

The Conference on the Legal Status of the ABM Treaty

Memorandum of Law, June 1, 2000: Did the ABM Treaty of 1972 Remain in Force after the USSR Ceased to Exist in December 1991 and Did It Become a Treaty Between the United States and the Russian Federation?

GEORGE MIRON
DOUGLAS J. FEITH

Feith and Zell, P.C.
Washington, DC

This Memorandum concludes that, following the extinction of the Union of Soviet Socialist Republics, the Anti-Ballistic Missile Treaty of 1972 did not become a treaty between the United States and the Russian Federation. Rather, as a bilateral, non-dispositive treaty, the ABM Treaty of 1972 between the United States and the USSR lapsed when the USSR ceased to exist.

In December 1991, new States that emerged on what had been USSR territory declared independence, announced the formation of the “Commonwealth of Independent States” and proclaimed that the USSR “as a subject of international law and a geopolitical reality no longer exists.” Soon thereafter, the United States acknowledged that the USSR “is no more.”

The United States has officially expressed its view that upon the extinction of a State, its bilateral political treaties automatically lapse, and has acted in accordance with that view in connection with the extinction of the Kingdom of Hawaii in 1898, the dissolution of the Austro-Hungarian Empire at the end of World War I, and the dissolution of Yugoslavia in 1992. The U.S. view is consistent with the opinion of international legal scholars who have addressed that issue. With consistency over more than a hundred years, scholarly writings state that when a State ceases to exist (becomes “extinct”), that State’s treaties have no further effect. Such treaties are said to lapse. The lapsing occurs by operation of law—that is, automatically upon the State’s extinction. It does not require action by any other treaty party. No judicial decision or applicable treaty contradicts this principle, and the U.S. Supreme Court has established that works of international legal scholars can be acceptable as evidence of the law.

In 1889, the State Department stated as a “principle of public law” that a treaty expires when one of the parties “loses its existence.” In support, the State Department quoted from General Henry W. Halleck’s *International Law*, written in 1861:

The principle of public law which causes Treaties under such circumstance [*i.e.*, the cessation of a State’s existence as an independent State] to be regarded as abrogated is thus stated: “The obligations of Treaties, even where some of their stipulations are in their terms perpetual, expire in case either of the contracting parties loses its existence as an independent State

In 1897, U.S. Secretary of State John Sherman invoked scholarly works to explain to the Government of Japan why the treaties made by the Kingdom of Hawaii would not survive the U.S. treaty of annexation of the Kingdom's territory, *i.e.*, "[t]he treaty of annexation does not abrogate [the Kingdom's treaties], it is the fact of Hawaii's ceasing to exist as an independent contractant that extinguishes those contracts."

Likewise, in 1902 Charles E. Magoon, Law Officer in the Office of the Secretary of the War Department, wrote a report that Secretary Elihu Root ordered to be published. On the subject of the treaty obligations of extinct States, the Report states:

But where there is a complete change, not only of sovereigns but of sovereignty, of necessity the agreement ends, for each sovereignty must exercise its grace in accordance with its own constitution, laws, and customs.

Similar observations include the following:

It is clear that political (including personal and dynastic) treaties of the extinguished state fall to the ground. Professor Amos H. Hershey, University of Indiana, 1911.

The extinction of the personality of a state results traditionally in an abrogation of all political and military treaties concluded between the now extinct entity and other states. Professor Gerhard von Glahn, University of Minnesota—Duluth, 1962.

Many other scholars have expressed the same opinion.

President William Clinton has taken the view that the ABM Treaty of 1972 remains "in force." In November 1997, he wrote that the "succession" issue is "unsettled," adding: "Neither a simple recognition of Russia as the sole ABM successor (which would have ignored several former Soviet states with significant ABM interests) nor a simple recognition of all NIS [newly independent states] as full ABM successors would have preserved fully the original purpose and substance of the Treaty, as approved by the Senate in 1972." A committee chairman in the U.S. House of Representatives replied that, if the Administration cannot now identify any country in addition to the United States that is bound by the treaty, then Congress would have to conclude that the treaty is no longer in force. In May 1998, President Clinton replied that the ABM Treaty is in force between the United States and the Russian Federation. He did not state the principle of law on which he based this conclusion. Nor did he explain how this conclusion can be squared with the aforementioned November 1997 statement by the President.

The pertinent sources of international law support the conclusion that, upon the USSR's extinction, the ABM Treaty lapsed, so it no longer has the force of international law. This conclusion is based on the following observations:

1. In December 1991, as accurately characterized by declarations of the CIS States and of the United States, the changes that had recently occurred on what had been the USSR's territory caused the USSR, by operation of law, to cease to exist as a State—that is, such changes brought to an end the international legal personality of the USSR.
2. The ABM Treaty of 1972 was a bilateral treaty.

3. The opinions of recognized scholars constitute evidence of customary international law in a case in which there is (a) no controlling judicial decision, (b) no controlling State practice, and (c) no otherwise controlling treaty.
4. Scholars are nearly unanimous in concluding that, upon a State's extinction, its bilateral treaties that are not "dispositive" do not by operation of law, *i.e.* automatically, become treaties between the extinct State's successor and the extinct State's treaty partner, that is, some bilateral treaties lapse. (A treaty is dispositive if it irrevocably fixed a right to particular territory, *e.g.*, delineates a border between States.)
5. No judicial decision contradicts the scholarly view that a non-dispositive bilateral treaty of an extinct State does not automatically become a treaty of its successor or successors.
6. The United States has never before considered itself bound by international law to accept as its treaty partner the successor to an extinct State.
7. The 1978 Vienna Convention on Succession of States in Respect of Treaties does not bind the United States because the United States is not a party to the Convention.
8. The 1978 Convention on Succession of States in respect of Treaties in any event would not impose the ABM Treaty on the United States because the imposition would be incompatible with the Treaty's object and purpose.
9. Article 34.1 of the 1978 Vienna Convention on the succession of States in Respect of Treaties has not passed into customary international law.
10. The ABM Treaty did not become a treaty between the United States and the Russian Federation by devolution.
11. The ABM Treaty was not a dispositive treaty.

As a matter of international law, when a U.S. President grants recognition to a foreign State, the President imposes no duty or obligation on the United States that the United States would not in any event be obliged to discharge. In contrast, when a U.S. President brings a treaty into force, the rule is that its terms must be fulfilled. Were the President to use the recognition function to make a treaty that would not otherwise exist, he would put the United States under a legal obligation to other States without Senate advice and consent. So there is no merit to the suggestion that the exclusive power to recognize States allows the President to make treaties without Senate advice and consent. The President's recognition authority cannot be exercised in a manner that would nullify the U.S. Senate's authority to advise and consent on the making of a treaty.

If a foreign State ceases to exist under international law and, consequently, a bilateral treaty between the extinct State and the United States lapses, the President cannot use the "receive Ambassadors" clause to bring a new treaty into force between the United States and a successor to the extinct State without Senate advice and consent. In other words, the President cannot, without Senate approval, bring a lapsed treaty back to life by declaring that a given foreign State is the successor or continuation of an extinct State. Principles of international law govern the issue of the extinction of States. However broad the President's authority may be to recognize States and governments of States under the "receive Ambassadors" clause, it is necessarily limited by the specific Constitutional requirement for Senate advice and consent on the making of treaties.

When the Senate consents to a treaty with a given foreign State, does it impliedly authorize future Presidents to make a treaty on the same subject with a new State that

is a successor to that given foreign State? An affirmative answer would violate the rule against the President's creating law unilaterally.

In sum, the ABM Treaty was a bilateral, non-dispositive treaty. In accordance with longstanding principles of international law, expounded with remarkable consistency by numerous officials and scholars from various countries over hundreds of years, when the USSR became extinct, its bilateral, non-dispositive treaties lapsed. Hence, the ABM Treaty lapsed by operation of law—that is, automatically—when the USSR dissolved in 1991. It did not become a treaty between the United States and the Russian Federation.