



UNC
SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF
INTERNATIONAL LAW AND
COMMERCIAL REGULATION

Volume 16 | Number 1

Article 1

Winter 1991

Legal Aspects of Bilateral Arms Control Treaties

Thomas Jr. Graham

Edward Ifft

Follow this and additional works at: <http://scholarship.law.unc.edu/ncilj>

Recommended Citation

Thomas J. Graham & Edward Ifft, *Legal Aspects of Bilateral Arms Control Treaties*, 16 N.C. J. INT'L L. & COM. REG. 1 (1991).
Available at: <http://scholarship.law.unc.edu/ncilj/vol16/iss1/1>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Legal Aspects of Bilateral Arms Control Treaties

Cover Page Footnote

International Law; Commercial Law; Law

Legal Aspects of Bilateral Arms Control Treaties

*Thomas Graham, Jr.**
*Edward Ifft***

Recent Trends

At no time in history has the arms control agenda been as busy or as promising as it is today. It includes a wide variety of both bilateral and multilateral negotiations, several of which either should lead or have led to extremely important agreements.¹ The dramatic and promising events which are occurring in the Soviet Union and Eastern Europe have opened up possibilities in the arms control arena which seemed remote only a short time ago. The two most obvious areas in which these possibilities have manifested themselves are the depth of reductions in armed forces and the degree of intrusiveness of verification measures which can be achieved.

At the same time that these remarkable possibilities appeared, the perceived need for formal arms control agreements, at least among some segments of public opinion, decreased. This is an interesting paradox. When tensions are great and public perception of the threat is high, the public demand for arms control is strong; but this is also when the successful conduct of arms control negotiations is most difficult. On the other hand, when the real or perceived threat is low, public demand for arms control falls off just when vigorous pursuit of sound arms control agreements is most likely to be successful. Thus, one can hear the argument made today that perhaps there is no need for painstaking negotiations leading to formal treaties with long-term obligations and elaborate and effective verification provisions.

Fortunately, the enlightened leaderships of all the principal countries in the arms control process have correctly understood the importance of seizing the opportunity to establish formal and legally

* General Counsel, United States Arms Control and Disarmament Agency, and representative to the Conventional Armed Forces in Europe negotiations.

** Senior State Department Representative, United States Delegation to Strategic Arms Reductions Talks.

¹ For example, the Strategic Arms Reduction Talks (START), the Conventional Armed Forces in Europe (CFE) negotiations (treaty signed in Paris, France on November 18, 1990), and the U.S.-Soviet bilateral and multilateral negotiations on chemical weapons (CW).

binding rules of international behavior that can form a powerful barrier against possible future lapses into uncontrolled and destabilizing forms of military competition. Security should be based upon legal obligations, not upon unilateral actions, which can easily be reversed. A prudent person who repairs his roof when the sun is shining will provide himself with at least some protection against future storms.

The Growing Complexity of Arms Control Agreements

Many of the lessons the authors have learned from years of involvement in arms control negotiations apply equally well to both bilateral and multilateral fora. This Article, however, will specifically address bilateral U.S.-U.S.S.R. arms control negotiations, which have been largely limited to the nuclear field. When one considers the progression of such agreements, from the Treaty on the Limitation of Anti-Ballistic Missile Systems² and the SALT I Interim Offensive Agreement of 1972³ to the current efforts, one trend immediately stands out. This is the steady growth in both the complexity of these agreements and the length of time needed to consummate them. The two 1972 agreements were each only four pages in length, with a few Agreed Statements and Common Understandings.⁴ Agreed Statements in 1972 were subsidiary obligations of a more technical nature related to the two Agreements and initialed on the date of signature of the Agreements by the two negotiators.⁵ Common Understandings were simply formal statements from the negotiating record.⁶ The Interim Agreement also had a short Protocol.⁷ The two agreements were negotiated concurrently by the same delegations in about two and one-half years. This was considered a long negotiation at the time.

The Threshold Test Ban Treaty⁸ and the Peaceful Nuclear Explosions Treaty⁹ were negotiated in the middle 1970s and represent

² Treaty Between the United States and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, 23 U.S.T. 3435, T.I.A.S. No. 7503 [hereinafter ABM Treaty].

³ Interim Agreement Between the United States and the Union of Soviet Socialist Republics on Certain Measures With Respect to the Limitation of Strategic Offensive Arms, May 26, 1972, 23 U.S.T. 3462, T.I.A.S. No. 7504 [hereinafter Interim Agreement].

⁴ *Id.*; ABM Treaty, *supra* note 2.

⁵ See ABM Treaty, *supra* note 2, at 3456-57; Interim Agreement, *supra* note 3, at 3478-79.

⁶ *Id.*

⁷ See Interim Agreement, *supra* note 3, at 3469.

⁸ Treaty Between the United States and the Union of Soviet Socialist Republics on Limitations of Underground Nuclear Weapon Tests, July 3, 1974, 71 DEP'T ST. BULL. 217 (1974) [hereinafter Threshold Test Ban Treaty].

⁹ Treaty Between the United States and the Union of Soviet Socialist Republics on Underground Nuclear Explosions for Peaceful Purposes, May 28, 1976, 74 DEP'T ST. BULL. 802 (1976) [hereinafter Peaceful Nuclear Explosions Treaty].

a step up the ladder of complexity, primarily because of the detailed technical verification provisions contained in the Protocol to the Treaty.¹⁰ These provisions proved to be insufficient to ensure effective verification, however, and the two sides had to work out long and complicated additional technical Protocols to each Treaty. These Protocols were signed by Presidents Bush and Gorbachev on June 2, 1990, and will enter into force along with these two Treaties.¹¹

The SALT II Treaty on the Limitation of Strategic Offensive Arms¹² required seven years of difficult negotiations, and in an effort to be comprehensive and free from ambiguity, was long and complex. It had attached to it nearly 100 Agreed Statements and Common Understandings.¹³ In 1975, when drafting work began on the SALT II Treaty, the legal thinking relative to these forms had evolved since 1972. As in 1972, Agreed Statements were intended to be initialed by the negotiators and were designed to contain additional obligations of a technical nature. On the other hand, Common Understandings were to be conformed statements jointly read into the plenary record and were to be used for agreed interpretative matters. In the end, the distinction between the two became blurred and they were all collected in a single document, while retaining their association with specific provisions of the Treaty, and signed by the two Presidents.¹⁴ There was also a Memorandum on agreed data on arms covered by the SALT II Treaty as well as a Statement of Principles for future negotiations. The SALT II Treaty was criticized for a number of reasons, became caught up in the political debate in 1980, and was never ratified, although it was informally observed by both sides from 1979 to 1986.

The highly successful INF Treaty of 1987¹⁵ took six years of U.S.-U.S.S.R. negotiations and, given that it addressed only a few weapon systems and a small percentage of the nuclear forces of each Party, was even more technical and complex.¹⁶ This was largely due

¹⁰ See Threshold Test Ban Treaty, *supra* note 8, at 218.

¹¹ Protocol to the Treaty Between the United States and the Union of Soviet Socialist Republics on Limitation of Underground Nuclear Weapon Tests, June 2, 1990, 26 WEEKLY COMP. PRES. DOC. 867-68 (June 4, 1990); Protocol to the Treaty Between the United States and the Union of Soviet Socialist Republics on Underground Nuclear Explosions for Peaceful Purposes, June 2, 1990, *id.*

¹² Treaty Between the United States and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms, June 18, 1979, 79 DEP'T ST. BULL. 24 (1979) [hereinafter SALT II Treaty].

¹³ *Id.*

¹⁴ See SALT II Treaty, *supra* note 12.

¹⁵ Treaty Between the United States and the Union of Soviet Socialist Republics on the Elimination of Intermediate-Range and Shorter-Range Missiles, Dec. 8, 1987, *entered into force* June 1, 1988, *reprinted in* 27 I.L.M. 90 (1988) [hereinafter INF Treaty].

¹⁶ The INF Treaty addresses eight types of missile systems. Among others, it covers intermediate-range missiles such as the U.S. Pershing II and the BGM-1096, and the So-

to the dramatic new intrusive verification provisions. The Treaty text itself is moderately complex, but much of the technical detail is in the associated Protocols. These voluminous attachments contain the detailed data base and the procedures for eliminating systems and for carrying out on-site inspections.

The data base illustrates the growth in complexity in successive agreements. For each missile system covered by the Treaty, the INF data base sets forth comprehensive information on the numbers of missiles, launchers, and support structures and equipment at each deployment area and missile operating base (with coordinates) as well as at non-deployed locations such as repair and storage facilities. The data base also contains technical data relevant to each missile system. The data base in the SALT II Treaty consisted of numbers in only ten categories, but this was considered a breakthrough in openness at that time.¹⁷ The INF data base runs to seventy-three pages and is accompanied by an even longer document containing site diagrams and photographs.¹⁸ The START data base is still more elaborate.

The INF Treaty did not employ the legal device of Agreed Statements and Common Understandings. Instead, everything was included in the text of the Treaty and the attached Protocols, which were included as "integral parts" of the Treaty. The Protocols were given this status to emphasize their importance, although it was understood that if they were simply documents associated with the Treaty, and not an integral part thereof, they would be equally legally binding.

Because Protocols, such as the one on data, could be anticipated to change frequently during the course of implementation, inclusion of the Protocols as a formal part of the Treaty proper necessitated a provision in the Treaty and Protocols that technical changes to these Protocols to "improve the viability and effectiveness" of the Treaty would not constitute amendments.¹⁹ Thus, the INF Treaty created the novel legal form in which technical changes to documents, which are integral parts of a treaty, are not considered to be amendments subject to ratification. This is, of course, in addition to subsequent implementing agreements which also do not constitute amendments.

It should be noted that, in spite of the considerable technical detail in the INF Treaty, the two parties labored for another two

viet Union's RSD-10, R-12, and R-14. Shorter-range missiles included in the Treaty's provisions are the U.S. Pershing 1A, and the Soviet Union's OTR-22 and OTR-23. *Id.*

¹⁷ SALT II Treaty, Memorandum of Understanding Between the United States of America and the Union of Soviet Socialist Republics, *reprinted in* 18 I.L.M. 1137 (1979).

¹⁸ INF Treaty, Memorandum of Understanding Regarding the Establishment of the Data Base, *reprinted in* 27 I.L.M. 98 (1988).

¹⁹ INF Treaty, *supra* note 15, art. XIII, para. 1(b), at 97; Protocol Regarding Inspections, § XI(4), *id.* at 198; Protocol on Procedures, § V, *id.* at 189.

years after the Treaty had been ratified to work out a 150-page Memorandum of Agreement²⁰ containing additional detailed procedures to be followed in implementing the Treaty's verification provisions. Most of these additional procedures were classic implementing agreements, but a few changes to the Treaty text were made pursuant to the "viability and effectiveness" provisions. All this was somewhat ironic since, during the two years in which the negotiators in Geneva were working out these detailed procedures, the two parties were proceeding to carry out their treaty obligations quite successfully. This is not to say that the work of the two delegations during the 1988-1989 period was in vain. Rather it illustrates that, if there is sufficient goodwill among the parties, the lack of highly detailed agreed procedures can be overcome. Such procedures do serve, however, as a safeguard against the possibility that a lack of trust and goodwill could threaten compliance in the future.

When the Reagan administration entered the START negotiations in 1982, there was a determination to avoid the "fatal flaws" of the SALT II Treaty. Thus, one of the early U.S. goals was to produce a relatively simple treaty—one which could be readily understood by the man in the street and which was not festooned like a Christmas tree with the myriad Agreed Statements and Common Understandings that had so encumbered the SALT II Treaty. This seems like a highly naive goal now. The START Treaty—nine years in the making—is by a wide margin the most complicated arms control document ever negotiated. Though the Treaty text proper will be perhaps 100 pages in length and as readable as the two sides can possibly make it, the total document will be well over 800 pages in length and probably beyond the comprehension of the average adult. The INF model of having protocols integral to the treaty is utilized and expanded upon in the START Treaty.

Although lawyers are trained to take such documents in stride, the point is clear. The trend in both the complexity of arms control agreements, and the time and effort required to conclude them, is a fact of life. The reasons why these agreements require such long periods of negotiations are beyond the scope of this Article, though the great complexity and sensitivity of the subject matter itself obviously are major factors.

One unfortunate effect of such protracted periods of negotiations is that the diplomats are simply overtaken by the rapid pace of military technology. Thus, problems that one or both sides set out to solve can easily become uncontrollable or unsolvable if the talks

²⁰ INF Treaty, Memorandum of Agreement Regarding the Implementation of the Verification Provisions of the Treaty Between the United States and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, December 1989.

stretch out over many years. A general recognition of this problem could lead in the future to relatively short negotiations to deal with selected aspects of the arms control universe, rather than attempting to digest huge bites all at once. Once we have a START Treaty in place, it would not be too difficult from a technical point of view to amend it from time to time as discrete issues are resolved. This would be preferable to replacing the START Treaty with an even more complicated treaty emanating from a second phase of START.

At the 1990 Washington summit, the two sides agreed to begin future talks on strategic arms "at the earliest practical date" following the signing of the Treaty,²¹ which probably means sometime shortly after entry into force. In future agreements on strategic offensive arms, the sides may be able to make good use of the detailed on-site inspection procedures, as well as the procedures for converting or eliminating strategic weapons systems and their components worked out in the START Treaty. Thus, specific numbers of categories of weapons systems could be lowered, new limitations established, and so on, without renegotiating these various procedures. This would be a major saving in time and effort.

Compliance Issues

Probably no aspect of arms control agreements attracts greater attention, at least in the West, than the subject of compliance. During the negotiation and ratification process, the issue of whether or not a given provision can be verified is crucial. After the agreement enters into force, the question of whether or not the other party is violating a given provision can be a major political issue, with serious consequences for international relations. If a determination is made that a violation has occurred, the issue of an appropriate response is immediately raised and is generally not easy to answer.

For several years, the President of the United States has been required to submit to Congress an annual "Compliance Report."²² This Report, which has both classified and unclassified versions, lays out in some detail any violations, probable violations, and possible violations that the Administration has determined the Soviet Union has committed.

The Soviet Union traditionally demonstrated far less concern with verification than Western states. This began to change, however, during the negotiation of the INF Treaty, as a result of the more open political structures emerging in Moscow. Thus, members of the Supreme Soviet and Congress of Peoples' Deputies have begun to show interest in the verifiability of agreements, and current

²¹ Joint Statement on Future Negotiations on Nuclear and Space Arms and Further Enhancing Strategic Stability, 26 WEEKLY COMP. PRES. DOC. 864 (June 4, 1990).

²² Department of Defense Authorization Act, Pub. L. No. 99-145, 99 Stat. 583 (1986).

Soviet negotiators by no means adopt the entirely defensive stance of their predecessors on questions of verification. This is apparent in the START negotiations as well as the multilateral negotiations on Conventional Armed Forces in Vienna and Chemical Weapons in Geneva.

The Role of Ambiguity

The ideal agreement would have no ambiguities in its provisions and compliance with all of these unambiguous provisions would be verifiable with 100 percent confidence. This is obviously not possible in the real world of arms control. Several examples from earlier U.S.-U.S.S.R. agreements are instructive.

Generally, extraordinary efforts are made to avoid ambiguity, but these cannot always be successful. Probably the most celebrated case of ambiguity is the provision in the Limited Test Ban Treaty of 1963 which prohibits any nuclear explosion that "causes radioactive debris to be present outside the territorial limits of the State under whose jurisdiction or control such explosion is conducted."²³ The English word "debris" is interpreted to include *gaseous* radioactive debris, but the Russian word having equal status (*osadki*) is interpreted to mean *particulate* debris. This linguistic difference has had unfortunate consequences with many charges and denials of violations over the years.

Another interesting case of ambiguity was intentional and was basically a calculated risk. In the SALT II negotiations, the United States wanted to ban the encryption of telemetry²⁴ transmitted during flight tests of ballistic missiles, but the Soviet side refused to agree. The parties finally settled on an ambiguous formulation interpreting the provision prohibiting "deliberate concealment measures which impede verification by national technical means of verification with the provisions of this Treaty."²⁵ This clearly papered over a difficult and sensitive issue and one can assume both sides under-

²³ Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, art. I, para. 1(g), 14 U.S.T. 1313 (1963) [hereinafter Limited Test Ban Treaty].

²⁴ Encryption is "the act or process of enciphering or encoding." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 746 (1976). A telemeter is defined as "an instrument . . . for measuring the distance of an object from an observer or . . . an electrical apparatus for measuring a quantity, transmitting the result to a distant station, and there indicating or recording the quantity measured." *Id.* at 2350. Telemetry in the context of ballistic missile testing involves a signal containing internal measurements of performance transmitted from the missile in flight to ground stations.

²⁵ SALT II Treaty, Second Common Understanding, art. XV, para. 2, *reprinted in* 18 I.L.M. 1156 (1979):

Each Party is free to use various methods of transmitting telemetric information during testing, including its encryption, except that, in accordance with the provisions of paragraph 3 of Article XV of the Treaty, neither Party shall engage in deliberate denial of telemetric information, such as through the

stood that. The problem left unresolved was that there was no agreement on whether specific measures would or would not impede verification. The worst case did occur—the Soviet Union increased the encryption of telemetry on its newest ballistic missiles, the United States charged a violation, and the Soviets rejected the charge on the grounds that the practice did not impede verification.

The natural reaction to this bit of history is to say that the negotiators made a mistake in including in the Treaty an ambiguous provision which they knew had a good chance of leading to compliance problems. This may be the correct assessment and a useful lesson for the future.

There is, however, another view of the issue. Unlike the case of the “radioactive debris” noted earlier, which was evidently due to carelessness, the sides in this instance were taking a calculated risk with full knowledge of the possible consequences. At least from the U.S. perspective, the alternative to the ambiguous provision was no provision at all, which would have essentially legalized the offending practice. The agreed formulation, imperfect though it was, did allow the practice to be challenged and might have provided some restraint on subsequent behavior if the SALT II Treaty had been ratified and entered into force.

In any case, the story should have a happy ending, since, with the entire weight of the history of this issue on their shoulders, the sides are working out an unambiguous and effective prohibition on telemetry encryption in the START Treaty.

The Threshold Test Ban Treaty of 1974 provides another useful example of intentional ambiguity. The central provision of this treaty limited the yield of underground nuclear weapons explosions to no more than 150 kilotons.²⁶ Because it is impossible even for the designers of such devices to predict exactly the yield, the sides agreed, in a bilateral conversation held some months after the signature of the Treaty, that one or two “slight, unintended breaches” of the 150 kiloton limit in any given year would not be considered a violation.²⁷ “Slight” and “unintended” are not terms one would like to see in international arms control obligations. Nevertheless, they served a purpose in this context and have never caused a problem.

The general point to be made is that clarity and precision are usually highly desirable in arms control agreements. There may be instances, however, in which this standard may not be achievable or

use of telemetric encryption, wherever such denial impedes verification of compliance with the provisions of the Treaty.

Id.

²⁶ Threshold Test Ban Treaty, *supra* note 8, art. I, para. 1, at 217.

²⁷ U.S. ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS 186 (6th ed. 1990).

even desirable. Such questions must evidently be dealt with on a case-by-case basis.

In some cases there may be no ambiguity in the agreement, but the agreement may not provide concrete or detailed criteria for the application of broad provisions. In such a case normal legal rules of interpretation are followed. The most celebrated violation of such an agreement was the large radar built by the U.S.S.R. near Krasnoyarsk in Eastern Siberia.

The United States formally charged the Soviet Union with a violation of the ABM Treaty in 1984 soon after the radar near Krasnoyarsk was detected.²⁸ The ABM Treaty provides that new large phased-array radars (of which this radar is certainly one) which are not ABM battle management radars but rather are for purposes of early warning of missile attack must be built on the periphery of the national territory and oriented outward.²⁹ This is to minimize their use as ABM radars. The radar near Krasnoyarsk is not located on the periphery of the national territory and it is oriented inward across Siberia. The Soviets claimed the radar, which never reached operational status, was for space tracking. This claim attempted to exploit the fact that the ABM Treaty provided an exemption for radars for the purpose of tracking objects in outer space, but failed to establish criteria for distinguishing these from radars constrained by the Treaty.³⁰ However, this Soviet attempt to exploit an ambiguity in the Treaty lacked credibility.

The issue remained such a serious one that the United States finally declared that it would not sign further agreements on strategic arms until it was satisfactorily resolved.³¹ In a most unusual reversal, Foreign Minister Shevardnadze formally admitted to the Supreme Soviet in 1989 that the Krasnoyarsk radar had indeed been a violation of the ABM Treaty and promised to dismantle it.³² This highly positive development is a welcome change from the usual practice in which a party in violation of an arms control agreement may, in the best case, correct its offending actions, but without admitting a violation.

Compliance Fora and the Handling of Disputes

A fundamental starting point in thinking about bilateral arms control agreements is that they are self-enforcing. There is no court

²⁸ Message to the Congress Transmitting the President's Report on Soviet Noncompliance with Arms Control Agreements and a Fact Sheet, 20 WEEKLY COMP. PRES. DOC. 73, 76 (Jan. 23, 1984).

²⁹ ABM Treaty, *supra* note 2, art. VI, para. b, at 3442.

³⁰ ABM Treaty, *supra* note 2, Agreed Statement F, at 3457.

³¹ Message to Congress Transmitting the President's Report on Soviet Noncompliance with Arms Control Agreements, 24 WEEKLY COMP. PRES. DOC. 1579 (Dec. 2, 1988).

³² Pravda, Oct. 24, 1989 (2d ed.), at 2-4.

with legal jurisdiction in such matters, nor is mediation by a third party or parties an option that appeals to either the United States or the Soviet Union. There are good reasons for this. The matters under consideration are highly sensitive ones affecting each country's national security. In addition, the means by which the relevant data were gathered could, if revealed to third parties, compromise important intelligence sources and methods.

There have been suggestions put forward from time to time that multilateral verification mechanisms could be applied to bilateral agreements. One could, for example, imagine on-site inspection teams that include nationals of third countries. The positive experience with International Atomic Energy Agency³³ inspectors could provide a precedent. In principle, one could argue that any violation would be exposed to the whole world by respected third parties and this could serve as a powerful deterrent to violations.

For the reasons noted above, it seems likely that verification and compliance issues related to U.S.-U.S.S.R. agreements will rest solely in their own hands for the foreseeable future. Nevertheless, other countries could begin to influence these issues in the future, even without the consent of the two parties. Many countries now have sophisticated seismic capabilities. They might well have information that could support or cast doubt upon a charge that a suspicious nuclear explosion violated a bilateral agreement on nuclear testing. Likewise, as more and more countries acquire highly capable space-based imaging systems, a similar situation could evolve in this area. In any case, the goal of all those interested in the rule of law should be to strengthen, make more reliable, and depoliticize multilateral mechanisms for monitoring international arms control agreements, whether or not they eventually have a role to play in bilateral agreements.

Certain mechanisms created by the United States and the Soviet Union to address compliance are well-established. The ABM Treaty created the Standing Consultative Commission (SCC).³⁴ The SCC has a mixed record, successfully dealing with a number of disputes and ambiguities in its early years, but becoming somewhat less effective in handling the Krasnoyarsk radar problem and certain other issues arising from the SALT II Treaty that became significant political issues. In the latter part of the Reagan administration more and more reliance was placed on regular diplomatic channels and appeals to public opinion to address compliance problems associated with U.S.-U.S.S.R. bilateral arms control treaties. This policy proved

³³ See generally Burns, *Overview of U.S. Arms Control Objectives*, 89 DEP'T ST. BULL. 43 (1989).

³⁴ ABM Treaty, *supra* note 2, art. XIII, at 3444.

to be effective in the Krasnoyarsk case, but it increased the difficulty of addressing this and other issues in the SCC.

Successive agreements are creating other compliance fora similar to the SCC. The INF Treaty created the Special Verification Commission (SVC).³⁵ There will be a Joint Consultative Commission³⁶ to raise issues concerning the Threshold Test Ban and Peaceful Nuclear Explosion Treaties, and the START Treaty envisages a Joint Compliance and Inspection Commission. Some of these would meet on a regular schedule, while others would meet only as necessary. As agreements and fora for monitoring them proliferate, an argument could be made for consolidating these fora into a single high-level body in more-or-less permanent session to deal with such matters.

Whether the sides end up with one such body or several, it is important that they be effective. Naturally, such bodies will be only as efficient and effective as the two sides jointly allow them to be. The problem is that they will almost certainly encounter ambiguous situations, differing interpretations of specific provisions, and honest disagreements, as well as clean-cut issues that can be readily resolved. When difficult situations arise, if the relevant forum cannot resolve the problem after a reasonable amount of time and effort, the issue should be raised to a higher level and resolved. Allowing a compliance problem to fester for years can only poison the atmosphere and undermine the legal foundations of arms control that have been painstakingly constructed over many years.

Issues Related to On-Site Inspection

At Reykjavik in 1986, President Reagan and General Secretary Gorbachev agreed on the principle of intrusive on-site inspection for the INF Treaty.³⁷ The INF Treaty is the first arms control agreement in force with truly significant on-site inspection provisions. The Antarctic Treaty of 1961³⁸ and the Outer Space Treaty of 1967³⁹ are two multilateral treaties which contain provisions for on-site inspection, but these provisions are of marginal importance.

During the first year that the INF Treaty was in force, the United States carried out some 200 inspections on the territory of the Soviet Union, and the Soviet Union carried out a large number of inspec-

³⁵ INF Treaty, *supra* note 15, art. XIII, at 97.

³⁶ Peaceful Nuclear Explosions Treaty, *supra* note 9, art. V, at 803.

³⁷ Statement to the United Nations First Committee by Soviet Deputy Foreign Minister V.F. Petrovsky, Oct. 14, 1986, 41 U.N. GAOR Supp. (No. 11) at 38-41, U.N. Doc. A/C.1/41/PV (1987).

³⁸ Antarctic Treaty, Dec. 1, 1959, art. VII, para. 1, 12 U.S.T. 794, 797, T.I.A.S. No. 4780, at 4.

³⁹ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, art. XII, 18 U.S.T. 2410, 2415, T.I.A.S. No. 6347, at 4.

tions at United States bases in Western Europe and the United States. The START Treaty will provide for many more such inspections with much more complex provisions than are contained in the INF Treaty. On-site inspections are now very much a feature of developing international arms control law, being found in the developing multilateral Conventional Armed Forces in Europe and Chemical Weapons Treaties in addition to the START Treaty.

Two important legal questions with respect to on-site inspections are proprietary rights and access by inspectors to privately owned facilities. Both are complicated and difficult questions when considering something like a treaty banning chemical weapons, but in the bilateral U.S.-Soviet nuclear arms control negotiations they are less significant.

In the United States, the Fourth Amendment to the United States Constitution protects private persons from unreasonable searches and seizures, which means that unless there is a governmental connection, a warrant must be obtained to permit any official of the government (and any foreign inspector) to enter a privately owned facility. There are important legal procedures that must be followed to obtain such a warrant, but the necessary time that would be required would negate the value of any arms control inspection which would require a warrant. This is not a serious problem in the START context, however, as virtually all the privately owned facilities which would be subject to inspections under the Treaty are owned by business organizations which are under contract to the government. Agreement to warrantless inspections can simply be made a clause in the contract.

Appropriate protection of proprietary data is not as clear a matter. Presumably, an inspector from the Soviet Union could, in the course of an inspection, become exposed to proprietary data. As a practical matter, however, this is not a significant issue in the START Treaty, in part because inspections largely will consist of simply counting items and in part because of the limited degree of competition in manufacturing strategic offensive systems. In addition, inspectors can be legally bound not to disclose information received during inspections except under specified conditions. A provision to this effect was included in the INF Treaty⁴⁰ and can set a useful precedent for other agreements which provide for intrusive on-site inspections.

Bilateral Versus Multilateral Treaties

This Article has examined problems associated with U.S.-Soviet

⁴⁰ See U.S. ARMS CONTROL AND DISARMAMENT AGENCY, *supra* note 27, at 435 (history and text of INF Treaty, Protocol Regarding Inspections, Dec. 8, 1988, § VI, para. 2).

bilateral arms control treaties. A question often asked is whether and how such treaties could be expanded to include other parties.

In answering this question, one should distinguish between nuclear testing treaties and treaties limiting strategic arms. It is unlikely that either the Soviet Union or the United States would agree to include third countries in agreements limiting U.S.-Soviet strategic arms. These agreements are designed to establish stable U.S.-Soviet balances in these systems and the introduction of third-country strategic systems would only greatly complicate this objective.

Nuclear testing agreements are another matter, however. The Limited Test Ban Treaty of 1963 was negotiated among the United States, the United Kingdom and the Soviet Union. This Treaty now has well over 100 parties. Likewise, the Threshold Test Ban Treaty and its companion Peaceful Nuclear Explosions Treaty after they enter into force could be expanded to include the five nuclear powers should the three other nuclear weapon states be willing to undertake these obligations.

Conclusion

This Article has examined some legal questions associated with bilateral arms control treaties. As the law of international arms control continues to develop, more and more of these questions should become settled. Quite complex and important issues are involved in the U.S.-Soviet bilateral arms control process and the expansion and strengthening of the relevant international law can only make the process more effective.

