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Christol: Exploitation of Outer Space For Peaceful Purposes

THE COMMON INTEREST IN THE EXPLORATION, USE AND EXPLOITATION OF OUTER SPACE FOR PEACEFUL PURPOSES: THE SOVIET-AMERICAN DILEMMA

by

CARL Q. CHRISTOL*

I. INTRODUCTION

The United States and the Soviet Union, as the world's major space powers, are obliged to maintain adequate security postures through the possession of balanced military forces. They also have the most to gain through the exploration, use, and exploitation of the space environment (outer space, per se, the Moon, and other celestial bodies) exclusively for peaceful purposes. Following the earlier evidence that space objects can be used for a great variety of scientific and technological purposes, a new trend has developed. Somewhat ironically there are both concurrent and growing demands for the commercialization and the militarization of the space environment.

At the present moment, where the apparent condition of detente experienced during the 1970s has been replaced by a less friendly and more obdurate relationship, at least if judged by the quality of the rhetoric being circulated by what can be described as media theater, there has emerged the need to consider arms control and disarmament as they pertain to the space environment. This subject relates to all weapons in all of the world's physical environment. By all weapons is meant conventional weapons, nuclear and mass destruction weapons, and the newer and more exotic weapons, such as laser and particle beam weapons. Included in such weapons are anti-satellite satellites (ASATs) and ballistic missile defense (3MC) systems. The areas of the world's physical environment include under water, the surface of the Earth, air space, and outer space.

The present Soviet-American dilemma, in so far as it relates to weapons and to the peaceful uses of the space environment, is the product of many differing outlooks. Some are procedural problems. Others are more fundamental.

At the procedural level there is the issue of the most useful forum for the negotiation of arms control and disarmament agreements. At the multilateral level there is the United Nations with the Committee on the Peaceful Uses of Outer Space (COPUOS) and the Conference on Disarmament (CO), previously known as the Committee of the Conference on Disarmament (CCD). Within such bodies negotiations can be carried out through committees of the whole or through smaller working groups. There is also the alternate of operating on

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the basis of consensus or finding other means for arriving at meaningful conclusions.

At the procedural level there is also the possibility for the two superpowers to engage in bilateral negotiations. Such negotiations can be carried on through "quiet diplomacy," or there is the prospect of operating in a goldfish bowl in which the media is fed unilateral positions, which might be a part of serious negotiations, or which, regrettably can be designed to serve propagandistic purposes. In embarking on genuine bilateral discussions, which could ultimately result in summit agreements, advantage can be derived from clarifying at an early stage the agenda of such negotiations. Among sovereign States the demand of one or both sides that certain preconditions be accepted on the basis of unilateral fiat has proven to be counterproductive in the past. There is no reason to believe that the claim by a State to establish preconditions for negotiations in the area of arms control and disarmament, including ASATs, could be any more salutary than in other areas.

Several substantive problems should also be identified. Probably the most important is the question if arms control and disarmament can be considered to be a unitary matter, or, whether the subject can be divided into wide-ranging component elements. If the former, negotiations should cover the entire category of armaments at one place and at one time. If the latter, it would not be necessary to link, for example, ASATs, BMD systems, nuclear and mass destruction weapons, conventional weapons, and the newer more exotic weapons, or any combination of the above, in a centralized negotiating effort. In either event, there are practical considerations confronting the superpowers and their respective allies, in which national security advantages and disadvantages flowing from greater expertise and overall military capabilities must be taken into account in addressing both the issue of arms control and disarmament and the approach to be taken to the process of negotiation.

A substantive issue of major importance relates to the critical problem of national security. Suppose that an international agreement is realizable. Should it totally prohibit the development, testing, deployment, and use — for example — of ASATs? Or, should the agreement allow such activity to take place but nonetheless to restrict ASATs in numbers, places, and component parts? The kinds of weapons they might be allowed to carry would have to be considered, if the regulatory rather than the prohibitory approach were taken.

Directly related to the foregoing is the critical issue of verification. This reasonably would include verification of contents of the ASAT, launch, orbital position, operational status, and return to Earth, among others. States will be very sensitive to the issue of verification because of the enormous damage which an ASAT might cause to communications or reconnaissance satellites. This is an issue having political as well as security ramifications. Since ASATs by definition are designed to cause harm to foreign space objects, their

presence produces a generally destabilizing effect. If States should agree to restrict, but not totally prohibit ASATs, it can be anticipated that demands for essentially total verification will be forthcoming.

It may be supposed that the final disposition of the use of ASATs will take the form of an international agreement which would prescribe required conduct and which would meet the national interests of the signatories. Some attention might be given to a possible alternative. One suggestion is for each of the superpowers to announce that it will pursue a given policy provided the same policy is adhered to by the other. Or, perhaps the promulgation of a national position, for example, a moratorium on ASAT launches, if rigorously adhered to by the other State, might lead to acceptance of a formal international agreement.

II. THE GOAL OF PEACEFUL USES

Both of the superpowers have offered tangible evidence of their support for the uses of the space environment for peaceful purposes. They are parties to the first four of the COPUOS-negotiated space agreements, and both of them gave their support to the Moon Agreement when it received the approval of the members of COPUOS in 1979. Both are parties to the major International Telecommunication Union conventions and to the relevant agreements of the ITU radio conferences.

Their commitments go back to President Dwight D. Eisenhower's 1958 call on States "to promote the peaceful use of space and to utilize the new knowledge obtainable from space science and technology for the benefit of mankind."¹ On April 22, 1958 President Khrushchev, following a proposal that had been made by President Eisenhower in correspondence with President Bulganin, wrote that his country had seriously considered American proposals that outer space should be reserved for peaceful purposes only. President Khrushchev also stated that the Soviet Union was "prepared to conclude an agreement which would provide for the prohibition of the use of outer space for military purposes and would permit the launching of rockets into outer space only in accordance with an international program of scientific research."²

Both States played an influential role in designing the terms of Article 4 of the 1967 Principles Treaty. While this Article and the Treaty as a whole did not provide that the totality of the space environment should be used exclusively for peaceful purposes, it did provide in paragraph 2 that the Moon

¹Introduction to Outer Space, An Explanatory Statement Prepared by the President's Science Advisory Committee 1 (1958).

²President Khrushchev to the President, 38 DEPARTMENT STATE BULL. 814 (1958).

and other celestial bodies should be used solely for such purposes. This article has been described in an authoritative Soviet commentary as having established "the principle of the partial demilitarization of outer space and the total demilitarization of celestial bodies . . ."³

III. THE DEBATE OVER THE MEANING OF PEACEFUL PURPOSES

Following the inclusion of the provisions of Article 4 in the 1967 Principles Treaty, a considerable amount of debate has taken place respecting the relationship between military activity and peaceful purposes. Although the Treaty imposed limitations on specific forms of military activities, the use of military personnel for peaceful purposes was recognized as lawful. For example, Article 4, paragraph 2, contains the following: "The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited."⁴ No one doubts any more that the use of military or non-military personnel to verify events or activities which might constitute a threat to a nation's security is peaceful.

However, the Treaty did not offer an ultimate definition or description of what was a peaceful purpose or what was meant by the expression "military." The negotiators accepted the fact that they had not been able to write a detailed code that would regulate all future events and activities in space. They perceived their function to be the establishment of a set of general principles knowing that these would be mobilized by future practices and agreements.

With the development of a creative science and an innovative technology, attention has been given in recent years to a clarification of the meaning to be accorded to peaceful purposes and to the militarization of the space environment. The last mentioned event has focused on the possibility of arms control and disarmament with the advent of ASATs and the prospect for BMD systems.⁵

It was not until the late 1970s in the United States that important political figures began to respond to the destabilizing impact on US-Soviet relations of the development, testing, deployment, and use of ASATs, even though low level diplomatic negotiations were conducted between 1977-1979. However, the legality of such instruments had not gone unnoticed.⁶

³PIRADOV INTERNATIONAL SPACE LAW, 91 (1976). For a valuable assessment of general Soviet views on the peaceful uses of outer space based on the writings of Soviet scholars, see Jaksetic, *The Peaceful Uses of Outer Space: Soviet Views*, 28 AM. U.L. REV. 493-505 (1979).

⁴Convention on International Liability for Damage Caused by Space Objects, March 29, 1972, 24 U.S.T. 2389, T.I.A.S. No. 7762.

⁵H. Scoville, Jr., & K. Tsipis, *Can Space Remain a Peaceful Environment?* Occasional Paper 18, The Stanley Foundation (July 1978); B.M. JASANI, *OUTER SPACE — BATTLEFIELD OF THE FUTURE?* 167-183 (1978).

⁶Gorove, *Arms Control Provisions in the Outer Space Treaty*, 3 GA J. INT'L & COMP. L. 114 (1973); C.Q. Christol, *Article Four of the 1967 Principles Treaty: Its Meaning and Prospects for its Clarification*, PRO-

With prospects for the presence of operational ASATs, and with the possibility that BMD systems could be designed and made operational at some date in the future, attention was again drawn to the meaning to be accorded to the goal of peaceful uses of the space environment. Undoubtedly, any ultimate meaning to be given to this expression will depend on the contextual situations which have invoked the need for its clarification and application.

Guidance will be provided in such a situation by the important debates which have now given general meaning and large-scale support for the differentiation between "peaceful" and "military" on the one hand and "peaceful" and "aggressive" on the other. The prevailing, but not unanimous, view is that only aggressive conduct violates the norm of peaceful uses and purposes. This approach accepts the proposition that there is a continuum between peace and aggression, and that the critical issue is as to the amount of force that can be employed while still not crossing the line separating peaceful conduct from aggressive or unacceptable coercive conduct. This approach adopts the view, as set out in Article 4, paragraph 2 of the Principles Treaty, that the use of military personnel, when their activities are peaceful in nature, is permissible.

The opposing point of view maintains that all military activity is inherently non-peaceful, and is, therefore, aggressive. This proposition would consider reconnaissance activities carried out by military personnel or by military satellites, while engaged in technical verification of the presence of space objects, to be aggressive, and, hence, impermissible. The rationale of the scholars who have rejected this outlook is simply that reconnaissance activities are essentially defensive in nature, even though carried out via military processes. These scholars are convinced that reconnaissance satellites are designed to preserve and protect the peace by inducing cautionary behavior so that no State would improvidently embark upon a first-strike attack, nuclear or otherwise. When space objects having such military characteristics are used in this manner, an important military-political condition is produced, namely, that of mutual deterrence with its ultimate value of human survival.

The view that aggressive conduct is the opposite of peaceful activity was recently adopted by the representative of the United States in a statement to the First Committee of the UN. Mr. R. H. Milton told that body on November 26, 1982 that focus should not be directed to the presence of a military device in the space environment, but rather that attention should be given to the "aggressive military use of space — through the use of any device."⁷ He added

CEEDINGS OF THE 21ST COLLOQUIUM ON THE LAW OF OUTER SPACE 192 (1979). The subject was also carefully debated at the 1982 session of the International Institute of Space Law and reported in the PROCEEDINGS OF THE 25TH COLLOQUIUM ON THE LAW OF OUTER SPACE 69-186 (1983); Goedhufs, *Some Observations on the Efforts to Prevent a Military Escalation in Outer Space*, 10 J. SPACE L. 24 (Spring 1982); Menter, *National Uses of Outer Space and National Security*, 17 INTL LAW, No. 3 at 581 (1983); C.Q. CHRISTOL, *THE MODERN INTERNATIONAL LAW OF OUTER SPACE* 22-37 (1982).

⁷United States Mission to the United Nations, Press Release U.S.U.N. 150-(82) at 1, Nov. 26, 1982.

"What may appear to be the most benign satellite may have important military applications. At the same time, many military devices are defensive and serve vital stabilizing purposes . . ."⁸

From a practical point of view space objects can play a constructive role in keeping the peace and can serve the cause of arms control and disarmament, the building of confidence, and the resolution of critical differences. However, their enormous value in the waging of war becomes very frightening when they are seen as probable targets of first instance in the event there were an inclination to begin hostilities. The mere presence of non-nuclear weapon carrying ASATs in the space environment, although creating with this presence an extremely destabilizing political-security situation, does not violate Article 4 of the Principles Treaty. However, their use so as to cause the space objects of foreign States to disfunction would be violative of Articles 7 and 9 of the Principles Treaty, of Articles 2 through 6 of the 1972 Liability for Damages Convention,⁹ and Articles 3, 7, 14, and 15 of the Moon Agreement.¹⁰ In light of the potential of ASATs to cause unacceptable detriment to the space objects of foreign States the need has arisen for the formation of rules applicable to them. Such rules could totally prohibit their launching and use. Such rules could, on the other hand, impose regulatory constraints on their use. In the latter case, for example, provision might be made for weapons-free zones in the space environment, where all weapons, including ASATs would be prohibited from orbiting except for clearly identified zones located at certain heights above the surface of the Earth. Guidance could be obtained from Article 3, paragraph 2 of the Moon Agreement. This paragraph reads:

Any threat or use of force or any other hostile act or threat of hostile act on the Moon is prohibited. It is likewise prohibited to use the Moon in order to commit any such act or to engage in any such threat in relation to the Earth, the Moon, spacecraft, the personnel of spacecraft or man-made space objects.¹¹

In keeping with its commitment that outer space be used exclusively for peaceful purposes the United States, while at the same time maintaining a responsible national security policy, has indicated that such a policy "must include both strong deterrence and active pursuit of arms control to restrain competition and make the world safer."¹² In referring to ASATs Secretary of

⁸*Id.*

⁹Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, January 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347.

¹⁰U.N. Doc. A/RES/34/68, (1979); 18 I.L.M. 1434 (1979).

¹¹*Id.*

¹²Secretary of State George Schultz, *Realism and Responsibility: The U.S. Approach to Arms Control*, Bureau of Public Affairs, U.S. Department of State, Current Policy No. 557 at 1, (May 14, 1934), reprinted in *Realism, Strength, Negotiation: Key Foreign Policy Statements of the Reagan Administration*, Bureau of Public Affairs, U.S. Department of State 51 (1984).

State Schultz repeated the previously announced policy approach, namely, that arms competition should not be extended to the space environment. He also reasserted the fixed policy that any agreements on this subject must be subject to verification. At the time of his May, 1984 statement, he added that the United States had not been "able to identify proposals to ban anti-satellite weapons that would be adequately verifiable and serve our overall goal of deterring conflicts."¹³ He also observed that the United States was continuing to "try to identify measures that would ban or limit specific weapons systems, while meeting our verification concerns."¹⁴

He also explained the rationale underlying the U.S. view that verification was central to an agreement on ASATs. In his words: "Experience has shown that agreements lacking such provisions become a source of tension and mistrust, rather than reinforcing the prospects for peace."¹⁵

A commitment to the requirement that the space environment be used for peaceful purposes, which would be applicable to ASATs, would provide support for those States seeking to establish the norm of effective verification of space activities. A valid commitment to engage in peaceful activities encompasses the duty to allow others to determine if the obligation is being fulfilled. To be effective this duty could be assigned to an international monitoring entity, although undoubtedly the superpowers will take such an option into account only after they are persuaded that verification meets their own interests, and, further after they find that an international approach would be preferable to a process of their own design and implementation. The use of satellites, military or otherwise, in order to verify compliance with arms control and disarmament agreements, as well as to monitor crisis areas, must be considered to be a peaceful one. Verification is essentially a technical procedure for it is designed to obtain hard data as to what is going on, and could be carried on by civilians as well as under military auspices.

IV. THE EMERGENCE OF THE ASAT PROBLEM

The Soviet Union as early as 1967 embarked on an ASAT development project. By 1976 target satellites and interceptors were in use.¹⁶ In 1977 the

¹³*Id.* at 4.

¹⁴*Id.*

¹⁵*Id.* at 2. He also observed: "The President's recent finding of Soviet violations or probable violations of a number of arms control obligations underlines that effective verification is essential." He was referring to Arms Control, U.S. Objectives, Negotiating Efforts, Problems of Soviet Noncompliance, U.S. Arms Control and Disarmament Agency 10-12 (1984).

¹⁶C.S. SHELDON II & M.S. SMITH, *SPACE ACTIVITIES OF THE UNITED STATES, SOVIET UNION AND OTHER LAUNCHING COUNTRIES/ORGANIZATIONS: 1957-1981*, REPORT, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, SUBCOMM. ON SPACE SCIENCE AND APPLICATIONS OF THE HOUSE COMM. ON SCIENCE AND TECHNOLOGY, 97th Cong., 2nd Sess. 58 (Comm. Print 1982); Smith, *America's International Space Activities*, 21 *SOC'Y* No. 2 at 18 (1984).

United States government entered into contracts with private firms calling for the expenditure of \$58.7 million to assess ASAT utility. At that time the use of ASATs as rams was under consideration.¹⁷

Because of joint concern over the militarization of the space environment the United States and the Soviet Union embarked on diplomatic conversations on the ASAT problem in 1977. Three meetings were held, but were not rescheduled following the Soviet invasion of Afghanistan in 1979. In 1978 President Carter authorized a modest program for the development of ASATs. In doing so he stated that the United States had found itself "under increasing pressure to field an anti-satellite capability of its own in response to Soviet activities in this area."¹⁸ He noted the importance of mutual restraint on the part of both States and indicated that the United States would seek "verifiable, comprehensive limits on anti-satellite capabilities and use [but] in the absence of such an agreement, the United States will vigorously pursue development of its own capabilities."¹⁹

The Soviet Union considered the ASAT problem to be serious enough to raise it at the United Nations. In a letter dated August 10, 1981 to the Secretary-General Foreign Minister A.A. Gromyko submitted a "Draft Treaty on the Prohibition of the Stationing of Weapons of any Kind in Outer Space."²⁰

The draft agreement was directed at future conduct. It did not call for the elimination of weapons already in Earth orbit. While pointing toward the need to extend the prohibitions contained in Article 4 of the 1967 Principles Treaty, the proposal said nothing about weaponry on the Moon or other celestial bodies. Article 1, paragraph 1 of the 1981 draft seemingly was designed to impose a condition on the United States but not on the Soviet Union. This paragraph identified the prescribed weapons to include "reusable manned space vehicles of an existing type or of other types which States Parties may develop in the future."²¹ Without mentioning the Space Shuttle by name it is clear that this is what was intended. Aside from the defect of the limited scope of the proposal and the attempt to conserve ASAT expertise while restricting the shuttle, the draft contained some peace-securing concepts, including provisions drawn from the 1977 Convention on the Prohibition of Military or Any

¹⁷Los Angeles Times, November 4, 1977, § 1 at 1.

¹⁸White House Press Release, Description of a Presidential Directive on National Space Policy, 14 WEEKLY COMP. PRES. DOC., No. 24 at 1137 (June 20, 1978); United States Space Activities, PUB. PAPERS, 1978, Vol. 1 at 1137 (1979); reprinted in C.Q. Christol, *supra* note 6, at 900 (1982).

¹⁹White House Press Release, Description of a Presidential Directive on National Space Policy, 14 WEEKLY COMP. PRES. DOC., No. 24 at 1137 (June 20, 1978); United States Space Activities, PUB. PAPERS, 1978, Vol. 1 at 1137 (1979); reprinted in C.Q. Christol, *supra* note 6, at 900 (1982).

²⁰U.N. Doc. A/36/1982, Annex, 1, (1981). The proposal also appears as Annex 1 to G.A. Doc. A/RES/36/97, (1982); reprinted in 10 J. SPACE L., No. 1 at 27 (1982).

²¹*Id.*

Other Hostile Use of Environmental Modification Techniques, with Annex.²² It has been suggested that the proposal was broad enough in its formulation to prohibit the deployment of space-based BMD lasers. On the other hand, it has been construed, pursuant to Article 3, to allow an attack on "space objects that a party believed to be armed."²³

Following the submission of the 1981 draft convention a number of events occurred which have a bearing on the 1984 efforts of the United States and the Soviet Union to prevent the militarization of the space environment, including controls over the presence of ASATs or, alternatively, their use. At issue from 1981 onward has been the appropriate forum for the consideration of controls over the militarization of the space environment, the scope of the issue to be considered, and acceptability of the provisions contained in the 1981 Soviet proposal and the modified 1983 proposal.

As noted above, negotiations could go forward in the UN or by way of bilateral procedures. Following the 1981 Soviet draft agreement the issue was raised at the UN whether it should be examined first by COPUOS or by the CCD. The Soviet Union favored the latter forum. On April 6, 1982 the Soviet representative submitted a copy of its draft to the CCD.²⁴ This action followed the adoption by the General Assembly in 1981 of G.A. Res. 36/99. The Resolution called for the conclusion of an appropriate treaty designed to prevent the spread of an arms race to outer space, including a prohibition on the stationing of weapons of any kind in outer space. The vote was 123 in favor, none opposed, and 21 abstentions. Those abstaining were the Western States, including the United States. The abstainers favored the substantive terms of the resolution, but thought that it did not go far enough with respect to verification procedures and other matters. The U.S. abstention did not indicate disapproval of the CCD as the appropriate forum, since this was preferred by the United States over arms control negotiations within COPUOS.

During the 1981 session of the General Assembly the Western States, and others, put forward a proposal which became General Assembly Resolution 36/97C. It was based on the view that the Soviet proposal had not gone far

²²Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, T.I.A.S. No. 9614. Both the United States and the Soviet Union are parties. For an analysis bearing the title of the Convention, see the author's forthcoming article to be published by The Hague Academy of International Law and the UN University.

²³Jones, *Implications of Arms Control Agreements and Negotiations for Space-Based BMD Lasers*, LASER WEAPONS IN SPACE. POLICY AND DOCTRINE 89 (ed. Payne 1983). However, the proposal was seen as "prohibiting the launching into space of lasers and other weapons that would go into orbit. . . . Similarly, the proposal probably would not restrict sub-orbital or fractional-orbital testing of lasers launched into space." *Id.* at 88. Compare, Strode, *Commentary on the Soviet Draft Space Treaty of 1981*, in AMERICAN MILITARY SPACE POLICY 85 (ed. Gray 1982).

²⁴GD/274, 7 April 1982.

enough in dealing with ground-based ASATs, where the Soviet Union possessed advanced capabilities particularly with regard to low-Earth orbit space objects. These countries considered the Soviet proposal to allow the use of land-based ASATs, while prohibiting only space-based ASATs. Thus, they sponsored a resolution whereby the CCD would be asked to examine the "question of initiating effective and verifiable agreements aimed at preventing an arms race in outer space, and it would be asked to consider, as a matter of priority, the question of negotiating effective and verifiable agreement to prohibit anti-satellite systems, as an important step toward banning an arms race in outer space."²⁵ This resolution was adopted on December 9, 1981 by a vote of 129 in favor, none against, and 13 abstentions. Those abstaining were the members of the Soviet bloc.

The UNISPACE-82 Conference also became the forum for a consideration of controls on the militarization of the space environment. At issue was whether it was expedient to give general attention to the peaceful uses of the space environment or whether a more restricted approach, such as an effort to prohibit the use of ASATs, should be pursued. The Conference concluded that both COPUOS and the CD possessed jurisdiction over the arms race in outer space. The Conference recorded its view that "the extension of an arms race into Outer Space is a matter of grave concern to the international community."²⁶

The United States has, however, resisted the use of COPUOS as the appropriate forum to consider arms control and disarmament matters relating to the space environment. Its statements in both 1983 and in 1984 have made it clear that it will not participate in debates on this subject, including controls over ASATs, in COPUOS. Its reason is that progress can be made most effectively in a body where experts are present and by confining negotiations in a single body it will not be so likely that conflicting conclusions would emerge from separate entities.

Even more important than the issue of finding the most effective UN instrumentality where negotiations may take place is the problem of the scope of the negotiations. Here the problem is whether the entire issue of the militarization of the space environment should be considered, or whether only ASATs should be considered. The problem is whether there should be a linkage of many kinds of armaments in the discussions, or whether only a single aspect should be dealt with.

The perspectives on scope held by the superpowers have varied over time. In particular the Soviet Union favored a very broad approach in the UN from 1981 onward, while the United States was supportive of a focus on ASAT

²⁵*Id.*

²⁶U.N. Doc. A/CONF. 101/L.4, (1982). The foregoing appears in the Test Resulting from the Consultations of the 'Friends of the President,' <https://ideaexchange.uakron.edu/akronlawreview/vol18/iss2/3>

problems. However, by mid-1984 the Soviet Union confined its interest to ASAT problems, while the United States has departed from its earlier more general approach so that it could accommodate its position to that now favored by the Soviet Union.

At the multilateral level, and with a narrow focus only on arms control and disarmament in the space environment, the Soviet Union and its supporters in 1982 expressed support for a comprehensive agreement dealing with all arms control matters. The United States, and its Western allies, on the other hand, in 1982 expressed a preference for controlling ASAT systems. Thus, at the 1982 meeting of the First Committee of the General Assembly, the Soviet representative favored an agreement which would prohibit nuclear weapons testing as well as obtaining a moratorium on such testing pending the conclusion of the prohibition agreement.²⁷ The Soviet Union also opposed "the spread of the arms race to outer space."²⁸

The Soviet Union at this time, and despite its 1981 efforts to prohibit ASAT systems, was not willing to confine negotiations to that particular subject. It considered such an approach to be an artificial narrowing of arms control efforts.²⁹ During the 1982 session of the First Committee, the Soviet Union made a full-scale presentation of its position on the limitation of armaments, including the issues of nuclear war and disarmament. The United States was criticized for stepped-up activities "aimed at the establishment of means of waging war in and from space, which involves the danger of turning space into another arena for the arms race."³⁰

On December 9, 1982 the General Assembly adopted Resolution 37/83 entitled "Prevention of an Arms Race in Outer Space." The vote was 138 to one, with seven abstentions. The negative vote was cast by the United States. It favored the provision contained in the resolution assigning to the CD the lead role in negotiating an agreement on the subject, but considered that it was premature to establish an ad hoc working group with an almost unlimited mandate.

At the 1982 meeting of the General Assembly a second relevant resolution was approved. Entitled "Prevention of an Arms Race in Outer Space and Prohibition of Anti-Satellite Systems," Resolution 37/99D received 112 favorable votes, but it was subject to 29 abstentions. This resolution, like 37/83, made mention of a working group, but did so in more ambiguous terms, e.g., "the possible establishment of a working group . . ." However, 37/99D,

²⁷U.N. Doc. A/C.1/37/PV.29, at 11-12 (1982).

²⁸U.N. Doc. A/C.1/37/PV.44, at 46 (1982).

²⁹*Id.*

³⁰U.N. Doc. A/C.1/37/PV.9 at 22 (1982). A further extended presentation of the Soviet perspective was made in U.N. Doc. A/C.1/37/PV.26 at 8-35 (1982).

unlike 37/83, stressed the need to produce an "effective and verifiable agreement" to both prevent an arms race in outer space and also to prohibit ASAT systems. Because of this concern the General Assembly also adopted a resolution emphasizing the need for the monitoring of arms control and disarmament agreements.³¹

When the CD met in 1983 the Soviet Union came forward with a proposal which was quite different from the policies that had been promulgated in 1982. Perhaps because during the interim it had gained some experience in testing its ASAT systems, or because of an enhanced awareness that the United States was making good progress in the development of its own ASAT program, it declared itself in favor of a unilateral moratorium on further ASAT activity, provided other countries would join in the moratorium.³²

The new Soviet emphasis on controls for ASATs became apparent when on August 18, 1983, President Yuri Andropov in a meeting with influential U.S. Senators challenged the United States to join in a moratorium on ASATs in the space environment prior to a ban on them altogether. He also advised the Senators that the Soviet Union was imposing a unilateral ban on such weapons "for the entire period during which other States, including the United States, refrains from stationing in outer space, weapons of any type."³³ In the two hour session no specific mention was made of the Space Shuttle.³⁴ The White House response, other than noting the ambiguity of the proposal, restated the government's view that verification would have to be a part of the negotiations leading to the goal favored by President Andropov. A Department of State spokesman considered that it "would be relatively easy for the Soviets to maintain a cover supply of interceptors for use in a crisis."³⁵

Almost immediately after the meeting with the U.S. Congressmen the Soviet Union on August 21, 1983, notified the UN Secretary-General that it wished to place on the agenda for the 1983 meeting of the General Assembly a draft "Treaty on the Prohibition of the Use of Force in Outer Space and from Outer Space Against the Earth."³⁶ The emphasis of this proposal, however, was not directed exclusively to ASATs, but rather was directed toward the prevention of the militarization of outer space and the promotion of the use of that area exclusively for peaceful purposes. According to its terms, the goal was to "prevent the arms race from spreading to outer space, which it has not yet penetrated."³⁷ This approach appears to have been founded on the view that

³¹G.A. Res. 37/77K (1982).

³²U.N. Doc. A/38/27, par. 92 (1983).

³³Christian Science Monitor, August 19, 1983, at 2.

³⁴*Id.*

³⁵Los Angeles Times, August 20, 1983, at 8.

³⁶U.N. Doc. A/38/194*, reprinted in 25 SURVIVAL, No. 6 at 279 (1983).

³⁷*Id.*

the earlier ASAT activities of the Soviet Union and the United States had not matured into an "arms race." Foreign Minister Gromyko indicated that the new approach of August, 1983, was being taken since the 1981 draft proposal had not resulted in relevant negotiations and approval.

The 1983 draft adopted some of the principles enunciated in 1981. Notable was the fact that the 1983 draft had a much wider scope than that of 1981. Thus, Article 1 of the 1983 submission, in keeping with the theme that activities in the space environment should be conducted "for peaceful ends only," called for the prohibition of "resort to the use or threat of force in outer space and the atmosphere and on the Earth through the utilization, as instruments of destruction, of space objects in orbit around the Earth, on celestial bodies or stationed in space in any other manner."³⁸ Paragraph 2 of Article 1 extended the prohibition of resort to the use of force to space objects in orbit around the Earth, on celestial bodies, or stationed in outer space in any manner whatsoever.

Article 2 of the draft prohibited specific activities. States were not to test or deploy "by placing in orbit around the Earth or stationing on celestial bodies or in any other manner any space-based weapons for the destruction of objects on the Earth, in the atmosphere or in outer space." Space objects were not to be used as a "means to destroy any targets on the Earth, in the atmosphere or in outer space."³⁹ The parties were also to be enjoined against the destruction, damaging, or disturbing the normal functions, including the changing of the flight trajectory, of space objects of other States. Further, the agreement provided that there should not be testing or the creation of new anti-satellite systems, plus the destruction of any anti-satellite systems that already existed. Paragraph 5 of Article 2 provided that the parties were "not to test or use manned spacecraft for military, including anti-satellite purposes."⁴⁰

The 1983 draft retained one of the critical provisions of the 1981 submission, namely, the right of parties to possess and not to interfere with national technical means of verification. It continued to model some of its provisions on the 1977 Environmental Modification Convention. It added a provision on consultation and cooperation among the parties, as well as the establishment of a Consultative Committee. New provisions called upon parties to take such domestic measures as were necessary and in keeping with constitutional requirements to prohibit conduct violative of the agreement. Article 7 of the new draft referred to the rights and duties of States under the UN Charter. In this manner the rights guaranteed under Article 51 and Article 2 (4) were highlighted.

³⁸*Id.*

³⁹*Id.*

⁴⁰*Id.*

During the 1983 session of the General Assembly the 1983 Soviet draft received a considerable amount of attention, as did the 1983 activities of the CD. Substantive issues were sidetracked. Rather, attention was given to the utility of setting up a working group in the CD, the jurisdictional prerogatives of the CD and COPUOS, and whether greater progress could be made in bilateral negotiations between the superpowers than through the UN. During the debates the United States reasserted a concern enunciated in 1982 over the fact that the Soviet Union had the "unique status of being the only country in the world which has an operational anti-satellite weapon system."⁴¹ Thus, in 1983 the United States considered that its national interest compelled it to keep pace with the Soviet Union in the basic research of ASAT system development.

During 1983 for a number of reasons, which need not be recounted here, the general relations between the United States and the Soviet Union were marked by augmented tensions. These highly publicized complaints undoubtedly influenced their approaches to the 1983 UN General Assembly resolutions relating to the peaceful uses of the space environment. Different views were held on substantive issues as well as those dealing with procedure.

During its 1983 session the U.N. General Assembly examined the issue "Prevention of an Arms Race in Outer Space" in its First Committee and the problem of "International Co-operation in the Peaceful Uses of Outer Space" in its Special Political Committee. On December 15, 1983, the General Assembly adopted Resolution 38/70 entitled "Prevention of an Arms Race in Outer Space." Like General Assembly Resolution 37/83 of December 9, 1982, bearing the same title, the 1983 Resolution recognized that it was in the common interest of all mankind to explore and use outer space for peaceful purposes. The Resolution reaffirmed that the exploration and use of outer space, including the Moon and other celestial bodies, "shall be exclusively for peaceful purposes." Further, the Resolution emphasized that outer space "shall not become an arena for an arms race."

General Assembly Resolution 38/70 attempted to clarify the procedures for ameliorating the trend toward a space arms race. While proceeding on the premise that multilateral negotiations should be carried out within the CD, it was specified that the resumption of bilateral negotiations between the superpowers "could make a significant contribution to such an objective." At the same time the Resolution called on the CD to establish an *ad hoc* working group in 1984 "with a view to undertaking negotiations for the conclusion of an agreement or agreements, as appropriate, to prevent an arms race in all its aspects in outer space." The vote for the Resolution was 121 in favor, one op-

⁴¹Ambassador C.M. Lichenstein, United States Mission to the United Nations, Press Release U.S.U.N. 111-82 at 1, (November 4, 1982).

posed (the United States), and one abstention (the United Kingdom). The position of the United States was that bilateral negotiations with the Soviet Union leading to a common approach to general disarmament and arms control differences would be the only satisfactory means of approaching and resolving the special issue of an arms race in outer space.

In 1983 the Special Political Committee also considered the emerging arms race in outer space. This departed from the Committee's earlier focus on the peaceful uses of outer space. This new approach raised jurisdictional issues, with the socialist States favoring COPUOS as the principal forum respecting a space arms race rather than the CD. The Western European group favored reference to the CD, with the United States being particularly opposed to consideration of the subject by COPUOS.

The general goal was identified by Mexico, which put forward a formula, which called upon all States:

in particular those with major capabilities, to undertake prompt negotiations under the auspices of the United Nations with a view to reaching agreement or agreements designed to halt the militarization of outer space and to prevent an arms race in outer space, thus contributing to the achievement of the internationally accepted goal of ensuring the use of outer space exclusively for peaceful purposes.⁴²

This became operative paragraph 14 of General Assembly Resolution 38/80 of December 15, 1983 entitled "International Co-operation in the Peaceful Uses of Outer Space."⁴³

In paragraph 15 of the same resolution COPUOS was requested to consider questions relating to the militarization of outer space, while the CD was to continue its 1982 mandate on preventing an arms race in outer space. This paragraph took into account the need for these two bodies to coordinate their respective efforts. The vote on this resolution was 124 in favor, 12 opposed, and 8 abstentions.

By these decisions the General Assembly assigned to COPUOS the question of arms control in outer space. The CD was given the function of negotiating agreements seeking to prevent an arms race in outer space. Nonetheless, the United States has made it clear that it wishes to proceed only through the CD in order to arrive at decisions on both subjects, namely, arms control and the prevention of an arms race in the space environment. Reliance has been placed on the CD because of its greater scientific expertise than is present in COPUOS. Moreover, it believes that constructive bilateral negotia-

⁴²U.N. Doc. A/SPC/38/L.29, (1983).

⁴³U.N. Doc. A/RES/38/80, (1984).

tions with the Soviet Union must occur if there is to be overall progress in these areas.

At the present time the United States appears to be committed to several additional policies relating to arms control and disarmament. First, it favors negotiations at the CD to be conducted in plenary meetings rather than in working group. Second, it wishes to examine nuclear weapons jointly with non-nuclear weapons, rather than separating the two. Third, it has expressed opposition to an agreement freezing the present level of nuclear weapons and weaponry. More importantly, it has urged a progressive builddown of existing mass-destruction weapons.

Contrasted is the position of the socialist States. They wish to establish a working group on nuclear arms in the CD. They want all States possessing nuclear weapons to freeze them at the level of existing stockpiles. They consider that the proposed working group should be charged with the drafting of an agreement banning nuclear neutron weapons.

The foregoing differences, although real, presumably could be largely and successfully resolved if there were not a mutual mood of tension currently exacerbating the relations between the superpowers. This atmosphere of non-accommodation has made it difficult to proceed constructively in 1984 to obtain a measure of arms control and disarmament. In particular until June of 1984 the several differences blurred prospects for achieving a meaningful restriction on the development, testing, deployment, and use of ASATs by either State.

V. PUBLIC EFFORTS BY THE SOVIET UNION TO DEAL WITH THE ASAT PROBLEM

Following the August 1983 meeting between President Andropov and United States Senators, the Soviet Union has embarked on informal, but highly publicized efforts to obtain limitations on present and future ASAT activity. This has resulted in what has been described as media theater in which public figures have announced their policy preferences to the general public through the offices of the communications industry. This has induced public statements and press releases by the other side. Much has been made of the belief that "negotiations" such as these are intended more for propaganda purposes than to assure that the space environment be used exclusively for peaceful purposes.

There are, however, undoubtedly some reasons for this rather unique approach to bargaining. First, in those countries enjoying a free and open press the various national pronouncements will have an impact on the formation of public opinion. Second, the foreign policy in the United States is the product of certain common outlooks on the part both of the President and of the Con-

gress. The positions put forward by the Soviet leaders and press provide congressional critics of the President with an appreciation of alternate policies over those favored by the administration. Third, there is a deepseated and natural concern on the part of an informed public on the subject of arms control and disarmament, just as there are equally serious concerns respecting national security. To the extent that the public exchanges may cause apprehension as to the quality of American leadership, which unquestionably has endeavored to strike a more even balance in the area of armaments with the Soviet Union than in recent years, there may be a certain sense of achievement on the part of Soviet leaders. However, there is a respectable body of public opinion in the United States holding that, if this were a serious objective on the part of the Soviet Union, that up to now it has been counterproductive. Fourth, it may be the view of the Soviet Union that since arms control and disarmament negotiations have been non-productive at the UN and in Geneva relating to nuclear arms and in Vienna relating to mutual and balanced force reduction that ASAT negotiations may have a more promising prospect for success. Underlying this Soviet outlook is undoubtedly an awareness that the United States may soon have technical advantages in the operation of ASATs and that the United States is examining the feasibility of going forward in a preliminary way with a BMD system.

Following the break-off of U.S.-Soviet 1978-1979 discussions on the use of ASATs following the Soviet invasion of Afghanistan, and as the United States was preparing to launch an ASAT from an F-15 aircraft, the Soviet Union embarked on a review of its ASAT policy. At the 1983 session of the CD the Soviet Union indicated that it would not be the first country to deploy any kind of ASAT. It also gave support to a unilateral moratorium on ASAT launches so long as other countries, including particularly the United States, would refrain from such activity.⁴⁴

Following his accession to the Soviet leadership, President Chernenko following the lead outlined publicly by President Andropov in August of 1983, in a letter to U.S. scientists on May 19, 1984 called for a ban on all space weapons. He expressed concern that military activities in space were acquiring an irreversible character. Thus, he called for talks to commence immediately "without any conditions or reservations."⁴⁵

While the public exchanges of May and June 1984, involving not only U.S.-Soviet unilateral statements but also communications on the part of the West German and the British foreign ministers to the Soviet foreign minister and President Chernenko, conveyed ideas and attitudes respecting ASATs, the underlying background was of equal importance. That background was one of the efforts of the Western allies to obtain an enhanced military posture in Eur-

⁴⁴*Supra*, note 32, at par. 92.

⁴⁵Christian Science Monitor, May 21, 1984, at 2.

ope and Soviet military and diplomatic responses, including the introduction of Soviet SS-20 missiles into Eastern Europe and the installation of shorter range missiles in East Germany and in Czechoslovakia. At the diplomatic front there was a continued refusal on the part of the Soviet Union to resume the arms control and disarmament talks that had been broken off in November of 1983. The fact that President Reagan suggested on April 23, 1983, that the United States should consider the development of a BMD system also affected the policy options of the Soviet Union. These considerations have produced different outlooks relating to both ASAT and outer space demilitarization agreements.

VI. THE INVOLVEMENT OF THE U.S. CONGRESS IN SPACE MILITARIZATION

Members of the Congress have taken a keen interest in U.S. space policies. They are able to influence presidential conduct in a number of ways including the provision or non-provision of funds for space activities, the adoption of resolutions calling for executive responses, the holding of hearings to give publicity to issues so that an informed public opinion will come into being, and direct appeals by individual Congressmen to the general public and to the world's authoritative decision makers. All of these have been employed regarding ASAT policies.

One of the first efforts to involve the Congress on this subject was made by Senator L. Pressler, who, on April 27, 1981, introduced S. Res. 129. It called for the resumption of ASAT negotiations between the United States and the Soviet Union. The goal, according to the resolution, would be to obtain "a balanced and verifiable agreement limiting the development, deployment, or use of weapons systems designed exclusively to intercept, damage, or destroy orbiting satellites."⁴⁶ The proposed resolution identified specific goals for inclusion in a U.S.-Soviet agreement, namely, a comprehensive non-use ban, a moratorium on further testing in space, the dismantling and destruction of existing operational ASAT interceptors, and "stringent verification of each party's compliance with these provisions."⁴⁷ The resolution also expressed the view that the Space Shuttle should be allowed to develop and operate, and, also that there should be no restriction on valid research and development activities permitted under the SALT I ABM Treaty.

A parallel interest found expression in the House of Representatives in 1982. Legislation designed to prevent an ASAT build-up in the space environment was introduced by Congressman J. Moakley. His proposal called on the President to resume bilateral talks with the Soviets with the purpose of

⁴⁶*Arms Control and the Militarization of Space, Hearings before the Subcomm. on Arms Control, Oceans, International Operations and Environment of the Senate Comm. on Foreign Relations, 97th Cong. 2nd Sess. 3 (1982).*

⁴⁷*Id.* at 3-4.

negotiating a comprehensive and verifiable treaty.⁴⁸ The proposal, which was more extensive than that of Senator Pressler, called for the prohibition of space-based, air-based, or ground-based weapons systems designed to damage, destroy, or interfere with the functioning of space craft. Further, any weapons able to inflict injury or cause any other form of damage on Earth, in the atmosphere, or on objects placed in space would be prohibited.⁴⁹

Senator Pressler on September 24, 1982 asked the Senate to consider whether the President should not be invited to institute negotiations with the parties to the 1967 Principles Treaty so that a protocol could be added to that agreement. In his view it should provide "for a complete and verifiable ban on the development, testing, deployment, or use of anti-satellite weapons."⁵⁰

Following the submission of S.J. Res. 28 by Senator P.E. Isongas on February 3, 1983, Senator Pressler introduced S. Res. 129 on July 11, 1983. It was approved by the Senate Committee on Foreign Relations on November 14, 1983. As approved it resolved that the President should seek an agreement with the Soviet Union to:

- (1) declare an immediate, mutual and verifiable moratorium of limited duration on the testing in space of antisatellite weapons;
- (2) immediately resume negotiations on a mutual and verifiable ban on the testing, production, deployment, and use of any antisatellite weapons;
- (3) seek, on an urgent basis, a comprehensive verifiable treaty prohibiting the testing, deployment and use of any space-directed or space-based weapons system which is designed to inflict injury or cause any other form of damage on the Earth, in the atmosphere, or on objects placed in space.⁵¹

The resolution added the caveat that any such agreement should not restrict operations in space not involving weapons, such as the Space Shuttle program. Support for the position of the Senate Committee on Foreign Relations was evidenced in the House of Representatives. For example, on July 19, 1983 over 100 of its members wrote to President Reagan calling on him to obtain an agreement with the Soviet Union on a mutual moratorium on the testing of ASATs in space.⁵²

On March 21, 1984, nine Congressmen introduced H.J. Res. 523, which called on the President to seek a mutual and verifiable ban on weapons designed to attack objects in space.⁵³ This was accompanied by H.J. Res. 524

⁴⁸H.R.J. Res. 120, 98th Cong. 2nd. Sess. (1983).

⁴⁹J. Moakley, *Space Weapons and Congress*, 13 ARMS CONTROL TODAY, No. 11 at 9 (1983).

⁵⁰128 CONG. REC. 129 (1982).

⁵¹H.R. Res. 129, 98th Cong. 1st Sess. (1983).

⁵²*Los Angeles Times*, July 20, 1983, § 1 at 4.

⁵³98th Cong. 2nd Sess. (1984).

which called on the President to seek a mutual and verifiable ban on weapons in space as well as on weapons designed to attack objects in space.⁵⁴ Both proposals called on the President to seek agreement with the Soviet Union to "(1) declare an immediate, mutual, and verifiable moratorium of limited duration on the testing in space of antisatellite weapons; and (2) immediately resume negotiations on a mutual and verifiable ban on the testing, production, deployment, and use of any antisatellite weapon."⁵⁵ Both proposals also stipulated that any such agreements should "not restrict operations in space not involving weapons, such as the United States space shuttle program."⁵⁶ H.J. Res. 524 contained a separate policy goal, namely the need to "seek, on an urgent basis, a comprehensive verifiable treaty prohibiting the testing, production, deployment, and use of any space-directed or space-based weapons system which is designed to inflict injury or cause any other form of damage on the Earth, in the atmosphere, or on objects placed in space."⁵⁷

On March 28, 1984 members of the House of Representatives, seeing a connection between President Reagan's March 23, 1983 proposal for a BMD system and ASAT control, tabled a resolution calling on the United States to maintain its commitment to the 1972 ABM agreement with the Soviet Union.⁵⁸ The submission referred to the need by the United States not to "engage in programs and activities which are inconsistent with or could undermine the provisions of the ABM Treaty."⁵⁹ Implicit in this initiative was the thought that perhaps future BMD system activities, as they might have a bearing on ongoing ASAT controls, could prejudice the 1972 Treaty.

In the United States members of the Congress, having the constitutional power to make appropriations, employ the "power of the purse" to induce the executive department to pursue policies not favored by it.

Early efforts in the House of Representatives to limit funding for ASAT activity were unsuccessful. The proposal of Congressman G. Brown contained in H.R. 2929, which would have denied the procurement funding in 1983-1984 of \$19.4 million for ASAT activity, but allowing for research and development funding, was defeated by a vote of 243 to 177 on June 14, 1983. On July 21, 1983, the House of Representatives by a vote of 275 to 142 defeated a measure calling for the prohibition of ASAT test flights until approved by the Congress. In an effort to overcome this outcome some Congressmen decided to rely on the appropriations process to achieve their goal. On September 24, 1983 they were able to secure the adoption of an amendment to the 1983 Defense

⁵⁴98th Cong. 2nd Sess. (1984).

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Id.*

⁵⁸H.R.J. Res. 531, 98th Cong. 2nd Sess. (1984).

⁵⁹*Id.*

Authorization Bill. Section 1235, which is still in force, provided that none of the funds appropriated in the entire statute "or any other Act may be obligated or expended to test any explosive or inert antisatellite warheads against objects in space unless the President determines and certifies to the Congress" the following facts:

- (1) that the United States is endeavoring in good faith to negotiate with the Soviet Union a mutual and verifiable ban on antisatellite weapons; and
- (2) that, pending agreement on such a ban, testing of explosive or inert antisatellite warheads against objects in space by the United States is necessary to avert clear and irrevocable harm to the national security.⁶⁰

The control over appropriations was employed again by the House of Representatives in 1983 when it considered the 1984 Department of Defense Appropriation Bill. At issue was the request of the Department of Defense for \$19.4 million for advance procurement and testing of the ASAT system. The House Committee on Appropriations declined to support this request in the belief that such funding would represent an important step "toward a possible arms race in space that could prove exceedingly expensive and dangerously destabilizing."⁶¹ In adopting this position the House Committee indicated its belief that the Soviet ASAT system had low altitude capabilities.

The House Committee recognized the need for a deterrent to the use of such systems and considered the best means for dealing with the threat to be "a ban or strict limitation on their development and deployment."⁶² The Committee also directed the executive department to prepare an unclassified, and thus suitable for release to the public, comprehensive policy statement "on arms control plans and objectives in the field of ASAT and space weapons [to] be presented to the Congress no later than March 30, 1984."⁶³

The Senate members of the joint Senate-House Conference Committee took the view that the sum of \$19.4 million should be appropriated for advance procurement for the ASAT program.⁶⁴ However, restrictions were imposed on the obligating or expending of the foregoing sum. It was not to be used until 45 days following submission to the Congress by the President of a comprehensive, report on the policy of the United States respecting arms control plans and objectives relating to ASATs. Further, the Executive Department was directed to submit the report no later than March 30, 1984. The President was obliged to indicate that the expenditure, if it were to take place, was required in

⁶⁰Sec. 1235, Pub. L. No. 98-94 (1983).

⁶¹H. REP. NO. 427, 98th Cong. 1st Sess. 192, October 20, 1983.

⁶²*Id.* at 193.

⁶³*Id.*

⁶⁴House Conference Committee, Appropriations for Department of Defense, H. REP. NO. 567, 98th Cong. 1st Sess. 55 (1983).

the interests of national security. Having established these limitations, the measure was passed by the Congress on December 8, 1983.

The report also mandated the Executive Department to "include specific steps the Administration contemplates undertaking, within the context of U.S.-Soviet negotiations, to seek a verifiable agreement with the Soviet Union to ban or strictly limit existing and future ASAT systems."⁶⁵ The rationale underlying this decision, as explained by Congressman Moakley, was twofold. First, earlier financial commitments for arms had created a burdensome competition with the Soviet Union as in the case of multiple independently-targetable re-entry vehicles (MIRVs). Further, the financial cost for a space based anti-ballistic missile system, as functionally related to ASATs, could cost hundreds of millions of dollars.⁶⁶

The Presidential report, made public on March 31, 1984, stated that the terms of the 1981 and 1983 Soviet treaty proposals would confirm and maintain the advantages achieved by the Soviet Union in the militarization of space environment. Thus, the Congressional outlooks for negotiations with the Soviet Union having as their goal the establishment of a comprehensive U.S.-Soviet ban on ASATs were not accepted. In order to overcome the Soviet advantage the President indicated that U.S. efforts in this area would go forward. However, Mr. Reagan did not rule out the possibility of negotiating a limited ban on specific types of ASATs. The Administration's continuing interest in the prohibition of ASATs has been focused on those able to operate at high altitudes, and especially at 22,300 miles above the surface of the Earth. The basic concern of the Executive Department, which is a continuing one, is related to verification. The report indicated that even a small deviation from acceptable treaty terms would pose a disproportionate risk to the United States.⁶⁷

The extent of public involvement in the issue was reflected by editorial comment in American newspapers. Representing criticism of the Administration's position was the following: "President Reagan says that he will go ahead with plans to turn outer space into a shooting gallery. His casual rejection of pleas to keep violence out of space is foolhardy in and of itself."⁶⁸ Other editorial comment, however, considered the Presidential action to be wholly appropriate because of the Soviet threat.

The members of the Congress have also advanced a variety of views respecting the most desirable U.S. policy on arms control and disarmament for the space environment. Congressmen believing that the Soviet Union has taken the lead in the development of ASATs have expressed the view that test-

⁶⁵*Id.* at 55-56.

⁶⁶J. Moakley, *supra*, note 49, at 9.

⁶⁷Los Angeles Times, Apr. 3, 1984, § 1 at 1. For the detailed dialogue between interested Senators and representatives of the executive department on April 25, 1984, see *Strategic Defense and Anti-Satellite Weapons: Hearings before the Senate Comm. on Foreign Relations*, 98th Cong., 2nd Sess. 1-361 (1984).

⁶⁸Los Angeles Times, Apr. 4, 1984, § 2 at 4.

ing of ASATs should take place. For example, on January 1, 1983 Congressman R.W. Kastenmeier introduced H.J. Res. 83 encouraging such conduct. On March 24, 1983 Senator M. Wallop introduced S. Res. 100 asking the Administration to request funding for a BMD system. On May 19, 1983 Congressman K. Kramer introduced H.R. 3073 calling for the creation of a new governmental agency to be charged with the rapid development of directed energy technology. Senators J.W. Warner and H. Heflin have given their support to the funding of a BMD system.⁶⁹ A political action committee, the American Space Frontier Committee, has been established to challenge the viewpoints of certain members of Congress. This group is reported to have raised a campaign chest of \$300,000 to secure the defeat of Congressmen who have expressed opposition to the BMD system. Among those targeted have been members of Congress who have urged that the United States impose constraints on ASAT development.⁷⁰

Congressmen seeking a prudent response to the militarization of the space environment by the Soviet Union have been influenced by the June, 1984, report of the U.S. General Advisory Committee on Arms Control. This body, appointed by President Reagan, concluded that during the past 25 years the Soviet Union "has continually violated existing agreements with the United States."⁷¹ Congressman J. Courter, a member of the House Armed Services Committee, commented that the report demonstrated that "there has been a conscious, premeditated, planned violation of many arms control agreements by the Soviet Union. And it is this clear pattern of attempting to take unilateral advantage of the difficulty of corroborating arms control that is most disturbing."⁷²

The Congress has an important role to play in the formation of U.S. policy in the area of arms control and disarmament. It has demonstrated a keen interest in the militarization of the space environment. Many members have favored reaching an agreement with the Soviet Union in which a moratorium would be imposed on the further development, testing, deployment, and use of ASATs, subject always to the guarantee of adequate verification practices. Other members of Congress, while generally supportive, have expressed major concerns over demonstrated instance of non-compliance by the Soviet Union of existing arms control and disarmament agreements.

Some members of Congress in an effort to limit the action of the Administration have endeavored to impose budgetary constraints on ASAT and

⁶⁹The positions advanced by public and private experts in the field of the militarization of the space environment have been collected in 63 CONG. DIG. No. 3 at 67-95 (1984).

⁷⁰Christian Science Monitor, June 11, 1984, at 7.

⁷¹Christian Science Monitor, June 15, 1984, at 1.

⁷²*Id.* The same conclusion regarding Soviet non-compliance had previously been reached by the U.S. Arms Control and Disarmament Agency. *Supra*, note 15, at 10-12.

BMD system developments. Others have favored a policy in which the President is obliged to report to them, prior to engaging in developmental activities, that the national security of the United States would be at risk if such conduct were to be suspended. The President, pursuant to Congressional wishes, reported to them on March 30, 1984 that the interests of national security required further ASAT development, testing, and deployment. This met the Congressional requirement. As a result the United States is going ahead with the testing of an ASAT to be launched from an F-15 type aircraft. The goal will be to target on an American space object in orbit. In light of these considerations it is clear that the legislative and executive branches of the government have determined that Soviet ASAT activity imposes a threat and that suitable preparations must be taken to protect U.S. security interests.

VII. THE MID-1984 U.S. - SOVIET DIALOGUE ON ASATs

Although President Andropov's April and August 1983 proposal to halt Soviet ASAT tests in the event that the United States would not engage in its own testing did not produce a termination of testing, it did elevate world attention to the seriousness of the problem. On May 19, 1984 President Chernenko called for a ban on all space weapons. In doing so he referred to the 1983 draft treaty submitted by the Soviet Union to the UN.⁷³ He called for talks to begin with the United States immediately "without any conditions or reservations."⁷⁴ On June 11, 1984 he again advanced the hope that the United States would join in a moratorium on space-based weapons and tests of ASAT systems.⁷⁵ None of these pronouncements were put forward through diplomatic channels either at the UN or through normal bilateral means. They were all communicated either to scientists or U.S. Congressmen visiting Moscow or they were released by the Soviet newsservice, Tass.

The Chernenko statement of June 11 came immediately after the publication of a communique released by the heads of major Western States at their London summit meeting. On June 9 they had called for the resumption of arms control negotiations between the United States and the Soviet Union. In doing so they favored agreements "which would build confidence and give concrete expression, through precise commitments, to the principle of the non-use of force."⁷⁶ In endorsing the speedy resumption of arms negotiations they stated: "The United States has offered to restart nuclear arms control negotiations anywhere, at any time, without preconditions. We hope that the Soviet Union will act in a positive and constructive way."⁷⁷

⁷³Los Angeles Times, May 20, 1984, § 1 at 8.

⁷⁴Christian Science Monitor, May 21, 1984, at 2.

⁷⁵Los Angeles Times, June 12, 1984, § 1, at 13.

⁷⁶Los Angeles Times, June 10, 1984, § 1 at 1.

⁷⁷*Id.*

At the close of the conference President Reagan stated on June 10 that the subject of ASAT controls should be on the negotiating table. He also observed that the negotiations should be based on "a recognition of the need for adequate verification."⁷⁸ Just as the conference was concluding the United States announced that an experimental missile guided by an on-board computer had been launched from a land base. It was successful in destroying a dummy warhead above the Earth's atmosphere. It was in these circumstances that President Chernenko issued his statement of June 11.

Despite President Chernenko's contention that "a freeze on anti-satellite weapons can be verified" reliably by national technical means presently available, the United States immediately announced that it would study the proposal.⁷⁹ An administration spokesman addressed himself specifically to the issue of ASAT control. He stated that "the door is not closed" to negotiations on this subject.⁸⁰

The clarification of national outlooks through the issuance of unilateral statements by national leaders was augmented on June 14, 1984 by answers given by President Reagan in a White House news conference. In response to a question whether he would be willing to hold a meeting with his Soviet counterpart, he answered that he was "ready, willing and able" to do so, that the United States had not "slammed the door" on ASAT matters, and that he had written to President Chernenko on matters of mutual interest, but that so far the Soviet leaders "have been unwilling to respond."⁸¹ He also stated that he was "willing to meet and talk at any time . . . The door is open. Every once in a while, we're standing in the doorway, seeing if anyone's coming up the steps."⁸² His comments have been described as being conciliatory, particularly since they have been seen as indicating that the United States did not wish to achieve a condition of superiority over the Soviet Union in the area of armaments. He said: "I would prefer that we not ask for superiority now that we've entered into and started this whole area."⁸³

In assessing national policies respecting arms control and disarmament States may be impelled to decide whether they wish to look at all such issues at a given time, or whether it would be more beneficial to examine only limited aspects of the whole at a fixed time. In 1982 the Soviet Union in addressing this problem at a meeting of the First Committee of the UN General Assembly rejected the view that ASATs should be considered separately. At that time the Soviet Union considered such an approach to be an artificial narrowing of

⁷⁸Los Angeles Times, June 12, 1984, § 1 at 3.

⁷⁹Los Angeles Times, June 12, 1984, § 1 at 13.

⁸⁰*Id.*

⁸¹Los Angeles Times, June 16, 1984, § 1 at 1.

⁸²123 Time, The Weekly Newsmagazine, 26, June 25, 1984, at 2.

⁸³Los Angeles Times, June 16, 1984, § 1 at 1.

general arms control efforts.⁸⁴ Nonetheless, on June 28, 1984, the Soviet Union issued an appeal to the United States to meet in Vienna in September to negotiate an agreement imposing controls on ASATs, subject to the condition that at the start of such negotiations there would be a mutual ban on the testing of ASATs and other space weapons.⁸⁵ This condition would require the United States to terminate its plans to test its developing ASAT system against a real target later than September, plans which were in the process of being implemented at the time of the Soviet offer.

The United States immediately on June 29 unequivocally accepted the proposal to negotiate on the ban of ASATs, while also expressing an interest in considering at such a meeting more wide-ranging arms control and disarmament arrangements.⁸⁶ Speaking for the executive department, Mr. R.C. McFarlane, the national security adviser, stated that the United States was willing "to discuss and define mutually agreeable arrangements" for resuming the nuclear weapons negotiations, as well as to talk about "feasible negotiating approaches which could lead to verifiable and effective limitations on anti-satellite weapons."⁸⁷

Spokesman for the White House were queried by the press whether the United States would be willing to proceed to negotiate only with respect to ASATs if the Soviet Union were unwilling to consider both ASATs and other aspects of arms control and disarmament. The spokesman responded in the affirmative. However, it is possible that the Soviet Union in taking its initiative, which seemed to focus on ASATs, was in fact opening the door for more wide-ranging discussions. The Soviet proposal, as reported by Tass, stated: "[t]he government of the Soviet Union offers the government of the United States to begin, at the level of specially appointed delegations, Soviet-American talks to prevent the militarization of outer space."⁸⁸

Despite the immediate and unequivocal acceptance by the United States of the Soviet offer to engage in bilateral negotiations on the militarization of outer space, including the concern over ASATs, there has arisen the question of whether the affirmative U.S. response has been construed by the Soviet Union as such a reply. Following the U.S. acceptance on June 29, 1984, there have been a large number of communications released to the press in the Soviet Union and in the United States, as well as high level discussions between the Soviet Ambassador to the United States and the U.S. Secretary of State. These have focused on the issue of whether the U.S. expression of its concern about other areas of arms control and disarmament, while at the same

⁸⁴U.N. Doc. A/C.1/37/PV.44 at 46, (1982).

⁸⁵Los Angeles Times, June 30, 1984, § 1 at 1.

⁸⁶*Id.*

⁸⁷Los Angeles Times, July 4, 1984, § 1 at 6.

⁸⁸*Id.* at 7.

time indicating its willingness to negotiate only on ASATs, constituted a precondition to the talks. The Soviet Union has indicated that in its view the United States was putting forward preconditions, while the United States has denied this charge.

When asked about the Soviet view that the United States was attaching conditions to the proposed talks, a White House spokesman replied that the U.S. response "asked no preconditions, and we meant what we said."⁸⁹ This view, however, was rejected by Foreign Minister Gromyko on July 2, 1984 after having been counseled by the British Foreign Secretary, Mr. G. Howe, that the United States had accepted the Soviet proposal without preconditions. According to Mr. Gromyko the U.S. response was intended "to create an illusion that the U.S. Administration is for negotiations. In reality it does not want negotiations. It evades them, and to do that, it is piling up preconditions."⁹⁰

Following Foreign Minister Gromyko's statement public unilateral exchanges flew thick and fast between the superpowers. As a mark of the apparent, and possibly calculated misunderstanding on the part of the Soviets, a highly placed U.S. government official said "It looks as if they can't take 'yes' for an answer."⁹¹ In an effort to end the confusion the White House on July 2, 1984 reaffirmed its intention to engage in ASAT negotiations with the Soviets in Vienna in September.⁹² While indicating that the United States was still concerned over the break-down of the medium- and long-range missile negotiations, the Administration stated that "We don't consider this a precondition to anti-satellite talks. We don't consider it to be an impediment."⁹³

However, a July 6 Soviet statement, as reported in Tass, seems to have been based on the view that the United States had not accepted the Soviet offer to negotiate, since the Soviet Union stated that it was confirming its offer to open negotiation on banning ASATs. It also established as a precondition for such negotiations a refusal to link "the talks on space with a discussion of questions of strategic and European-based nuclear arms."⁹⁴ Thus, the Soviet Union indicated that the sole focus of the proposed meeting would be on "preventing the militarization of outer space."⁹⁵ In reasserting that the United States had not accepted its proposal of June 28, the Soviet Union indicated that it required a different response from the United States than had previously been

⁸⁹Los Angeles Times, July 2, 1984, § 1 at 1.

⁹⁰Los Angeles Times, July 3, 1984, § 1 at 6.

⁹¹Los Angeles Times, July 2, 1984, § 1 at 1.

⁹²Los Angeles Times, July 3, 1984, § 1 at 6.

⁹³*Id.*

⁹⁴Los Angeles Times, July 7, 1984, § 1 at 1. The Tass statement also said: "By linking questions of nuclear armaments with the problem of preventing the militarization of space, the American Administration is seeking to avoid the talks on space." *Id.*

⁹⁵*Id.* at 6.

received and was, therefore, "awaiting a positive response . . ." from the United States.⁹⁶ Whether this will be resolved on the basis of quiet diplomacy or whether it will become a *cause celebre* of media diplomacy carried out through unilateral press releases remains to be seen.

VIII. CONCLUSION

Many considerations will naturally influence the superpowers as they examine their foreign policy goals and their outlook toward international law in the present scientific and technological age. This is particularly true where security issues are at stake and where an earlier era of supposed detente has been followed by a period of openly stated and acknowledged suspicions. Each country fearing the presence of an advantage in one or more respects on the part of the other has evidenced a willingness to promote its strategic and tactical strength, even though such efforts offer no assured guarantee of real security.

The differences relating to arms control and disarmament between the United States and the Soviet Union are multiple. They include varying perceptions of suitable national balances of armaments, of the forums which might be employed to negotiate their differences, of the agenda which might be established for such negotiations including the issue of whether one State can establish preconditions for inclusion in such an agenda, of whether there should be a moratorium on the development, testing, deployment, and use of ASATs during negotiations on the banning or on the control of such space objects, and on the means whereby such objects may be verified sufficiently by parties to any future agreement, if, in fact there is to be such an agreement. A critical difference is one of basic approach, namely, whether it is possible to deal only with ASATs or whether this aspect of the militarization of the space environment must be linked to other arms control and disarmament negotiations which were suspended by the Soviet Union in November of 1983.

There are also differences between the executive department of the United States and the Congress relating to an agreement with the Soviet Union respecting ASATs. There is a respectable minority in the House of Representatives which would prevent further ASAT development in the United States through denying funds for this purpose. In the Senate the approach has been to encourage the President to take the initiative with the Soviet Union in order to obtain an agreement providing for verified means to assure that a moratorium on such activities would be respected. However, the President would be allowed to go forward with an ASAT program if he were to advise the Congress that a developmental program was required by national security. The President made that declaration on March 30, 1984, and the Congress has provided funds for these developments. Future funding will unquestionably depend on

**Id.*

whether the Soviet Union decides that it wishes to carry on arms control and disarmament negotiations in good faith. Judging from the Soviet responses to the willingness expressed by the Administration to negotiate the ASAT issue, the road to Vienna in September may indeed be a rocky one.

Despite the occasional serious differences between the President and members of Congress, and there may be reasonable misperceptions as to what are superficial and basic differences, the fact remains that President Reagan enjoys a high level of approval by the American people for his general policies and outlooks. The quality of his leadership, which has been treated in the United States as consisting both of substance and style, is generally perceived as being even-handed and based on the premise that the superpowers share common goals and purposes, especially in the area of international peace and security.⁹⁷

The American perception of Mr. Reagan's qualities is undoubtedly the product of his personal philosophy, which, in its ultimate quality is one of hope for the future. This was reflected late in June of 1984 when he was asked to comment on the statement of a high level U.S. military commander. The latter had observed that war between the United States and the Soviet Union was an "almost inevitable probability" in this generation.⁹⁸ President Reagan stated:

I think one of the most dangerous things in the world is for anyone to get fixed in their minds the inevitability theory, because then, that very thing being in their minds can bring about war. We're going to do everything to see that it doesn't happen."⁹⁹

This suggests that his goal is to contribute to the realization of common respect among States, including the fundamental view that rights and duties are mutual and that the full acceptance of these principles will produce adequate and basic harmony between the superpowers.

The United States and the Soviet Union have played leading roles in the development of existing international space law. Their willingness to adjust opposing outlooks led to their acceptance of the 1967 Principles Treaty, including the critical provisions of Article 4. Further accommodations of outlooks results in their joint approval of the 1979 Moon Agreement, including the critically important provisions of Article 3.

In 1981 and in 1983 the Soviet Union put forward proposals at the UN seeking to secure restraints on the militarization of the space environment. These were considered by the United States as insufficient approaches to the

⁹⁷In a recent newspaper interview former President Richard M. Nixon stated that, "Reagan would like to be remembered as a man of peace." *Los Angeles Times*, July 1, 1984, § 1 at 6.

⁹⁸*Los Angeles Times*, June 23, 1984, § 1 at 4.

⁹⁹*Id.*

goal of a peaceful world, particularly since the Soviet proposals seemed designed to accord to the Soviet Union special benefits resulting from its earlier and extended development, testing, deployment, and use of ASATs.

However, in June, 1984, the United States adopted a new policy position. It abandoned its reservations about entering into an ASAT agreement with the Soviet Union. It expressed itself as being unconditionally willing to enter into negotiations on the militarization of the space environment, including ASATs with the Soviets to take place in September, 1984. This decision was taken in the face of the facts that the verification of the presence of ASATs may never fully be assured, that violation of a future agreement may be virtually impossible to guard against, and that the United States would voluntarily be obliged to forego the prospect of gaining the ASAT expertise and capabilities now believed to be possessed by the Soviet Union. Although these concerns are evidence of a prudent perception of the needs of national security, the United States has nonetheless officially expressed an unconditional willingness to meet with the Soviet Union to focus on this singular aspect of arms control and disarmament.

In the future the superpowers would profit if they were to seek directly to clarify their respective outlooks toward each other. Presumably it is in their respective interests to avoid a continuation of the arms race in the space environment. At some point it would seem that both would be able, assuming a rational approach based on self-interest, to determine that they had had "enough" of the current uncertainty and tension. This being the case, their efforts could constructively be directed toward agreement on an international treaty imposing suitable constraints on the militarization of the space environment, including clearly stated provisions dealing with the means available to the parties to insure verification of the agreement. International lawyers, guided by a firm commitment to the rule of law in world affairs, should lend their sense of values and professional skills to this worthy objective.
