

---

# WHITHER THE TREATY? THE U.S. LEGAL APPROACH TO ARMS CONTROL

Rizwan Ladha

Tufts University,  
The Fetcher School

---

*Over time, the United States has used a full spectrum of legal vehicles available at its disposal to advance its arms control agenda. This paper will examine four principal forms of legal agreement that have been used by the United States in arms control: the formal treaty, the executive agreement, the non-legally binding pledge, and the unilateral action. The paper will submit a short case study on each vehicle, and then will apply the lessons of these four models to the recent U.S. experience with the New START arms control treaty. Finally, this paper will extract the central lesson from the exercise: that by and large, domestic political circumstances drive the legal form of an arms control agreement, not vice versa, and that this flexibility in legal approach has been sufficient to overcome nearly all domestic political circumstances and continue making progress on arms control.*

## Introduction

Over the past five decades, the United States has had significant measurable success in arms control and nuclear weapons reductions, with both Russia and the U.S. having lowered their combined nuclear forces from a high of nearly 70,000 warheads in the 1980s to fewer than 22,000 today.<sup>1</sup> For the United States, this success has been achieved not through the repeated application of one formula or framework, but rather through the employment of a diverse set of legal approaches to arms control, including the formal treaty, the executive agreement, the non-legally binding pledge and unilateral action. Each of these vehicles offers certain benefits and disadvantages that can be judged on the basis of objective criteria, such as the depth of the agreement, the robustness of its verification provisions and its enforcement mechanisms. At the same time, because any international agreement signed by the United States is then subject to a

---

1 Robert S. Norris and Hans M. Kristensen, "Global nuclear inventories, 1945-2010," *Bulletin of the Atomic Scientists* 66, no. 4 (July/August 2010): 78.

domestic approval process, each of the four mechanisms listed above present a separate set of advantages and disadvantages with respect to the likelihood that the agreement would be legally and politically accepted by U.S. policymakers.

In examining the history of arms control agreements in the United States and the political environment corresponding to each agreement, this paper will argue that the answers to domestic political questions have driven the legal form of the agreement, instead of the other way around. That is, rather than decide on the legal vehicle based on a set of arms control-specific criteria detached from domestic political factors, U.S. arms control negotiators have taken the opposite approach, choosing the legal mechanism of the agreement by prioritizing domestic factors over objective agreement-specific criteria. This paper will examine the legal and operational efficiency of the four different mechanisms mentioned above, taking into account the relative strengths and weaknesses of each vehicle in the arms control arena. This paper will then contextualize each mechanism through a case study, in order to demonstrate how these vehicles have been utilized in the past to circumvent nearly any set of domestic political circumstances. Finally, this paper will analyze the most recent U.S. case of the New START Treaty, and will conclude with implications of the central argument going forward as the United States continues to advance its arms control agenda.

### **Mechanism I: The Formal Treaty**

In the arms control arena, the four legal mechanisms listed above present themselves on a spectrum, wherein the formal treaty is the most stringent and robust mechanism and the unilateral action is the weakest. As will become clear through this paper, a direct correlation exists between the strength of the agreement and the difficulty of the domestic approval process for that agreement. That is, as the agreement becomes more formal and binding, it faces a more substantial barrier to approval. The inverse also holds true, whereby an agreement that will pass with relative ease domestically is usually less robust. With this relationship in mind, we examine the most binding legal vehicle, the formal treaty.

Broadly defined, a formal treaty is a legally binding written agreement, undertaken by two or more states, that commits the parties to an explicitly de-

defined set of principles. The 1969 Vienna Convention on the Law of Treaties<sup>2</sup> defines the formal treaty as:

... an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

As mentioned above, this type of agreement is considered the legally strongest and most binding of the various mechanisms explored in this paper. Arguably, for these same reasons it is also the most difficult to negotiate, draft, sign and ratify.

The formal treaty presents certain advantages and should be considered an important instrument in a country's international agreement toolbox. First, due to the intense amount of effort required to negotiate, draft, sign and ratify a legally binding treaty, there is generally a high probability that once ratified, the treaty's provisions will be upheld by its signatories, who have invested so much time, resources (financial and human) and political capital to see the treaty through to acceptance that not complying with the provisions of the treaty would invalidate the efforts that were taken to achieve that acceptance. Of course, there are exceptions to this rule. Abram Chayes and Antonia Handler Chayes outline in their book *The New Sovereignty* a number of reasons why states may choose not to comply with a treaty, or may choose to withdraw from it, even after ratification.<sup>3</sup> But generally, and particularly with respect to arms control, states that sign and ratify a formal treaty governing some aspect of nuclear weapons and/or delivery systems tend to abide by their obligations.

An additional factor that provides a compelling reason for the use of formal treaties in arms control is that of monitoring, verification and inspection to ensure compliance with the provisions of a treaty. Arguably, in many other foreign policy arenas, including environmental issues, human rights and trade, compliance with a treaty can be checked through some form of non-intrusive observation, which can also, and equally importantly, detect and confirm non-compliance. However, when dealing with a country's nuclear weapons stockpiles, fissile materials, delivery systems and weapons development complex,

2 It is of interest that the United States, despite having not ratified the Vienna Convention, abides by it in large part – a behavioral phenomenon in treaty compliance described by Beth Simmons as a “false negative.” Beth Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge, UK: Cambridge Univ. Press, 2009), 67-80.

3 Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995), 197-228.

which are central to national security and to some degree are state secrets, intrusive observation is required to ensure treaty compliance.

At the same time, there are challenges to arms control posed by the formal treaty, the foremost of which is the ratification process. The formal treaty, generally speaking, does require some instrument of domestic acceptance by dualist signatory states, whether by ratification, approval, or other means. In the case of the United States, the process of ratification requires the advice and consent of at least two-thirds of the Senate – a domestic mechanism enshrined in Article II of the United States Constitution<sup>4</sup> and put in place to ensure that approval of any treaty will have bipartisan support. To facilitate the vote of the Senate and present the treaty as more favorable to those Senators who may object to the treaty in part or in whole, a resolution of ratification may be submitted to the Senate Foreign Relations Committee, which then deliberates on the treaty and its accompanying resolution text. Once the Committee approves the documents, making any amendments to the resolution text as it sees fit, the treaty is then presented to the Senate floor for debate and a vote.<sup>5</sup>

The difficulty within this process, by which the domestic national legislature grants its approval of a treaty governing the relations of the state with the international community, is what Robert Putnam calls the “two-level game.”<sup>6</sup> We might also call this complication the collision of domestic politics with international diplomacy, which ensures that Congress will not blindly accept any treaty negotiated and signed by the President and/or his appointees. This fail-safe has been useful in the past as a mechanism to ensure that no international treaty signed by the United States violates the tenets of the U.S. Constitution or the political sovereignty or territorial integrity of the United States. At the same time, it presents on occasion a challenge in the form of domestic politicking by Senators who might pander to their domestic constituents for the sake of reelection, or to gain support in another policy issue area, rather than weigh the treaty

---

4 Article 2, Section 2 of the Constitution of the United States declares that the president “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur.”

5 The resolution of ratification mechanism, as discussed later in this paper, was utilized most recently in September 2010 in the case of the New START Treaty. Congressional Research Service, Library of Congress, *Treaties and Other International Agreements: The Role of the United States Senate* (Washington, D.C.: U.S. Government Printing Office, 2001), 136.

6 Putnam describes the two-level game thusly: “At the national level, domestic groups pursue their interests by pressuring the government to adopt favorable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures while minimizing the adverse consequences of foreign developments.” Robert D. Putnam, “Diplomacy and Domestic Politics: The Logic of Two-Level Games,” *International Organization* 2, no. 3 (Summer 1988): 427-460.

purely on its merits and take a decision accordingly. As discussed in further detail below, such behavior was exhibited prominently by certain Senators in the 2010 debate over the New START Treaty.

Nonetheless, the formal treaty mechanism has been employed successfully by the United States in arms control measures in the past. The case study taken here is that of START I.

### *Case Study: START I*

The Strategic Arms Reduction Treaty<sup>7</sup>, first proposed by Ronald Reagan in the 1980s and finally signed by President George H.W. Bush and Mikhail Gorbachev in July 1991, continued the momentum established by SALT I and SALT II<sup>8</sup> and set a legally binding ceiling upon each country of 1,600 strategically deployed delivery vehicles carrying a maximum combined total of 6,000 warheads. Additionally, under the provisions of the treaty, which was ratified by the U.S. in October 1992, excess delivery vehicles would be destroyed, and – in accordance with Ronald Reagan’s famous mantra, “Trust but verify” – would be confirmed through intrusive on-site inspections and the use of telemetry and satellite technology to ensure that neither country would cheat on its commitments under the treaty.

This stringent verification regime was codified in Articles IX and XI of the treaty, as well as in the add-on Inspection Protocol. Briefly, Article IX provides for the use of “national technical means” of verification “for the purpose of ensuring verification of compliance with the provisions of this Treaty,” where “national technical means” encompasses the use of satellites, monitoring ships and aircraft, and land radar. Article XI grants both parties the right to conduct on-site inspections, as well as continuous monitoring activities. Finally, the Inspection Protocol details precisely the terms and conditions under which all verification measures would be implemented. As discussed later, this right to conduct intrusive verification, which legally ended for both countries when START I expired on December 5, 2009, became part of the core argument amongst the

---

7 *Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms*, July 31, 1991, <http://www.state.gov/www/global/arms/starhtm/start/start1.html> (accessed December 6, 2010).

8 It is of interest to note that SALT II was never ratified – primarily, from the American perspective, due to the Soviet invasion of Afghanistan six months after the treaty was signed. Nonetheless, the U.S. and USSR by and large adhered to the provisions of the treaty in the spirit of continuing mutual nuclear force reductions, and this commitment arguably paved the way for the successful signing and ratification of START I.

U.S. policymakers who advocated for the ratification of New START. They claimed that without the ability to have American officials physically in Russia conducting on-site inspections, the United States would have a much more difficult time verifying Moscow's continued adherence to its obligations.

An analysis of the international and domestic political landscape at the time is crucial to understanding why the legal mechanism of a formal treaty, with its binding obligations and difficult ratification process, was nonetheless utilized successfully in the case of START I. In 1991, international politics were evolving rapidly, and the end of the Cold War seemed imminent. The Berlin Wall had fallen in 1989, finally raising the Iron Curtain and releasing the stranglehold on East Germany. Mikhail Gorbachev had risen to power as the General Secretary of the Soviet Communist Party and, since March 1990, as the President of the Soviet Union. In the United States, the 1988 national elections had granted the Republican Party another term of control of the White House with the inauguration of George H.W. Bush. A moderate Republican and former Vice President under outgoing President Reagan, he understood that the collapse of the USSR and the end of the Cold War would potentially usher in a new era of global peace and prosperity, but only if managed appropriately.

Domestically, the 102nd Congress, which was in its first session at the time START I was signed and in its second session when the treaty was ratified, maintained a Democratic majority of Congress, with a 57 percent majority in the Senate and a 62 percent majority in the House of Representatives. According to Joe Cirincione, historically this type of Democratic control over Congress, when combined with a Republican presidency, yields a high chance of success for arms control agreements. Writing in the *Bulletin of the Atomic Scientists* in 2000, Cirincione devised an "election matrix" to examine the combination of party control of the White House and the Capitol at certain points in U.S. arms control history; he determined that arms control agreements, regardless of legal type, have the highest chances of success when domestic political elections yield the precise combination of a Republican President with a Democratic Congress.<sup>9</sup>

In the end, the end of the Cold War established an international political landscape in which both the United States and the USSR could agree to intrusive and robust verification mechanisms for the sake of international security and peace. Because of this understanding, the inclusion of strict provisions and stringent verification measures in START I necessitated the employment of a

---

<sup>9</sup> Joe Cirincione, "Republicans Do It Better," *Bulletin of the Atomic Scientists* 56, no. 5 (September/October 2000): 17-19.

formal and legally binding treaty. Domestically, the mix of a Republican President and Democratic-controlled Congress set the stage for easy digestibility of a bilateral arms control treaty of the most binding nature, and led to the ratification of START I fourteen months after it was signed.

## Mechanism II: The Executive Agreement<sup>10</sup>

In international law, executive agreements are operationally synonymous with treaties and are accorded the same domestic legal power as formal treaties; however, domestic U.S. law draws a distinction between treaties and executive agreements with respect to how they are ratified. That is, unlike a treaty, the domestic approval process for the executive agreement requires only a simple majority vote in both Houses of Congress. This vehicle therefore can allow arms control negotiators to bypass or at least mitigate substantially the dilemma posed by Putnam's two-level game, and may in certain circumstances provide a more amenable avenue than the formal treaty to securing domestic approval of an international accord.

However, the domestic legality of the executive agreement is not clear, as there is no unified consensus in the U.S. legal community on the true constitutionality of the executive agreement. Although the Supreme Court in 2003 judged the mechanism to fall within the President's Constitutionally derived executive powers under Article II,<sup>11</sup> there is still considerable discord amongst legal scholars over the legality and applicability of executive agreements, particularly vis-à-vis the formal treaty.<sup>12</sup> Additionally, it is important to note that

---

<sup>10</sup> There are two distinct subtypes of the executive agreement: (1) congressional-executive agreements, which are "sanctioned by the joint authority of the President and both Houses of Congress," and (2) Presidential or "sole" executive agreements, which are made by the President on his independent authority. For the purposes of this paper, we will consider the role and function of the congressional-executive agreement specifically. Congressional Research Service, Library of Congress, *Treaties and Other International Agreements: The Role of the United States Senate* (Washington, D.C.: U.S. Government Printing Office, 2001), 77.

<sup>11</sup> In *American Insurance Association et al. v. John Garamendi*, 539 U.S. 396 (2003), the Supreme Court stated that "...our cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic." However, in this statement the Supreme Court does not make a distinction between congressional-executive agreements and sole executive agreements; it is safe to conclude that the statement refers implicitly to the latter.

<sup>12</sup> For an extended discussion on the constitutionality of executive agreements, see David Golove and Bruce Ackerman, who consider treaties and executive agreements to be fully interchangeable, while Laurence Tribe disagrees. Bruce Ackerman and David Golove, "Is NAFTA Constitutional?," *Harvard Law Review* 108, no. 4 (February 1995): 799-929; Laurence H. Tribe, "Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation," *Harvard Law Review* 108, no. 6 (April 1995): 1221-

there is considerable resistance to the sustained use of executive agreements in lieu of formal treaties, as some argue that increased reliance on the former would contribute significantly to the erosion of treaty power.<sup>13</sup>

Nonetheless, the President makes use of this legal mechanism frequently in many policy issue areas, given that more than 90 percent of the international accords concluded by the United States in the period since 1939 have been executive agreements.<sup>14</sup> However, the United States has employed this mechanism only once in the arms control arena, as in the case of SALT I, below. This peculiarity raises a key question: Given that an executive agreement would by its nature face a lower barrier to ratification domestically, and that it has been utilized so extensively in other foreign policy areas, why then is it not used more frequently in arms control?

### *Case Study: SALT I*

The Strategic Arms Limitation Talks Interim Agreement,<sup>15</sup> signed by Richard Nixon and Leonid Brezhnev in May 1972, was the first bilateral nuclear arms reduction agreement between the two Cold War superpowers. Along with the Anti-Ballistic Missile (ABM) Treaty of 1972, it was the product of nearly three years of negotiations between the U.S. and USSR. Until talks finally began in November 1969, the leaders and top diplomats of both countries had been signaling to each other for years that they were ready to enter into arms control negotiations, but were unable to do so because of the deployment of ballistic missile defense systems by both countries in 1966 and 1967. Although there was some promise the following year when President Johnson stated at the signing of the Nuclear Nonproliferation Treaty (NPT) that the United States and the Soviet Union were finally ready to enter talks, the effort again collapsed when the USSR invaded Czechoslovakia less than two months later. Finally, with the election of Richard Nixon in November 1968, Brezhnev sent a statement

---

1303.

13 As the Congressional Research Service writes in its 2001 report: “Not only would it [the executive agreement] circumvent the method set out in the Constitution that deliberately made entering treaties more difficult than passing legislation, but it would indirectly reduce the influence of states whose interests were seen to be protected by requiring a two-thirds majority of the Senators voting.” Congressional Research Service, Library of Congress, *Treaties and Other International Agreements: The Role of the United States Senate* (Washington, DC: U.S. Government Printing Office, 2001), 25.

14 Ibid.

15 *Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Certain Measures With Respect to the Limitation of Strategic Offensive Arms*, May 26, 1972, <http://www.fas.org/nuke/control/salt1/text/salt1.htm> (accessed December 6, 2010).



to the White House on the day of his inauguration, signaling its willingness to discuss strategic arms limitations. Negotiations began in the fall of 1969 and culminated in 1972 with the ABM Treaty, a formal treaty, and the SALT Interim Agreement, an executive agreement.

As discussed above, the benefit of the executive agreement is that it circumvents the treaty impasse of domestic ratification by the U.S. Senate. In the case of SALT I, the Nixon administration recognized well in advance that, if submitted as a formal treaty and subjected to the Senate ratification process, the agreement would face substantial domestic resistance. Therefore, according to Benjamin Loeb, writing in the *Bulletin of the Atomic Scientists* in 1987, SALT I was signed and submitted as an executive agreement and not as a treaty.<sup>16</sup>

However, there is arguably another reason why SALT I was not conceived as a formal treaty: its verification measures were extremely limited. According to Article V of the Interim Agreement, the sole method to be used by both parties to ensure compliance with the provisions of the agreement would be “national technical means of verification ... consistent with generally recognized principles of international law.” The only additional verification provision outlined by the treaty was to prohibit, in vague and general terms, what it referred to as “concealment measures” that would somehow impede the processes of verification.<sup>17</sup> Compared to START I, the verification requirements in SALT I were not quite as robust or stringent.

Ultimately, however, the agreement was negotiated, drafted, signed and passed by both Houses of Congress, and eventually brought into force as the first bilateral arms control agreement between the United States and the Soviet Union. It is argued here that the success of SALT I was due in equal parts to four factors. First, the mutual signing of the NPT by the USSR and the United States in 1968 sent a strong signal to both countries that they shared similar concerns over the role of nuclear weapons in national and international security. More importantly, this signaling demonstrated to the leaders of both countries, after many years of failed discussion attempts, that they finally were ready to

---

<sup>16</sup> Loeb writes, “Because of opposition spearheaded by Sen. Henry M. Jackson [D-WA], there was doubt it could achieve the necessary two-thirds Senate vote if submitted as a treaty.” The role of Senator Jackson in stonewalling any progress on SALT I was pivotal in forcing its conversion from a formal treaty into an executive agreement. Benjamin S. Loeb, “Amend the Constitution’s treaty clause,” *Bulletin of the Atomic Scientists* 43, no. 8 (October 1987): 38-41.

<sup>17</sup> Concealment was defined in SALT I as follows: “Each Party undertakes not to use deliberate concealment measures which impede verification by national technical means of compliance with the provisions of this Interim Agreement.” “Article V,” *Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on the Certain Measures With Respect to the Limitation of Strategic Offensive Arms*, May 26, 1972.

discuss the future. Second, the introduction of Richard Nixon into the White House presented Brezhnev with the opportunity to launch discussions with a new President; this sentiment is evidenced by the timing of the message from Moscow, which coincided with Nixon's inauguration.

Third, once negotiations were underway and an agreement was being drafted, the Nixon administration perceived significant domestic opposition to SALT I if it were to be submitted as a formal treaty, and hence lowered the barrier to domestic acceptance by utilizing the executive agreement mechanism, which crossed the simple-majority threshold in both Houses with relative ease. Finally, SALT I encompassed no stringent verification measures. Had such provisions as intrusive on-site inspections been included in the agreement, it arguably would have been submitted as a formal treaty instead, as was the case with START I.

### **Mechanism III: The Non-Legally Binding Pledge**

The non-binding pledge is a simple application of agreed principles between countries, codified loosely in a document that places states parties under no specific legal obligations. A mechanism with no constitutionally derived legitimacy in domestic U.S. law, the non-legally binding pledge nonetheless enjoys widespread appeal internationally, as states face little to no domestic resistance to committing themselves to such an agreement.

By the same token, however, non-legally binding pledges often incorporate no enforcement mechanism, particularly in arms control, since verification measures taken by another country cannot be implemented and enforced absent some legal structure or framework. Additionally, the principles of a pledge usually commit parties to undertake actions in some vague, nebulous manner; this ambiguity gives states the opportunity to support a pledge nominally, without facing any repercussions later for not adhering to its principles.

In the history of U.S. arms control initiatives, the non-legally binding pledge has been utilized as a legal mechanism most prominently in the case of the 2003 Proliferation Security Initiative (PSI), which is examined below.

#### *Case Study: Proliferation Security Initiative*

Launched in 2003 by the George W. Bush administration, the PSI<sup>18</sup> is a measure

---

18 U.S. Department of State, "Proliferation Security Initiative," United States Department of State, <http://www.state.gov/t/isn/c10390.htm> (accessed December 1, 2010).

spearheaded by the United States that is intended to prevent, through the interdiction of ships on the high seas, the illicit transfer of sensitive nuclear-related technology and equipment around the world. The effort comprises a two-tiered structure: the first is the acceptance of a non-legally binding pledge and set of “interdiction principles” amongst the U.S. and 97 other countries,<sup>19</sup> and the second tier consists of legally binding bilateral ship-boarding agreements between the United States and eleven states that are of particular significance because of their role in maritime trade.<sup>20</sup>

The unique structure and legality of the Proliferation Security Initiative warrant some additional discussion here. Because of the pledge nature of the PSI, many countries worldwide are able to support this effort, at least rhetorically if not in action, without being forced to commit themselves to any legally binding provisions. The Initiative is fully aware of this, and calls on PSI member states to voluntarily “interdict transfers to and from states and non-state actors of proliferation concern *to the extent of their capabilities and legal authorities* [emphasis added].” At the same time, however, the PSI is forward-looking in how its principles might be implemented and enforced at the domestic level for any given country; therefore, the Third Interdiction Principle of the Proliferation Security Initiative calls on member states to:

Review and work to strengthen their relevant national legal authorities where necessary to accomplish these objectives, and work to strengthen when necessary relevant international law and frameworks in appropriate ways to support these commitments.<sup>21</sup>

Nonetheless, this relatively low legal barrier to acceptance of the Proliferation Security Initiative is evidenced by the numbers: As of September 10, 2010, the effort has found at least nominal support amongst 97 countries around the world. Additionally, the value to countries of the PSI, aside from its non-legally

---

19 U.S. Department of State, “Proliferation Security Initiative Participants,” United States Department of State, <http://www.state.gov/t/isn/c27732.htm> (accessed December 1, 2010).

20 The eleven states with which the US has concluded bilateral, legally binding ship-boarding agreements are: Antigua and Barbuda; Bahamas; Belize; Croatia; Cyprus; Liberia; Malta; Marshall Islands; Mongolia; Panama; and St. Vincent and the Grenadines. These eleven states in particular provide access to a large majority ports along major maritime shipping routes, and/or register many ships under their national jurisdiction, meaning a ship registered to a country flies that country’s flag and therefore is considered the territory of that country on the high seas. U.S. Department of State, “Ship Boarding Agreements,” United States Department of State, <http://www.state.gov/t/isn/c27733.htm> (accessed December 1, 2010).

21 U.S. Department of State, “Interdiction Principles for the Proliferation Security Initiative,” United States Department of State, <http://www.state.gov/t/isn/c27726.htm> (accessed December 7, 2010).

binding status as a pledge, lies precisely in its rapidity: it is designed to mobilize countries to act in a timely manner, utilizing all tools available, to stop in real time the transfer of illicit weapons of mass destruction and related delivery systems and materials. If it had taken the form of a legally binding formal treaty, the PSI would immediately be rendered operationally invalid, since countries would require considerable time to ratify or accede to the agreement. Moreover, the *ad hoc* and informal nature of the PSI means there is no office or secretariat to make a decision when confronted with an urgent matter. Such a decision-making process would otherwise require considerable time, by which time the illicit transfer in question may already have occurred successfully.

In examining the Proliferation Security Initiative, it is important to understand the international environment into which with the effort was born, and consider the catalyst for the formation of the initiative. In 2002, fifteen Scud missiles were discovered hidden amongst bags of cement aboard the *So San*, a Cambodian freighter ship bound for Yemen from North Korea.<sup>22</sup> After U.S. intelligence tracked the movement of the ship from the Korean Peninsula to the Arabian Sea, a Spanish navy ship boarded the freighter, at which time the missiles were discovered. However, after Yemeni President Ali Abdullah Saleh indicated the missiles were intended for him, U.S. President George W. Bush ultimately signed a directive authorizing the Spanish navy to allow the freighter to continue on its way. While the rationale for the final U.S. decision was that Yemen was a strong ally in the U.S. war on terror, some argued that such an event could never be allowed to occur again, in which the U.S. might locate and seize a shipment of illicit arms, only to be forced, as a function of international law or politics, to relinquish them.

Domestically, when President Bush formally announced the PSI in Poland on May 31, 2003,<sup>23</sup> there was fairly little media coverage on the effort until later that year. Nonetheless, the domestic political landscape fairly closely mirrored public opinion, as it had still been less than two years since the attacks of September 11, 2001; as such, any substantive discussion of the PSI in the United States arguably would have been colored through the prism of the attacks, which encompassed angry public sentiment and a paradigm shift in U.S. homeland and national security.

Later that year, the PSI was featured prominently in the media when

22 Emma Belcher, "Regime Change of a Different Kind: Exploring Adaptation in the Nuclear Non-proliferation Regime" (PhD diss., Fletcher School of Law and Diplomacy, Tufts University, 2010).

23 George W. Bush, "Remarks by the President to the People of Poland," May 31, 2003, United States White House Archives, <http://georgewebush-whitehouse.archives.gov/news/releases/2003/05/20030531-3.html> (accessed December 7, 2010).

the German-owned ship *BBC China* was interdicted on its way to deliver centrifuge parts to Libya. This interdiction, and Libya's decision shortly thereafter to renounce its nuclear ambitions, was cited quickly by Bush administration officials as concrete evidence of the effectiveness and utility of the PSI. Speaking in 2004 at a conference in Washington, D.C., then-Undersecretary for Arms Control and International Security John Bolton said with respect to the Proliferation Security Initiative, "The seizure of that ship and the equipment on it, we think, had a major, perhaps dispositive role in Libya's decision to give up the pursuit of weapons of mass destruction last year."<sup>24</sup> Since then, the PSI has gained widespread support, as evidenced above, and most recently President Barack Obama stated in April 2009 that he seeks to turn PSI into "a durable international institution."<sup>25</sup>

For the purposes of this paper, and as compared to the other three legal mechanisms discussed here, the Proliferation Security Initiative specifically should be understood in its own context, given the domestic and international circumstances at the time of its inception, and particularly given its unique two-tiered structure that combines non-binding principles with legally binding provisions. Nonetheless, as a legal mechanism, the PSI has demonstrably been used by the United States in arms control to form broad solidarity amongst states on a highly time-sensitive matter, without having to submit to any domestic approval process for such an international agreement.

#### **Mechanism IV: The Unilateral Executive Action**

As a foreign policy instrument, executive action represents a commitment on behalf of the President of the United States to undertake a set of actions independent of any other country. From an American legal perspective, the U.S. Constitution does not grant the President the explicit power to make law, domestic or international, independent of the legislature. Yet Presidents have employed and continue to utilize this mechanism to advance the foreign policy agenda of the United States vis-à-vis other countries.

In the international political arena, a unilateral action by the President might be undertaken in a loose bilateral sense, in that the two states decide independently of each other to carry out similar measures. Such an approach

---

24 John R. Bolton, "The International Atomic Energy Agency: The World's Enforcer or Paper Tiger?" (presented at a conference at the American Enterprise Institute), Washington, DC, September 28, 2004).

25 Barack Obama, "Remarks by President Barack Obama, Hradcany Square, Prague, Czech Republic," April 5, 2009, United States White House, [http://www.whitehouse.gov/the\\_press\\_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered](http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered) (accessed December 8, 2010).

would be based exclusively on mutual trust, as the heads of state of those countries would have no other incentive to take any action beyond making rhetorical overtures, and certainly would not be legally bound to any mechanisms of transparency, honesty or accountability. The benefit to coordinating unilateral actions with another country is that such a move would not need any domestic approval, since the U.S. would not be entering into an agreement of any form with the other state, but rather be undertaking strictly unilateral action. However, this legal mechanism obviously would not carry the same weight as a treaty, would not be legally binding, and at best would be a set of rhetorical statements to which the two countries may or may not commit independently of each other. Additionally, in the arms control arena specifically, there would be no verification measures, no method to detect non-compliance, and no enforcement mechanisms to stop and reverse the behavior of a state that chooses to undertake action that is contrary to its rhetorical, stated pledge. To restate, a set of unilateral actions undertaken by two heads of state independently would be based ultimately on mutual trust.

Interestingly, despite the lack of legal strength of this mechanism, the United States has employed the unilateral executive action at least once before in arms control with arguably impressive results. That instance was the Presidential Nuclear Initiatives of 1991-1992, which is examined below.

### *Case Study: Presidential Nuclear Initiatives*

On September 27, 1991, U.S. President George H.W. Bush announced that his administration would undertake a set of unilateral actions designed to reduce the tactical nuclear weapons arsenal of the United States.<sup>26</sup> He also proposed a set of measures intended to accelerate the progress of commitments made by both the U.S. and the Soviet Union under START I, which was signed less than two months prior to this announcement.

One week later, Soviet President Mikhail Gorbachev announced that the USSR would undertake its own set of unilateral measures intended to reduce the role of tactical nuclear weapons in the Soviet arsenal, and committed the Soviet Union to eliminating one thousand nuclear warheads *in addition to* what was required under START I.<sup>27</sup> Continuing this commitment after the Cold

---

<sup>26</sup> Arms Control Association, "The Presidential Nuclear Initiatives (PNIs) on Tactical Nuclear Weapons At a Glance," Arms Control Association, <http://www.armscontrol.org/factsheets/pniglance> (accessed December 8, 2010).

<sup>27</sup> Eli Corin, "Presidential Nuclear Initiatives: An Alternative Paradigm for Arms Control," Nuclear Threat Initiative, [http://www.nti.org/e\\_research/e3\\_41a.html](http://www.nti.org/e_research/e3_41a.html) (accessed December 8, 2010).

War ended, Gorbachev's successor, President Boris Yeltsin, declared in January 1992 that arms control obligations undertaken by the now-dismantled Soviet Union would continue to be upheld by the Russian Federation.<sup>28</sup>

None of these statements – which important to note, were made by Bush and Gorbachev/Yeltsin independently of each other – were legally binding, nor would there be any method to ensure that either country would actually carry out the initiatives declared publicly. Additionally, because data on tactical nuclear weapons for both nations were and are for the most part classified, it is difficult to determine the degree to which either state conformed to its declarations, and to declare conclusively that the Presidential Nuclear Initiatives were successful.

However, it appears that to a significant extent, the United States and Russia did fulfill their commitments: According to preliminary data compiled in 2001 by Joshua Handler at Princeton University,<sup>29</sup> as well as separate extrapolations by Courtney Keefe and Daryl Kimball of the Arms Control Association on data from a variety of sources,<sup>30</sup> the United States lowered its total number of tactical nuclear weapons from between five and seven thousand in 1991 to less than two thousand in 2001. For its part, Russia had between *twelve* and nearly *twenty-two thousand* tactical nuclear weapons in 1991, but by 2001 had reduced its arsenal to less than four thousand.

Based on these numbers, therefore, the Presidential Nuclear Initiatives can be considered a success. Despite the lack of legally binding obligations on both treaties that would have come about as the result of a formal treaty, and in spite of the lack of transparency that would have been afforded by some sort of mutual agreement, this unilateral approach eliminated for both countries the barrier to domestic acceptance and allowed for quick and relatively straightforward negotiations. Undoubtedly, the success of this initiative was also due in no small part to the signing of START I earlier in 1991, which established a momentum on which both the U.S. and USSR capitalized almost immediately.

---

28 Yeltsin declared, "Russia regards itself as the legal successor to the USSR in the field of responsibility for fulfilling international obligations. We confirm all obligations under bilateral and multilateral agreements in the field of arms limitations and disarmament which were signed by the Soviet Union and are in effect at present." Boris Yeltsin, "Address to the Nation on Russia's Policy in the Field of Arms Limitation and Reduction," January 29, 1992, Fourth Freedom Forum, [http://www.fourthfreedom.org/Applications/cms.php?page\\_id=27](http://www.fourthfreedom.org/Applications/cms.php?page_id=27) (accessed December 11, 2010).

29 Joshua Handler, "The September 1991 PNIs and the Elimination, Storing and Security Aspects of TNWs" (presented at the conference on Time to Control Tactical Nuclear Weapons at the United Nations, New York, NY, September 24 2001).

30 See footnotes 3 and 4, "The Presidential Nuclear Initiatives (PNIs) on Tactical Nuclear Weapons At a Glance."

Ultimately, however, the most unique aspect of the Presidential Nuclear Initiatives – that they encompassed no verification or enforcement measures – makes the legal mechanism of unilateral executive action a tool that can only be used in specific circumstances – namely, when mutual trust between two heads of state is relatively strong, and when the constituents of both countries reflect this level of trust.

Having examined these four legal mechanisms – formal treaty, executive agreement, non-binding pledge and unilateral action – the most recent U.S. experience with New START is explored below. This case study is unique in that it presents a contemporary application of these vehicles to the decision-making processes of U.S. administration officials, as they weigh the merits of each mechanism against the domestic political environment in which they operate.

### **New START: Struggle and Success**

The New Strategic Arms Reduction Treaty<sup>31</sup> (New START) is a follow-on agreement to START I that reduces the number of nuclear weapons for the United States and Russia from a ceiling of 2,200 to 1,550 strategic warheads each. More importantly, it includes a stringent verification system that encompasses intrusive on-site inspections, continuous monitoring, and the use of telemetry and satellite technology.

Negotiations to draft a follow-on treaty to START I began in April 2009, shortly after President Obama declared in his “Prague Speech” the commitment of the United States to a world free of nuclear weapons.<sup>32</sup> One year after the start of those negotiations, Presidents Barack Obama and Dmitry Medvedev signed the treaty, which was then submitted to the Senate for ratification. However, despite the vocal support of the Joint Chiefs of Staff,<sup>33</sup> Secretary of Defense Robert Gates,<sup>34</sup> and other former administration officials for the treaty,

---

31 *Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms*, April 8, 2010, <http://www.state.gov/documents/organization/140035.pdf> (accessed December 9, 2010).

32 Barack Obama, “Remarks by President Barack Obama, Hradcany Square, Prague, Czech Republic.”

33 Amanda Terkel, “Joint Chiefs Of Staff Chairman Mike Mullen: New START Treaty Should Be Ratified In The Lame Duck Session,” *The Huffington Post*, November 21, 2010, [http://www.huffingtonpost.com/2010/11/21/mike-mullen-new-start\\_n\\_786507.html](http://www.huffingtonpost.com/2010/11/21/mike-mullen-new-start_n_786507.html) (accessed December 12, 2010).

34 David Cloud, “Gates warns of ‘significant consequences’ if Senate fails to ratify New START treaty,” *Los Angeles Times*, November 21, 2010, <http://articles.latimes.com/2010/nov/21/world/la-fg-start-treaty-20101121> (accessed December 12, 2010).



New START encountered immediate, unexpected and substantial resistance in the Senate.

The 111th United States Senate was composed in 2010 of a Democratic majority of 56 Senators, with 42 Republicans and two Independents.<sup>35</sup> With a minimum of 67 votes required to pass the treaty, the White House needed nine Republican votes, since all Democrats and Independents were expected to support New START. There was a sense of especially dire urgency to ratify the treaty due to the outcome of the November 2010 midterm elections, in which the Democratic Party lost five seats to the Republicans. However, these changes would not come into effect until January 2011, at which point the White House would need to secure the support of fourteen Republican Senators rather than only nine.

Hence, the Obama administration, in order to capitalize on this immediate opportunity, lobbied vigorously to secure the support of at least nine Republicans and pass the treaty before the end of calendar year 2010. In doing so, however, it encountered significant resistance in the form of key Republican Senators who questioned the prudence of the agreement and declared their intent to prevent the ratification of New START at all costs. To appease those individuals and win passage of the treaty, the Obama administration was forced to make unprecedented concessions costing billions of dollars.<sup>36</sup>

Although these compromises were very financially and politically cost-

35 “Congressional Profile,” Clerk of the U.S. House of Representatives, [http://clerk.house.gov/member\\_info/cong.html](http://clerk.house.gov/member_info/cong.html) (accessed December 15, 2010).

36 Prominent Republican Senators Jon Kyl (Arizona) and Jim DeMint (South Carolina) led others in blocking floor debate on New START and delaying a call for a vote for as long as possible, claiming more time was needed in the new year to carefully examine and deliberate on the treaty. In addition, Senator Kyl repeatedly voiced concerns regarding the inability of the United States to modernize its nuclear arsenal if the treaty were ratified. The Obama administration, despite having stated that New START would not in any way impede U.S. modernization efforts, nevertheless arrived at an agreement with Senator Kyl in November 2010 in order to placate him: In exchange for his support on New START, the White House would allocate an additional \$14 billion to U.S. nuclear weapons complex upgrades, on top of the \$80 billion already promised – a budget in itself that former Director of the National Nuclear Security Administration, Linton Brooks, said he “would have killed for.” However, despite this deal, Senator Kyl two weeks later declared that he still was not in support of New START, and thereafter stated that he would “work very hard” to ensure the treaty would not be passed in the last few weeks of the year. Ultimately, however, more than the minimum of nine Republican Senators voted in favor of the treaty. Jill Dougherty, “Jump START?,” *CNN World*, December 5, 2010. <http://edition.cnn.com/2010/POLITICS/12/02/start/> (accessed December 15, 2010); Linton Brooks, “Nuclear Deterrence Perspectives” (lecture delivered at Center for Strategic and International Studies), Washington, D.C., April 16, 2010. Quoted in John K. Warden, “Ambassador Linton Brooks on New START and the next treaty,” Center for Strategic and International Studies, April 16, 2010, <http://csis.org/blog/ambassador-linton-brooks-new-start-and-next-treaty> (accessed December 15, 2010); Ken Strickland, “Kyl ‘will work very hard’ to kill START this year,” *First Read from NBC News*, December 14, 2010, [http://firstread.msnbc.msn.com/\\_news/2010/12/14/5650483-kyl-will-work-very-hard-to-kill-start-this-year-?](http://firstread.msnbc.msn.com/_news/2010/12/14/5650483-kyl-will-work-very-hard-to-kill-start-this-year-?) (accessed December 15, 2010).

ly, they ultimately were successful. After much debate, the treaty was brought to a vote on the Senate floor on December 22, 2010, and passed by a vote of 71 to 26, with three abstaining. The Russian Federation Council gave its approval of New START on January 26, 2011,<sup>37</sup> and on February 5, the instruments of ratification were exchanged by the United States and the Russian Federation, thereby bringing New START into force.<sup>38</sup>

### *Why New START Could Only Be a Formal Treaty*

In the United States, the curiosity of the events from April to December 2010 over this arms control agreement is that, despite the blessings and endorsement of the treaty from the U.S. military and former and current Defense and State Department officials, a handful of legislators demonstrated their ability to hold the treaty hostage and prevent its ratification. This peculiarity could have been circumvented if New START were not a formal treaty and instead had taken the form of some other legal mechanism, such as the unilateral action or the executive agreement. Why then was the formal treaty mechanism utilized, despite the numerous domestic challenges it subsequently encountered?

First, New START took the form of a treaty because the level of resistance it encountered in the Senate was not expected. By all indications, the Obama administration did not anticipate spending months deadlocked with Republican Senators, since New START was never intended to be a drastic and sweeping agreement. Rather than make deep cuts in American and Russian nuclear arsenals, it aimed to be a sensible agreement that made modest nuclear cuts, restarted Russian-American dialogue, and most importantly reinstated inspectors in both countries' nuclear facilities. During the Obama presidential campaign in 2008, the future President emphasized that during his presidency he would achieve not only a new arms control treaty with Russia, but also the domestic ratification of the Comprehensive Test Ban Treaty. Arguably, the administration did not expect to invest quite the level of political capital it ultimately was forced to expend in order to win passage of New START.

Second, from an operational standpoint and despite the domestic ratification obstacle, as a legal mechanism New START could be in no other form

37 Fred Weir, "With Russian ratification of New START, what's next for US-Russia relations?," *The Christian Science Monitor*, January 26, 2011, <http://www.csmonitor.com/World/Europe/2011/0126/With-Russian-ratification-of-New-START-what-s-next-for-US-Russia-relations> (accessed February 27, 2010).

38 U.S. Department of State, "New START Treaty Entry Into Force," February 5, 2011, United States Department of State, <http://www.state.gov/r/pa/prs/ps/2011/02/156037.htm> (accessed February 19, 2011).

but that of the formal treaty. From its inception, New START was part of a White House strategy intended to “press the reset button on relations between the United States and Russia,” according to President Obama.<sup>39</sup> To do so would involve reestablishing a level of mutual trust between the two countries that had nearly disintegrated during the presidency of George W. Bush from 2000 to 2008. That trust would necessitate the implementation of transparency and confidence-building measures that could only come about through robust verification mechanisms. The stringency of the verification regime as codified in New START allows for mutual intrusive on-site inspections, as well as the use of continuous monitoring, telemetry, satellite, and radar; this translates into not only a U.S. ability to place inspectors on the ground in Russian nuclear facilities, but also the Russian ability to do likewise. Arguably, the opportunity for Russian scientists and government officials to cross U.S. borders and enter American nuclear weapons labs and facilities is of the utmost national security concern, and hence the permission for these activities to be conducted should come not from the President or a designated authority, but from the people of the United States via their elected officials. It is precisely for this reason, and so that U.S. authorities would have the ability to conduct parallel activities within Russia, that New START was negotiated, drafted, signed, submitted to the Senate, and ultimately ratified as a formal treaty.

Finally, New START was intended to rededicate the U.S. to the principles and frameworks of the global non-proliferation regime. It is important to keep in mind that the penchant of the George W. Bush administration was to adopt an isolationist U.S. approach to international agreements of any kind.<sup>40</sup> Therefore, upon taking office in 2009, President Obama sought to recommit the United States to the framework of the formal treaty in general, and specifically in the arms control arena. Hence, the new administration had no choice but to submit its first arms control agreement with Russia as a formal treaty, since the utilization of any other legal mechanism would have been contrary to

---

39 U.S. White House, “Interview of the President by ITAR-TASS/Rossiya TV,” July 2, 2009, United States White House, <http://www.whitehouse.gov/the-press-office/interview-president-itar-tassrossiya-tv-7-2-09> (accessed December 8, 2010).

40 The one exception to this tendency was the 2002 Treaty of Moscow, or SORT, which was signed as a bilateral formal treaty between the U.S. and Russia – but only after Russia insisted that the agreement take the form of a treaty. Until that point, the Bush administration had intended to make SORT a fairly unstructured set of non-legally binding unilateral actions, akin to the 1991-1992 Presidential Nuclear Initiatives. For more information, see *Treaty Between the United States of America and the Russian Federation on Strategic Offensive Reductions*, May 24, 2002, Nuclear Threat Initiative, [http://www.nti.org/e\\_research/official\\_docs/inventory/pdfs/ apsort.pdf](http://www.nti.org/e_research/official_docs/inventory/pdfs/ apsort.pdf) (accessed December 9, 2010). Also see Eli Corin, “Presidential Nuclear Initiatives: An Alternative Paradigm for Arms Control.”

the rhetoric of the President during and after the 2008 election campaign, and moreover would have undermined the credibility of the President, both at home and abroad.

Therefore, New START could have been signed and approved only as a formal treaty, since no other mechanism would have provided for, as is argued here, the most compelling reason to use the formal treaty: the inclusion of thorough, stringent and intrusive verification measures to ensure mutual compliance with the provisions of the treaty and to detect non-compliance. An executive agreement, as the case of SALT I has shown, would have severely curtailed the ability of the United States to generate transparency from within the Russian nuclear complex. Similarly, a non-legally binding pledge would have had no traction at the bilateral level, since this mechanism is effective only when it has broad multilateral support, as in the case of the Proliferation Security Initiative. Finally, the utilization of unilateral action concurrently with Russia, as was the case in 1991-1992 with the Presidential Nuclear Initiatives, would have been a risky strategy that arguably could only have succeeded in the correct circumstances, wherein the heads of state of Russia and the U.S. would have had a sustained high level of mutual trust. Unfortunately, that precondition was virtually nonexistent in the previous eight years of the George W. Bush administration.

Hence, the Obama administration took the appropriate approach by negotiating, drafting and signing New START as a formal treaty, despite the multitude of obstacles it faced during the Senate ratification process. Ultimately, an inaccurate assessment of the domestic political environment convinced senior policymakers that as a formal treaty, this arms control agreement would pass with relative ease. At the same time, the stark realities of the international security environment and a renewed need for intrusive verification mechanisms necessitated the utilization of the formal treaty as a legal vehicle.

## Conclusion

What the above five case studies demonstrate is that the variety of legal mechanisms in arms control can be leveraged strategically over time to overcome domestic political obstacles. The various tools available to the United States allow the executive branch to find room for maneuverability in often-difficult political climates, in order to strengthen the nonproliferation regime and continue making progress on arms control.

While the United States indeed has made significant arms control progress over the past fifty years, there is a noteworthy flaw in this approach. The

prioritization by arms controllers of domestic political circumstances over objective, arms control-specific criteria sometimes has come at the expense of the strength of the agreement. That is, an arms control initiative sometimes has taken a different form for the purpose of winning domestic approval, but in the process has lost some of its stringency and robustness. This important trade-off has the potential to slow the overall advancement of the U.S. arms control agenda.

However, upon examination of the case studies above, it becomes evident that precisely because of the unique nature of the U.S. political system as codified in the Constitution, domestic political factors *must* form the primary driver in arms control negotiations, and that the approach taken by the United States in its arms control initiatives has been the most prudent one in the long term. Putnam's "two-level game" model serves as a reminder that any international agreement requires domestic approval, which in its most difficult form in the U.S. is the Senate ratification process. Arguably, if that domestic approval cannot be secured, then arms control as a process has not been successful.

Hence, in the U.S. legal framework, the political obstacles inherent to the domestic approval process must be overcome or somehow otherwise circumvented, even if that evasion comes at the expense of a slight weakening of agreement provisions and strength. Some progress on arms control arguably is better than no progress at all, and because the United States utilizes the full spectrum of tools in its international negotiations and agreements toolbox, it is able to adapt its initiatives to evolving domestic political circumstances, in order to continue making steady progress on arms control.

**PEAR**