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The Importance of Domestic Law to International Arms Control

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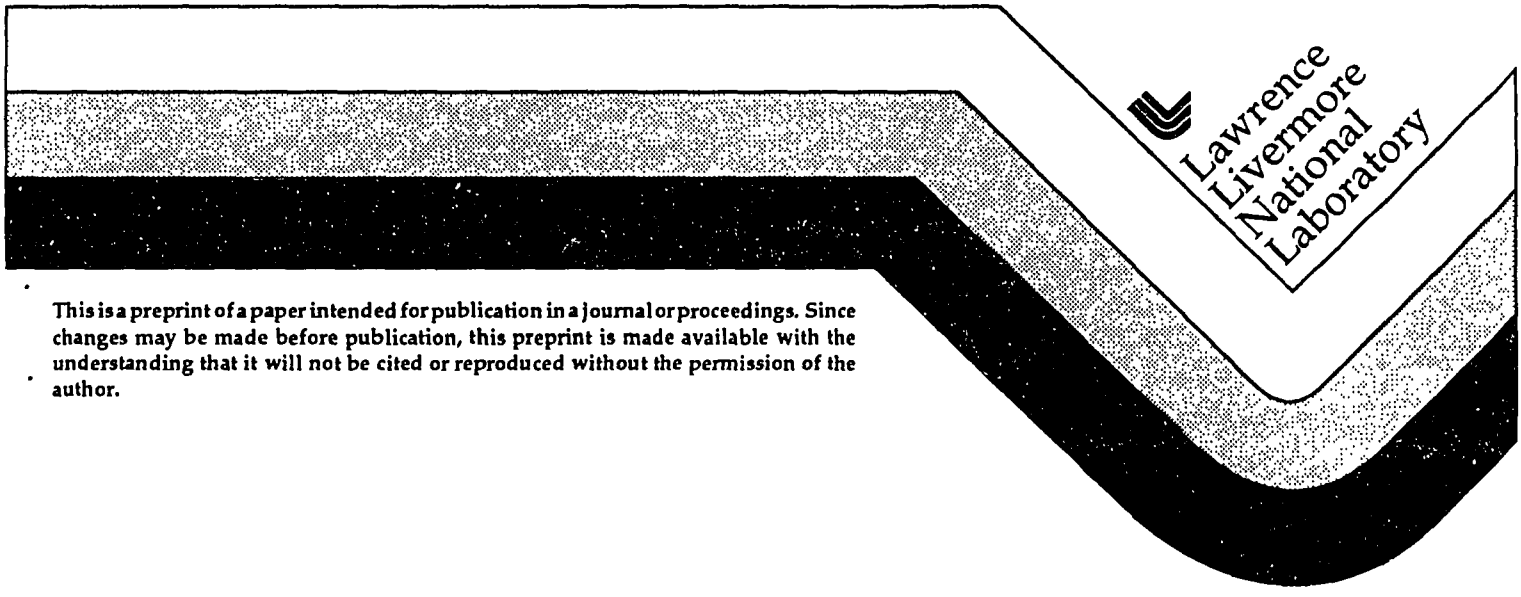

DISCLAIMER

THE IMPORTANCE OF DOMESTIC LAW TO INTERNATIONAL ARMS CONTROL

Studies of arms control and disarmament tend to focus on political, military, and diplomatic processes. Recently, in the context of the conversion of defense activities to civilian use, the economic aspects of arms control have also received renewed interest. The legal dimension , however, is in need of fresh examination. Both international and domestic law are sailing increasingly in uncharted waters.

Recent arms control agreements and related developments in international peacekeeping have expanded the scope of international law and altered how we perceive certain fundamentals, including the principle of national sovereignty. Still, the nation state is largely unchallenged as the primary actor in international affairs. National governments retain near absolute sovereign rights and responsibilities even in an age of trans-national economic integration and codified international norms for human rights, freedom of the press, and the peaceful resolution of disputes. Indeed, the role of domestic law in arms control and disarmament may be more significant now than ever before.

A brief review of relationships between arms control and domestic law should illustrate ways in which our thinking has been underestimating the importance of domestic law. Hopefully, this survey will set the stage properly for the excellent, more detailed case studies by Elinor Hammarskjold and Alan Crawford. Toward that end, this paper will highlight a number of more general, and sometimes provocative, themes. These themes should be kept in mind when those two complementary presentations are considered.

The relationship between domestic law and arms control is not distant; it is fundamental. Central concepts of domestic law such as contracts and remedies shape our basic thinking about the principals of arms control. Some of the

important conditions for advancing the arms control agenda such as openness and accountability are shaped by domestic law.

In fact, domestic law goes to the heart of the question of why we seek arms control agreements. Peace and security as well as prosperity and freedom are associated with domestic law and order. On the international scene, it is often said that liberal democracies don't wage war on each other or that open societies remove distrust. However true these observations may be, we do distinguish among nations by the justness and vigor of their rule of law and feel less threatened by those states without authoritarian governments. We find militarism and adventurism most commonly where the rule of law is weak.

Domestic law provides more than a conceptual model for approaches to disarmament related activities, and it influences more than the fundamental context. Domestic law often prescribes the detailed process of arms control decision making in specific countries. In the United States, the Arms Control and Disarmament Act created a specific agency to promote an expansive arms control agenda. That act provides that the Director of the U.S. Arms Control and Disarmament Agency (ACDA) shall be a participant in National Security Council (NSC) deliberations with arms control significance. By law, also, the United States is committed to the goal of complete and general disarmament , but of course, in a manner consistent with its own national security and that of its allies. Thus, through legislation, the United States is compelled to insure that arms control objectives and opportunities are weighed against competing goals and considerations. Domestic law has been used in this case to ensure that arms control is pursued energetically, but not blindly. The law aids in promoting the introduction of arms control proposals into the marketplace of ideas within the Executive Branch, but it does not guarantee that they will be selected.

To support legislative oversight of this process, the Congress of the United States has used domestic law to increase transparency in the decision making process and to provide limitations or guidance. For example, Congress requires the Executive Branch to submit arms control impact statements well before major weapons systems are procured. The Congress also requires publication of compliance assessments such as the Pell report that compel judgments on how well the United States and other countries are living up to their obligations under

arms control agreements. Domestic law has been used by the Congress to compel international negotiations not favored by the Executive Branch and have even sought to compel specific outcomes. Recent examples include the Hatfield amendment limiting nuclear testing and requiring negotiation of a nuclear test ban and the various nuclear freeze and build down proposals on strategic nuclear arms which, in the early 1980's, were used by the Congress to influence the START talks.

Through vehicles such as the Nuclear Non-proliferation Act, the Export Administration Act, the Arms Export Control Act, and the Missile Technology Control Act, the Congress sets standards for arms sales and provides controls on the export of technologies which could be used for the proliferation of weapons of mass destruction or their means of delivery. Arms control conditions are also attached to agreements on cooperation, such as in the Nunn-Lugar amendments designed to provide assistance in dismantling nuclear weapons in the new states created on the territory of the former Soviet Union. These laws often create conflict between the executive and legislative branches and, with provisions such as mandatory sanctions against foreign companies or states, frequently increase tensions between national governments as well. Whatever the merits of these legislative and legal acts, they do force the political process to debate arms control issues which might otherwise not be considered.

Domestic law also plays a critical role in implementation of international arms control agreements by creating and providing the budgets for organizations like the U.S. Arms Control and Disarmament Agency (ACDA), the U.S. Defense Department's On-site Inspection Agency (OSIA) and other departments and agencies. It also provides implementing legislation with important implications for treaty implementation, inspection rights, verification, and compliance.

Perhaps the most visible relationship between domestic law and arms control is to be found in the constitutional practices for legislative approval of international treaties or agreements. These vary among nations. Under the Constitution of the United States, the Executive Branch exchanges instruments of ratification of treaties, but the consent of two-thirds of the members present in the United States Senate is required before hand. To guarantee that international agreements other than treaties which may limit the military forces of the United

States receive special attention, Section 33 of the Arms Control and Disarmament Act provides that such agreements be approved by a Joint Resolution of both Houses of Congress or by other positive legislation. Approval of arms control treaties and agreements has always carried some uncertainty. In the United States, the Threshold Test Ban Treaty ultimately received unanimous Senate approval, but only after extensive further protocols were negotiated sixteen years after the original treaty was signed. Some treaties, like SALT II, never received favorable action. Today, Ukraine's legislature has raised concerns about the START treaties and the Lisbon Accords. Furthermore, the often extensive testimony in the Congress during consideration of arms control accords can have an impact on subsequent practices which may be examined under the rules for the interpretation of treaties and agreements to clarify international obligations. It also influences obligations under domestic law.

In the United States in recent years, uncertainty has emerged as to whether the single act of consent to ratification of a treaty can itself result in different obligations under international and domestic law. This has raised fundamental constitutional questions and legal scholars are divided, most noticeably in the debate between the so-called "one treaty" and "two treaty "theories. Advocates of the one treaty theory argue generally that the Senate vote is not the enactment of domestic legislation per se, but rather a vote on whether or not to execute a form of legislative veto to prevent a treaty from becoming a part of the Supreme Law of the Land as is provided for under the United States Constitution. To "one treaty" theorists, testimony may influence considerations of subsequent practice under international law, but there is only one set of treaty obligations and those result from the treaty negotiated. Of course, Congress could enact additional legislation compatible with the treaty which might further constrain the United States.

The "two treaty" theory argues, in essence, that the vote on consent for ratification of a treaty under the Constitution is a special legislative process whereby the treaty is approved to become part of the supreme law of the land by a two-thirds vote of only one House of Congress; namely, the Senate. Congressional testimony becomes more than an element for understanding subsequent practice for international treaty interpretation; it becomes a part of the establishment of legislative intent clarifying obligations under domestic law.

Oversimplifying legal analysis is always dangerous. Each of these approaches has a logic. Theoretical differences may actually lead to few different consequences in practice, but clearly the "two treaty" approach would seem to increase the chances that the United States would find itself limited by a domestic interpretation of the meaning of treaty obligations that might be different from what would be applicable under international law. Even those who support a "two treaty" approach to ratification have recognized that there is a danger in suggesting that treaty obligations might be amended by erroneous testimony. Thus, during recent ratification hearings, committees of the United States Senate have asked official witnesses to state whether or not they are giving "authoritative testimony." Other nations have different approaches, some of which also introduce this question of the distinction between international and domestic obligations. For the purposes of this brief survey, this distinction simply highlights the important role that domestic legal and constitutional processes play in arms control today.

Arms control is also not exclusively the domain of public officials, whether they be part of the executive, legislature, or judiciary. Arms control also involves private citizens. In the United States, the Freedom of Information Act permits private citizens to request the declassification and publication of information. This legal approach to transparency has become an important part of the arms control political process and could have important implications for compliance in many nations around the globe. Recognizing that individuals as well as governments have responsibilities, the United States has taken some steps toward criminalization in domestic law of violations of international arms control agreements. Under the Anti-terrorism and Biological Weapons Act of 1989, it is a domestic crime for an American citizen to participate in an offensive biological weapons program.

Such legislation criminalizing violations of arms control agreements may be even more useful in other nations. President Boris Yeltsin of Russia, when Russia was but one federation of the USSR, declared that he would press for legislation banning biological weapons testing on Russian soil. At that time, the Soviet Union had declared that it was not in violation of the Biological Weapons Convention (BWC). Later, Yeltsin, as President of a now independent Russia,

came to the conclusion that there had been violations of the BWC by the Soviet Union. Consistent with his earlier proposal, and in the context of recommendations made at the BWC Review Conference the previous year that all nations move in this direction, he announced legislation to criminalize individual participation in such programs.

As the technologies associated with weapons of mass destruction and their means of delivery become more widespread, international restraints and national intelligence organizations increasingly will be unable to deal with national cheating and sub-national threats or terrorists. Domestic law enforcement will be vital in the years ahead, particularly in support of modern non-proliferation concerns. Furthermore, the boundaries of sovereignty are becoming increasingly unclear and permeable. Matters of arms control significance are less in the hands of government today than even a few years ago because of greater freedom of travel and the revolution in international communications. The number of entities and individuals of arms control significance has expanded greatly. Where there are concerns, as in the case of assistance to sub-national terrorists, domestic rather than international law may offer more appropriate remedies.

There is another convergence between domestic law and arms control in what may be called the question of "levels of violence." With the end of the Cold War, we are seeing more clearly that death and destruction on a large scale takes place daily with weapons which have not been the subject of arms control as we have known it. Recently, at the Organization of American States, one Latin American diplomat suggested an expanded arms control focus to help deal with ever more lethal small arms being used in the drug trade. The international arms control community is a long way from taking up the question of individual firearms, but such weapons do impact on international violence and the prospects for peacekeeping operations in many parts of the world. The arms control community has, however, seen that where the line on arms to be limited is drawn can be important. In the CFE treaty, distinctions were made between military equipment and paramilitary equipment. Some of the paramilitary equipment excluded is now being used in ethnic violence in parts of the former Soviet Union. One wonders what would have happened in the Caucuses, if the CFE Treaty had captured more of that equipment. Or one might ask, would violence

have been reduced if Yugoslavia had been a party to CFE and its partition had thus required a formal process of reallocation of military equipment under the eyes of other states party to the CFE Treaty. This is, of course, only a hypothetical question, but many observers believe that the CFE Treaty was helpful to a more peaceful demise of the Soviet Union.

This convergence between the issues of domestic law and the issues of arms control is increasing for understandable reasons. As discussed above, arms control is an inherent part of national security and foreign policy which, in turn, is linked to domestic policy. For example, economics and tight budgets mean that the burden of armaments becomes both an international and a domestic issue. The "swords into ploughshares" agenda which includes disarmament, nuclear safety, security and dismantlement, defense conversion, Nunn-Lugar science and technology centers in Moscow and Kiev and the like raises important questions related to economic organization, technology transfer, and even taxes. Meetings with parliamentarians became routine during the arms negotiations in Geneva, but it is even more important today. Many of the cutting edge issues of arms control today including verification, intrusiveness, proprietary information, intellectual property rights, and rights of privacy are important domestic issues.

Arms control, which frequently is caught up in domestic partisan and ideological debate, cannot be separated from domestic political developments. The United States sought to negotiate the bilateral Chemical Weapons Destruction Agreement with the Soviet Union in order to address several problems which might delay a global agreement. Many American's believed that a bilateral inspection agreement would be necessary to deal with the formidable challenges of verifying a chemical weapons ban in the large, secretive Soviet Union. Others believed an early start on destruction would be necessary to destroy the large stockpiles on the territory of the two superpowers. Doubt that the Soviet Union would build the necessary facilities for safe and environmentally sound destruction of chemical weapons has only been reinforced in a democratic Russia were grassroots concerns about safety and environmental damage have made site selection a volatile political question. This grassroots democracy which has complicated our CW arms control agenda is, nevertheless, even more important to the future of arms control because it brings greater transparency to one of the

most heavily armed nations in the world which is still struggling to leave behind its totalitarian past. Environmental impact studies and "NIMBY" --"Not in my back yard" have complicated arms control implementation, but they also illustrate the important relationship between arms control and domestic law. Indeed, arms control benefits from the growth of democracy and the rule of law and has shown that it can contribute to their strengthening. The world of arms control has changed and how we deal with this change will be more and more a matter of domestic law.

QUESTION NUMBER ONE:

ANSWER:

Before I address this specific question on the ABM treaty, let me make a general comment that puts everything in context. I think it is important to understand as we look at compliance and enforcement that there were several interacting, historical developments that influence all of our judgments. First, the nature of arms control itself evolved throughout the Cold War era to the end of the Cold War and beyond. With it evolved approaches to verification. Measures that were once considered non-negotiable became negotiable. Measures which were once considered unacceptable became acceptable. A second interrelated point is that the nature of the regimes involved in negotiations changed. Indeed, with the political change that took place in the Soviet Union and subsequently in Russia and other countries the nature of the requirements have changed. Mr. Berdennikov has made a very important point which is that we have to look at future arms control regimes and the rationalization of existing arms control regimes from the point of view of a cost-effectiveness that takes into account existing circumstances. We do not want to undermine arms control regimes, but still we must allocate our resources where they are most needed to deal with the broader, urgent arms control concerns such as non-proliferation. The countries of the world only have so many assets, and they have to invest them in the most valuable way possible. The bilateral relationship has changed, and gradually we have moved away from a pre-occupation with distrust and toward problem solving. We have sought to create the conditions which would make that possible. I think that is the source of the great progress that has been made in recent years.

Nevertheless, it doesn't mean all the problems go away. Some of them are inherent in the process. For example, not too many years ago under the INF treaty our colleagues from the other side suggested that the United States was in violation of the INF treaty because we had a Pershing missile stage that we had not reported at a certain base . We checked and went back to our colleagues and said they were wrong. Again, they insisted they were right. We checked again, and again we were reassured that they were wrong. Well, the problem was that they were right and we were wrong. In an open field on an American military installation, there was an old cylinder, which had in fact been a part of a Pershing

missile. Because it had been dismantled, the military people at the base never thought of that junk as being a treaty accountable item. But in fact, the way treaty was drafted, it was a treaty accountable item. Thus, we had to report that we had been in violation. Such problems which have been mentioned result from carelessness, confusion, or misunderstanding.

There are other problems such as the inherent uncertainties in verification. The question of a "likely" violation of the Threshold Test Ban Treaty was mentioned. The word "likely" was used as a qualifier to mean we couldn't be absolutely certain. But we had a situation in which the seismic magnitude of Soviet tests measured over time kept increasing. At the same time, however, we were re-evaluating our assessment of the soil at Soviet test-sites and moving our thresholds upward. Therefore, we were concerned that by our earlier standards there would have been a clear violation, but by our new standards it was less clear. And this took place over a period of time. There was a hot dispute over the validity of the new, softer standards. The decision was made that we would not find a violation, but rather that we would only find a "likely" violation, because there was still enough uncertainty as to whether or not it was a violation. But it did raise an interesting question: if you believe that our standard of today is correct, then why were the early Soviet tests of such an incredibly low magnitude? But if you believe that your earlier standard was correct, then these must have been very, very large tests that were taking place. Here, the uncertainty was in the monitoring measure and the data related to that.

The ABM treaty is a somewhat different question. It's less related to monitoring than to the history of the negotiation. It is true that the debate, of course, has now become highly politicized. To make that the most important issue, however, is to miss what is even more important; namely, the difficulty you have in negotiations trying to square a circle. Remember, sometimes two sides are trying to use ambiguous language to assert what is or isn't the case. There was an independent study done for ACDA by the distinguished law professor John Norton Moore on this whole issue of "broad" or "narrow" interpretation of the ABM treaty. I think his conclusion was the best I've seen. It was the most extensive study done with the greatest access to information. No one else has ever done as complete a study. Professor Moore's conclusion was that, in essence, the broad interpretation was fully warranted under international law.

We could also go with the narrow as well, but if we were going to go to the narrow interpretation, we had to go to the Soviet Union and make it absolutely clear that we insist upon the narrow and get agreement. Otherwise, under international law, the broad would be warranted because it wasn't clearly resolved in the negotiating text. That sounds too ambiguous, confusing and indefinite for many people. The problem is, I think, that it's the truth. The truth is that some Americans thought they got the narrow restriction and others thought that the narrow was not achieved. There were divisions after the negotiations within the U.S. government itself including within the U.S. technical bureaucracy in the early seventies. We had to deal with this question. The attempt to resolve it became an issue of internal U. S. bureaucratics in which the various factions were trying to determine the outcome by influencing the "subsequent practices" question. In a sense, what you had was treaty interpretation by internal bureaucratic debate over a number of administrations over a long period of time. I bring this up because it simply reminds us again and again that it's not that things are necessarily "black" and "white" and that there are "good guys" and there are "bad guys". Rather, any treaty is going to have uncertainties. And those uncertainties may not mean much at the time but later they may have greater significance and when that happens you are going to have to deal with it.

The broad vs. narrow decision was not made as a programmatic policy response to a violation of the ABM Treaty by the Soviet Union. A conscious decision was made to go with the broad interpretation on the grounds that was considered to be an acceptable interpretation, a correct interpretation of the ABM treaty. Now by that time the Reagan administration had already concluded that the Soviet Union was in violation of the ABM treaty. But I should remind you that the first finding on the Krasnoyarsk Radar was not that it was in violation but rather that it was in "likely" violation. And the reason the word "likely" was used in this case was because we had not yet given the Soviet Union a chance to try to resolve our concerns about the radar. Therefore, it was felt inappropriate to reach a final conclusion. You can argue the merits of that decision, but diplomatic consideration was the basis for the decision. It was not until 1988 that the Soviet Union confirmed that it also was in their view that the Krasnoyarsk Radar was a violation of the ABM treaty. By then, the broad interpretation had already been announced by the Reagan Administration.

There were numerous questions as to whether or not to withdraw from the ABM treaty. No major effort was made to do so for two reasons. First, during the period of the Cold War we were still trying to engage the Soviet Union in an arms control process. To influence that process, there was a sense of caution about a withdrawal from the ABM treaty. It was different in the case of SALT II because it was not an active treaty. When interim compliance with SALT II was dropped, the whole question of Soviet compliance with SALT II went with it. You cannot say we are not going to have interim compliance and then afterwards declare the other side in violation.

Interestingly enough, after the break-up of the Soviet Union and with the engagement of Russia in cooperation on strategic defenses, the issue of the viability of the ABM treaty came up again because you had "changed circumstances." From a legal point of view, it was a close call as to whether the changed circumstances voided the treaty. The systems covered by the ABM treaty were now deployed in a number of countries on one side under what had been a bilateral treaty. More importantly, you had a treaty that was designed to hold the populations of two hostile countries hostage. Now those two countries were engaged in a program of cooperation to protect the citizens of both countries. So to question the ABM Treaty's relevance was legitimate. The decision was made, however, under the Bush Administration, not to withdraw from the ABM treaty, not declare it void based on changed circumstances, but rather to propose to amend it, to take into account the changed circumstances. And before the Bush Administration left office, it presented a proposal to amend the ABM treaty, to modernize it. So the answer is, we did consider withdrawing from the ABM treaty as a policy response , but the broad vs. narrow issue was not, strictly speaking, a policy response to a violation. It took place in the context of that discussion. In the end the United States proposed to amend rather than to withdraw from the ABM treaty.

QUESTION NUMBER TWO:
ANSWER:

I would like to take just a second to comment on a couple of items what were raised. First, **Mr. Thierry** raised the issue again of one treaty or two treaties. The

traditional interpretation in American jurisprudence has been the one treaty theory. In essence that interpretation says that a treaty is incorporated into the supreme law of the land and that the action of the Senate is, in essence, a veto to that process. It is not a routine legislative process. What is incorporated is the treaty and what the treaty means under international law. There has long been a strain of the two treaty theory in American jurisprudence, but it has only been in recent years, and in particular because of interest in our legislature especially in the Senate, that the two treaty theory has gained much more support. The two treaty theory says that the treaty is being incorporated into the supreme law of the land as a domestic legislative enactment by one house. Thus, under the two treaty theory, testimony is not simply subsequent practices for interpreting the treaty. Rather, it is in fact, more than that. It is a part of the legislative history for the purpose of legal interpretation of the application to the United States domestically. The difficulty is that, under the two treaty theory, you could have one treaty that is the law of the land which applies to the United States domestically, but another treaty, which means something different, which applies to the other party and to the United States under international law. Now, if the United States is more strict with itself and does not expect other parties to abide by that same restrictive interpretation then that may not create a problem with other parties. It becomes more complex, however, when you try to hold the other party to that interpretation as part of a subsequent practice argument. I should note that the two treaty theory is a different practice also from that of countries which, in essence, enact the treaty through specific, detailed legislation to make it binding under domestic law. Under such constitutional arrangements, it is this domestic legislation rather than the treaty text which is the vehicle whereby constraints are made binding as part of the law of the land. In many cases, the United States does not have implementing legislation because the treaties do not require it. It is the treaty text which is the law of the land.

This gets more complex if you consider policy remedies if another party violates a treaty to which you are a party. There is a school of jurisprudence that says that it is possible, in essence, to abrogate parts of a treaty but not all of the treaty if that is a proportionate and proper response. This is a hotly contested issue but when combined with the traditional Senate practice of placing conditions, understandings, and reservations on treaties, you can see how even a bilateral setting can get very complicated very quickly. Now imagine this situation in a

multilateral setting, in which numerous countries have conditions, reservations, and understandings. This has resulted in the introduction in recent international arms control negotiations of measures that are designed to discourage such reservations and understandings. The United States Senate, however, has made it quite clear that it will not accept any commitment not to have reservations or understandings. In an effort to avoid a confrontation in recent years, the Senate has avoided any reservations or understandings that would force a re-negotiation. Again, this has largely been in a bilateral setting. Before we go too much further with the two treaty theory, the time has come for international and domestic legal scholars to take another look at this question. This constitutional question is bigger than parties and politics; it has to do with the future of the legal structure that enhances world stability. For that reason, I would like to highlight this point.

The second point deals with the issue Mr. Mashady raised -- this question of defeating the objects and purposes of the treaty. This is a very vague area, but he raises an important question. A number of times I have had to deal with this question as to whether certain specific acts would defeat the object and purpose of the treaty if such acts are undertaken between signature and ratification. I think this issue well come up again. In all cases, the key is understanding what was the intent of the treaty. As a former negotiator, I must confess that negotiators don't always sit down and draft a master list of intent. As a result, we have to be very careful in the future. For example, we are now talking about the possibility of negotiating certain limitations on nuclear testing. I think we need to think about what is the intent . Is it to prevent modernization, is the intent to prevent any further testing as of the date of signature, is the intent to prevent nations which have not tested from testing? We need to find out what our intent is and to think in advance about what would be defeating the objectives and purposes of the treaty. So in essence, we want examples of what would defeat the object and purpose of the treaty. Let me stop here and just thank you all for what I thought was an excellent session.

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