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David Lenefsky

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THE ENTRY-INTO-FORCE PROVISION OF THE COMPREHENSIVE TEST BAN TREATY: AN EXAMPLE OF BAD INTERNATIONAL LAWYERING

*David Lenefsky**

The Comprehensive Test Ban Treaty¹ (“CTBT”), which President Clinton signed on September 24, 1996, had an ignoble origin and has an uncertain future. On August 20, 1996, India blocked the sixty-one nation Conference on Disarmament from forwarding the just completed text of the CTBT to the United Nations.² The treaty would otherwise have been opened for signature by member states on September 17, 1996, when the U.N. General Assembly was scheduled to begin its annual regular session.³ India’s position was that the CTBT should not be adopted because it failed to include an obligation by the nuclear-weapon countries to “bring about a halt to the qualitative development, upgradation and improvement of nuclear weapons.”⁴

The problem is not so much the procedure governing the work of the Conference on Disarmament, which requires consensus before an agreement is passed on to the United Nations for formal adoption.⁵ By a planned end run around India and the Conference, 121 countries committed to a worldwide testing ban brought the CTBT to a special session of the General Assembly on September 9, 1996, and it was endorsed the next day by 158

* LL.B., 1963, LL.M., 1964, New York University; Member, New York Bar.

1. Comprehensive Test Ban Treaty, *opened for signature* Sept. 24, 1996, 35 I.L.M. 1439.

2. *See Report of the Conference on Disarmament*, U.N. GAOR, 51st Sess., Supp. No. 27, at 26, U.N. Doc. A/51/27 (1996).

3. *See* Barbara Crossette, *U.S. Steps Up Effort to Get India to Join A-Test Ban*, N.Y. TIMES, Aug. 10, 1996, at A3.

4. *Report of the Conference on Disarmament*, *supra* note 2, at 26.

5. *See Rules of Procedure of the Conference on Disarmament*, U.N. Conference at Geneva, Art. VI, para. 18, U.N. Doc. CD/8/Rev. 7 (1996).

votes to three, with five abstentions.⁶

Nor is the problem that the CTBT is the first post-World War II multilateral arms control agreement which requires ratification by all declared nuclear weapon countries—the United States, the United Kingdom, Russia, China and France—before it comes into force.⁷ All five were observing a voluntary testing moratorium, and all had announced their intention to sign and ratify the treaty.⁸

Rather, the problem is that the CTBT provides that it comes into force only after it is ratified by all forty-four countries listed in Annex 1.⁹ These forty-four countries have been identified by the International Atomic Energy Agency as possessing nuclear reactors used either for power or research. The Annex includes five countries who pose special non-proliferation concerns: Israel, Iran, India, Pakistan, and North Korea.

Iran, despite calling the CTBT a defective instrument “that does not reflect an international consensus” and is “marred by discrimination, shortsightedness and ambiguity,” nonetheless signed it on September 24, 1996.¹⁰

The next day, Israel signed the CTBT and stated that it would ratify the Treaty. But Israel also kept its option not to ratify, saying it would “consider ratification of that Treaty depending upon developments in the region, particularly the adoption of that Treaty by the major countries.”¹¹

Since India had already said it would not sign the CTBT, Pakistan was able to remain ambivalent, stating that it would sign if India would.¹²

Then, on May 11, 1998, India shocked the world by exploding the first

6. See G.A. Res. 50/245, U.N. GAOR, 50th Sess., U.N. Doc. A/RES/50/245 (1996). Barbara Crossette, *U.N. Endorses a Treaty to Halt All Nuclear Testing*, N.Y. TIMES, Sept. 11, 1996 at A3.

7. The Nuclear Non-Proliferation Treaty defines a nuclear weapons country as “one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967.” Treaty on the Non-Proliferation of Nuclear Weapons, art. IX, para. 3, July 1, 1968, 21 U.S.T 483, 492, 729 U.N.T.S 483, 489 (entered into force Mar. 5, 1970).

8. See Principles and Objectives for Nuclear Non-Proliferation and Disarmament, NPT/Conf. 1995/32/Dec.2, para. 4(a). The Soviet Union (Russia) had not tested since 1991, the U.K. since 1992, the U.S. since 1993, and France and China, who tested in 1996, January and July, respectively, had announced a halt. See Arms Control Today, *Factfile: The Nuclear Testing Tally* (visited Sept. 8, 1999) <<http://www.armscontrol.org/ACT/May98/ffmy98.htm>>.

9. See Comprehensive Test Ban Treaty, *supra* note 1, at 1457.

10. U.N. GAOR, 51st Sess., 4th Plenary mtg. at 24, U.N. Doc. A/51/PV.4 (1996).

11. U.N. GAOR, 51st Sess., 20th Plenary mtg. at 14, U.N. Doc. A/51/PV.20 (1996).

12. See *id.* at 3.

of five nuclear devices in three days.¹³ Pakistan followed suit, exploding five devices seventeen days later.¹⁴ After intense international pressure led by U.S. economic sanctions imposed under the Nuclear Proliferation Prevention Act,¹⁵ Pakistan and India announced that they would commence a moratorium on further explosions and comply with the CTBT by September 1999.¹⁶ Whether India and Pakistan will follow through is uncertain since leaders in both countries must deal with unstable governing coalitions that are vulnerable to swings in public opinion and pressure from militants.¹⁷

North Korea, which abstained from the September 9, 1996 vote to endorse the CTBT,¹⁸ has since failed to state whether it will sign, limiting its comments to bitter criticism of the nuclear-weapon countries, particularly the U.S.¹⁹

The drafting of a multilateral arms control agreement such as the CTBT allows any one non-nuclear-weapon country to forestall its entry into force unprecedented. This is particularly true when that non-nuclear-weapon country is North Korea, a rogue country, or India, which for decades kept its nuclear option open and actually exploded a nuclear device in May 1974.²⁰

A review of the entry-into-force provisions of multilateral arms control agreements negotiated since the Second World War demonstrates that the CTBT's entry-into-force provision constitutes bad policy and bad lawyering.

The first post-World War II arms control agreement, the Antarctic Treaty, was signed on December 1, 1959 by all twelve countries involved in its negotiation.²¹ The treaty internationalized and demilitarized the

13. See John F. Burns, *India Sets 3 Nuclear Blasts, Defying a Worldwide Ban; Tests Bring a Sharp Outcry*, N.Y. TIMES, May 12, 1998, at A1.

14. See John F. Burns, *Nuclear Anxiety: The Overview; Pakistan, Answering India, Carries Out Nuclear Tests; Clinton's Appeal Rejected*, N.Y. TIMES, May 29, 1998, at A1.

15. 22 U.S.C. 6301-6305 (1995).

16. See U.N. GAOR, 53rd sess., 12th Plenary mtg. at 12, U.N. Doc. A/53/PV.12 (1998); U.N. GAOR, 53rd Sess., 13th Plenary mtg. at 16, U.N. Doc. A/53/PV.13 (1998).

17. See Jonah Blank, Thomas Omestad, and Bruce B. Auster, *Balance of Terror: Why India vs. Pakistan is not like America vs. Russia*, U.S. NEWS & WORLD REPORT, June 8, 1998 at 37.

18. See Comprehensive Test Ban Treaty, *supra* note 1, at 1439.

19. See U.N. GAOR, 51st sess., 12th Plenary mtg. at 11, U.N. Doc. A/51/PV.12 (1996).

20. See THE INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, STRATEGIC SURVEY 1974/75 (Oxford University Press, 1975).

21. This included the three nuclear weapons countries at that time: the U.S., the U.K., and the U.S.S.R. See Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 795, 402 U.N.T.S. 71.

Antarctic continent and provided for its cooperative exploration and future use.²² Its entry-into-force provision provided that the treaty would take effect upon ratification by all twelve signatories.²³ Since all twelve signatories were treaty sponsors, there was no doubt about its coming into force. This occurred on June 23, 1961.²⁴

The next multilateral arms control treaty was the Limited Test Ban Treaty, negotiated and signed in 1963 by the U.S., the U.K., and the U.S.S.R.²⁵ It prohibits any nuclear explosion in the atmosphere, in outer space, or underwater.²⁶ Its entry-into-force provision requires ratification only by its three original signatories.²⁷ Those parties ratified the treaty on October 10, 1963.²⁸ Since then, more than one hundred non-nuclear-weapon countries have ratified the treaty, including India, Israel, and Iran.²⁹ Pakistan deposited its instrument of accession some twenty-five years after signing.³⁰ North Korea has never signed.³¹ Because the Limited Test Ban Treaty did not outlaw nuclear explosions underground, a comprehensive treaty was considered imperative by arms control advocates.³²

The Outer Space Treaty,³³ opened for signature in 1967, is another example of a non-armament treaty. Like the Antarctic Treaty, it sought to prevent military competition in a previously peaceful area. The treaty outlawed the use of outer space for military purposes, including the moon and other celestial bodies.³⁴ Its entry-into-force provision required

22. *See id.* at 12 U.S.T. 796, art. I.

23. *See id.* at 12 U.S.T. 800, art. XIII, para. 5.

24. *See id.* at 12 U.S.T. 794.

25. *See Treaty Banning Nuclear Weapon Tests in the Atmosphere, In Outer Space and Under Water*, Aug. 5, 1963, 14 U.S.T. 1313, 480 U.N.T.S. 43.

26. *See id.* at 14 U.S.T. 1313, art. I.

27. *See id.* at 14 U.S.T. 1318, art. III, para. 3.

28. *See id.* at 14 U.S.T. 1313.

29. *See Arms Control and Disarmament Agency, Treaty Banning Nuclear Weapon Tests in the Atmosphere, In Outer Space and Under Water: Signatories* (visited Sept. 9, 1999) <<http://www.acda.gov/treaties/lbt1.htm>>.

30. *See id.* Pakistan signed Aug. 14, 1963, and on March 3, 1988 deposited its instrument of accession.

31. *See id.*

32. *See THE INTERNATIONAL INSTITUTE FOR STRATEGIC STUDIES, STRATEGIC SURVEY 1992/93 218* (Oxford University Press, 1993).

33. *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, 18 U.S.T. 2410, 610 U.N.T.S. 205.

34. *See id.* at 18 U.S.T. 2414, art. IV.

ratification by only five countries. The treaty mandated that these five countries include its three nuclear-weapon sponsors—the U.S., the U.K., and the U.S.S.R.—and any two other countries.³⁵ To date, a majority of countries have acceded to the treaty.³⁶

Next came the Nuclear Non-Proliferation Treaty³⁷ (“NPT”), completed and opened for signature in 1968. Because the NPT sought to prohibit non-nuclear-weapon countries from acquiring nuclear explosives, it was only natural that the NPT was the first post-World War II multilateral arms control agreement to require a large number of countries to ratify before it came into force. Accordingly, the NPT provided that it would come into force after ratification by its three nuclear-weapon sponsors—the U.S., the U.K., and the U.S.S.R.—plus forty other states.³⁸ No country was identified as one of the forty required to ratify before the NPT came into force. The NPT came into force on March 5, 1970.³⁹ More than 180 countries, including Iran⁴⁰ and North Korea,⁴¹ are parties to the NPT, making it the most universally accepted arms control agreement in history.⁴² However, Israel, India and Pakistan have never signed.⁴³

The Seabed Arms Control Agreement,⁴⁴ opened for signature in 1971, was the third non-armament international agreement. The Seabed Treaty came into force on May 18, 1972, when it was ratified by twenty-two countries.⁴⁵ Again, like the Outer Space Treaty and the NPT, no particular country other than the same three nuclear-weapon sponsors had to ratify the Seabed Treaty before it came into force. Ratification by any nineteen

35. *See id.* at 18 U.S.T. 2419, art. XIV, para. 3.

36. *See* Arms Control and Disarmament Agency, *Outer Space Treaty* (visited Sept. 9, 1999) <<http://www.acda.gov/treaties/space5.txt>> .

37. Treaty on the Non-Proliferation of Nuclear Weapons, *supra* note 7, 21 U.S.T. 483, 729 U.N.T.S. 483.

38. *See id.* at 21 U.S.T. 492, art. IX, para. 3.

39. *See* Arms Control and Disarmament Agency, *Signatories and Parties to the Treaty on the Non-Proliferation of Nuclear Weapons* (visited Sept. 9, 1999) <<http://www.acda.gov/treaties/npt1.htm>> .

40. Ratification deposited on Feb. 2, 1970. *See id.*

41. Instrument of Accession deposited on Dec. 12, 1985. *See id.*

42. *See id.*

43. *See id.*

44. Treaty on the Prohibition of the Employment of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, Feb. 11, 1971, 23 U.S.T. 701, 955 U.N.T.S. 115.

45. *See id.* at 23 U.S.T. 708, art. X, para. 3.

countries was sufficient.⁴⁶

The Biological Weapons Convention,⁴⁷ opened for signature in April 1972, was the first international agreement since World War II to provide for the actual elimination of an entire class of weapons. Its entry-into-force provision is identical to that of the Seabed Treaty.⁴⁸

The Environmental Modification Convention,⁴⁹ which prohibits environmental modification techniques for hostile purposes, came into force on October 5, 1978.⁵⁰ Pursuant to its terms, twenty countries were required to ratify before it came into force.⁵¹ This Convention does not require any particular country to ratify before it takes effect,⁵² not even the nuclear-weapon countries, which are presumably most likely to possess environmental modification weapons. In fact, the U.S. did not ratify the Convention until December 13, 1979, fifteen months after it came into force.⁵³

Finally, the 1993 Chemical Weapons Convention⁵⁴ mandates the destruction of chemical weapons within ten years of its entry into force. This was achieved through its ratification by sixty-five countries.⁵⁵ Like the Environmental Modification Convention, no single country, including those which are known or believed to possess chemical weapons, is required to ratify before the treaty takes effect.⁵⁶ The Chemical Weapons Convention

46. *See id.*

47. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, April 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

48. *See id.* at 26 U.S.T. 592, art. XIV, para. 3.

49. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, 1108 U.N.T.S. 151.

50. *See* Arms Control and Disarmament Agency, *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques* (visited Sept. 9, 1999) <<http://www.acda.gov/treaties/environ1.htm>> .

51. *See* Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, *supra* note 48, at 31 U.S.T. 340, art. IX, para. 3.

52. *See id.*

53. *See id.* at 333.

54. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800.

55. *See id.* at art. XXI, para. 1.

56. *See id.*

came into force on April 29, 1997.⁵⁷

Obviously, the diplomatic and legal policy regarding entry-into-force provisions underlying all multilateral arms control agreements prior to the CTBT was consistent: Get the treaty into effect as soon as possible. Then count on international diplomacy to get the holdouts on board.

After all this diplomatic and legal experience, why then did the countries committed to the CTBT negotiate such an uncharacteristically difficult, if not impossible, entry-into-force provision? Even India opposed the requirement that its ratification be a condition of the CTBT coming into force.⁵⁸

The U.S. had long argued that entry into force of the CTBT should depend upon ratification only by the five nuclear-weapon countries plus a specified number of other countries, but without identifying which ones.⁵⁹ The other four nuclear-weapon countries wanted to require countries like India, Pakistan and Israel that have unacknowledged nuclear-weapon programs to ratify as well.⁶⁰ The final CTBT text requiring ratification by all countries in possession of nuclear reactors was the result of a compromise.⁶¹

The Clinton Administration, keen to get its strong verification and enforcement provisions accepted and anxious to get agreement on a treaty text in time for the American presidential election in November,⁶² exchanged acceptance of its verification and enforcement provisions for acceptance of the present language governing entry into force.⁶³ That the U.S. compromised along these lines with the British, who incredulously expressed interest in resuming nuclear testing but who are completely dependent upon U.S. testing facilities in Nevada,⁶⁴ and with Russia and China, which were both entangled in serious domestic leadership

57. See Arms Control and Disarmament Agency, *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques* (visited Sept. 9, 1999) <<http://www.acda.gov/treaties/cwctext.htm>> .

58. See *Report of the Conference on Disarmament*, *supra* note 2, at 28.

59. See The Acronym Institute, *The Treaty Provisions, Accessions, Entry Into Force* (visited Sept. 9, 1999) <<http://www.acronym.org.uk/a10treat.htm>> .

60. See Barbara Crossette, *Nuclear Test Ban Negotiators to End Talks Without a Treaty*, N.Y. TIMES, June 28, 1996, at A3.

61. See The Acronym Institute, *supra* note 60.

62. See Crossette, *supra* note 3.

63. See The Acronym Institute, *supra* note 60.

64. See STRATEGIC SURVEY 1992/93, *supra* note 31, at 218.

problems,⁶⁵ was at best hasty and at worst a diplomatic blunder.

What then should the U.S. and the vast majority of U.N. member states that wanted a legally binding CTBT have done? The treaty text which the General Assembly opened for signature should have been renegotiated to omit the requirement that any particular non-nuclear-weapon country must ratify the CTBT before it would come into force. The U.S. feared that if the entry-into-force provision was renegotiated at the General Assembly, then the door would have been opened to renegotiate and weaken the verification and enforcement provisions.⁶⁶

The foremost principle, however, should have been the following: do not negotiate a treaty that realistically would never come into force. If opening the treaty text to change its entry-into-force provision carried the risk that other treaty terms would be renegotiated, then the parties should have undertaken that risk. In the meantime, the five nuclear-weapon countries had committed themselves to a complete testing moratorium.⁶⁷ The international pressure against non-nuclear-weapon countries testing would not have been any less if negotiations on a CTBT had continued than it would have been under a treaty which did not have full legal force. The Indian and Pakistani nuclear explosions in May 1998⁶⁸ are proof positive of that.

The CTBT provides that in the event the treaty has not yet entered into force three years after it is open for signature, then a majority of those states which have ratified it can convene a conference for the purpose of taking "measures consistent with international law . . . to facilitate the early entry into force of the Treaty."⁶⁹ Such a conference is scheduled to be held in either late September or early October 1999.⁷⁰ This conference cannot, however, waive or amend the uniquely troublesome entry into force

65. See Kenneth Lieberthal, *A New China Strategy*, FOREIGN AFFAIRS, Nov./Dec. 1995, at 35; Strobe Talbott, *Democracy and the National Interest*, FOREIGN AFFAIRS, Nov./Dec. 1996, at 47.

66. See The Acronym Institute, *supra* note 58.

67. See Principles and Objectives for Nuclear Non-Proliferation and Disarmament, *supra* note 8.

68. See Burns, *supra* notes 13 and 14.

69. Comprehensive Test Ban Treaty, *supra* note 1, at art. XIV, para. 2.

70. See Daryl Kimball, *The Test Ban Treaty on the Eve of the Article XIV Conference on Entry Into Force*, 37 DISARMAMENT DIPLOMACY 1 (May 1999) <<http://www.acronym.org.uk/370pan.htm>> .

provision.⁷¹

History is full of ironies, and the history of the CTBT is no exception. The U.S., having taken the lead in negotiating all the multilateral arms control agreements since 1945, let slip the opportunity to conclude a fully binding agreement to ban all nuclear weapon tests for the first time in history.

An anecdote about President Kennedy and the Limited Test Ban Treaty is worth repeating. Immediately after the treaty was concluded the President began to talk about its importance. He was initially uncertain about how the public, no less the U.S. Senate, would respond.⁷² The President was surprised that the public responded so favorably. In turn he began to talk more and more about the treaty, and the public became more and more enthusiastic. In light of this enthusiasm, the President speculated that he had probably missed an opportunity to successfully push for a Comprehensive Test Ban.⁷³

71. Amendments to the treaty can only be adopted after its entry into force. *See* Comprehensive Test Ban Treaty, *supra* note 1, art. VII, para. 1. Ratifying countries can, however, agree to treat the treaty as in force provisionally for themselves. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. XXV, 8 I.L.M. 679.

72. *See* THEODORE C. SORENSON, KENNEDY 734 (1965).

73. *See* Tom Wicker, *30 Years of Futility*, N.Y. TIMES, Nov. 22, 1985, at A35.

