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**“The Administration’s Proposal for a U.N. Resolution on the
Comprehensive Nuclear Test Ban Treaty”
Committee on Foreign Relations
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Chairman Corker, Ranking Member Cardin, and Members of the Committee, thank you for inviting me to testify on the Obama Administration’s plan to seek U.N. Security Council adoption of a resolution relating to the Comprehensive Nuclear-Test-Ban Treaty (CTBT).

As you consider the subject of today’s hearing, I would suggest that there are two dimensions to the issue, each of which needs to be considered separately. The first is the wisdom of the Administration’s policy objective—seeking to promote and ultimately bring into force the CTBT. The second is the propriety of the Administration’s strategy for advancing this policy—specifically their decision to bring the CTBT before the U.N. Security Council (UNSC) for a vote rather than asking the Senate to reconsider its rejection of the treaty in 1999.

While I suspect there are divergent views within this Committee on the first issue, I would expect much less disagreement about the importance of ensuring that the process followed by the Administration to advance the CTBT respects the constitutional prerogatives of the Senate. Further, because the CTBT has been debated extensively in the past, I don’t expect us to be able offer you many truly novel insights into whether the Senate should give its advice and consent to its ratification.

I therefore intend to devote most of my remarks to the second issue. I will make the case that there are important separation of powers issues at stake in what the Administration is proposing to do, and the Senate should not look the other way, irrespective of how it feels about the Administration’s larger policy objective. I will turn only at the end of my remarks to some observations about the CTBT itself.

I. The Threat to the Senate’s Constitutional Prerogatives

In discussing whether and how the Administration’s plan to seek a UNSC resolution on the CTBT threatens the constitutional prerogatives of the Senate, I am at the disadvantage of not knowing for sure what type of Security Council action the Administration is seeking. And, of course, whatever language the Administration initially proposes will likely be further modified as a result of the Council’s deliberations. I therefore can only talk in general terms about some of the options for Council action, and how those options should be viewed by anyone concerned about protecting the prerogatives of the Senate.

A. Imposition of the CTBT by UNSC Fiat

When it first emerged that the Administration had decided to take the CTBT to the UNSC, there was a great deal of speculation that the Administration intended to ask the Council to simply adopt a global prohibition on nuclear weapons testing. In other words, rather than seeking to ban nuclear testing the traditional way—through a tedious multilateral arms control negotiation like the one that gave us the CTBT—they might ask the UNSC to impose something akin to the CTBT overnight in an exercise of the Council’s authority under Chapter VII of the U.N. Charter to “decide what measures shall be taken . . . to maintain or restore international peace and security.”

I have no doubt that the speed and simplicity of this approach would appeal to some who value progress on arms control above all else. But I submit that such a step would be highly corrosive not only to the Senate’s constitutional authority to approve the imposition of new international legal obligations on the United States, but also to the legitimacy of the UNSC. While multilateral arms control processes can be excruciatingly cumbersome and slow, they do have the advantage of producing legal regimes that command universal, or near-universal, respect because they are the product of international consensus.

The imposition of a new arms control regime by UNSC fiat would inevitably be viewed by some countries as an illegitimate power grab by the Council, particularly by the five permanent members of the Council. It therefore could diminish the Council’s ability to act effectively in the future. And, of course, it would deny the Senate any role whatsoever in approving imposition the new arms control regime on the United States.

This does not necessarily mean, however, that it would be beyond the power of the UNSC to seek to prohibit nuclear weapons testing under Chapter VII of the U.N. Charter. Undoubtedly there are many scholars of international law who would argue that the Council does indeed have the authority to take such action, and that such action would be binding on the United States because the United States is a party to the U.N. Charter.

They would argue that the pesky problem of Senate advice and consent to the new international legal obligation is taken care of by the fact that, in 1945, the Senate gave its advice and consent to ratification of the U.N. Charter, which carried with it a grant of authority to the UNSC to take actions like imposing a ban on nuclear testing. They would further point to Congress’s enactment of the United Nations Participation Act in 1945 as providing a statutory foundation for deeming the United States bound by the UNSC action.

The problem with this line of reasoning is that it accepts that the UNSC is empowered under Chapter VII to act as a global super-legislature, ordering about the nations of the world as it sees fit, so long as it can characterize its actions as intended “to maintain or restore international peace and security.” Once this principle has been accepted, there really is no outer limit to it. Certainly the principle would not be limited to UNSC action in the area of arms

control. There would be no legal reason why this same authority would not extend to UNSC action with respect to all kinds of other matters traditionally subject to multilateral and bilateral treaties among nations. Indeed, there is no reason why the authority would not also extend to all manner of domestic policy issues that today are considered the exclusive province of national governments. The implications of this, not only for the Senate, but for Congress as a whole, and indeed for American democracy as we know it, are obvious.

To be sure, Administration spokesmen quickly denied that they intended to seek a UNSC resolution that would essentially impose the CTBT on the world by Council mandate, bypassing not only the Senate, but also many other governments around the world. But this begs the question what they are trying to accomplish by means of a UNSC resolution, and in particular whether they are still trying to utilize the UNSC as a global super-legislature with respect to nuclear testing, just one that they are not today asking to ban such testing outright.

I would suggest to the Committee that you be alert to two legal indicators of whether they are seeking to erect the UNSC as a super-legislature on this issue. The first is whether, at outset of the operative portion of the resolution, the Council recites the magic words that it is “*Acting* under Chapter VII of the Charter of the United Nations.” The second is whether one or more of the operative paragraphs begins with the word “*Decides*”. The combination of these two features will be a clear indication that the Council is in fact seeking to act as a global super-legislature with respect to some aspect of nuclear testing.

The fact that this particular resolution may not go further and seek to impose the CTBT today by UNSC fiat should be no cause for complacency. It is quite common for the Council to act incrementally in matters such as this, laying a foundation of baby steps in precursor UNSC resolutions before eventually taking the giant step that has been the true objective all along.

B. Imposition of an Obligation Not to Defeat the Object and Purpose of the CTBT

One thing the UNSC resolution could do short of seeking to impose a CTBT-like prohibition on nuclear testing would be to cement in place an understanding that any test of a nuclear weapon would violate what is claimed to be the obligation of signatories of the CTBT “to refrain from acts which would defeat the object and purpose” of the treaty. I have heard suggestions that as part of the Administration’s plan, there may be a Joint Statement of the P-5 members of the UNSC affirming that any nuclear weapons test by a CTBT signatory would violate this obligation, and that this Joint Statement may then be incorporated by reference, or otherwise approved by, the UNSC resolution.

I believe any UNSC action along these lines would be a serious threat to the prerogatives of the Senate. This is a complicated area of international and U.S. constitutional law, so I beg your indulgence as I try to explain why the Committee should be concerned if this is the approach the Administration takes. There is also a fair amount of history on this very issue with

respect to the CTBT, which, once understood, makes this potential course of action at the UNSC particularly audacious.

1. Article 18 of the Vienna Convention

I want to emphasize at the outset that there is a serious question whether the Senate accepts, or should accept, the notion that the United States has an obligation under international law “to refrain from acts which would defeat the object and purpose” of *any* treaty that the President has signed but the Senate has not yet approved. To accept this notion would concede that the President has the constitutional authority to unilaterally impose international legal obligations on the United States without the Senate’s approval, a proposition the Senate has vigorously rejected in the past.

The principal authority for the claim that the President has this authority arises from Article 18 of the Vienna Convention on the Law of Treaties. That article states:

A state is obliged to refrain from acts which would defeat the object and purpose of an international agreement when (a) it has signed the agreement . . . subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the agreement; or (b) it has expressed its consent to be bound by the agreement, pending the entry into force of the agreement and provided that such entry into force is not unduly delayed.

You will observe that virtually any time the Vienna Convention is mentioned, the reference is accompanied by a disclaimer that the Convention has not been ratified by the United States, but is generally considered to reflect customary international law. So there is a rather obvious question to be asked: if the Vienna Convention on the Law of Treaties reflects customary international law, why hasn’t the United States ratified it?

The simple answer is that some of the claimed principles of international law set forth set forth in the Convention have been judged by this Committee in the past to be inconsistent with the prerogatives of the Senate under Article II, Section 2, clause 2 of the Constitution to approve or disapprove the imposition by the President of international legal obligations on the United States. So the more correct statement with respect to the Vienna Convention would be that in the opinion of the Executive branch it generally reflects customary international law, but, in the opinion of the Senate, in important respects it does not.

The Vienna Convention was concluded in 1969, and submitted to the Senate by the Nixon Administration in 1971. In a 2001 study prepared for this Committee by the Congressional Research Service (CRS), entitled “Treaties and Other International Agreements: The Role of the United States Senate”, CRS notes acidly with regard to the negotiations the produced the Vienna Convention that:

As in the case of many treaties . . . the executive branch conducted the negotiations without congressional observers or consultations, although the subject matter was of clear concern to the Senate.

Following due consideration, a resolution of advice and consent was approved by this Committee in 1972, subject to an understanding and interpretation. The understanding was directed primarily at the issue of what we in the United States call executive agreements, but the concerns raised in the understanding apply equally to the legal obligations claimed to arise under Article 18 of the Convention. As summarized in the 2001 CRS study, the understanding:

. . . would have made clear that the Vienna Convention does not establish an international law rule which could hold the United States bound to a treaty which a President had signed, but which the Senate had not accepted.

The Nixon Administration disagreed with this understanding, and therefore the approval process for the Vienna Convention stalled. The Convention was subject to Committee hearings again in 1986, and again the same disagreements emerged regarding the compatibility of the Convention with the constitutional prerogatives of the Senate to approve the imposition of international legal obligations on the United States. Accordingly, the Vienna Convention has not been approved, and remains pending today before the Senate.¹

2. The Rice Letter

Even if one accepts the view of the Executive branch that the United States has an obligation under international law not to defeat the object and purpose of a treaty that has been signed by not approved by the Senate, there is the equally important question of when and how that obligation can be terminated.

¹ A second source of authority for the claim that the a treaty signatory is obliged not to defeat the object and purpose of a treaty prior to its entry into force appears in section 312(3) of the Restatement of the Law, Third, Foreign Relations Law of the United States, published by the American Law Institute in 1987. Interestingly, the Reporters' Notes on this section include the observation that "The principle that a signatory state may not take steps that would defeat the object and purpose of an international agreement, even prior to its entry into force . . . is less familiar to common law writers than to their civil law counterparts." The Reporters' Notes also point out that this principle did not appear in the Restatement of the Law, Second, Foreign Relations Law of the United States, published in 1965. It is hard to resist the conclusion that the addition of this principle to Restatement, Third reflects the influence of Article 18 of the Vienna Convention, which was concluded in 1969. All of this suggests that the notion that a treaty signatory is legally obliged to refrain from acts that would defeat the object and purpose of the treaty is a relatively new innovation in the understanding of American scholars of international law—one that arguably developed with little regard for the constitutional concerns of the Senate.

Article 18 of the Vienna Convention itself specifies two circumstances under which this obligation can be terminated. First, Article 18 says a signatory remains subject to this obligation “until it shall have made its intention clear not to become a party to the agreement”. Second, it says that once a country has ratified, it remains subject to this obligation until the treaty enters into force, “provided that such entry into force is not unduly delayed”.²

In the case of the CTBT, the question is whether the Senate vote in 1999 to reject the treaty made America’s “intention clear not to become a party to the agreement.” I would expect most Senators to agree that when the Senate votes to reject a treaty, that is a clear expression of intent not to be bound, and that if the United States initially had a binding legal obligation not to defeat the object and purpose of the treaty, that obligation is terminated once the Senate has spoken.

That, however, was not the view of the Clinton Administration following the Senate vote in 1999. To the contrary, shortly after the Senate vote, Secretary of State Albright sent a letter to a number key governments describing the Senate action as a “disappointment” and stating:

Despite this setback, I want to assure you that the United States will continue to act in accordance with its obligations as a signatory under international law, and will seek reconsideration of the Treaty at a later date when conditions are better suited for ratification.

The “obligations as a signatory under international law” referred to in Albright’s letter consisted primarily of the obligation not to defeat the object and purpose of the treaty. Not surprisingly, a number of Senators objected to this effort to claim that the United States had continuing legal obligations under the CTBT notwithstanding the Senate’s vote. Led by Senator Jon Kyl, they pressed the Bush Administration to repudiate the Albright letter.

On June 5, 2008, Secretary of State Rice responded to Senator Kyl by assuring him that:

. . . the United States has no international legal obligations resulting from the 1996 signature of the CTBT, and **we do not believe that such obligations would arise unless the treaty was to be ratified by the United States.** (Emphasis added)

I do not agree entirely with the legal analysis in the Rice letter. Read carefully, she does not say that the Albright letter—which essentially dismissed the significance under international law of the Senate vote on the CTBT—was wrong at the time it was written. Rather, she implies

² The United States has not ratified the CTBT, so the second circumstance specified in Article 18 for terminating the legal obligation arising under the Article is not directly relevant to the question at hand. It is worth noting, however, that entry into force of the CTBT has already been delayed for 20 years since the treaty was signed, and the treaty’s complicated mechanism for achieving entry into force makes it unlikely that the treaty will enter into force at any point in the foreseeable future, irrespective of whether the United States decides to ratify the treaty.

that circumstances subsequently changed, and therefore the Albright letter became wrong. The change in circumstances had to do with the attitude of the President toward the treaty. President Clinton favored approval of the treaty, and therefore the United States remained obligated not to defeat its object and purpose despite the Senate vote. But President Bush did not favor approval of the treaty, so that obligation terminated upon his coming to office, according to the reasoning of the letter. Because of its significance to this issue, I have attached a copy of Secretary Rice's letter to my testimony.

Clearly implicit in what the Obama Administration may now be planning to do at the U.N. is the notion that when President Obama came to office favoring the treaty, the switch flipped again, and the United States once again became bound not to defeat the object and purpose of the CTBT.

This notion is hard to reconcile with Article 18 of the Vienna Convention, which does not appear to contemplate the obligation not to defeat the object and purpose of a treaty switching on and off, depending on the state of mind of the chief executive of a treaty signatory. And it is impossible to reconcile with the Rice letter, which states unequivocally that given the CTBT's history in the United States, "we do not believe that such obligations would arise unless the treaty was to be ratified by the United States."

In view of the concerns that the Senate has consistently expressed regarding the Vienna Convention, the 1999 Senate vote on the CTBT, and the letter that Secretary Rice sent to Senator Kyl in 2008, I am surprised that the Obama Administration would today take the view that the United States has an obligation under international law not to defeat the object and purpose of the treaty. And I find it astonishing that the Administration would consider asking other governments and the UNSC to endorse its position on the issue, given the serious separation of powers concerns that position raises under the U.S. Constitution.

II. So Why Not Ask The Senate to Reconsider the CTBT?

Many have asked why, if the CTBT is so important to the Obama Administration, the President has decided to bring the matter before the UNSC rather than before the U.S. Senate for reconsideration of its 1999 decision to reject the treaty. One has to suspect that the Administration fears that if it were to ask the Senate to reconsider the treaty today, the probable result would be the same as in 1999.

I promised at the outset of my testimony not to belabor the tired arguments for and against the CTBT. But I do want draw the Committee's attention to one of the key obstacles to approval—one which, in my opinion, helps explain why the Obama Administration has not tried harder over the last seven years to build support for the treaty in the Senate.

This obstacle is clearly identified in the 2009 report of the Congressional Commission on the Strategic Posture of the United States. This Commission was appointed by the congressional

leadership in 2008 to forge bipartisan recommendations regarding the nuclear weapons strategy of the United States. The Chairman of the Commission was former Secretary of Defense William Perry, and the Vice-Chairman was former Secretary of Defense James Schlesinger. The Commission had a total of 12 members, equally divided among Democrats and Republicans, all experts in the field of defense and arms control.

Among other things, the Commission carefully reviewed the CTBT. Unlike most other issues considered by the Commission, it was unable to forge a consensus on the CTBT. The members split evenly on whether the CTBT should be approved, with all the Democratic members favoring approval of the CTBT, and all the Republicans opposing it.

The portion of the Commission's report dealing with the CTBT is only seven pages long, and provides an excellent synopsis of the state of the debate. It includes brief summaries of the case for approval of the CTBT made by the Commission members in favor of the treaty, and of the case against approval made by the Commission members opposed to the treaty.

One of the key points made by the opponents was that:

. . . the treaty remarkably does not define a nuclear test. In practice this allows different interpretations of its prohibitions and asymmetrical restrictions. The strict U.S. interpretation precludes tests that produce a nuclear yield. However, other countries with different interpretations could conduct tests with hundreds of tons of nuclear yield—allowing them to develop or advance nuclear capabilities with low-yield, enhanced radiation, and electro-magnetic pulse. **Apparently Russia and possibly China are conducting low yield tests.** This is quite serious because Russian and Chinese doctrine highlights tactical nuclear warfighting. (Emphasis added)

Opponents of the treaty went on to point out that, according to a 2002 report of the National Academy of Sciences, it is possible to conceal from detection underground nuclear tests with yields up to 1000-2000 tons. This means that it is possible for countries like Russia and China to conduct low-yield tests based on their definition of what is prohibited by the treaty without fear of detection. Further, even if these countries agreed to our definition of what the treaty prohibits, we would be unable to verify whether they were respecting that agreed definition.

Supporters of the CTBT on the Commission agreed that the lack of an agreed definition of precisely what activity the treaty prohibits is a problem, and they did not dispute the assertion that Russia and possibly also China are conducting low-yield nuclear tests that the United States considers to be prohibited under the treaty.

Because of the shared concern about the lack of an agreed definition, the Commission unanimously recommended that:

To prepare the way for Senate re-review of the CTBT, the administration should . . . secure P-5 agreement on a clear and precise definition of banned and permitted test activity.

This was not a minor matter, even to the CTBT's supporters on the Commission. Former Senator John Glenn, a member of the Commission and supporter of the CTBT, made this clear when he testified before the Armed Services Committee on the Commission's report in 2009. Senator Glenn stated:

I would favor CTBT, but I would only vote for it if it had better definition. Right now the—the Russians do not have an agreement with us as far as I know on exactly what it is we're agreeing to. They, for instance, have said that as long as they—they can test to smaller levels, as I understand it, they can test to smaller levels as long as it's not detectable. Well to me that's like saying it's OK to rob the bank if—so long as nobody catches me. . . . A treaty is equal on both parties, and right now the Russians do not see it that way as—as I understand it. So I would want better definition of it and then I'd be for it . . .

To my knowledge, notwithstanding the unanimous recommendation of the Strategic Posture Commission in 1999, no agreement has been reached among the P-5 regarding the definition of prohibited activity under the CTBT. I do not know if it hasn't happened because the Obama Administration hasn't tried to negotiate such an agreement, or because it has tried and failed. A third possibility is that it is impossible for the United States to even ask Russia and China to agree to a definition of what the treaty prohibits, because during the CTBT negotiation the P-5 affirmatively agreed to disagree about what they were prohibiting. Whatever the reason, one of the key Commission-recommended steps to lay the groundwork for Senate reconsideration of the treaty has not been achieved.

For these reasons, it should come as no surprise that the Administration has decided to bring the CTBT before the UNSC rather than the Senate.

II. Customary International Law

I will conclude my testimony with two comments on another theory about what the Administration may be hoping to accomplish by bringing the CTBT before the UNSC. Some have suggested that the UNSC could adopt a resolution fostering the notion that following signature of the CTBT there has emerged a new norm of customary international law which prohibits nuclear weapons testing.

My first comment on the suggestion that a new norm has emerged is that it is counterfactual. There have been 14 acknowledged nuclear weapons test explosions since the CTBT was signed in 1996: five by India in 1998, five by Pakistan in 1998, and four by North Korea, in 2006, 2009, 2013, and 2016.

Beyond this, we cannot ignore that statement in the report of the Strategic Posture Commission that “Apparently Russia and possibly China are conducting low yield tests.” Because whatever additional information the U.S. Government has about these low yield tests presumably is classified, and because the tests apparently took place at a level below the threshold of detectability by existing verification mechanisms, we do not know how many such tests have taken place, nor when. But anyone who wishes to contend that a new norm of international law has emerged must explain how such a norm can exist in the face of so many exceptions to it.

My second point is that the same definitional problem that bedevils the CTBT will also bedevil any claimed norm of customary international law against nuclear weapons testing. (This presumably would also be a problem for any UNSC resolution that sought to prohibit nuclear weapons testing.) Unless agreement can be reached on precisely what is a prohibited nuclear weapons test, different countries would be free to adopt different interpretations of the alleged norm.

In practice, this would mean that, as is already the case today under the CTBT, acceptance of the notion that customary international law prohibits nuclear weapons testing would give rise to a situation in which some countries claimed the right to conduct low level nuclear weapons tests, but the United States considered itself prohibited to do so. And as under the CTBT, the shortcomings of existing verification technology would ensure that we had no real certainty about the degree to which other countries were taking advantage of their interpretation of what was prohibited to conduct low yield nuclear tests. This would hardly be an advantageous arrangement for our nation.

This concludes my prepared testimony. I thank you for your attention and look forward to your questions.