. *Id.* Senator Lott noted that the Senate defeated the CTBT on substance, not politics. However, the numerous public contradictory statements certainly must have confused the international community.

ing moratorium. The Bush Administration has no plans to conduct a nuclear test.¹³⁵

The Bush Administration maintains its opposition to the CTBT and has even considered renouncing it.¹³⁶ At the same time, the United States remains an active participant in the CTBTO Preparatory Commission (PrepCom) and continues to fund its share of PrepCom expenses,¹³⁷ thus allowing the country to influence and shape the organization. The somewhat schizophrenic view of the CTBT reflected in the fact that the United States participates in CTBTO PrepCom meetings while refusing to ratify the CTBT may seem quite odd. However, since the international condemnation was so vociferous when the U.S. Senate blocked the CTBT, formally withdrawing from participation in the PrepCom and from the establishment of the IMS without a genuine requirement to conduct a nuclear test would likely upset U.S. allies while providing little corresponding benefit. Moreover, the current approach provides the additional benefit of continued U.S. influence on the establishment of the IMS.

Although the United States is also not a party to the Vienna Convention on the Law of Treaties (VCLT),¹³⁸ many of the Convention's provisions are considered to reflect custom-

135. See Richard M. Jones, *Reiteration of Requirement for Congressional Approval for Nuclear Testing*, AIP BULL. OF SCI. POL'Y NEWS (July 7, 2004), available at <http://www.aip.org/fyi/2004/092.html>.

136. Hewitson, *supra* note 14, at 454.

137. The U.S. assessment is twenty-two percent. See Preparatory Comm'n for the Comprehensive Nuclear-Test-Ban Treaty Org., *Decisions on Budgetary and Financial Issues*, 19th Sess., Annex VIII, app. VIII (Nov. 12, 2002), available at <http://www.ctbto.org/bin/DeliverDoc?cmd=displayPDFFile&doid=737>. This scale of contributions is based on the scale of assessments adopted by the General Assembly at its 55th session. G.A. Res. 55/5, U.N. Doc. A/55/49 (2000) (modified to reflect differences in membership between the CTBTO PrepCom and the UN); Hewitson, *supra* note 14, at 455. The United States participates in funding the CTBT PrepCom. See Asada, *supra* note 73, at 112. Additionally, the Bush Administration funds the IMS, because it is in the U.S. national interest to gain access to such data. See Philipp C. Bleek, *White House to Partially Fund Test Ban Implementing Body*, ARMS CONTROL TODAY, Sept. 2001, at 25; Hewitson, *supra* note 14, at 455-57 (noting that the Administration funds the IMS monitoring even though it does not fully support the CTBT or on-site inspections).

138. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

ary international law with respect to treaties.¹³⁹ As set forth in VCLT article 2(1)(g), a “party” to a treaty is a state that has consented to be bound by a treaty and for which the treaty is in force.¹⁴⁰ At that point, and only at that point, is the state legally bound by the treaty under VCLT article 26.¹⁴¹ The “consent to be bound” may be expressed internationally by different methods such as signature, ratification, or accession.¹⁴² Likewise, VCLT article 24 provides that “a treaty enters into force in such a manner and upon such date as it may provide.¹⁴³ Thus, the United States has not expressed its consent to be bound by the CTBT, as it has signed but not ratified the treaty, nor has the CTBT entered into force.

Nevertheless, the VCLT provides that a state may incur certain obligations by virtue of its signature of a treaty. In particular, VCLT article 18 provides that a state is “obliged to refrain from acts which would defeat the object and purpose of a treaty when (a) it has signed the treaty . . . until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”¹⁴⁴ The scope of a signatory’s obligation not to defeat a treaty’s “object and purpose” is often elusive, but this provision of the VCLT nevertheless raises the question of what, if any, obligations flow from U.S. signature of the CTBT.

The commitment under the VCLT arising from signature alone of a treaty is to refrain from actions that would defeat the object and purpose of the treaty. This commitment would appear to be an interim obligation commencing with the signature of a treaty and existing until treaty EIF or until the signatory notifies the depositary of its intent not to become a party to the treaty. This interim obligation is well established

139. BARRY E. CARTER, PHILLIP R. TRIMBLE & CURTIS A. BRADLEY, *INTERNATIONAL LAW* 95 (2003); *see also* Letter of Transmittal, *supra* note 56.

140. VCLT, *supra* note 138, at art. 2(1)(g).

141. *Id.* at art. 26.

142. *Id.* at art. 11.

143. *Id.* at art. 24.

144. *Id.* at art. 18.

as customary international law, because so many treaties have dealt with it as having some import and meaning.¹⁴⁵

As an example of how the pre-EIF obligations of signatory states have been addressed historically, article 38 of the General Act of Berlin provided that “[t]he present Act shall enter into force for each Power to begin from the date when it shall have ratified it Meanwhile the signatory Powers of the present general Act bind themselves to adopt no measure which may be contrary to the dispositions of the said Act.”¹⁴⁶ This and other historical references to pre-EIF obligations led to the establishment of the customary international law obligation to refrain from defeating the object and purpose of a treaty after signature.¹⁴⁷

The most sensible interpretation of the effect of article 18 of the VCLT is that it must logically be a middle ground between the interpretation of signature as a meaningless formality with no operative effect until EIF and, on the other hand, signature viewed as establishing full treaty obligation with EIF as a mere formality.¹⁴⁸ As Charme notes,

Each of the two extremes articulated above is unacceptable. Ordinarily, the making of a treaty subject to ratification, acceptance or approval is properly a two-stage process. It is initiated by signature and concluded by ratification, acceptance or approval. Treaty making in this fashion is deemed necessary to allow signatory states time to contemplate the treaty and its potential domestic and international ramifications before the signatory state is bound.¹⁴⁹

The International Law Commission, in its consideration of article 18, provided examples of violation of the interim obligation:

145. Joni S. Charme, *The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma*, 25 GEO. WASH. J. INT'L L. & ECON. 71, 71 (1991-1992).

146. General Act of the Conference of Berlin Concerning the Congo, Feb. 26, 1885, *reprinted in* 3 AM. J. INT'L L. 7, 25 (Supp. 1909), *cited in* Charme, *supra* note 145, at 78.

147. Charme, *supra* note 145, at 78.

148. *Id.* at 88-90.

149. *Id.* at 90.

A treaty provides for the return of art work taken from the territory of another state. Prior to ratification, the signatory either destroys or allows the destruction of the art work; and a treaty provides for the cession of certain installations owned by a signatory in another state. The ceding State destroys the installations or allows their destruction.¹⁵⁰

A final view of article 18 is that, for the United States, it is synonymous with “soft law.”¹⁵¹ No widely accepted definition of soft law exists, but the common theme is that “there exists a gray area, in between the white area of “law” and the black area of “non-law.”¹⁵² In this ill-defined area, “some degree of respect is due, but precisely defined rights and obligations do not attach.”¹⁵³ The VCLT is binding on parties, but the United States is not a party.¹⁵⁴ Therefore, a principle articulated in the VCLT is only binding on the United States to the extent that it is customary international law.

Despite not being a party to the VCLT, the United States has long maintained the view that the VCLT’s interpretation of the obligation of signatories is expressive of customary international law. Although some may argue that the Senate’s refusal to grant advice and consent is clear evidence of U.S. intent not to become a party to the CTBT, the consensus view of commentators and of this author is that only the President has the authority to make that declaration given his constitutional role in the treaty-making process.¹⁵⁵

Ultimately, the most logical and reasonable interpretation that can be gleaned from available sources is that treaty signa-

150. *Id.* at 99 (citing *Draft Convention on the Law of Treaties*, 29 AM. J. INT’L L. 653 (1935), also known as the *Harvard Draft*); H. Lauterpacht, Special Rapporteur to the General Assembly, *International Law Commission Report*, [1953] 2 Y.B. INT’L L. COMM’N 90, 109, U.N. Doc. A/CN.4/SERA/1953/Add.1.

151. Charme, *supra* note 145, at 107.

152. *Id.* at 108.

153. *Id.*

154. *Id.* at 110.

155. See Daryl Kimball, *Nuclear Issues on the Front-Burner for Bush*, Jan. 9, 2001, available at <http://www.bu.edu/globalbeat/syndicate/Kimball010901.html> (analyzing the 1999 Senate vote against the CTBT, considering whether that vote formally repudiated the CTBT, and finding that Congress does not have the power to repudiate a treaty since only the President may make that decision).

ture “is binding to a certain degree.”¹⁵⁶ The “certain degree” is the object and purpose of the treaty, which, in the case of the CTBT, is extremely vague.

One commentator has argued that the object and purpose of a treaty has recently become not just legally decisive but moreover a politically controversial aspect of treaty-related decisions.¹⁵⁷ The varying use of terminology describing and defining object and purpose “reflect[s] the vagueness of the theoretical concept that was to be expressed.”¹⁵⁸

In considering the compatibility of a reservation to a multilateral convention with the object and purpose of the same, the International Law Commission stated:

Even if the distinction between provisions which do and those which do not form part of the object and purpose of a convention be regarded as one that is intrinsically possible to draw, the Commission does not see how the distinction can be made otherwise than subjectively. If State A tenders a reservation which State B regards as compatible and State C regards as incompatible with the object and purpose of the Convention, there is no objective test by which the difference may be resolved.¹⁵⁹

Interestingly enough, in the VCLT, the term “object and purpose” is used in eight different articles and yet nowhere is it defined.¹⁶⁰ Authoritative sources also fail to define the term “object and purpose,” noting that defining such meaning is “elusive.”¹⁶¹ “Scholarly writings,”¹⁶² then, are the only other sources to consider in the quest for the meaning of this vital term.

156. *Id.* at 114.

157. Isabelle Buffard & Karl Zemanek, *The “Object and Purpose” of a Treaty: An Enigma?*, 3 AUSTRIAN REV. INT’L & EUR. L. 311, 311 (1998).

158. *Id.*

159. *Id.* at 319-20 (quoting *Report of the International Law Commission to the General Assembly*, ¶ 24, U.N. Doc. A/1858 (1951)).

160. *Id.*

161. ANTHONY AUST, *MODERN TREATY LAW AND PRACTICE* 188 (2000).

162. Buffard & Zemanek, *supra* note 157, at 322.

Many scholars agree that divining the true object and purpose of a treaty can be a formidable task.¹⁶³ One author notes, referring to the UN Convention on the Law of the Sea,¹⁶⁴ that “to interpret and apply the object and purpose criterion in the case of any given article of this vast and complex convention would be exceedingly difficult, if not impossible.”¹⁶⁵ The longer a treaty is, the more difficult it may be to determine its object and purpose.¹⁶⁶ The CTBT is a long treaty.

In attempting to articulate with any precision the object and purpose of the CTBT, it is first helpful to identify treaties with a similar object and purpose in order to draw a comparison. There is certainly little question of the link between the CTBT and the NPT. The CTBT attained the boost that made it a reality from the 1995 NPT Review and Extension Conference.¹⁶⁷ The U.S. Congress itself views them as intimately connected. In fact, the Fiscal Year 1998 National Defense Authorization Act mandates activities in conformity with the NPT and CTBT “when and if that treaty [the CTBT] enters into force.”¹⁶⁸

A treaty ostensibly designed to prevent nuclear testing would logically have that goal as its object and purpose. However, the NPT presaged the CTBT, noting in the preamble that states are “to seek to achieve” the cessation of nuclear testing—though the treaty contains no operative provision in that regard.¹⁶⁹ The twin goals of the NPT are nonproliferation and eventual nuclear disarmament in the context of general and complete disarmament. Because a comprehensive test ban has been identified historically (and implicitly in the NPT) as a key element leading to eventual nuclear disarmament, this could arguably be an object and purpose of the CTBT as well.

163. Edward F. Sherman, Jr., Note, *The U.S. Death Penalty Reservation to the International Covenant on Civil and Political Rights: Exposing the Limitations of the Flexible System Governing Treaty Formation*, 29 TEX. INT'L L.J. 69, 78 (1994).

164. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, S. TREATY DOC. NO. 103-39, 1833 U.N.T.S. 3.

165. Sherman, *supra* note 163, at 78.

166. *See id.*

167. *See* 1995 RevCon, *supra* note 38.

168. National Defense Authorization Act for FY 1998, Pub. L. No. 105-85, § 3156(b)(2) (1997).

169. *See* NPT, *supra* note 10.

Therefore, the dual object and purpose of the CTBT may be to ban nuclear testing and promote nuclear disarmament.

John D. Holum, the Director of the Arms Control and Disarmament Agency (which has since been abolished and merged into the State Department) during the Clinton Administration, has made comments that further support this vision of the dual object and purpose of the CTBT. In discussing the political and legal effect of President Clinton's signature of the CTBT, he noted that the CTBT served the dual purposes of preventing nuclear testing and preventing the horizontal and vertical proliferation of nuclear weapons.¹⁷⁰ In contrast with Holum's view, though, some view the prevention of nuclear testing as the sole object and purpose of the CTBT.¹⁷¹

Another twist on this matter is that some contend that the object may be different from the purpose of a treaty. For example, Germany made certain reservations to the UN Convention Against Torture¹⁷² that led to questions of whether those reservations were compatible with the object and purpose of the treaty.

Whereas the object of the [Convention Against Torture] appears to be quite simply protection against torture and other cruel or inhuman treatments, the purpose seems to be twofold. On the one hand, the Convention defines and brings more clarity and certainty to the already existing substantive rules of in-

170. Hon. John D. Holum, Dir. U.S. Arms Control and Disarmament Agency, Remarks to the Arms Control and Disarmament Committee of the American Bar Association (Sept. 26, 1996), *available at* <http://dosfan.lib.uic.edu/acda/speeches/holum/aba.htm>. Vertical proliferation refers to the qualitative improvement and increase in quantity of the nuclear weapons possessed by those states that already have nuclear weapons, while horizontal proliferation refers to new states developing nuclear weapons capabilities. One might quibble over whether the dual object and purpose of the CTBT would be to stop testing and eventual disarmament or to stop testing and vertical/horizontal proliferation. But this may be a distinction without a difference, since it is also arguable that inhibiting vertical/horizontal proliferation is essential to eventual disarmament.

171. *See* Lawyer's Comm. on Nuclear Pol'y, Comprehensive Test Ban Treaty: Legal Aspects, <http://www.lcnp.org/disarmament/ctbt.htm>.

172. United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

ternational law. On the other hand, as its primary aim, the Convention adds strength to the existing rules by means of a specific implementation system, in order to ensure their practical application and true respect.¹⁷³

The above analysis suggests that, while the Torture Convention's object is fairly simple, its purpose is quite complex. If this approach were applied to the CTBT, one might argue that the object of the CTBT is to prohibit nuclear explosive testing, but its purpose appears to be supporting the twin goals of nuclear disarmament and nonproliferation.

Despite Germany's reservations to the Convention Against Torture, most scholars in the German, Austrian, and English tradition view object and purpose as a joint notion.¹⁷⁴ Likewise, the United States views object and purpose as a unitary concept.¹⁷⁵ French legal doctrine, however, treats them as distinct notions:

The object of the act is its immediate purpose, *i.e.* the situation which the author of the act has envisaged or the effect he is striving for, whereas the purpose of the act is the reason of the object, the final situation

173. Massimo Coccia, *A Controversial Declaration on the UN Convention Against Torture*, 1 EUR. J. INT'L L. 314, 322 (1990) (discussing Germany's reservation to the Convention).

174. Buffard & Zemanek, *supra* note 157, at 325.

175. This practice is apparent in the 1993 International Court of Justice (ICJ) case *Oil Platforms*. In this case, Iran asked the Court to declare that the United States had breached the object and purpose of the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran through the destruction of three oil platforms. See Treaty of Amity, Economic Relations and Consular Rights, Iran-U.S., Aug. 15, 1955, 8 U.S.T. 899, 284 U.N.T.S. 93; Application Instituting Proceedings, *Oil Platforms*, (Iran v. U.S.), 1992 I.C.J. (Nov. 2), at 3. The United States rejected the Iranian view:

There must be a distinction, even in the case of a treaty of friendship, between the broad category of unfriendly acts, and the narrower category of acts tending to defeat the object and purpose of the Treaty. That object and purpose is the effective implementation of friendship in the specific fields provided for in the Treaty, not friendship in a vague general sense.

Preliminary Objection Submitted by the United States of America, *Oil Platforms*, (Iran v. U.S.), 1993 I.C.J. (Dec. 16), at 41-42 (quoting *Military and Paramilitary Activities in and against Nicaragua* (Nic. v. U.S.), 1986 I.C.J. 137 (June 27)) (emphasis added).

for which the object is the instrument of achievement.¹⁷⁶

Finally, it seems that “most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes.”¹⁷⁷

The treaty preamble may assist in elucidating both the object and purpose. In the case of the CTBT, though, the preamble merely illustrates the object-purpose confusion by highlighting several objects and purposes: nuclear disarmament, reductions in arsenals of nuclear weapons, prevention of nuclear proliferation, general and complete disarmament under strict and effective international control, the cessation of all nuclear weapons test explosions, protection of the environment, and enhancement of international peace and security.¹⁷⁸

Another important point to consider in this evaluation of “object and purpose” is that, pursuant to CTBT article 1, refraining from conducting nuclear testing is the central obligation of the CTBT *parties*, not mere signatories. Although some suggest that a signatory should bear the same obligation as a party to a treaty, the distinction between the two is important and prevents the ratification and EIF process from becoming merely symbolic. The difference between signature and ratification/EIF of a treaty is vividly highlighted by the CTBT’s dual structure.¹⁷⁹

176. Buffard & Zemanek, *supra* note 157, at 325.

177. IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 130 (Manchester U. Press 1984) (1973).

178. CTBT, *supra* note 1, at pmb1.

179. See Jan Klabbers, *How to Defeat a Treaty’s Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 *VAND. J. TRANSNAT’L L.* 283, 289-91 (2001). One interesting issue that arises under this analysis is whether there might be a different view of defeating the object and purpose if the CTBT entry into force provision had other requirements. For example, if the CTBT had been concluded as a treaty that did not require each state to provide two separate expressions of consent to be bound but rather entered into force when fifty states had merely signed it, and given that the United States signed early, defeating the object and purpose could be viewed differently. This type of international agreement would be considered an Executive Agreement in the United States, but that is irrelevant from an international law perspective.

There is, of course, no consensus on precisely what acts by a signatory would defeat the object and purpose of a treaty.¹⁸⁰ There are obstacles to using either the legitimate expectations of other states party to the treaty or the subjective intent of the signatory state as gauges.¹⁸¹ One scholar favors a “manifest intent” test where the issue is how the act manifests itself to the outside world.¹⁸² Another scholar favors an objective test, arguing that a state may not perform an act which would invalidate the basic purpose of the treaty.¹⁸³

There are actions that a state may take which arguably would not contribute to the object and purpose of a treaty but at the same time would not defeat it. For example, measures taken in preparation for resumption of nuclear testing would not defeat the object and purpose of the CTBT.¹⁸⁴ Similarly, restriction or termination of CTBTO PrepCom funding would not defeat the object and purpose of the CTBT.¹⁸⁵ One commentator has argued that statements indicating that the United States does not view its signature on the CTBT as imposing any constraints on testing are arguably not in keeping with the spirit of the CTBT but just as certainly do not defeat its object and purpose.¹⁸⁶ Actual testing by a signatory would almost surely be viewed by many states as incompatible with the object and purpose of the CTBT, but no single state’s view is determinative.¹⁸⁷ Certainly if a state had not tested in the past, to begin doing so after signing the CTBT would be incompatible with the object and purpose of restraining proliferation.

Defeating the object and purpose of a treaty is not necessarily the same as violating the terms of the treaty. Rather, it could be conduct making it impossible for the treaty to attain its goal. In the case of SALT II,¹⁸⁸ which also had a lengthy post-signature time lapse before EIF, the United States be-

180. See Hewitson, *supra* note 14, at 464.

181. Klabbers, *supra* note 179, at 299-305.

182. *Id.* at 305.

183. AUST, *supra* note 161, at 118.

184. Hewitson, *supra* note 14, at 464.

185. *Id.*

186. *Id.*

187. *Id.*

188. Treaty on the Limitation of Strategic Offensive Arms (SALT II), U.S.-U.S.S.R., June 18, 1979, S. EXEC. DOC. Y, 96-1.

lieved that the prohibition on “new types” of Intercontinental Ballistic Missiles (ICBMs) would implicate object and purpose restrictions.¹⁸⁹ After signing the SALT II, a state could not test new types of ICBMs prior to entry into force, since such testing would provide the state with the knowledge necessary to manufacture new ICBMs in secret and that knowledge could not be “unlearned.”

The United States is not currently required to comply with the test ban per se, since that obligation would only attach upon entry into force. But if the object and purpose of the CTBT could conceivably be located at a higher level of abstraction, such as inhibiting the nuclear arms race or staving off the creation of knowledge pertaining to new and potentially more dangerous nuclear weapons, with a test ban as simply the method for accomplishing those overarching goals, then other states could argue that the United States and other signatories are obligated to refrain from testing even before EIF if such testing would help to develop new nuclear weapons or new insight regarding existing types of weapons. The reason for the testing would be relevant to that argument, even as it injects some subjectivity into the analysis.

It is surely not enough to simply argue that no testing is permissible pre-EIF since that is what the terms of the CTBT require. That argument collapses what should be the difference between an obligation to observe the treaty pre-EIF (which is not required by international law) and a more plausible obligation not to take pre-EIF steps that would have the effect post-EIF of depriving other signatories of some of the benefit of the bargain struck. In other words, the state that tested would arguably have placed itself into an irreversibly better military position via the testing. Such repositioning would have the effect of disrupting the balance between the negotiating states that existed at the moment of signature, thus frustrating the object and purpose of preventing further development of nuclear capabilities. However, this analysis is purely speculative and presupposes a contractual analysis of treaties.¹⁹⁰

189. Interview with Professor David A. Koplow, Georgetown University Law Center (Mar. 13, 2007) (on file with author).

190. See Curtis J. Mahoney, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 *YALE L.J.* 824 (2007).

B. *Contrast to Actual Withdrawal from a Ratified Treaty*

VCLT article 54 provides that termination or withdrawal from a treaty may occur either according to the provisions of the treaty or with the consent of all the parties to the treaty after consultation.¹⁹¹ The CTBT provides in article IX that a state party may withdraw from the treaty if it determines that “extraordinary events” related to the subject matter of the treaty have jeopardized its supreme interests.¹⁹² This is a rather standard withdrawal clause for an arms control treaty and is similar to the withdrawal clause in the NPT.¹⁹³ However, because the United States has not ratified the CTBT and the treaty has not entered into force, the United States is not a party and it need not—and indeed technically cannot—utilize this provision to “withdraw” from it.

There is certainly no question regarding the ability of a state to withdraw from treaties that have such withdrawal clauses based on the state’s perception of the treaty’s impact on its supreme national interests. Of course, some have questioned whether North Korea should have been able to withdraw from the NPT.¹⁹⁴ The United States, however, recently withdrew from the Anti-Ballistic Missile (ABM) Treaty.¹⁹⁵ President Bush announced the U.S. withdrawal from the ABM Treaty on December 31, 2001, and the withdrawal became effective on June 13, 2002, pursuant to the terms of the treaty.¹⁹⁶

Authority to withdraw from a treaty comes not only from the withdrawal provision of the treaty itself, but also from VCLT article 54, which notes that treaties may be terminated

191. VCLT, *supra* note 138, at art. 54.

192. CTBT, *supra* note 1, at art. IX, ¶ 2. Most arms control treaties, such as the NPT, contain similar withdrawal provisions.

193. NPT, *supra* note 10.

194. *See, e.g.*, Press Release, U.N. Conference on Disarmament Debates, North Korean Withdrawal from Nuclear Non-Proliferation Treaty (Jan. 20, 2003), *available at* http://www.unog.ch/news2/documents/_newsen/dc0306e.htm. UN Security Council Resolution 1718 specifies that North Korea must retract its withdrawal from the NPT, but North Korea has not yet done so. *See* S.C. Res. 1718, U.N. Doc. S/RES/1718 (Oct. 14, 2006).

195. Treaty on the Limitation of Anti-Ballistic Missile Systems, U.S.–U.S.S.R., May 26, 1972, 23 U.S.T. 3435, 944 U.N.T.S. 13.

196. *Id.* *See also* Announcement of Withdrawal from the ABM Treaty, <http://www.state.gov/t/ac/rls/fs/2001/6848.htm> (highlighting the change in circumstances and citing the withdrawal provision in article XV(2) of the ABM).

in accordance with the terms of the treaty.¹⁹⁷ The Restatement (Third) on Foreign Relations Law uses similar language.¹⁹⁸

C. “*Unsigning*” of Other Treaties

There is no term in the formal international law lexicon for “unsigning” a treaty, although that term has crept into common usage both inside and out of the legal community. A state cannot “erase” its signature. Rather, it must give notice to the depositary of the treaty that it no longer intends to be bound by the signatory obligation not to defeat the object and purpose of the treaty and does not intend to ratify it. It certainly seems that a mere treaty signatory should find it easier to abandon its obligations than a treaty party, and that is indeed the case.

The technical treaty terminology for unsigning a treaty is withdrawing consent to be bound prior to EIF. Little legal authority exists on this topic, and states rarely engage in this practice.¹⁹⁹ The consent that a state gives upon signing a treaty is its consent to be bound once the treaty has entered into force.²⁰⁰ At the Vienna Conference on the Law of Treaties, a delegate from the Ukrainian Soviet Socialist Republic referred to the “sovereign right of a state to withdraw from the treaty at any time before it finally became binding.”²⁰¹ This assertion went unchallenged.

In 1952 Greece withdrew an instrument of acceptance deposited in 1950. After the treaty had later entered into force, Greece reconfirmed its acceptance. In 1958 Spain withdrew an instrument of accession two months after it had been deposited, but before the treaty had entered into force. At the same time it deposited a new instrument containing a reservation. In both cases the UN Secretary-General notified the other states concerned. No objection was made. In view of these cases, it is now the practice of the Secretary-General to regard withdrawal of consent before

197. VCLT, *supra* note 138, at art. 54.

198. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 312(3) (1987).

199. AUST, *supra* note 161, at 95.

200. *Id.*

201. *Id.* (quoting *Official Records*, 19th Meeting, at 100).

the entry into force of a treaty as permissible, on the understanding that until entry into force states are not definitively bound.²⁰²

The VCLT also recognized and formalized the legal doctrine of *rebus sic stantibus*, meaning that all treaties are signed with current circumstances in mind. VCLT article 62 provides that a fundamental change in circumstances justifies a withdrawal from a treaty if those circumstances were “an essential basis of the consent of the parties to be bound by the treaty.”²⁰³

It is useful in understanding the withdrawal process to look at recent U.S. practice in “unsigned” a treaty that it had, like the CTBT, signed but not ratified. In that vein, the U.S. actions with respect to the International Criminal Court (ICC) are instructive.²⁰⁴ The United States signed the treaty establishing the ICC in December 2000, but then declared its intent not to become a party. Therefore, the United States “unsigned” the treaty in May 2002. The treaty entered into force in July 2002.²⁰⁵

The United States complied with international law with respect to the ICC Treaty. There is no legal obligation for a treaty signatory to become a party to a treaty. The ICC Treaty (also known as the Rome Statute) specifies in article 125 that it is “subject to ratification, acceptance or approval by signatory States.”²⁰⁶ As previously explained, any obligations based on VCLT article 18 with regard to the object and purpose of a treaty can only exist until a state makes its intention clear “not to become a party to the treaty.”²⁰⁷ President Bush’s repudiation of the ICC was clear demonstration of such intent.

202. *Id.* at 96.

203. VCLT, *supra* note 138, at art. 62.

204. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

205. Curtis A. Bradley, *U.S. Announces Intent Not to Ratify International Criminal Court Treaty*, ASIL INSIGHTS, May 2002, http://www.asil.org/insights/insigh87.htm#_edn (providing a detailed analysis of the legal implications of President Bush’s announcement of his intention to repudiate the treaty).

206. Rome Statute, *supra* note 204, at art. 125.

207. VCLT, *supra* note 138, at art. 18.

In contrast with U.S. actions regarding the ICC are U.S. actions regarding the Kyoto Protocol.²⁰⁸ The Kyoto Protocol entered into force in 2005. Although President Clinton signed the treaty, President Bush announced in 2001 that he would not submit the treaty to the Senate for advice and consent, declaring the document “fatally flawed.”²⁰⁹ Some commentators have argued that leaving the U.S. signature on the treaty could be problematic insofar as it might lead other states to conclude that eventual ratification is still intended. They contend that this sends a confusing message, particularly when the United States has already shown with the Rome Statute that it is willing to follow through on declared intentions not to become a party:

Unsigning the Rome Treaty but not the Kyoto Protocol suggests that the U.S. intends to adopt Kyoto. This has emboldened the European Union (EU) to lobby Russia to seek the best deal it can while eventual ratification by a U.S. Senate remains a possibility Th[e] requirement (of VCLT Art. 18) is not satisfied by verbally disavowing a treaty, while at the same time maintaining one’s signature and continuing to send delegations to ongoing negotiations. The Vienna Convention’s withdrawal requirement is achieved only by filing an instrument rescinding the signature with the same body to which the signature was communicated.²¹⁰

In any event, with respect to the CTBT, the United States currently adheres to its unilateral moratorium on nuclear testing initiated in 1992²¹¹ and is therefore unquestionably meeting any obligation it may have under customary international law not to defeat the object and purpose of the CTBT.

208. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (entered into force Feb. 16, 2005).

209. See Press Release, The White House, President Bush Discusses Global Climate Change (June 11, 2001), available at <http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html>.

210. Christopher Horner & Iain Murray, *Why the United States Should Remove Its Signature from the Kyoto Protocol*, CEI MONTHLY PLANET, Sept. 2004, at 8, 8, available at <http://www.cei.org/pdf/4254.pdf>.

211. Gallery, *supra* note 18.

D. *Undue Delay of Entry into Force of the CTBT?*

The UN General Assembly opened the CTBT for signature in 1996. As of 2007, the treaty has still not entered into force. This ten-year time frame might be considered an “undue delay” within the scope of article 18(b) of the Vienna Convention, but probably would not.

Although article 18(b) requires that states refrain from defeating the object and purpose of a treaty pending EIF, provided that EIF is not “unduly delayed,” the VCLT does not define this time period.²¹² As is evident with the VCLT itself, which was opened for signature in Vienna on May 23, 1969 and did not enter into force until January 27, 1980,²¹³ a period of over eleven years, the ten year time period that the CTBT has been open for signature is not without precedent in international treaty law. If ten years constitutes an undue delay, however, it would obviate the need for the United States and other signatories to avoid acts that would defeat the CTBT’s “object and purpose.”²¹⁴

E. *Withdrawal from the Senate Calendar*

Unlike pending legislation, treaties that have been rejected by the Senate are generally viewed as the legal “property” of the Senate Foreign Relations Committee.²¹⁵ Pursuant to Rule 9 of the Senate Foreign Relations Committee, once the President has submitted a treaty for the advice and consent of the Senate, the treaty is referred to the Senate Foreign Relations Committee. It then remains on the Committee calendar until the Committee acts to report it to the full Senate or suggests that it be returned to the President, or the Senate discharges the treaty from the Committee.²¹⁶

212. VCLT, *supra* note 138, at art. 18.

213. *Id.*

214. Andrew Michie, *The Provisional Application of Arms Control Treaties*, 10 J. CONFLICT & SEC. L. 345, 372 (2005).

215. *Id.*

216. Rules of the Committee on Foreign Relations, 109th Cong., 1st Sess., S-PRT 109-11 (Feb. 1, 2005), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_senate_committee_prints&doid=f:98278.wais. If the United States did sign and then “unsign” a treaty and then later decided that it desired to be a treaty party, it would do so via an instrument of accession rather than an instrument of ratification.

This language suggests that even though the CTBT is languishing in the Senate Foreign Relations Committee files, the Senate could still act upon it.²¹⁷ In the meantime, a treaty in the posture of the CTBT has no legal effect, other than to impose the obligations discussed above with respect to customary international law as codified in VCLT article 18.²¹⁸

V. CONCLUSION

The current legal status of the CTBT in the United States is confusing but stable. Assuming that the Administration has no intention of testing nuclear weapons,²¹⁹ the status quo is acceptable notwithstanding any ambiguity with respect to the object and purpose test. Indeed, only if this or a future U.S. Administration decides that nuclear testing is required (for example, to certify the reliability of the nuclear weapons stockpile) could another signatory even raise a question regarding whether U.S. actions were consistent with the obligations of a signatory. That said, hypothetically, if such testing were contemplated, it is my view that the obligations of the United States as a signatory to the CTBT would not preclude all nuclear testing for all purposes.

217. See Asada, *supra* note 73, at 102.

218. See 87 C.J.S. *Treaties* § 4 (2005); *SEC v. Int'l Swiss Inv. Corp.*, 895 F.2d 1272, 1275 (9th Cir. 1990) (“[a]n un-ratified treaty has no force until ratified”).

219. CTBT art. XV prohibits reservations to the articles and annexes of the treaty. CTBT, *supra* note 1, at art. XV.