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Anti-Ballistic Missile Treaty Demarcation and Succession Agreements: Background and Issues

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ABSTRACT

This report discusses the content of and issues related to the ABM Treaty Succession and Demarcation Agreements signed in September 1997. The Senate will be asked to provide its advice and consent to the ratification of these agreements as amendments to the 1972 ABM Treaty. The House may also review the implications of these agreements when it debates U.S. national and theater ballistic missile defense programs. The report begins with a brief overview of the 1972 ABM Treaty and a summary of the circumstances that led to negotiations on the new agreements. It then describes the rationale for the negotiations and the substance of the agreements. The report also contains a discussion of issues, such as the role of Congress in reviewing the agreements, the implications of the agreements for U.S. missile defense programs, and their relationship to strategic offensive arms reductions, that have come up during debates on Defense Authorization and Appropriations legislation. The Senate may address many of these issues when the Administration submits the agreements for its review. This report will be updated as events warrant.

Anti-Ballistic Missile Treaty Demarcation and Succession Agreements: Background and Issues

Summary

In September 1997, the United States and Russia signed several agreements related to the 1972 ABM Treaty. The Clinton Administration has stated that it will submit these agreements to the Senate as amendments to the ABM Treaty after the Russian parliament approves the START II Treaty.

The Memorandum of Understanding on Succession responds to questions about the legal status of the ABM Treaty after the demise of the Soviet Union; it names Russia, Ukraine, Belarus, and Kazakhstan as the successors to the Soviet Union for that agreement. Together, these states can deploy the single ABM site permitted by the Treaty. The Clinton Administration argued that this MOU was not an amendment to the ABM Treaty, and, therefore, did not need the Senate's advice and consent. Many in Congress disagreed and the Senate compelled the Administration to submit the MOU in a condition attached to another treaty's resolution of ratification. Some in Congress believe the MOU will strengthen the ABM Treaty and the arms control process. Others argue that the agreement undermines U.S. interests because it preserves an outdated Treaty and will complicate efforts to negotiate amendments to the Treaty that may be needed for the United States to deploy a nationwide ballistic missile defense system.

The United States initiated negotiations on the Agreed Statements on Demarcation because the ABM Treaty did not contain a precise dividing line between ABM systems, which are limited by the Treaty, and TMD systems, which are not. The United States wanted to develop advanced TMD systems that might have some theoretical capabilities against strategic ballistic missiles, so it sought agreements that would ensure that these systems were not limited by the Treaty. Russia, on the other hand sought provisions that would limit the capabilities of U.S. TMD systems because it feared that the United States might direct these systems against Russia's strategic ballistic missiles, undermining Russia's nuclear deterrent. The resulting agreements divide TMD systems into two categories -- those with interceptor velocities below 3 km/sec and those with faster interceptors. Systems with slower interceptors will not be limited by the Treaty as long as they are not tested against target missiles with velocities above 5 km/sec and ranges above 3,500 kilometers. Systems with faster interceptors also cannot be tested against such targets, and their interceptors cannot be based in space, but each country must still determine for itself whether systems with faster interceptors comply with the ABM Treaty. The United States and Russia also agreed to a number of confidence-building measures and general principles that are designed to ease Russia's concerns about the capabilities of U.S. TMD systems.

The Clinton Administration contends that these agreements will not impede the development of any U.S. TMD systems. But some in Congress have argued that the United States will unilaterally restrain its TMD systems and restrict their deployments to avoid lengthy compliance debates with the Russians. Some believe the United States should deploy whatever defenses are necessary to defend U.S. territory, forces, and allies, even if it must abandon the ABM Treaty to do so.

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Anti-Ballistic Missile Treaty Demarcation and Succession Agreements: Background and Issues

Introduction

On September 26, 1997, the United States and Russia signed several agreements related to the 1972 Anti-Ballistic Missile (ABM) Treaty. These agreements addressed succession questions that came up after the demise of the Soviet Union and demarcation issues related to the U.S. development of advanced theater ballistic missile defenses. President Clinton has stated that he will treat these agreements as amendments to the ABM Treaty and submit them to the Senate for its advice and consent to ratification.¹

Many Members of Congress have questioned whether these agreements serve U.S. national security interests. Some Members argue that the succession agreement -- which names Russia, Ukraine, Belarus, and Kazakhstan as legal successors to the Soviet Union in the ABM Treaty -- perpetuates a Treaty that is no longer in the U.S. interest because it denies the U.S. the ability to deploy missile defenses to protect its entire national territory. Others contend that this agreement preserves the original intent of a Treaty that continues to serve as the foundation of the U.S.-Russian strategic balance. Similarly, some Members support the Administration's view that the demarcation agreements -- which define the differences between ABM systems, which are limited by the Treaty, and theater missile defense systems, which are not -- will preserve both the integrity of the ABM Treaty and U.S. options for theater missile defenses. But some believe that these agreements will permit too much missile defense, and therefore undermine the ABM Treaty, while others argue they will unduly constrain U.S. missile defenses simply to maintain an outdated Treaty.

This report describes the background behind the negotiations of these agreements and the issues raised by their provisions. It begins with a brief overview of the 1972 ABM Treaty and a summary of the circumstances that led to the negotiations. It then describes the rationale for the negotiations, the substance of the agreements, and issues that many in Congress and outside the government have raised during debates over these agreements.

¹It is unclear, at this time, when the Senate will receive the amendments. The Clinton Administration stated that it would not submit them until the Russian parliament approved the 1993 START II Treaty (the United States and Russia also signed a Protocol to that Treaty in September 1997). The Russian parliament did this in mid-April, 2000, but the Administration may withhold these agreements while it seeks to negotiate both additional modifications to the ABM Treaty and deeper reductions in a START III Treaty.

Background

Overview of the 1972 Anti-Ballistic Missile Treaty

The United States and Soviet Union signed the Treaty on the Limitation of Anti-Ballistic Missile (ABM) Systems on May 26, 1972. This Treaty was one of two agreements reached during the first Strategic Arms Limitation Talks (SALT I). The second, the Interim Agreement on the Limitation of Strategic Offensive Arms, imposed a "freeze" on the number of launchers each country could deploy for its strategic offensive nuclear weapons and called for further negotiations that would lead to reductions. Together, these agreements were intended to slow, and eventually reverse, the nuclear arms race between the United States and Soviet Union. The limits on offenses and defenses were related because many analysts and government officials believed that neither side would be willing to limit or reduce its offensive forces if the other side deployed widespread defenses against those forces. Instead, both sides would seek to expand their offensive forces to be sure that they could penetrate and overwhelm the defenses on the other side if a conflict occurred. To preclude this offense-defense arms race, both sides agreed to limit sharply their deployments of defensive systems and to freeze their deployments of offensive systems while they negotiated a more comprehensive treaty to limit and reduce those forces (the SALT II Treaty, signed in 1979).²

The ABM Treaty prohibits the deployment of ABM systems for the defense of the nations' entire territory, but permits each side to deploy limited ABM systems at two locations, one centered on the nation's capital and one at a location containing ICBM silo launchers. A 1974 Protocol further limited each nation to one ABM site, located either at the nation's capital *or* around an ICBM deployment area. The Treaty specifies that the radius of the deployment area for each ABM system cannot exceed 150 kilometers and that each site can contain no more than 100 ABM launchers and 100 ABM interceptor missiles. The Treaty also limits the number and power of the ABM radars at each ABM site and specifies that, in the future, any radars that provide early warning of strategic ballistic missile attack must be located on the periphery of the national territory and oriented outward. Furthermore, the Treaty bans the development, testing, and deployment of sea-based, air-based, space-based, or mobile land-based ABM systems and ABM system components (the Treaty lists these

²Many participants in the current debate over National Missile Defenses and the future of the ABM Treaty continue to highlight this relationship between limits on offensive and defensive systems. Some in the United States argue that Russia will not continue to reduce its forces under the START I and START II Treaties if the United States deploys ballistic missile defenses that exceed the limits in the ABM Treaty because such defenses would undermine Russia's nuclear deterrent. Many members of Russia's parliament have also cited this offense-defense relationship in their discussions and criticisms of the START II Treaty. Consequently, those who support the demarcation agreements often note that, by ensuring that the United States will not violate the ABM Treaty with TMD systems, these agreements should clear the way for the Russian parliament to approve the START II Treaty. See, for example, Myers, Steven Lee. U.S. and Russians Agree to put off Deadline on Arms. *New York Times*. September 27, 1997, p. A1.

components as interceptor missiles, launchers, and radars or other sensors that can substitute for radars).

The numerical limits and deployment restrictions in the ABM Treaty do not apply to other types of defensive systems -- such as defenses against aircraft or defenses against ballistic missiles that are not *strategic* ballistic missiles (such as shorter-range battlefield or theater ballistic missiles). However, the Treaty does state that the parties cannot give these other types of defenses ABM capabilities. In particular, the parties agreed that they would not give these types of systems the capabilities to counter strategic ballistic missiles or their elements in flight trajectory. The parties also cannot test these other types of defenses "in an ABM mode."

International Events and the ABM Treaty

Demise of the Soviet Union. The demise of the Soviet Union in late 1991 raised questions about the future of the ABM Treaty. Some wondered whether all the facilities that had been a part of the Soviet ABM system would remain legal in the absence of a periphery for the national territory of the Soviet Union. For example, although Russia was the most likely successor to the Soviet Union in the Treaty, some of the Soviet ABM facilities were outside Russian borders. Some also questioned whether the Treaty could remain in force at all after one of the signatory nations ceased to exist. In fact, many critics of the ABM Treaty and supporters of policies that would lead to U.S. missile defense deployments found the situation to be advantageous; without a treaty partner, the Treaty could lapse and the United States could deploy missile defenses without limits. On the other hand, the United States and Soviet Union had signed several arms control agreements -- such as the 1987 Intermediate Nuclear Forces (INF) Treaty, the 1991 Conventional Armed Forces in Europe (CFE) Treaty, and the 1991 Strategic Arms Reduction Treaty (START) -- that the parties sought to maintain after the demise of the Soviet state. In each case, they worked out arrangements that would permit several of the former Soviet republics to participate as successors to the Soviet Union.³ Because the Clinton Administration believed that the ABM Treaty remained in the U.S. national security interest, it began negotiations in late 1993 on a succession agreement that would resolve these questions about the future of the Treaty.

The Growing Theater Ballistic Missile Threat. Desert Storm, the Persian Gulf war in 1991, also contributed to renewed interest in the limits in the ABM Treaty. During that conflict, Iraq launched dozens of short-range "Scud" missiles at

³The "Tashkent Agreement" of 1992 allocated Soviet allotments under the CFE Treaty to Azerbaijan, Armenia, Belarus, Kazakhstan, Moldova, Russia, Ukraine, and Georgia. The Lisbon Protocol of 1992 names Russia, Ukraine, Belarus, and Kazakhstan as the successors to the Soviet Union in the START I Treaty. Ukraine and Belarus have also participated in the implementation of the INF Treaty through agreements reached in the Treaty's Special Verification Commission (SVC). The Senate did review the Lisbon Protocol when it offered its advice and consent to the START I Treaty, but it did not request or receive an opportunity to review the multilateralization arrangements made for the INF and CFE Treaties. For a description of these agreements, see Library of Congress, Congressional Research Service, *Arms Control and Disarmament Activities: A Catalog of Recent Events*. CRS Report 97-177F, Amy F. Woolf, Coordinator. Updated January 5, 1998.

Israel and at allied forces in Saudi Arabia. The United States had deployed Patriot air-defense systems in the region to counter the Scud attacks, but these defenses proved to have limited capabilities against ballistic missiles. Although the United States had already initiated the development of more capable defensive systems to counter short- and medium-range ballistic missiles, Iraq's attacks alerted many in the United States to the growing threat posed by ballistic missiles in regional conflicts and generated new interest in the development of advanced theater missile defenses (TMD). By 1993, some analysts and officials in the Clinton Administration had begun to ask whether these advanced TMD systems would be covered by the limits in the ABM Treaty. All agreed that the Treaty did not explicitly limit TMD systems, but it also did not define precisely the difference between ABM systems and TMD systems, and, as is noted above, it prohibits giving these systems capabilities to counter strategic ballistic missiles. As a result, in order to avoid possible compliance questions, the Clinton Administration sought to reach an agreement with Russia on the characteristics that would distinguish between ABM systems and TMD systems.

The Memorandum of Understanding on Succession

After the 1991 demise of the Soviet Union, Russia inherited the vast majority of the Soviet Union's ABM facilities and most of its strategic offensive nuclear forces. Consequently, Russia appeared to be a logical successor to the Soviet Union for the ABM Treaty. However, political and military circumstances mitigated against this outcome. For example, at the Bishkek Conference in 1992, all the former Soviet republics (except the Baltic states, which had never considered themselves part of the Soviet Union), agreed that they would jointly assume the treaty obligations of Soviet Union.⁴ The United States had already participated in negotiations to name many of these states as parties to other U.S.-Soviet arms control agreements. In addition, these states were acting on their own to join multilateral arms control regimes, such as the Nuclear Non-proliferation Treaty. Some -- such as Belarus, Kazakhstan, and Ukraine -- reportedly viewed participation in these arms control regimes as an important element of their status as independent nations.⁵ Consequently, they probably would not have welcomed U.S. or Russian efforts to name Russia as the sole successor to the Soviet Union in the ABM Treaty.

In addition, the location of some of the Soviet Union's ABM facilities would have made it difficult for Russia alone to replace the Soviet Union in the ABM Treaty. As is noted above, the ABM Treaty requires that all early warning radars for ballistic missile attack be located on the periphery of the nation, oriented outward. The Treaty also prohibits the transfer of ABM systems or their components to other nations. But the Soviet Union had deployed two early warning radars in Ukraine, and one each in Latvia, Kazakhstan, and Azerbaijan. The Soviet Union also had located its test range for ABM interceptor missiles in Kazakhstan. Each of these facilities would have been

⁴This is referred to in *A New Threat to the ABM Treaty: The Administration's TMD Proposal*. *Arms Control Today*, January/February 1994, p. 12.

⁵ SCC Parties Sign Agreements on Multilateralization, TMD Systems. *Arms Control Today*. September 1997, p. 26.

inconsistent with the provisions in the ABM Treaty if Russia was named as the sole successor to the Soviet Union; they would have been outside Russia's periphery and Russia could not have legally transferred them to these states. In addition, Russia has started construction on a new radar facility in Belarus to replace the radar in Latvia.⁶ Even if the United States had agreed to "grandfather" older Soviet facilities that were outside Russia, this new radar would have violated the Treaty's mandate that all future radars be located on the nation's periphery. As a result, Russia expressed an interest in including other former Soviet states as parties in the ABM Treaty so that it could maintain the Soviet ABM system without violating the Treaty.⁷

Negotiating the Agreement

The Standing Consultative Commission began its consideration of a Memorandum of Understanding on succession in late 1993. At that time, the United States proposed that the ABM Treaty be open to any former Soviet republic that wanted to participate. There was some debate within the U.S. interagency process about this proposal. For example, the Department of Defense reportedly wanted to limit the number of new parties in the ABM Treaty (although it acknowledged that this number would include more than just Russia) to minimize potential problems that might arise if the United States sought to negotiate changes to the Treaty in the future. But the State Department argued and the White House agreed that the United States should not prejudge the outcome of negotiations on succession and should, instead, leave the decisions on whether to participate up to the potential successor states.

The SCC reportedly completed a preliminary agreement on the Memorandum of Understanding in May 1996 that would have allowed any former Soviet state to become a party to the ABM Treaty. However, only four states -- Russia, Belarus, Ukraine, and Kazakhstan -- had participated in the discussions up to that point and they were the only ones that expressed an interest in joining the Treaty. As a result, the final agreement limited treaty participation to five nations, these four former Soviet states and the United States.

⁶At the present time, Russia has an agreement with the Latvian government that permits it to operate the radar facility at Skrunda, Latvia through August 31, 1998. Russian officials report that construction of the new radar at Baranovichi, Belarus is behind schedule and, therefore, Russia must extend the lease on the Skrunda radar. See Aleksey Meshkov, "Russia: Latvian Radar Closure Not To Diminish Detection Potential," Moscow, RIA Novosti, February 19, 1998; and Mikhail Shevtsov, Russia Building Radar Station in Belarus, Itar-Tass, February 12, 1998.

⁷SCC Parties Sign Agreements on Multilateralization, TMD Systems. *Arms Control Today*. September 1997, p. 26.

Substance of the Agreement

The Memorandum of Understanding (MOU) on Succession⁸ states that "the United States of America, the Republic of Belarus, the Republic of Kazakhstan, the Russian Federation and Ukraine ... shall constitute the Parties to the Treaty." It further states that the "USSR Successor States" shall assume the rights and obligations of the former USSR under the Treaty and shall each implement the provisions of the Treaty with regard to its territory and activities, either independently or in cooperation with any other state." But these states cannot each deploy their own independent ABM systems. Article VI of the MOU states that the "Successor States shall collectively be limited at any one time to a single anti-ballistic missile system deployment area and to a total of no more than fifteen ABM launchers at ABM test ranges..."

The MOU goes on to state that the terms "national territory" and "territory of its country," which referred to the territory of the Soviet Union, would now refer to the combined territories of these successor states and the "periphery of its national territory" would now mean the periphery of the combined territories of the successor states. These provisions would permit Russia to continue to operate the test facility in Kazakhstan and the radars in Ukraine, and to construct a new early warning radar in Belarus. However, with only four new participants, some former Soviet Union ABM facilities would still remain outside the "territory" of these participating states. As a result, Article V of the MOU states that the Successor States may continue to use any facility covered by the Treaty that is "currently located on the territory on any State that is not Party to the Treaty, with the consent of such State...." Consequently, Russia can continue to operate the early warning radars in Latvia and Azerbaijan, as long as those states agree, even though these radars are now outside the periphery of the participating nations.

Issues for Congress

Congressional Review of the MOU on Succession. The most contentious issue that came up during congressional discussions about the MOU on Succession was whether the agreement represented a substantive change to the ABM Treaty and, therefore, was an amendment that should be subject to the advice and consent of the Senate. Beginning in 1996, the Clinton Administration asserted that the MOU would not represent a substantive change to the Treaty, and therefore, would not require the Senate's advice and consent, because it would not alter the fundamental limits in the Treaty. The successors still could deploy only one ABM site with 100 interceptor launchers and missiles and could not deploy an ABM defense of their entire territory. To the contrary, the Administration claimed that the "MOU works to preserve the original object and purpose of the ABM Treaty" and that the U.S. objective in negotiating the MOU was to "reconstitute the original treaty arrangement as closely

⁸The formal title of this agreement is the Memorandum of Understanding Relating to the Treaty Between the United States of America and the Union of the Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems of May 26, 1972. The text of the agreement can be found at the Arms Control and Disarmament site on the world wide web (www.acda.gov/factshee/missdef/).

as possible."⁹ Furthermore, the Administration argued that "the resolution of succession questions after the dissolution of a State has been regarded as a function of the Executive branch, and that many executive agreements have been concluded that recognized the succession of new States to the treaty rights and obligations of their predecessors. ... Such agreements have not been regarded as treaty amendments ... but rather as the implementation of existing treaties."¹⁰

Congress has, on several occasions, however, highlighted its interest in having any agreements related to the ABM Treaty submitted to the Senate for its advice and consent. For example, in the Defense Authorization Act for FY1995 (P.L.103-337, Sec. 232), Congress stated that any international agreement that would substantively modify the ABM Treaty would not be binding unless the Senate offered its advice and consent. The Conference Report accompanying that legislation noted that there were a wide range of views on what changes would be considered "substantive," so it requested that the Administration consult with the Senate to determine if changes were substantive.¹¹

The 104th Congress sought to be more specific. In the FY1997 Defense Authorization Act, the House stated that an agreement that added anyone other than the United States and Russia to the ABM Treaty *would* constitute an amendment to the Treaty and require advice and consent of the Senate. The final version of the Defense Authorization Act for FY1997 did not contain this language, in part because the Clinton Administration had threatened to veto a bill with language requiring the submission of the succession agreement, but the Conference Committee nevertheless noted in its report that Congress would consider a succession agreement to be a substantive change to the Treaty.¹² In addition, in the Defense Appropriations Bill for FY1997, the House sought to withhold funding for the Standing Consultative Commission or for implementation of any new agreements reached in that commission until the President certified that he would submit the agreements to the Senate for its advice and consent. This language did not, however, become law. The final version of the legislation, which was included in the Omnibus Consolidated Appropriations Act for 1997, withheld funding for the SCC until the President submitted a report containing a detailed analysis of whether the MOU on Succession would represent a substantive change to the Treaty.¹³

The Clinton Administration submitted its analysis to Congress on November 25, 1996. In the report, the Administration presented the arguments described above to conclude that the MOU on Succession did not constitute a substantive change to the

⁹Letter from National Security Advisor Sandy Berger to Senate Majority Leader Trent Lott, March 25, 1997.

¹⁰U.S. Department of Justice, Office of Legal Counsel, Office of the Assistant Attorney General. Memorandum for John M. Quinn, Counsel to the President, from Walter Dellinger Assistant Attorney General, Re: Section 233(a) of S.1745. June 26, 1996.

¹¹U.S. Congress. House. National Defense Authorization Act for Fiscal Year 1995. Conference Report 103-701. August 12, 1994. p. 640.

¹²*Congressional Record*, July 30, 1996, p. H9250.

¹³Omnibus Consolidated Appropriations Act, 1997. P.L. 104-208, Sec. 406.

Treaty, and, therefore, did not require the advice and consent of the Senate. The Administration also repeated its rationale in March 1997, in a letter from National Security Advisor Berger to Senator Lott, and stated that it continued to believe that the MOU would not need Senate approval or any other congressional action to enter into force.

Many in Congress, however, disagreed with the Administration's conclusions. Some argued that the MOU would represent a substantive change to the ABM Treaty, even if it did not permit the deployment of additional ABM defenses, because it would limit the rights of and extend new obligations to states that had not possessed these rights and obligations before. Some Members also argued that the agreement would change the substance of the Treaty because it would redefine the territory and redraw the periphery of the "nation" covered by the Treaty.¹⁴ Some analysts outside Congress also claimed that the MOU would change the substance of the Treaty because it would change the composition of the Standing Consultative Commission and because the parties had to negotiate new procedures for that body.¹⁵ This, however, may not be relevant because the Treaty specifically states that the parties to the Treaty should establish and amend, as necessary, the regulations for the SCC that govern its procedures, composition, and relevant matters. Consequently, because the Treaty, in its original form, foresaw the possible need for changes in the SCC, these changes probably do not constitute substantive changes in the Treaty.

During its consideration of amendments to the Conventional Armed Forces in Europe Treaty (the CFE Flank agreements), the Senate added a condition to the resolution of ratification stating that the President must certify that he would submit the MOU on Succession to the Senate before he could deposit the instruments of ratification for the CFE Flank agreement. The Administration objected to this condition, in part because it addressed an unrelated treaty in the resolution of ratification for amendments to the CFE Treaty. However, when it realized that it did not have the votes to defeat the condition, it accepted the Senate's mandate and agreed to submit the MOU on Succession to the Senate for its advice and consent. The President stated that he would submit this agreement, along with the demarcation agreements and the Protocol extending the elimination period in the START II Treaty, to the Senate after the Russian parliament approved the ratification of START II. The Russian parliament approved START II in mid-April 2000, but the Administration has not yet indicated when it will submit the agreements to the Senate.

The Future of the ABM Treaty. The Clinton Administration has argued that the MOU on Succession is needed to preserve the ABM Treaty and allow it to remain in force. The Administration supports this goal because it believes the Treaty serves as the foundation of the U.S.-Russian strategic relationship.¹⁶ The Treaty's supporters

¹⁴These arguments are extended in the Conference Report to the FY 1997 Defense Authorization Bill, which can be found in *Congressional Record*, July 30, 1996, p. H9250.

¹⁵Moore, Thomas and Baker Spring. The Senate's Right to Approve ABM Treaty Changes Must Be Upheld. The Heritage Foundation, Executive Memorandum No. 479. May 12, 1997. p. 2.

¹⁶See, for example, U.S. Department of State, Remarks by Secretary of State Madeleine K. (continued...)

note that it remains relevant to this relationship, even after the demise of the Soviet Union, because it permits continuing reductions in strategic offensive nuclear weapons. They believe that if the ABM Treaty were permitted to lapse due to the absence of a succession agreement, Russia would not only fail to ratify the START II agreement, it might also stop implementing the START I agreement. This is because officials in Russia have argued that Russia should not continue to implement reductions in its offensive weapons if the United States moves to deploy a nationwide ballistic missile system and these same Russian officials believe that the United States would deploy such a system as soon as it was released from the obligations in the ABM Treaty.¹⁷

In contrast, some analysts and members of Congress oppose the MOU on Succession precisely because it might prolong the life of the ABM Treaty.¹⁸ They argue that the Treaty is no longer in the U.S. national security interest because it limits the United States ability to defend itself against missile attacks. Instead, they believe the United States should develop and deploy whatever missile defenses are necessary to respond to emerging ballistic missile threats from China, North Korea, and other potential adversaries, even if that means exceeding the limits in the ABM Treaty. Their insistence that the Administration submit the MOU to the Senate was, in part, due to their interest in using the debate on the MOU as a foundation for a broader debate to review the entire Treaty.¹⁹

Others have opposed the MOU on more specific grounds, arguing that the added parties will complicate efforts to negotiate changes in the Treaty's restrictions on ABM deployments.²⁰ They believe that the United States will need to seek changes --

¹⁶(...continued)

Albright, At Anti-Ballistic Missile Treaty Signing. Office of the Spokesman, September 26, 1997.

¹⁷See, for examples, the discussion by Aleksey Ivanovich Podberezkin, the deputy chairman of RF State Duma International Affairs Committee and Anton Viktorovich Surikov, director of Information-Analysis Center of Institute of Defense Research, "Opinion 1: "A Treaty Giving the United States Advantages: START II Ratification Should Be Revisited After 2000" in *Moscow Nezavisimoye Voyennoye Obozreniye* in Russian 20-26 Feb 98 No 7, p 6, Translated in FBIS-SOV-98-089, March 30, 1997.

¹⁸In a letter to the President in 1995, 13 Senate Republicans argued that "The cornerstone of U.S. security policy should not be a Cold War-era treaty, but a defense posture that responds to the threats of the 21st century." See Gertz, Bill. 13 GOP Senators Vow To Prevent New Limits on Missile Defenses. Washington Times. March 10, 1995, p. A1. House Republicans have also stated that "...expanding the outmoded ABM Treaty to include new parties would be fundamentally inconsistent with the national security of the United States, our troops, and our allies." Policy Statement on Missile Defense and the Helsinki Summit, by the 1997 House Republican Policy Committee. Issued March 19, 1997.

¹⁹Some Senators who support the continued implementation of the ABM Treaty also believe the Senate should review the MOU as an amendment to the Treaty. Their position is motivated by their interests in preserving the Senate's constitutional role on treaties.

²⁰See, for example, the prepared statement of R. James Woolsey, in U.S. Congress, House. Ballistic Missile Defense: Responding to the Current Ballistic Missile Threat. Committee on (continued...)

such as increases in the permitted numbers of ABM sites and interceptor missiles or a relaxation on the ban on space-based sensors -- if it wants to deploy an effective national missile defense system. And they fear that the new participants in the Treaty will support Russia if it objects to the changes in the ABM Treaty, which could prolong the negotiations or even lead to a vote of 4-1 against any U.S. proposals.²¹ Officials in the Clinton Administration have disputed this assertion. They note that Ukraine, Kazakhstan, and Belarus have their own interests and they do not always correspond to Russia's interests. In addition, John Holum, the director of the Arms Control and Disarmament Agency, testified that these three nations had participated in the ABM/TMD demarcation discussions in the SCC and that their participation had not complicated the negotiations.²²

Agreed Statements on ABM/TMD Demarcation

Theater Missile Defenses and the ABM Treaty

The 1972 ABM Treaty's limits apply to missile defenses that are designed to intercept strategic offensive ballistic missiles, but not to defensive systems that are designed to intercept shorter-range ballistic missiles or aircraft. But the Treaty states that other types of defensive systems cannot be given capabilities that will allow them to defend against strategic ballistic missiles and they cannot be "tested in an ABM mode."²³ The Treaty does not, however, define strategic ballistic missiles or "tested in an ABM mode."

Strategic Ballistic Missiles. When the United States and Russia signed the ABM Treaty, they understood that strategic ballistic missiles were those systems limited by the Interim Agreement on Offensive Weapons that they signed at the same time. In an agreed statement accompanying that agreement, the parties specified that land-based strategic ballistic missiles were those with the range to reach from the northeastern border of the continental United States to the northwestern border of the

²⁰(...continued)

Government Reform and Oversight. Hearing, 104th Cong. 2nd Sess. May 30, 1996, p. 63. See, also, Baker Spring. The Senate Should Block the White House's End Run on the ABM Treaty. *The Heritage Foundation Backgrounder No. 1106*. March 11, 1996, p. 5.

²¹Hill Doubts Administration has Russian Deal on Navy Upper Tier. *Aerospace Daily*, October 25, 1996. p. 141.

²²U.S. Congress, Senate. Committee on Governmental Affairs, Subcommittee on International Security, Proliferation, and Federal Services. National Missile Defense and the ABM Treaty. Hearing. 105th Cong. 1st Sess. May 1, 1997. Washington D.C., 1997. pp. 16-17.

²³Article VI of the Treaty states that "to enhance assurance of the effectiveness of the limitations on ABM systems and their components" the parties agree "not to give missiles, launchers, or radars, other than ABM missiles, ABM launchers, or ABM radars, capabilities to counter strategic ballistic missiles or their elements in flight trajectory and not to test them in an ABM mode..." See U.S. Arms Control and Disarmament Agency, *Arms Control and Disarmament Agreements. Texts and Histories of the Negotiations*. 1990 Edition. Washington, D.C. p. 159.

continental Soviet Union -- a distance of 5,500 kilometers. But that distance did not define the range of submarine-based strategic ballistic missiles because these could move closer to the shores of the other nation. Nevertheless, the parties shared an understanding of which submarine-launched ballistic missiles were "strategic" because they agreed on the number of submarines and launchers covered by the Treaty. And some of these submarines and launchers carried the Soviet SS-N-5 SLBM (submarine-launched ballistic missile), which had a range of only 1,400 kilometers.²⁴

Tested in an ABM Mode. Although the ABM Treaty does not contain an agreed definition of "tested in an ABM mode," the United States outlined its own definition in a unilateral statement issued at the time it signed the Treaty. It said it would consider an interceptor missile to be tested in an ABM mode if it were tested against a target vehicle with a flight trajectory of a strategic ballistic missile; or if it were flight tested in conjunction with the test of an ABM interceptor missile or an ABM radar at the same test range; or if it were flight tested to an altitude inconsistent with the interception of targets against which air defenses are deployed. The United States also indicated that it would consider a radar to be tested in an ABM mode if it made measurements on a target vehicle with a strategic ballistic missile trajectory during the reentry portion of the target's trajectory or made measurements in conjunction with the test of an ABM interceptor missile or an ABM radar at the same test range.²⁵

The United States and Soviet Union adopted an Agreed Statement that defined "tested in an ABM mode" in 1978. The specific provisions of this statement remain classified, but it contains the criteria that the two sides use when independently assessing whether tests of their missile defense components or systems will demonstrate capabilities against strategic ballistic missiles.²⁶

²⁴U.S. Library of Congress, Congressional Research Service. *The ABM Treaty and Theater Missile Defense: Proposed Changes and Potential Implications*, by Steven A. Hildreth. CRS Report 94-374F, May 2, 1994. p. 3.

²⁵U.S. Arms Control and Disarmament Agency, *Arms Control and Disarmament Agreements. Texts and Histories of the Negotiations*. 1990 Edition. Washington, D.C. pp. 165-166.

²⁶See the statement of Dr. Kent Stansberry, Deputy Assistant Secretary of Defense, in U.S. Congress, Senate, Committee on Governmental Affairs, Subcommittee on International Security, Proliferation, and Federal Services, Compliance Review Process and Missile Defense, Hearing, 105th Cong. 1st Sess. July 21, 1997. Washington D.C., p. 5. The United States has also used a concept known as the "Foster Box" when determining whether its defensive systems are "tested in an ABM mode." During the 1972 Senate debate over the ABM Treaty, the Director of Pentagon Defense, Research, and Engineering, John Foster, testified that the upper threshold for *non-ABM* testing should be an interceptor tested against a target with a maximum velocity of 2 kilometers/second and a maximum intercept altitude of 40 kilometers. The United States has not used this threshold to mean that any defensive system tested against a target with a greater velocity or intercept altitude was "tested in an ABM mode," it has, instead, used it to indicate that such tests would require further review, using the standards in the 1978 statement, to determine whether they were tests "in an ABM mode."

The Demarcation Problem

Based on the agreed statements, therefore, a defensive system apparently would become subject to the limits in the ABM Treaty if it were given capabilities to counter strategic ballistic missiles or if it were tested against targets that resembled strategic ballistic missiles in their flight trajectories. As is noted above, the parties included the 1,400 km Soviet SS-N-5 submarine-launched ballistic among those limited by the SALT I Interim Agreement. Using this standard, any missile with a range greater than 1,400 kilometers could be considered strategic and any defensive system designed to counter missiles with that range or tested against missiles with that range could be subject to the limits in the ABM Treaty.

By the 1990s, however, some countries had developed theater ballistic missiles with ranges that exceeded 1,400 kilometers. China, in particular, had developed the 3,500-kilometer CSS-2 intermediate-range missile. At the same time, both the United States and Soviet Union had retired their older, shorter range submarine-launched ballistic missiles. As a result, a threshold of 1,400 kilometers for strategic ballistic missiles would be well below the range needed to define current strategic ballistic missiles, but it would capture many modern theater ballistic missiles. This was the crux of the demarcation problem for the United States: if a range of 1,400 kilometers defined a strategic ballistic missile, then the limits in the ABM Treaty would apply to advanced theater missile defense systems, even if they were never tested against and had only limited capabilities against modern strategic ballistic missiles.

Negotiating The Demarcation Agreements

The United States entered the ABM/TMD demarcation negotiations with a simple objective: it wanted to maintain the flexibility to develop advanced theater missile defense (TMD) systems without having those systems fall under the limits in the ABM Treaty. According to Administration documents, the United States wanted to "record a clear understanding on the compliance of TMD systems and preclude disputes or ambiguities concerning current and future TMD systems."²⁷

The United States initially proposed a simple demarcation rule that would define an ABM interceptor as one that demonstrated the capability to destroy a target ballistic missile with a velocity greater than 5 km/sec.²⁸ Anything tested against less capable targets would not be subject to the Treaty limits. This demarcation line would have defined the difference between theater and strategic ballistic missiles in a way that would have permitted the United States to develop TMD systems to defend against missiles such as the Chinese CSS-2, which reportedly has a peak velocity of around 5 kilometers per second, without raising questions about whether the defenses could intercept modern strategic ballistic missiles, which reportedly have peak velocities of at least 7 kilometers per second.

²⁷U.S. Ballistic Missile Defense Organization, *1997 Report to Congress on Ballistic Missile Defense*. Washington, D.C. p. 1-5.

²⁸U.S. Proposal to Retool ABM Treaty Reopens Debate on Missile Defense. *Arms Control Today*. January/February 1994, p. 24.

The United States recognized that TMD systems that were designed and tested against more advanced theater ballistic missiles might also have some theoretical capability against strategic ballistic missiles. This is why it proposed that TMD systems not be covered by the Treaty unless they *demonstrated* that capability, presumably in a test program.

Russia's objectives in the negotiations differed markedly from those of the United States. Instead of seeking a demarcation line that would exclude advanced TMD programs from ABM Treaty limits, Russia sought a formula that would capture advanced programs within the Treaty's confines. This is because Russia feared that the United States might deploy its advanced TMD systems in a way that would allow the United States to intercept Russia's strategic ballistic missiles, and, therefore, undermine Russia's nuclear deterrent.²⁹

To address these concerns, Russia proposed that an ABM interceptor be defined as one with the capability to intercept targets with a velocity of 3 kilometers per second, rather than 5 kilometers per second. Russia also suggested that the parties limit the range of the target missile in TMD interceptor tests to 3,500 kilometers. And, it proposed a limit on the velocity of the *interceptor* missile at 3 kilometers per second. Any interceptor tested with a greater velocity, even if it were tested against a shorter range or slower target missile, would be considered to be an ABM interceptor subject to the limits in the Treaty. Russia also rejected the "demonstrated capability" criteria in the U.S. proposal because it believed that U.S. TMD systems could have capabilities against strategic ballistic missiles even if they had never been tested against those missiles. Hence, under the Russian proposal, the limits in the ABM Treaty would apply to U.S. TMD systems that might also have some capability against Russia's strategic ballistic missiles, even if they never demonstrated that capability. Finally, Russia suggested that the parties link the number and location of deployed TMD systems to size and scope of threat and that they restrict the power of TMD radars. These provisions were also intended to reduce the likelihood that the United States could deploy TMD systems in a way that would threaten Russia's strategic offensive forces.

The United States rejected Russia's proposal to limit TMD interceptor velocity, for all TMD systems, to 3 km/sec. Although this would not have impeded the most mature of the advanced TMD systems -- the Army Theater High Altitude Area Defense (THAAD), which reportedly has an interceptor velocity of around 2.8 km/sec -- it would have precluded the development of two options for the Navy's wide area defense system -- the Lightweight Exoatmospheric Projectile (LEAP) on an SM-2 missile (4.3-4.8 km/sec) and a modified THAAD with a MK72 booster (4-4.5 km/sec).³⁰ Nevertheless, the United States said it would accept a limit of 3 km/sec for the velocity of land-based TMD interceptors and that it would also accept this limit for lower-tier sea-based interceptors (i.e., TMD systems that would intercept their targets in the lower atmosphere), but it would reserve the *right to revisit the issue in*

²⁹U.S. Proposal to Retool ABM Treaty Reopens Debate on Missile Defense. *Arms Control Today*. January/February 1994, p. 24.

³⁰U.S. Rejects Moscow's Proposal to Limit ATBM Interceptor Speeds. *Arms Control Today*. May 1994, p. 19.

the future.³¹ Then, to protect the Navy's options for wide area defense, the United States sought the right to conduct up to 6 tests per year of faster interceptors (those with speeds of 4.0-4.5 kilometers per second) that were designed to destroy targets in the upper atmosphere. And, to protect the Air Force "boost-phase interceptor" program, the United States offered to limit air-based interceptors to a speed of 5.5 km/sec and a range of 600 kilometers in tests.³²

In negotiations during the latter half of 1994, the United States and Russia were unable to resolve their differences over the specific limits on interceptor velocity. Russia also repeated its proposal for restrictions on the numbers and locations of deployed TMD systems.³³ The United States objected because it did not want the ABM Treaty to limit the deployments of TMD systems.

The demarcation discussions in the SCC were postponed during the first half of 1995.³⁴ In the United States, the new Republican majority in Congress objected to the negotiations and called on the President to suspend them.³⁵ During this time, the United States reportedly reconsidered its position and reverted to its original proposal that the demarcation agreement limit the speed of target missiles, not interceptor missiles.³⁶

At the same time, high level talks between U.S. and Russian officials continued in an effort to develop a joint declaration of principles that Presidents Clinton and

³¹U.S. officials emphasized this point to highlight the fact that they did not consider these limits to be permanent.

³²U.S. Takes New Offer to ABM Talks, But DOD in No Hurry For a Resolution. *Inside the Pentagon*, October 6, 1994, p. 3. See also U.S. Continues to Press for Looser Limits on ABM Treaty. *Arms Control Today*. September 1994, p. 24.

³³Russia Backs Away from High-Speed TMD Test Proposals. *Arms Control Today*. December 1994, p. 20.

³⁴ABM Treaty Clarification Talks Postponed. *Arms Control Today*. March 1995, p. 31.

³⁵In a letter dated January 4, 1995, 17 House Republicans, including Speaker Gingrich, Majority Leader Arney, Rep. Spence, Rep. Gilman, and Rep. Livingston, called on the President to suspend negotiations until Congress had a chance to review the issues involved. See Gen. Shali Cautions Deutch over Missile Defense Treaty Approach. *Defense Week*. January 17, 1995, p. 5. Republicans in the Senate also objected to the Administration's approach. In a letter dated January 17, 1995, 22 Republican Senators, argued that original U.S. proposal had been "clear and logical" but that the "increasing number of detailed performance and operational limitations" in other proposals "would have the effect of transforming the ABM Treaty into an ABM/TMD treaty, foreclosing a number of promising TMD options and making the agreement difficult to implement and monitor." They further urged the President to temporarily suspend the negotiations while Congress reviewed U.S. missile defense policy. See Gertz, Bill. GOP Senators Seek Break in Missile Talks. *Washington Times*. February 10, 1995, p. A12.

³⁶Gertz, Bill. U.S. May Drop its Concessions in ABM Treaty Talks. *Washington Times*. April 10, 1995. p. A1.

Yeltsin could announce at their summit meeting in May 1995.³⁷ At that time, the Presidents agreed that they were committed to the ABM Treaty as the cornerstone of strategic stability but they also agreed that both parties must have the option to establish and deploy effective TMD systems. They also agreed that these TMD systems must not lead to the violation or circumvention of the ABM Treaty (i.e., Russia's concern that the United States might use TMD systems to undermine Russia's strategic nuclear forces) and that their deployment would not pose a *realistic threat* -- as opposed to a theoretical threat -- to the strategic nuclear force of the other side (this addressed the U.S. concern about limits on TMD systems that were never tested against strategic targets). They also agreed that their TMD systems would not be tested in a way that would give them capabilities against each other's forces and that the scale of TMD deployment would be consistent with the threat.³⁸

In June 1995, the United States offered a new proposal that would have excluded from the ABM Treaty limits any TMD system with interceptor velocities below 3 km/sec as long as the system were tested against a target with a velocity of less than 5 km/sec. But this 3 km/sec velocity for interceptors was not a limit; it was, instead a dividing line between slower and faster TMD interceptors. The United States suggested that, until they agreed on more formal arrangements, the parties agree that testing and deployment of TMD systems with faster interceptors would be permitted, subject to each side's own internal compliance review. Russia appeared willing to accept the U.S. proposal for systems with slower interceptors, but it rejected the proposal for systems with faster interceptors.³⁹

In mid-November 1995, the United States and Russia incorporated their areas of agreement in a framework that stated that all TMD systems could be tested against targets with velocities below 5 km/sec and ranges below 3,500 kilometers.⁴⁰ They also agreed that interceptors tested with velocities of less than 3 km/sec would be considered to be treaty-compliant as non-ABM systems. The framework also included confidence-building measures that were designed to address Russia's concerns about the potential capabilities of U.S. TMD systems. The parties agreed that they would provide prior notification of TMD tests against ballistic missile targets; allow reciprocal visits at test ranges; provide data exchanges on systems and programs; provide annual notifications on routine deployment areas; offer assurances that neither would deploy TMD systems in a way that would jeopardize the other side's strategic nuclear forces; provide an annual review of TMD and the theater missile threat; and allow further consultations, as needed.

³⁷Gertz, Bill. U.S., Russia to Stand by ABM Treaty. Draft Statement Sets Summit Tone. *Washington Times*. April 24, 1995. p. A4.

³⁸The full text of these principles can be found in Russia-United States Joint Statement on Missile Systems; May 10 1995. *Weekly Compilation of Presidential Documents*. v. 31, May 15, 1995. p. 799.

³⁹ABM Treaty Remains Threatened by Continuing Push for TMD. *Arms Control Today*. September 1995, p. 28, 33.

⁴⁰Text of "Framework" Altering ABM Treaty, *Washington Times*, December 4, 1995, p. A1.

This framework did not, however, resolve the dispute over limits on systems with faster interceptors or the question of whether tests of these systems would be permitted in the absence of more formal arrangements.⁴¹ In a letter to Secretary of State Christopher,⁴² Russia's Foreign Minister Primakov insisted that an agreement on these systems limit them to tests against targets with a maximum velocity of 5 km/sec and a maximum range of 3,500 km (the same target limits that applied to slower interceptors); ban tests of faster interceptors against targets with multiple warheads or strategic ballistic missile warheads; ban space-based TMD interceptors; ban space-based tracking and guidance sensors; ban TMD systems based on other physical principles (such as lasers); and permit TMD systems with nuclear warheads (this would have accommodated a possible Russian TMD program). Primakov also suggested that the two sides discuss limits on the basing of air-launched faster TMD systems; limit the velocity of these faster interceptors; and restrict the numbers and locations of deployed TMD systems with faster interceptors.

The United States had already rejected many of the points in Primakov's proposal, including the limits on interceptor velocity, limits on numbers and deployment areas for TMD systems, and bans on space-based components. In addition, the United States objected to a ban on tests against targets with multiple warheads because it thought this would encourage rogue nations to develop multiple warhead missiles to evade U.S. TMD systems. The stalemate on an agreement for faster systems persisted through the end of 1996.⁴³

The stalemate broke when Presidents Clinton and Yeltsin met at Helsinki in March 1997 and agreed on a framework that balanced the U.S. interest in leaving the velocity of interceptor missiles unlimited and compliance judgements up to the individual nations with Russia's interest in ensuring that U.S. TMD deployments did not undermine Russia's strategic offensive forces. In this framework, the parties reaffirmed the May 1995 principles that stated their support for the ABM Treaty and their agreement that the parties could deploy TMD systems that did not undermine the Treaty or pose a realistic threat to the strategic forces of the other side. The two sides also agreed, as they had for slower TMD systems, that they would only test faster interceptors against targets with velocities below 5 kilometers per second and ranges below 3,500 kilometers. The United States also accepted Russia's proposals for a ban on space-based TMD interceptors, but it did not accept any constraints on space-based sensors.

At Helsinki, the United States and Russia also agreed to exchange detailed information about their TMD plans and programs. This information would

⁴¹This dispute is outlined in Gertz, Bill. Moscow Won't Buy U.S. Missile Stance. *Washington Times*. March 14, 1996, p. A7.

⁴²Primakov Letter Outlines Russian Missile-Talks Stance. *Washington Times*, July 15, 1996. p. 10.

⁴³Russia reportedly continued to insist that the United States accept at least some of its proposals for limits on interceptor speed, space sensors, TMD testing conditions, and numbers and locations of TMD deployments. The United States continued to reject these proposals. See Gertz, Bill. Service Chiefs Fear for Missile Defenses. *Washington Times*. March 10, 1997, p. A4.

presumably help Russia understand that U.S. TMD programs were not directed against Russia's forces and would not have the capabilities to undermine Russia's strategic deterrent. The parties also agreed to issue unilateral statements about their plans not to flight test TMD systems with faster interceptors against a ballistic missile target before 1999; not to deploy faster land- and air-based interceptors; and not to test TMD interceptors against targets with multiple warheads or targets with strategic warheads. These unilateral statements, which the parties would issue annually and could change at any time, were in lieu of Russia's proposal for explicit bans on these activities. The provisions in these agreements became the Agreed Statements and associated documents that the parties signed in September 1997.⁴⁴

Substance of the Agreements

The ABM/TMD demarcation agreements consist of two separate Agreed Statements with Common Understandings, an Agreement on Confidence-Building Measures related to TMD systems, a Joint Statement on the Annual Exchange of Information on the Status of Plans and Programs for TMD systems, and U.S. and Russian unilateral statements on plans for TMD systems. The following section describes the contents of each of these documents.⁴⁵

First Agreed Statement. This document addresses the relationship between TMD systems with slower-velocity interceptors and the ABM Treaty. Specifically, it defines slower-velocity systems as those with interceptors whose demonstrated velocity does not exceed 3 km/sec over any part of a flight trajectory. These systems will be considered compliant with the ABM Treaty as long as they meet two conditions during their flight tests:

- The velocity of the ballistic target-missile does not exceed 5 km/sec over any part of its flight trajectory; and
- The range of the ballistic target-missile does not exceed 3,500 kilometers.⁴⁶

These characteristics of the target missile provide a demarcation line between theater and strategic ballistic missiles, which is consistent with the U.S. approach from the beginning of the negotiations. As long as a TMD system with a slower-velocity interceptor is not tested against a "strategic" target ballistic missile, it will be considered to have *not* been given capabilities to counter strategic ballistic missiles and *not* been tested in an ABM mode.⁴⁷ This is not, however, a new definition of

⁴⁴The United States, Russia, Ukraine, Belarus and Kazakhstan all signed the documents on ABM/TMD demarcation, and they agreed that these would enter into force simultaneously with the Memorandum of Understanding on Succession.

⁴⁵The text of these documents can be found at the Arms Control and Disarmament site on the world wide web (www.acda.gov/factshee/missdef/).

⁴⁶Fact Sheet on First Agreed Statement on ABM Treaty. White House. Office of the Press Secretary. September 26, 1997.

⁴⁷Fact Sheet on First Agreed Statement on ABM Treaty. White House. Office of the Press Secretary. (continued...)

"tested in an ABM mode." In the Common Understandings that accompany this statement, the parties agreed that the provisions of this agreement are not intended to replace or amend the 1978 Agreed Statement that defines "tested in an ABM mode." Instead, this agreement simply indicates that TMD systems that meet the conditions in this new Agreed Statement need not be assessed against the terms of the 1978 statement; they will automatically be considered to be TMD systems that are not covered by the limits in the ABM Treaty.

The parties also agreed in a common understanding that the velocity of space-based interceptor missiles shall be considered to exceed 3 kilometers per second. As a result, this Agreed Statement would not apply to TMD systems with space-based interceptors.

Some analysts believe that this Agreed Statement imposes a limit on the velocity of TMD interceptor missiles. They have concluded that, because slower speed systems are automatically excluded from the limits in the ABM Treaty (unless they are tested against "strategic" targets), faster speed systems must automatically be covered by the limits in the ABM Treaty. These conclusions are not true. The designated speed for interceptor missiles is not a limit, but a dividing line between those that are covered by the First Agreed Statement and those that are covered by the Second Agreed Statement. The United States can test TMD interceptors with velocities greater than 3 km/sec and they can deploy these TMD systems without ABM Treaty restriction, as long as they meet the conditions set out in the Second Agreed Statement and are not "tested in an ABM mode," as defined by the 1978 Joint Statement.

Second Agreed Statement. The Second Agreed Statement contains three specific limits on TMD systems with faster-velocity interceptors. First, these systems cannot be tested against ballistic target-missiles with velocities that exceed 5 km/sec. Second, they cannot be tested against ballistic target-missiles with ranges that exceed 3,500 kilometers. And, third, the parties cannot develop, test or deploy space-based interceptor missiles for TMD systems or space-based TMD interceptors based on other physical principles (such as space-based lasers). The agreement states that this ban is designed to "preclude the possibility of ambiguous situations or misunderstandings related to compliance" because it is difficult to distinguish between space-based ABM and TMD interceptors (the ABM Treaty already bans space-based ABM interceptors). This provision does not, however preclude the development of space-based TMD sensors, a restriction that Russia had sought throughout the negotiations.

Beyond these three specific limits, the Second Agreed Statement does not include any further statements about when or whether TMD systems with faster-velocity interceptors will be considered to have capabilities against strategic ballistic missiles or to be tested in an ABM mode. As a result, the parties must still refer to the 1978 statement when designing and developing these types of TMD systems. Nevertheless, the parties agreed that they would hold further consultations in SCC to

⁴⁷(...continued)

Secretary. September 26, 1997.

address questions and concerns that may come up as TMD technologies evolve. The Clinton Administration has emphasized that this provision does not provide Russia with a "veto" over U.S. advanced TMD systems and it is still up to the individual countries to determine whether their systems are consistent with the provisions of the ABM Treaty. However, some Russian observers have argued that this provision means that the United States and Russia must agree that a TMD system is consistent with the terms of the Second Agreed Statement (including the principles in the preamble) before the United States can deploy the system.

The Second Agreed Statement's preamble incorporates the principles that the United States and Russia had first agreed on in May 1995. It states that the parties are committed to the ABM Treaty as the cornerstone of strategic stability; that the parties have the option of deploying effective TMD systems but that such systems will not lead to the violation or circumvention of the ABM Treaty; that the TMD systems will not pose a realistic threat to the strategic nuclear forces of the other party; that the TMD systems will not be deployed for use against the other party; and that the scale of deployment will be consistent with the theater missile threat facing each party. As is noted above, Russia had sought specific limits on the numbers and locations of TMD systems to ensure that the United States could not circumvent the ABM Treaty and deploy TMD systems in ways that would threaten Russia's strategic offensive forces. The United States refused to accept limits on its TMD deployments, but it was willing to reassure Russia about its intentions by highlighting these principles.

Agreement on Confidence-Building Measures. The United States and Russia began discussing many of the provisions in this agreement during the early years of demarcation negotiations. In it, they agree to provide information that would help each side keep track of TMD development programs, assess the capabilities of these systems, and remain confident that these systems would not pose a realistic threat to their strategic ballistic missiles.

The Agreement states that the parties must provide the specified information for the U.S. THAAD and Navy Theater-Wide systems and for the Russian and Ukrainian S-300V (SA-12) system. But they also agreed that all systems covered by the Second Agreed Statement (i.e. those with interceptor velocities greater than 3 km/sec) will be subject to the Confidence-Building Measures, even if they are not listed when the agreement enters into force. This is designed to address Russia's concerns about the potential capabilities of future U.S. TMD programs by ensuring that Russia will receive a wide range of information and assurances about these systems, as well.

The parties agreed to exchange TMD systems information on an annual basis, beginning 90 days after the agreement enters into force. Included in this information are notifications that are designed to help the parties monitor tests of TMD systems. These include:

- Notifications about the locations of test ranges and test areas where launches of interceptor missiles for TMD systems will take place; and
- For launches of interceptor missiles when ballistic target-missiles will be used in the test, notifications about the location of the test range, the type of interceptor

to be used, the planned date of the test, and the location of the launch for both the interceptor and target missile.

Each party can also arrange, on a voluntary basis, to provide a demonstration of its TMD systems or to allow visitors from the other parties to observe tests of systems covered by the agreement.

The parties also agreed to provide assurances that they would not deploy advanced TMD systems in numbers and locations that could pose a realistic threat to strategic nuclear forces of the other side. Towards this end, each side agreed to provide information about the theater ballistic missile threat confronting the nation (and prompting the TMD deployment). They also agreed to provide detailed information about the TMD programs covered by the agreement. This information, which would help each side understand the capabilities of the other parties' TMD systems, would include:

- The name, basing mode, and general concept of operations for the TMD systems;
- The status of plans and programs;
- For systems in testing, the number of systems it plans to possess;
- Information about the basing modes for TMD systems, including the number of launchers in a land-based battalion; the type of ship and number of launchers on each type of ship; the type of aircraft and number of interceptor missiles each type of aircraft is capable of carrying; and the number of interceptors on a fully loaded launcher; and
- Technical data about the components of the systems, including the length, diameter, type of propellant, and maximum velocity demonstrated during launches of interceptor missiles; the length and diameter of launch cannisters; the number of missiles per launchers; and the frequency band and potential of radars.

Joint Statement on Annual Exchange of Information on the Status of Plans and Programs. As is noted above, the parties agreed to provide information on the status of their plans and programs for TMD systems covered by the Second Agreed Statement. This information must include statements about whether the parties plan to test before April 1999 an interceptor with velocity greater than 3 km/sec; whether they plan to develop systems with interceptors whose velocity exceeds 5.5 km/sec for land-based and air-based systems and 4.5 km/sec for sea-based systems; and whether they plan to test TMD systems against MIRVed targets or RVs planned for deployment on strategic ballistic missiles. They agreed to provide this information each year and to hold consultations in the SCC to address questions and concerns about activities related to any changes in the statements of the other parties. In the initial statements provided in September 1997, all the parties stated that they had no plans to undertake the designated activities.

During the negotiations Russia had sought to ban the activities described in these statements. The United States refused direct limits, but did agree to reassure Russia with the information in these statements. Some critics of the demarcation agreements fear either that the United States will essentially treat these statements as bans by avoiding the proscribed activity so that it will not have to change its statement or that Russia will use SCC consultations about changes in the statements as an opportunity to challenge and object to U.S. plans and programs.

Issues for Congress

Congressional Review. As was true with the Memorandum of Understanding on Succession, Congress and the Clinton Administration differed on whether the demarcation agreements would represent substantive changes to the ABM Treaty, and therefore, would require the advice and consent of the Senate for their ratification. When the Administration opened the negotiations in 1993, it described the process as an effort to "clarify" the ABM Treaty. As such, it argued that the agreements would not need the advice and consent of the Senate. However, many in Congress disagreed, in part because they objected to the substance of the negotiations and wanted to make sure that Congress had a chance to review and vote on the outcome.

In 1996, after the demarcation agreement for TMD systems with slower-velocity interceptors began to take shape, the Administration acknowledged that the agreement would represent a substantive change to the ABM Treaty. However, it still did not agree that it would submit the agreement to the Senate. In a letter to Senator Lott, National Security Advisor Berger noted that the Justice Department's Office of Legal Counsel had noted that a substantive change could be approved by a majority vote of both Houses of Congress, and that the Administration could seek this approval after the agreement was completed or "in advance of negotiation of an agreement provided the standards specified in advance by Congress for an agreement are met."⁴⁸

Prior to March 1997, the Administration appeared to be willing to claim that Congress had given this "prior authorization" for a demarcation agreement based on the 5 km/sec velocity and 3,500 kilometer range for target ballistic missiles. This is because, in the Defense Authorization Bill for FY1996, Congress had stated that a TMD system should not be covered by the limits in the ABM Treaty unless its components were tested in an "ABM qualifying test." And it defined an ABM qualifying test as one conducted against a target ballistic missile with a velocity of 5 km/sec and a range of 3,500 kilometers. Because these characteristics were included in the agreement for TMD systems with slower-velocity interceptors, the Administration sought to claim that Congress had already approved the demarcation line for those systems.

Many in Congress disagreed with the Administration's conclusions, in part because these characteristics were only part of the demarcation agreement and in part because it would have denied Congress the chance to review and vote on the

⁴⁸Letter From the National Security Advisor to Senate Majority Leader Lott. March 25, 1997. p. 2.

complete demarcation agreements. After added pressure from Congress, and as a part of the broader effort by the Administration to win Congressional approval of the Flank Agreement amending the Conventional Armed Forces in Europe (CFE) Treaty, the Administration agreed, in March 1997, that it would submit the Agreed Statements on Demarcation to the Senate for its advice and consent.

Legislated vs. Negotiated Standards. Many in Congress took a great interest in the specific details of the demarcation agreements and sought to legislate limits on the President's ability to negotiate those agreements. For example, the House version of the Missile Defense Act of 1995, which was debated as a part of the FY1996 Defense Authorization Bill, stated that "unless and until a missile defense system, system upgrade, or system component is flight tested in an ABM qualifying flight test, such a system, upgrade, or component has not, for purposes of the ABM Treaty been tested in an ABM mode nor been given capabilities to counter strategic ballistic missiles and therefore is not subject to ABM Treaty." As is noted above, the legislation defined a qualifying flight test as one against a ballistic missile that exceeds a range of 3,500 km or a velocity of 5 kilometers per second. If this provision had become law, the Administration would have had no reason to continue demarcation negotiations; any result that was not consistent with this language would have been inconsistent with U.S. law. As a result, many in the House called on the President to suspend the negotiations with Russia.

The Senate version of the bill included the same definition of an ABM qualifying flight test, but, instead of declaring that such a flight test would be the demarcation line between ABM and TMD systems, required that any demarcation agreement with more restrictive criteria be sent to the Senate for its advice and consent. This formula remained in the final version of the legislation and not only permitted the Administration to continue the negotiations, it also served as the source of the Administration's claim that Congress had pre-authorized the eventual demarcation agreements.

Effects on U.S. TMD Programs. The Clinton Administration has stated unequivocally that the Demarcation Agreements will not impede the development or deployment of any U.S. TMD programs.⁴⁹ All six systems that are currently a part of the U.S. core TMD program can continue without raising ABM Treaty compliance issues.⁵⁰ Five of those programs -- the Army's Patriot Advanced Capability system (PAC-3), the Marine Corp's Hawk weapons systems improvements, the Army's Theater High Altitude Area Defense (THAAD) program, the Navy's Area Defense program, and the Medium Extended Air Defense System (MEADS) -- are all covered by the First Agreed Statement.⁵¹ All will be tested with interceptor velocities below 3 km/sec and none will be tested against target ballistic missiles with velocities that

⁴⁹See, for example, the Remarks of Secretary of Defense William S. Cohen before the Navy League Exposition, Washington D.C. March 27, 1997.

⁵⁰Press Briefing By Robert Bell, Senior Director for the NSC for Defense Policy and Arms Control, the White House. Office of the Press Secretary. March 24, 1997, p. 3.

⁵¹For detailed descriptions of these TMD programs, see U.S. Ballistic Missile Defense Organization. 1997 Report to Congress on Ballistic Missile Defense, Washington, D.C. Chapter 2.

exceed 5 km/sec or ranges that exceed 3,500 kilometers. As a result, according to the First Agreed Statement, none will be considered to be tested in an ABM mode, and all of the five will be compliant with the ABM Treaty. The sixth system in the U.S. core program -- the Navy Theater Wide Program -- is covered by the Second Agreed Statement. This system will not be tested against target ballistic missiles with velocities that exceed 5 km/sec or ranges that exceed 3,500 kilometers and the United States has determined, through its own unilateral compliance review process, that this program will not violate the ABM Treaty's prohibition on testing non-ABM systems in an ABM mode.⁵²

Critics of the demarcation agreements, however, question the Administration's conclusions. Some mistakenly believe that the 3 km/sec dividing line between missile defense systems with slower and faster interceptors would preclude the development of more capable TMD systems with faster interceptors.⁵³ Most, however, recognize that the Agreed Statements do not limit the velocity of TMD interceptor missiles, but they believe that the Clinton Administration may do so anyway. They contend that the United States will unilaterally "dumb down" its TMD systems to avoid raising any compliance concerns that could lead to protracted discussions with the Russians.⁵⁴

Some observers have raised similar concerns about the statements on plans and programs that the parties agreed to update on an annual basis. In these statements, the United States has indicated that it has no plans to test a TMD interceptor with a velocity greater than 3 km/sec against a ballistic missile target before April 1999, that it has no plans to develop TMD interceptors with velocities greater than 5.5 km/sec for land-based and air-based systems and 4.5 km/sec for sea-based systems (the only faster-speed system under development, the Navy's Theater Wide system, reportedly will have interceptor velocities just under 4.5 km/sec); and no plans to test TMD systems against targets with multiple warheads or warheads for strategic ballistic missiles. Some critics argue that these unilateral statements could become virtual bans on the stated activities because the United States might restrict the capabilities of its TMD programs to avoid changing the statements and raising Russian concerns. Or they believe that, even if the United States changes its plans, Russia will use the promised consultations in the SCC to delay or obstruct U.S. plans. The Administration has responded by denying that the consultations would provide Russia with a "veto" over U.S. plans and programs, but this does not satisfy those who believe that the United States will restrain its programs itself to avoid these consultations and possible confrontations with the Russians.

⁵²See the statement of Dr. Kent Stansberry, Deputy Assistant Secretary of Defense, in U.S. Congress, Senate, Committee on Governmental Affairs, Subcommittee on International Security, Proliferation, and Federal Services, Compliance Review Process and Missile Defense, Hearing, 105th Cong. 1st Sess. July 21, 1997. Washington D.C., p. 8.

⁵³See, for example, Another ABM Giveaway? *The Wall Street Journal*, March 24, 1997.

⁵⁴Representative Curt Weldon has frequently expressed concerns about the possibility that the United States might "dumb down" its TMD systems to remain within the bounds of the limits in the demarcation agreements. See, Another ABM Giveaway? *The Wall Street Journal*, March 24, 1997.

Some analysts have also questioned whether the general principles listed at the beginning of the Second Agreed Statement might eventually limit the scope of U.S. TMD systems. In these principles, the United States and Russia have agreed that they will not deploy TMD systems that pose a realistic threat to the strategic offensive forces of the other side and that the numbers and location of their TMD deployments will be consistent with the theater missile threat faced by each country. These principles are designed to address Russia's concerns about the possibility that the United States might use advanced TMD systems to counter Russia's strategic ballistic missiles, but they fall short of Russia's earlier insistence that the agreements limit the numbers and geographical locations of U.S. TMD systems. Some critics fear that Russia might question U.S. deployment plans and use discussions in the SCC as a means to limit the numbers and locations of U.S. TMD deployments.⁵⁵

Implications of the Ban on Space-based Interceptors. The Clinton Administration argues that the United States lost nothing when it agreed to ban space-based theater missile defense interceptors in the Second Agreed Statement because the United States currently has no plans to develop or deploy such interceptors. In addition, Administration officials have noted that, for all practical purposes, it would be impossible to distinguish between space-based ABM interceptors and space-based TMD interceptors.⁵⁶ This is because it would actually be easier to intercept a strategic ballistic missile than a theater ballistic missile with a space based interceptor because the strategic ballistic missile, with its longer range, would spend a greater amount of time outside the atmosphere and within range of the interceptor missile. Hence, if a space-based system had the capabilities needed to identify and intercept a theater ballistic missile, it would also be able to identify and intercept strategic ballistic missiles. Consequently, according to Administration officials, because the ABM Treaty already bans space-based ABM components, it also already bans space-based TMD interceptors.

Some analysts disagree with the Administration's approach. They argue that, even though the United States currently has no plans to develop space-based TMD interceptors, these plans could change in the future. And some believe these plans should change. They contend that space-based interceptors may be the most promising technology for missile defense.⁵⁷ If given a choice between maintaining the ABM Treaty, with its ban on space-based ABM components, and deploying space-based ABM or TMD interceptors, they might recommend abrogation of the Treaty and development of the defenses.

⁵⁵Gertz, Bill. White House Denies GOP Charge Missile Pact Will Hurt U.S. *The Washington Times*, March 25, 1997, p. A6.

⁵⁶U.S. Congress. Senate. Compliance Review Process and Missile Defense. Committee on Governmental Affairs. 105th Cong. 1st sess. Hearing. July 21, 1997, Washington, D.C. p. 15. See, also, Press Briefing By Robert Bell, Senior Director for the NSC for Defense Policy and Arms Control, the White House. Office of the Press Secretary. March 24, 1997, p. 5.

⁵⁷See, for example, the Joint Statement on Anti-Ballistic Missile Agreement. From the Speaker's Press Office, March 23, 1997, signed by Congressman Newt Gingrich, Congressman Bob Livingston, and Congressman Chris Cox. See also Another ABM Giveaway? *The Wall Street Journal*, March 24 1997.

The Future of the ABM Treaty. The Clinton Administration has argued that the demarcation agreements strengthen the ABM Treaty. By clarifying when TMD systems *are not* covered by the limits in the Treaty and by calling for extensive data exchanges and notifications, the agreements can eliminate potential disputes that might undermine the Treaty. And when it agreed that it would not deploy TMD systems that could pose a realistic threat to Russia's ballistic missile forces, the United States assured Russia, and others, that it would not use TMD systems to undermine or circumvent the limits in the Treaty.

Some analysts in the arms control community disagree with the Administration's assertions, and, instead, argue that the demarcation agreements will undermine the ABM Treaty and strategic stability.⁵⁸ Some contend that TMD systems with demonstrated capabilities against target missiles with velocities up to 5 km/sec would also have significant capabilities against ballistic missiles with velocities of 7 km/sec (which is characteristic of a strategic ballistic missile) because the capabilities of the interceptors would degrade gradually, not instantly, beyond the threshold in the demarcation agreement.⁵⁹ As a result, these critics have argued that the demarcation agreements would permit the United States to develop advanced TMD systems that could intercept strategic ballistic missiles and provide a nationwide defense of the United States.

Some in the arms control community have also criticized the preamble to the Second Agreed Statement because the United States and Russia agreed that they would not deploy TMD systems that would pose a "realistic threat" to the strategic ballistic missiles of the other side. They claim that this weakens the ABM Treaty because it is far less stringent than the standards in the Treaty. When determining whether a TMD system posed a "realistic threat" to the strategic ballistic missiles of the other side, the analysts assumed the nations would use a "force-on-force" assessment -- would the deployed TMD system realistically be able to intercept enough strategic ballistic missiles to undermine the deterrent of the other side? But, these critics noted, the ABM Treaty used a different standard; it prohibited giving even a single interceptor capabilities against even a single strategic ballistic missile. Hence, the demarcation agreements would permit more robust defenses than the Treaty would have allowed.

Others argue that the demarcation agreements are not in the U.S. interest because they would preserve the ABM Treaty at the expense of U.S. TMD programs and missile defense deployments. Some, including Senator John Kyl, object specifically to the principle that states that the ABM Treaty remains the cornerstone

⁵⁸See, for example, A New Threat to the ABM Treaty: The Administration's TMD Proposal. *Arms Control Today*, January/February 1994, p. 12.

⁵⁹For a detailed discussion of this problem, see Gronlund, Lisbeth, George Lewis, Theodore Postol, and David Wright. Highly Capable Theater Missile Defenses and the ABM Treaty. *Arms Control Today*. April 1994, pp. 3-8. A contrasting view can be found in *Proliferation, Potential TMD Roles, Demarcation and ABM Treaty Compatibility*. Dr. Keith B. Payne, Study Director. National Institute for Public Policy, September 1994, pp. 26-28.

of strategic stability.⁶⁰ These critics either do not accept the argument that offensive arms control reductions will be threatened by the deployment of missile defenses in the United States, or they believe that the emerging threats to the United States justify the deployment of widespread theater and strategic missile defenses, even if this undermines progress in offensive arms control.

Others believe that the United States did not need to clarify the difference between ABM and TMD systems to maintain the Treaty. They note that the Treaty was never intended to apply to TMD systems, and by negotiating limits on these systems, the United States had converted the ABM Treaty into an ABM/TMD Treaty. The Clinton Administration has denied this contention, noting that the Treaty does cover TMD systems when it states that these cannot be given capabilities against strategic ballistic missiles or tested in an ABM mode. And the Administration has argued that it did not negotiate ABM Treaty limits on TMD systems in the demarcation agreements. To the contrary, it negotiated provisions that would clarify the circumstances under which TMD systems were not covered by the ABM Treaty.

Nevertheless, critics argue that this effort was unnecessary. They believe that the United States should pursue whatever TMD (and national missile defense) programs it needs to protect its own security, without letting the ABM Treaty constrain those efforts. Instead, they believe that the Administration put the preservation of an "obsolete agreement" ahead of U.S. national security interests.⁶¹

Others argue that the Clinton Administration went too far to preserve the ABM Treaty because they believe it is an inappropriate foundation for the relationship between the United States and Russia. Some object to the Administration's efforts to preserve the ABM Treaty because they see it as the foundation of an adversarial relationship between the United States and Russia, based on mutual vulnerability, rather than a cooperative relationship based on mutual respect.⁶² Instead, some analysts have suggested that the United States and Russia cooperate in the development of early warning systems and ballistic missile defenses because both face adversaries who are developing more effective ballistic missile systems that might deliver nuclear, chemical, or biological warheads.⁶³ They note that the Bush Administration pursued this type of agreement in negotiations conducted in 1991 and 1992. But, the Clinton Administration stopped these discussions when it initiated the demarcation discussions in late 1993.

When the Senate reviews the Agreed Statements and associated documents, it will address many of the questions raised here. Do the agreements interfere with

⁶⁰Gertz, Bill. Clinton, Yeltsin Agree on Missile Defenses. Critic call statement backward step. *Washington Times*. May 11, 1995. p. A20.

⁶¹Priest, Dana and Thomas W. Lippman, ABM Treaty under attack as Relic of Cold War *Washington Post*, March 13, 1995, p. 1

⁶²See, for example, the testimony of Ambassador David J. Smith, before the Senate Armed Services Committee, Subcommittee on Strategic Forces. March 24, 1998.

⁶³Payne, Keith, Andrei Kortunov, Andrei Shoumikhin, and Mr. Willis Stanley Cold Peace or Cooperation? The Potential for U.S.-Russian Accommodation on Missile Defense and the ABM Treaty. National Institute for Public Policy, March 1997.

ongoing U.S. TMD programs or any projected programs the United States might pursue in the future? Will the United States itself impose limits on these programs so as not to raise compliance concerns that could lead to Russian objections? Will Russia use further consultations about TMD systems as a means to slow or stop U.S. TMD programs? And, ultimately, does the ABM Treaty continue to serve U.S. national security interests?