

The Fissile Materials Cutoff Treaty: An Interim Report

Ephraim Asculai

In the spring of 2006, the United States delegation to the Conference on Disarmament (CD) in Geneva presented a draft text of a mandate for an ad hoc committee to negotiate a treaty, a “Ban on the Production of Fissile Material for Nuclear Weapons or Other Nuclear Explosive Devices.”¹ With this proposed mandate, the US delegation presented a draft text proposal for the treaty. However, this is not a new topic for the CD, since the issue has been raised in the past. The following article presents a brief history of the Fissile Materials Cutoff Treaty (FMCT),² a discussion of the US draft texts, the position of the proponents and opponents of the treaty, including Israel, the situation in the spring of 2007, and some outlook for the future.

A Brief History

In July 1992, the Bush administration announced a global arms control initiative that also stipulated a ban on the production of fissile material.³ The initiative specified the Middle East as one of the five areas where special efforts should be made to apply the ban. In December 1993 the UN General Assembly adopted a resolution calling for the negotiation of a “non-discriminatory, multilateral and internationally and effectively verifiable treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices.” In March 1995, the CD adopted a report, often called the “Shannon Report” after the Canadian Ambassador Gerald Shannon who was appointed Special Coordinator by the CD,⁴ whereby it agreed to establish an ad hoc committee to negotiate the proposed fissile materials production ban. The report avoided dealing

at this early stage with the divisive issue of accounting for past production of fissile materials, or “stocks,” by stating that all issues could be debated by the committee. However, the discussions were again stalled, for two main reasons: stocks and linkage with nuclear disarmament. Led by India, a number of non-aligned countries linked the commencement of FMCT negotiations to negotiations on a timetable for universal nuclear disarmament. The nuclear tests conducted by India and Pakistan in May 1998 had the effect of opening up new opportunities.⁵ Under pressure to make concessions, India indicated that it would no longer insist on the linkage.

In August 1998 a new coordinator was elected, and the ad hoc committee conducted its first working sessions. However, these few sessions, serving more as a debating forum, were not fruitful, and no progress was made on the way to an agreed text or even a first

Members of the INSS
research staff

draft. The following year the mandate was not renewed and no further formal discussions took place in the ad hoc committee on the topic of an FMCT. This was the situation until May 2006. The reasons for this were not only FMCT-related. Some CD members, notably China and Russia, linked an agreement to discuss an FMCT to the larger issue of the work of the CD, notably to an agreement on the Prevention of an Arms Race in Outer Space (PAROS). The US, on the other hand, opposed such a linkage.

Notwithstanding the formal history, many informal discussions and seminars took place, position papers were published, and proposals were put forward in the years since the Shannon Report was adopted.

The US Proposal

The US proposal for the mandate includes the following paragraphs:

1. The Conference decides to establish an Ad Hoc Committee on a “Ban on the Production of Fissile Material for Nuclear Weapons or Other Nuclear Explosive Devices.”⁶

2. The Conference directs the Ad Hoc Committee to negotiate a nondiscriminatory and multilateral treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices.

These two paragraphs of the proposed mandate text already hold the first contentious items: the production of fissile materials is not totally banned; the verification requirement, part of the Shannon Report, is omitted; and the divisive issues such as existing stocks of fissile materials and nuclear disarmament that had been included in the Shannon Report are not included in the proposed mandate.

To be sure, the production of fissile material was not banned even in the Shannon Report. The reasons for this are easy to understand and carry a logic of their own: high enriched uranium (HEU) is used, for example, in marine propulsion reactors, and plutonium is used in advanced nuclear fuel for reactors, when remixed with uranium. Thus, it is the *use* of newly produced materials in nuclear explosives that is banned, not their production.

The omission of the verification requirement is more serious and contravenes the 1993 UN resolution. Verification is supported not only by the “purists” who insist that the application of all treaties, especially those relating to arms control, must be strictly verified because of bad experiences. A more realistic view is that verification should be included in those treaties that *can* be verified. The US apparently took the view that an FMCT is not verifiable and that verification can be circumvented, as was shown in the case of the NPT, notably (but not exclusively) when applied to Iran. It is possible that the US decided to have a more declarative treaty as a first stage, setting the scene for the application of verification at a later stage.

The related issue of stocks should also be taken seriously. The apparent leader of the campaign for the requirement of the inclusion of existing stocks of fissile materials in the treaty is Egypt. Egypt’s traditional position is that all such materials, whether in Non-Nuclear Weapons States (NNWS) or in Nuclear Weapons States (NWS), should be accounted for and placed under verification.⁷ This is seen as a first step on the road to universal nuclear disarmament. Egypt’s position is supported by quite a few member states of the Non-Aligned Movement (NAM).

Egypt’s proposal has one interesting im-

plication: it bypasses the NPT. If the stocks are included in the treaty and if the treaty is universally accepted, there would be little use for the NPT, other than some declarative values concerning universal nuclear disarmament, the right to peaceful uses of nuclear energy, and an interim right to hold nuclear weapons by the NWS. However, the inclusion of stocks does have another important implication: the possible inclusion of safeguards for those who join the treaty, even for those who are not parties to the NPT.

Verification

What would be the purpose of verification if it is included in a future FMCT? The Shannon Report calls for “an internationally and effectively verifiable treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices.” In order to be effective, the verification has to: a) cover all known production facilities (e.g. enrichment and reprocessing plants) and their products; b) search effectively for any undeclared such facilities; and c) search for any undeclared materials including those produced in such facilities or acquired from other sources. In addition, d) it has to assure that no fissile material has been diverted from peaceful uses to nuclear explosives.

The first requirement is the simplest, albeit still a very complicated and costly task. However, if the Additional Protocol (AP) is applied, the probability of failure is limited, though not totally reduced to zero. The second requirement, the search for undeclared facilities, is much more difficult, and would arouse serious objections from the inspected parties if it became more intrusive than acceptable. The search for fissile materials, the third requirement, is an almost impossible task, since these are easily hidden and

notoriously difficult to uncover. The fourth task cannot be carried out unless stocks are included in the initial declaration and later monitored and accounted for.

If a verification regime for those who become parties to the treaty is mandated, it would probably resemble the present IAEA inspection regime, the AP included. There are tasks that the present regime cannot undertake and some that probably cannot be fulfilled. In addition, the international community would expect the verification mechanism to provide assurances as to the integrity of the states, attesting to the fact that these have done no wrong. This cannot be done. There is no way that any verification can provide assurances about the absence of concealed activities or materials in a given state. Any such assurances (such as are implied in the text of the AP, and in several statements and reports of the present IAEA director general) would be misleading, and their consequences fraught with danger. Therefore, an ineffective verification mechanism could be even worse than a treaty without verification, since a false sense of security can be worse than a situation whereby states are committed to a treaty, without verification, where suspicion would exist.

Although the exact reasons for the US decision on the specific route may not be very clear, the idea of having a treaty without verification is probably the soundest possible one.

In Lieu of Verification

Article III of the US proposed text of the Draft Treaty includes:

2. No Party shall be precluded from using information obtained by national means and methods in a manner consistent with generally recognized principles

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of international law, including that of respect for the sovereignty of States.⁸

3. Any questions that arise regarding the implementation by a Party of the provisions of this Treaty shall be addressed through consultations between that Party and the Party or Parties seeking clarification.

4. In addition, any Party may bring to the attention of the Parties to this Treaty concerns regarding compliance with the provisions of this Treaty by another Party or Parties and may request the depositary to convene the Parties to this Treaty to consider the matter.

5. If...any Party believes that questions have arisen that are within the competence of the Security Council of the United Nations..., that Party may request consideration of such questions by the Security Council. The requesting Party should provide evidence related to the matter.

In these few sections, the US proposes to replace any international verification mechanism with a loosely defined set of rights for individual states to use any information they legally collect to try and resolve their grievances, namely if they suspect a state of acting contrary to its treaty obligations. In part this resembles how the cases of North Korea and Iran were brought to the attention of the world and later dealt with. In these cases, this method was an effective starting point, but the overall outcome was not.

Another interesting feature of the US proposal is that the treaty would come into force following its ratification by the five NWS. This opens some interesting speculations: is this a means of bypassing the CD and agreeing on a treaty only among the NWS? Is this a confidence-building measure designed to

lower the pressure on the demand for nuclear disarmament? Can the other states be persuaded to join this treaty while negotiating the open issues, including stocks and verification, at a later stage? The US rationale for this is based on past experience with the NPT, where only three ratifications were needed for its entry into force, and the Comprehensive Test Ban Treaty (CTBT) where forty-four ratifications are needed (and where no entry into force is in sight).⁹ It is better to employ the NPT model and expect the others to join in when they are convinced of the benefits of the treaty. Meanwhile the treaty implementation would already be underway.

A further question is why the US put forward its proposal at this time. Out of the many possible motivations, two stand out clearly: the US wanted to present an appearance of recovering from its inability to ratify the CTBT and proceeding with a nuclear non-proliferation/disarmament agenda, and it needs such a move in order to justify, at least partially, its willingness to conclude a nuclear cooperation agreement with India by securing its agreement to this treaty. In addition, an FMCT without verification will not affect the US in any significant way, since it has effectively terminated its production of fissile materials for nuclear explosives, and will not be harassed by a verification mechanism when the treaty comes into force.

The International Reaction to the US Proposal

A general debate concerning the FMCT was launched at the CD in May 2006, when the US presented its proposals. During this debate several (but not all) members of the CD presented their country's position on the major issues.¹⁰ Not all relevant issues were addressed by all speakers, but none

of the speakers opposed the idea of having an FMCT. It is worthwhile to note the reactions of some of those who would be most affected by the FMCT – the NWS, India, and Pakistan.¹¹

- China: “FMT negotiations in the CD should be based on the mandate contained in the Shannon Report...We are of the view that future FMCT negotiations should not involve the issue of stockpile.”

- India: “India continues to believe that any treaty banning the production of fissile material must be non-discriminatory: it must stipulate the same obligations and responsibilities for all States...We believe that an FMCT should incorporate a verification mechanism in order to provide the assurance that all States party to it are complying with their obligations under the Treaty.”

- Pakistan: “We believe that a verifiable treaty on fissile materials is an essential condition for the effective cessation of a nuclear arms race. A credible verification regime will be necessary to guarantee successful implementation.”

- Russia: “The scope of the treaty will not cover existing stocks of fissile materials, since otherwise it would entail establishing a cumbersome verification mechanism, and, accordingly, unacceptably high costs of its maintenance.”

These statements indicated that there was as yet no agreement on the terms of reference for an FMCT, necessary for the mandate of an ad hoc committee and for the start of a debate on the text of a future treaty. The specific stumbling blocks for such an agreement will be the issues of stockpiles and verification. Moreover, the broader linkage to the work program of the CD (e.g., PAROS) is an outstanding issue that hinders any progress on specific issues.

The subject of the FMCT was raised again at the winter 2007 session of the CD meetings, but nothing more than hearing statements by the members of the CD was achieved during the major part of this session. However, towards the end of the winter session, a draft resolution concerning the appointment of four coordinators was tabled. This proposal included the appointment of a coordinator “to preside over negotiations on a non-discriminatory and multilateral treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices.”¹² It could be another way of bypassing the necessity of approving a (contentious) mandate, but this has yet to be seen. During the ensuing discussion many CD members supported the proposal, but stated that they had to refer the matter to their capitals. Thus, the winter 2007 session ended without a decision being taken on the proposal. In any case, it will be an uphill road for any FMCT text to be agreed on.

Israel and the FMCT

Israel never hid its disdain for an FMCT, especially under the Shannon Report. Joining such a treaty would seriously harm its policy of opacity, which is one of the basic premises of its national security strategy. This would especially be true if the treaty included verification provisions. Israel is not a member of the NPT, and as such, is not under a comprehensive safeguards regime. There is no external accounting of its activities, its inventories of materials, or its facilities, and not only in the nuclear field.¹³ Israel, not free of threats, guards its privacy jealously.

In the past there have been a few official public statements concerning the FMCT as well as some media reports about Israel’s position. In 1998, following the establishment

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of the ad hoc committee on the FMCT, then-prime minister Binyamin Netanyahu said in a press release that Israel still has “fundamental problems” with an FMCT and that Israeli support for the ad hoc committee “does not indicate we are taking a position on the treaty and its contents.”¹⁴ Furthermore, it was reported that in two letters and several conversations in 1999, Netanyahu told US president Clinton, “We will never sign the treaty, so do not delude yourselves, no pressure will help. We will not sign the treaty because we will not commit suicide.”¹⁵ During a 2006 debate at the UN, an Israeli representative made what is perhaps the most elaborate statement on the subject:¹⁶

Israel cannot view an FMCT devoid from regional and global realities. Israel views the FMCT in both regional and global contexts, and its policy is governed by these two considerations:

1. In the regional context of the Middle East, issues related to nuclear disarmament can be dealt with only after achieving lasting relations of peace and reconciliation, and within the context of the overall regional security and stability...

2. In the global context, recent developments highlight the fact that, non-compliance of states with their international obligations, as well as the misuse and unchecked dissemination of nuclear fuel cycle capabilities, have become among the most pressing challenges in the nuclear non-proliferation field. The FMCT does not address these challenges and in fact can further complicate them.

Israel also stresses that an FMCT, especially now, will be counterproductive to non-proliferation efforts because it will give states like Iran the ultimate legitimacy to produce fissile material, ostensibly for civilian pur-

poses, since the treaty would only ban fissile material production for weapons purposes. In conclusion, it is doubtful that Israel would join it, even in its diluted US version.

A Look to the Future

The future of the US proposals at the CD will largely depend on behind the scenes negotiations. These proposals will probably reemerge at the CD if and when enough support is gained for the proposal to appoint a coordinator for this subject matter, so that no opposition is presented at the plenary and an ad hoc committee can begin its work, even of no mandate is formally approved.

It is uncertain if the CD can, at this time, make much progress towards achieving an agreed text of an FMCT. If the US is genuinely serious about such a treaty, it could bypass the CD and agree with the other NWS on a text and bring the treaty into force in a relatively short time. It would then try and get other states to join in. This would, however, cause great, perhaps irreparable, damage to the CD in particular and to the UN nonproliferation mechanism in general. The US attitude towards these international organizations does not exclude this possibility. A detour around the international organizations could perhaps achieve the desired treaty with the US text and have the NWS ratify it. These states would even persuade others to join in. However, it would not easily achieve the status of a norm in international law, a status that is perhaps the ultimate desire of the parties to the treaty.

One cannot be very optimistic about the effect of an FMCT on the non-proliferation issue. The NWS are not the issue today. Even the three non-NPT members are not the issue. The main issues are the nuclear proliferation by rogue states, with Iran being the lead ex-

ample in 2007, and the assistance, by Pakistan and others that are commercially motivated, to proliferators. The FMCT will not have any effect on these issues. Indeed, the non-proliferation regime received a considerable boost when an agreement was achieved with North Korea in February 2007, which goes even further than the proposal for discontinuing the production of fissile materials. This was not done within the proposed framework of the FMCT, and its verification will not follow the proposed methodology. The fact that such an agreement could be achieved is a clear demonstration that the proposed treaty is not an essential step in preventing proliferation of nuclear weapons. Thus, the CD and the other international organizations, including the Security Council, would do well to address effectively the more pressing issues, and not be sidetracked into keeping up appearances of moving ahead.

Notes

1. Member of the INSS research staff, <http://geneva.usmission.gov/Press2006/0518DraftFMCT.html>.
2. Of the many acronyms that have been proposed over the years, FMCT is the most popular, and the one used here.
3. Taken from Shai Feldman, "Israel and the Cut-Off Treaty," *Strategic Assessment* 1, no 4 (1999): 6-9.
4. Briefly, the way the 65-member CD works is this: the full Conference agrees, by consensus, on a mandate for an ad hoc committee (composed of all CD members) on a specific topic, places it on its agenda and selects a person (one of the heads of the national delegations to the CD) to become the "Special Coordinator" to chair the committee. Unless the CD decides otherwise, the mandate has to be reaffirmed each year and placed on the agenda. Otherwise, the issue will not be debated at the CD that year. As a rule, all CD decisions are taken by consensus, i.e., with no votes against. Israel is a member of the CD.
5. This is not surprising if one recalls that the NPT, the Additional Protocol, and other non-proliferation efforts also followed proliferation crisis events.
6. The term "fissile materials" is defined in the same way in all proposals for the treaty. Without going into technical details, the term means mainly mean high enriched uranium (HEU) and plutonium (Pu) that can be used in nuclear weapons.
7. The five NWS are defined in the NPT: China, France, Russia (replacing the USSR), the UK, and the US.
8. The "legal" information could include satellite photography, open source information, and so on. It would, however, exclude, e.g., human intelligence and similarly obtained information.
9. <http://geneva.usmission.gov/Press2006/0518RademakerPress.html>.
10. This section is mostly based on: http://www.reachingcriticalwill.org/political/cd/positions_matrix.html.
11. Israel did not take part in this debate.
12. As reported on the UN Office in Geneva website, <http://www.unog.ch/>.
13. As an example, Israel signed but did not ratify the Chemical Weapons Convention (CWC), thus undertaking not to produce chemical weapons, but not placing its facilities under international inspections.
14. As reported in: <http://cns.miis.edu/research/wmdme/israelinc.htm>.
15. There are several version of this message. This version was reported in: http://www.arm-scontrol.org/act/2003_12/MillerandScheinman.asp.
16. http://www.israel-un.org/gen_assembly/60UNGA/itzchaki19apr2006.htm.