

1988

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Recommended Citation

De Tar, Richard A. "The Proposal for Reinterpreting the ABM Agreement: Death of a Treaty." American University International Law Review 3, no. 2 (1988): 419-450.

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THE PROPOSAL FOR REINTERPRETING THE ABM AGREEMENT: DEATH OF A TREATY

Richard A. De Tar*

INTRODUCTION

On May 26, 1972, the United States and the Soviet Union signed the Treaty on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty or Treaty).¹ The Treaty was ratified and entered into force on October 3, 1972.² The ABM Treaty was the result of years of difficult negotiations facilitated by the Strategic Arms Limitation Talks.³

The drafters of the ABM Treaty believed that negotiating limits on defensive ABM systems was a step toward constraining offensive systems.⁴ Accordingly, the parties to the Treaty agreed not to deploy nationwide ABM systems for the defense of their countries.⁵ In this regard, the Treaty has successfully restricted the deployment of an entire class of American and Soviet weapons that could repel ballistic missiles.⁶

The Treaty, however, has become the subject of a debate involving two distinctly different interpretations of its provisions.⁷ The dispute

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1. Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, 23 U.S.T. 3435, T.I.A.S. No. 7503 [hereinafter ABM Treaty].

2. *CIS Index to Presidential Executive Orders & Proclamations*, 1972 (Micro. 29-18) (Proclamation made by President Nixon on Oct. 3, 1972). The United States Senate ratified the ABM Treaty by a vote of 88 to 2. 133 CONG. REC. S2976 (daily ed. Mar. 11, 1987).

3. See E. BOTTOME, *THE BALANCE OF TERROR* 155 (1986) (stating that SALT I was a two-part agreement, one part of which is the ABM Treaty).

4. ABM Treaty, *supra* note 1, preamble, 23 U.S.T. 3435, 3437, T.I.A.S. No. 7503 (stating that the treaty would substantially aid reduction in strategic offensive arms).

5. *Id.* art. I (2), 23 U.S.T. 3435, 3438, T.I.A.S. No. 7503.

6. Smith, McNamara, Rhinelander and Keeny, *Early Dismantlement of the ABM Treaty*, *ARMS CONTROL TODAY*, March 1987, at 3; see R. GARTOFF, *DETENTE AND CONFRONTATION*, 188-89 (1985) (stating that the ABM Treaty has effectively limited ballistic missile defense).

7. Compare 85 DEP'T STATE BULL. 32, 32-33 (Dec. 1985) (statement of Robert McFarlane, Assistant to the President for National Security Affairs) (announcing in October 1985 that not only is the previously accepted research of ABM systems permitted under the terms of the ABM Treaty, but future development and testing of ABM systems, though previously prohibited, is also authorized) with Smith, *Ex-Secretaries Urge Adherence to ABM Pact*, *Wash. Post*, Mar. 10, 1987, at A7, col. 4 (reporting that former secretaries of defense favor a "traditional," or broad, interpretation of the ABM Treaty prohibitions).

focuses on the effect of the ABM Treaty on the Strategic Defense Initiative.⁸ The supporters of the "traditional" interpretation of the Treaty maintain that the Treaty prohibits development, testing, or deployment of any space-based, air-based, sea-based, or mobile land-based ABM systems,⁹ including those systems contemplated by SDI.¹⁰ Conversely, proponents of the "reinterpretation" of the Treaty, argue that while the parties are prohibited from developing, testing, or deploying ABM systems and their components that were in existence at the time the Treaty was signed, the parties are permitted to develop, test, and deploy ABM systems that were created after the Treaty was signed.¹¹ Therefore, because SDI contemplates "future" ABM systems, advocates of the reinterpretation contend that development and testing of SDI is permitted.

This Comment analyzes the ABM Treaty in light of the debate over SDI. Part I of this Comment details the evolution of strategic relations between the United States and the Soviet Union from the emergence of nuclear weapons to the signing of the ABM Treaty. Part II discusses SDI, its rationale, and its potential conflict with the ABM Treaty, as well as its practical limitations. Part III reviews the provisions of the ABM Treaty with the purpose of the Treaty in mind. It discusses the statements and subsequent conduct of the parties, analyzes the ABM Treaty ratification proceedings in the Senate and discloses formerly classified information contained in the Treaty negotiating record. This section reveals that the parties intended for the ABM Treaty to prohibit development and testing of both then-current and future ABM systems.

8. See Brown, *Too Much, Too Soon for SDI*, ARMS CONTROL TODAY, May 1987, at 2-3 (explaining that SDI is a research program that envisions a three-layered anti-ballistic missile defense, including a space-based ABM system, designed to protect the United States from nuclear attack); see also *infra* notes 33-39 and accompanying text (explaining SDI in detail).

9. 133 CONG. REC. S6825-26 (daily ed. May 20, 1987) (remarks of Sen. Nunn). The ABM Treaty allows the parties to deploy one fixed, land-based system at each party's capital city and one fixed, land-based system at one of each party's intercontinental ballistic missile (ICBM) sites. ABM Treaty, *supra* note 1, art. III, 23 U.S.T. 3435, 3440, T.I.A.S. 7503.

10. Brown, *supra* note 8, at 2 (explaining that SDI envisions space-based ABM systems).

11. See Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972, 1974-77 (1986) [hereinafter *ABM and SDI*] (explaining that under the terms of the Treaty, the parties are only prohibited from developing and testing those ABM systems in existence at the time of the Treaty's formulation). Reinterpretation supporters believe that the terms of the Treaty refer only to "current" systems. *Id.* at 1973. Therefore future ABM systems, particularly space-based systems, are not restricted. *Id.*

This Comment concludes that the reinterpretation of the ABM Treaty is a misinterpretation that would incorrectly permit development and testing of SDI. The Reagan administration would adopt the reinterpretation despite scientific recommendations that reject the probable effectiveness of current SDI research. Perhaps more importantly, adoption of the reinterpretation would not merely alter the ABM Treaty, it would destroy it.

I. THE UNITED STATES AND SOVIET UNION PRE-ABM TREATY NUCLEAR STRATEGIES

In order to comprehend the importance of the ABM Treaty, it is essential to understand the development of the military strategies of the United States and the Soviet Union prior to 1972. In the early 1950s, the United States developed the first coherent nuclear weapons strategy, termed massive retaliation, in response to the Soviet Union's acquisition of nuclear weapons.¹² Under this strategy, the United States threatened to respond to any Soviet military aggression with a massive nuclear strike against the Soviet Union.¹³ This strategy was effective; the near United States monopoly on the possession of nuclear weapons counterbalanced the Soviet Union's sizeable numerical advantage in conventional arms.¹⁴

By the 1960s, however, the Soviet Union had increased its nuclear arsenal to rival that of the United States.¹⁵ As a result, a new strategy

12. See C. BLACKER & G. DUFFY, *INTERNATIONAL ARMS CONTROL: ISSUES AND AGREEMENTS* 201 (2d ed. 1984) (discussing that under the concept of massive retaliation, the United States would respond to Soviet aggression with nuclear force sufficient to assure the destruction of the Soviet Union). This theory emerged when the United States realized that because it possessed conventional forces noticeably inferior to those possessed by the Warsaw Pact nations, it had to rely on nuclear arms to maintain the status quo. *Id.* Nuclear deterrence also served as a relatively inexpensive means of neutralizing the imbalance created by the disparity in conventional forces. *Id.*

13. See E. BOTTOME, *supra* note 3, at 19, 21 (recognizing that because the United States had no military alternatives other than atomic weapons to impede Soviet hegemony, the United States would discourage Soviet aggression by maintaining massive retaliatory capacity to strike back with nuclear force). *But see* L. HALLE, *THE COLD WAR AS HISTORY* 343 (1967) (noting that once the Soviet Union had achieved nuclear capabilities sufficient to match those of the United States, the defense of European allies became untenable because the United States would no longer respond to a Soviet invasion of Western Europe with a nuclear attack when its own cities were now vulnerable to Soviet nuclear attack).

14. See D. LACKEY, *MORAL PRINCIPLES AND NUCLEAR WEAPONS* 42 (1984) (stating that after the Korean War the United States became reluctant to expand its conventional forces).

15. See *id.* at 48-49 (detailing the buildup of Soviet forces in the mid-1950s); see also R. KOLKOWICZ, M. GALLAGHER, B. LAMBETH, *THE SOVIET UNION AND ARMS CONTROL: A SUPERPOWER DILEMMA* 27 (1970) [hereinafter *SUPERPOWER DILEMMA*]

focusing on deterrence emerged, termed Mutually Assured Destruction (MAD).¹⁶ Under MAD, if each country maintained a nuclear arsenal sufficient to destroy the other after absorbing a first strike, the situation would deter either country from resorting to nuclear weapons.¹⁷

Mutually Assured Destruction was effective only if each country could ensure the "survivability"¹⁸ of enough of its nuclear arsenal to expose the other country's population and industry to the "vulnerability"¹⁹ of a retaliatory strike. For a short period the advent of intercontinental ballistic missiles (ICBMs) diminished the ability of either country to ensure survivability.²⁰ The subsequent development of submarine-launched ballistic missiles (SLBMs) in the early 1960s that were hard to locate and difficult to destroy, quickly reinstated the survivability of each country's nuclear forces.²¹

(explaining the shift in Soviet nuclear doctrine to reflect the theory of massive retaliation by increasing its nuclear capabilities while concurrently reducing its conventional forces).

16. See C. BLACKER & G. DUFFY, *supra* note 12, at 202-03 (explaining the theory of mutually assured destruction (MAD) as a strategy based on mutual deterrence whereby each nation maintains a nuclear arsenal sufficient to inflict unacceptable retaliatory damage upon the other nation to such a degree that the other nation would refrain from aggression); A. JORDAN, W. TAYLOR, JR., *AMERICAN NATIONAL SECURITY: POLICY AND PROCESS* 224-25 (1981) (basing mutually assured destruction on the notion that two adversaries are each assuredly capable of destroying each other, thus, deterring either party from engaging in a nuclear attack).

17. C. BLACKER & G. DUFFY, *supra* note 12, at 202-07; see also Panofsky, *The Mutual Hostage Relationship Between America and Russia*, 52 FOREIGN AFF. 109, 109 (Oct. 1973) (asserting that this "mutual hostage" relationship created by MAD deserves credit for having prevented nuclear war).

18. See C. BLACKER & G. DUFFY, *supra* note 12, at 203 (outlining the concepts of "survivability" and "vulnerability" as the major requirements to assure the effectiveness of MAD); Ikle, *Can Nuclear Deterrence Last Out the Century?* 51 FOREIGN AFF. 267, 268 (Jan. 1973) (noting that mutual deterrence requires three conditions to be effective). The three requirements are: United States nuclear forces designed to retaliate against a sudden Soviet first-strike; swift and sure retaliation; equivalent level of destructive force as the Soviet first-strike. *Id.* The first element essential to MAD was survivability. C. BLACKER & G. DUFFY, *supra* note 12, at 203. If a country did not ensure that its nuclear arsenal could survive a first strike then it could not retaliate and therefore would contain no deterrent. *Id.*

19. C. BLACKER & G. DUFFY, *supra* note 12, at 203. Theoretically, a country would launch a first strike if that country was not sufficiently vulnerable to the other country's retaliatory strike. *Id.*

20. See *id.* at 204 (noting that the development of ICBMs to transport nuclear warheads at high speed greatly reduced the survivability of both sides' nuclear arsenals); see also L. HALLE, *supra* note 13, at 347 (explaining that during the period following the initial success of the Soviet Union's space program, many experts in the United States predicted that the Soviet Union possessed the technology to develop a decisive superiority in ICBMs that would enable the Soviets to disarm the United States with one strike).

21. C. BLACKER & G. DUFFY, *supra* note 12, at 204; see Ikle, *supra* note 18, at 274 (noting that submarines permit retaliation after a massive surprise attack); see also A. JORDAN & W. TAYLOR JR., *supra* note 16, at 224 (noting that a submarine-

After SLBMs guaranteed survivability, the only means available for either country to achieve strategic superiority was to reduce or eliminate its vulnerability.²² Both the United States and the Soviet Union attempted to reduce their vulnerability through the development of more advanced nuclear weapons as well as a substantial increase in the quantity of nuclear weapons. This strategy resulted in an escalating arms race during which each country increased its nuclear arsenal exponentially.²³

During this period, the Soviet Union also embarked on the development of the first ballistic missile defense system.²⁴ Consequently, Secretary of Defense Robert S. McNamara and various United States strategists advocated that the United States develop an anti-ballistic missile system (ABM) to keep pace with Soviet advancements in this technology.²⁵ During the 1960s, the movement of both countries toward ABM systems prompted deterrence theorists to argue that the proposed innovations would only promote a new arms race and increase the likelihood of nuclear war.²⁶ In the early 1970s, there was a gradual reduc-

launched nuclear force would preserve deterrence because such a force is virtually invulnerable to a first strike). It is debatable as to how effectively SLBMs would actually function following a nuclear attack because submarines must rely on communications that would likely be unavailable at the time. *Id.*

22. See C. BLACKER & G. DUFFY, *supra* note 12, at 203 (explaining that if a country is not vulnerable to nuclear attack then there is no deterrence against the nuclear capabilities of an adversary).

23. See generally E. BOTTOME, *supra* note 3, at 18-69 (describing how the development of various weapons systems triggered the development of other systems which resulted in an escalating arms race in the 1950s and early 1960s). See also D. LACKEY *supra* note 14, at 69-70 (dividing the nuclear era into four arms races, each triggered by the development of new weapons systems and countered by the opposing side).

24. See AMERICAN SECURITY COUNCIL, *USSR vs USA; THE ABM AND THE CHANGED STRATEGIC MILITARY BALANCE* 48 (2d ed. 1969) [hereinafter *USSR vs USA*] (noting that the Soviet Union initiated development of an ABM system in the 1950s). With this development the Soviet Union possessed a strategic program that the United States feared could eliminate Soviet vulnerability from nuclear attack and therefore eliminate nuclear deterrence. *Id.* at 69.

25. C. BLACKER & G. DUFFY, *supra* note 12, at 206; see *USSR vs USA supra* note 24, at 60 (quoting President Richard M. Nixon in 1969 that an American ABM system was essential for the security of the United States and its allies); R. HARKAVY & E. KOLODZIEJ, *AMERICAN SECURITY POLICY-MAKING* 102 (1980) (containing comments made by Secretary of Defense Robert McNamara in 1967, that the reasons justifying the deployment of an ABM system was to protect against a Soviet ICBM attack).

26. See C. BLACKER & G. DUFFY, *supra* note 12, at 205-10 (noting that deterrence theorists were uncomfortable with the growing arms race and with research directed towards defensive systems because both policies threatened to upset the delicate nuclear balance and make nuclear war more likely); see also *SUPER POWER DILEMMA, supra* note 15, at 51 (recognizing that any actions directed toward limiting the damage from a nuclear war are recognized as upsetting the balance of terror, thereby reducing the deterrence effect); R. HARKAVY & E. KOLODZIEJ, *supra* note 25, at 102 (explain-

tion of tension between the superpowers.²⁷ A result of this period of "détente" was the Strategic Arms Limitation Talks (SALT), which gave birth to the ABM Treaty.²⁸

In sum, the ABM Treaty was negotiated with the realization that the successful deployment of anti-ballistic missile systems could reduce or eliminate the vulnerability of both countries and thereby remove the only deterrent that had successfully prevented either superpower from initiating a nuclear war.²⁹ The Treaty thus "ratifies" the MAD system in that through its restrictions on defensive systems, it seeks to maintain a system of mutual deterrence.³⁰ Through the preservation of this "balance of terror", the drafters of the ABM Treaty hoped to avoid the increasing possibility of nuclear war.

II. THE STRATEGIC DEFENSE INITIATIVE

A. THE ORIGINAL PLAN FOR THE FUTURE

In March of 1983, President Reagan announced plans to develop and deploy a defensive system designed to protect the United States from a ballistic missile attack.³¹ This proposal eventually became known as the Strategic Defense Initiative (SDI).³² The plan originally proposed vigorous research to determine the feasibility of such a defensive system.³³

ing that the advent of ABM systems was perceived as a threat to MAD and that attempts to devise defensive systems resulted in added efforts to produce offensive systems to overcome them).

27. See E. BOTTOME, *supra* note 3, at 155 (reporting that many foreign policy experts thought at the time that détente was the beginning of the end of the arms race).

28. A. JORDAN & W. TAYLOR JR., *supra* note 16, at 225.

29. See C. BLACKER & G. DUFFY *supra* note 12, at 242 (explaining that the explicit purpose of the ABM Treaty is to reduce the possibility of nuclear war by ensuring the stability of each nation's deterrent); Keeney and Panofsky, *Mad Versus Nuts: Can Doctrine or Weaponry Remedy the Mutual Hostage Relationship of the Superpowers?*, 60 FOREIGN AFF. 287, 288 (1981) (stating that MAD has so far prevented world war).

30. A. JORDAN & W. TAYLOR JR., *supra* note 16, at 225.

31. N.Y. Times, Mar. 24, 1983, at A1, col. 6; cf. Gates, Deputy Director of Central Intelligence, *The Soviets and SDI*, An Address to the World Affairs Council of Northern California, at 2 (Nov. 25, 1986) (available at the Arms Control and Disarmament Agency, Washington, D.C.) (noting that until March of 1983 the United States developed its nuclear strategy based on the deterrent ability of huge nuclear arsenals and the vulnerability of each side which insured that any act of nuclear aggression was confronted with equal and indefensible retaliation).

32. Address by Robert C. McFarlane, Assistant to the President for National Security Affairs, *The Strategic Defense Initiative*, at 3 (Mar. 7, 1985) (available at The United States Department of State, Bureau of Public Affairs, Washington, D.C., Current Policy No. 670). Research into SDI was intended to determine whether it was technologically feasible and cost-effective to integrate a defensive system into the United States nuclear weapons arsenal. *Id.*

33. *Id.* The traditional interpretation of the ABM Treaty imposes no limits of any

The effectiveness of SDI depends on the limits of nuclear technology. Under one theory, SDI might only protect United States land-based ballistic missiles, ensuring the survivability of the weapon but not diminishing the vulnerability of a nuclear attack.³⁴ Another view of SDI is that it could potentially provide a defense system impervious to all ballistic missiles directed against the United States.³⁵

As of October 15, 1985, the Reagan administration emphasized that SDI was a research program only and that there were no plans to reinterpret the ABM Treaty.³⁶ SDI research was intended to provide future presidents and Congress with the information necessary to make informed decisions concerning the feasibility and direction of SDI.³⁷ The program envisioned that SDI would become feasible only when the system possessed survivability capabilities during a nuclear attack and became cost effective.³⁸

kind on research. *Id.*

34. See Ikle, *supra* note 18, at 283 (explaining that a defensive system that protects offensive weapons preserves the survivability of the weapons, thus ensuring that a country has adequate retaliatory forces; see also Brown, *supra* note 8, at 2 (stating that a near-perfect defense of population will not be feasible for decades).

35. Brown, *supra* note 8, at 2. Brown cautions that the full effectiveness of SDI is difficult to ascertain while the program is in the research stages. *Id.*; see also *Strategic Defense Initiative: Hearings Before the Subcomm. on Strategic and Theater Nuclear Forces of the Senate Comm. on Armed Services*, 99th Cong., 1st Sess. 72 (1985) [hereinafter *Senate Hearings*] (statement of Richard Perle, Assistant Secretary of Defense) (arguing that the success of SDI depends on diminishing the chances that a Soviet nuclear strike against the United States will destroy all retaliatory capability).

36. See Address by Paul H. Nitze, Special Advisor to the President and Secretary of State on Arms Control Matters, *SDI: Its Nature and Rationale*, at 2 (Oct. 15, 1985) (available at the United States Department of State, Bureau of Public Affairs, Washington, D.C., Current Policy No. 751) [hereinafter *Nitze Address*] (noting that SDI as a research program is permitted under the ABM Treaty); see also Address of Kenneth Adelman, Director of the United States Arms Control and Disarmament Agency, *SDI: Setting the Record Straight*, at 2 (Aug. 7, 1985) (available at the United States Department of State, Bureau of Public Affairs, Washington, D.C., Current Policy No. 751) (reiterating that SDI is a research program only and that such research is consistent with United States obligations under the ABM Treaty).

37. See Nitze Address, *supra* note 36, at 2 (commenting that SDI research will provide future administrations and members of Congress with the information necessary to decide whether to shift United States military strategy toward a greater emphasis on defensive systems than the United States employed in the 1970s and the 1980s).

38. See Bunn, *Deploying a Disaster*, *ARMS CONTROL TODAY*, Mar. 1987, at 22 (explaining that survivability refers to the ability of SDI to withstand an attack, while cost effectiveness is achieved when the opposing side can no longer deploy additional offensive forces to overcome the defenses at equal or less than the cost of providing the defense). *But see* Nitze, *An Arms Control Agenda that Kissinger Should Know*, *Wash. Post*, Mar. 30, 1987, at A11, col. 3 (cautioning that although great progress has been made in the research phase, it is still unknown whether the prospective defense would be survivable or cost-effective). These two concerns have been referred to as the "Nitze criteria." Bunn, *supra*, at 22.

B. EARLY DEPLOYMENT

In 1987 a heated political and scientific debate raged concerning the relationship between the ABM Treaty and progress concerning SDI. This debate continues despite admonitions from the scientific community that the United States is not ready to move beyond the research phase in SDI planning³⁹ and regardless of Reagan administration statements that the United States is only interested in "researching" defensive systems.⁴⁰

In October of 1985, the Reagan administration presented its reinterpretation of the ABM Treaty but vowed to follow the traditional interpretation.⁴¹ The reinterpretation maintains that while the ABM Treaty prohibits the development, testing, and deployment of defensive systems in existence when the Treaty was signed, it did not prohibit systems that became feasible after the Treaty was signed.⁴² Since July 1986, the Reagan administration has based its negotiating position on an SDI program that is only permitted by a reinterpretation of the Treaty.⁴³ Advocates of the reinterpretation, led by State Department Legal Adviser Abraham Sofaer, former Secretary of Defense Caspar Weinberger, and former Assistant Secretary of Defense Richard Perle, claim that SDI research has progressed so rapidly that the traditional interpretation of the ABM Treaty prevents scientists from implementing their discoveries.⁴⁴

39. See *Physicists Say SDI Technology Still Distant*, ARMS CONTROL TODAY, June 1987, at 24-25 [hereinafter *Distant Technology*] (explaining that members of the scientific community have determined that it is too early to assess the potential effectiveness of SDI).

40. Cf. Nitze Address, *supra* note 36, at 2 (noting members of the Reagan administration arguing correctly that SDI research is permitted under the traditional interpretation of the ABM Treaty).

41. See Keeny, *To Redefine the ABM Treaty is to Kill It*, L.A. Times, Feb. 15, 1987, at 6, col. 3 (reporting that Secretary of State George Shultz announced that the Reagan administration would not seek to implement its reinterpretation of the ABM Treaty without first consulting Congress and the NATO allies); Safire, *Get Off the Floor*, N.Y. Times, Feb. 9, 1987, at 19, col. 6 (citing the Secretary of Defense as advocating a narrow interpretation of the prohibitions of the ABM Treaty).

42. *ABM and SDI*, *supra* note 11, at 1973.

43. ARMS CONTROL ASSOCIATION, DANGERS OF IMPLEMENTING THE NEW INTERPRETATION OF THE ABM TREATY 1, 1 (April 1987) (available at the Arms Control Association, Washington, D.C., Background Paper). Although the reinterpretation is not yet official policy, the Reagan administration has taken positions consistent with the reinterpretation at the Defense and Space talks in Moscow and Reykjavik. *Id.*; see also *Early Dismantlement of the ABM Treaty*, ARMS CONTROL TODAY, Mar. 1987, at 3 (statement of Spurgeon M. Keeny, president of the Arms Control Association) (quoting Secretary of State George Shultz as saying a final decision could not be made until the Reagan administration undertook a detailed consultation with Congress and the NATO Allies).

44. Weinrod and Holmes, *Weighing the Evidence: How The ABM Treaty Permits*

The proposed plan for SDI is to proceed with a three-tier model, including a space-based component based on future technology.⁴⁵ The American Physical Society (APS) concluded, however, that another ten years of research was necessary to even consider whether a defensive system based on future technology is feasible.⁴⁶ A member of the APS reviewing panel, Dr. Wolfgang Panofsky, stated that the APS study, basing its conclusions on current technology, revealed that the traditional interpretation of the Treaty would offer no significant restraints toward establishing a sound SDI program.⁴⁷

III. INTERPRETING THE TREATY

A. TREATY TEXT

According to both international and domestic law, the principal method of determining the significance of a treaty is to consider the ordinary meaning of its text.⁴⁸ Additionally, treaties are correctly eval-

A Strategic Defense System, BACKGROUNDERS, THE HERITAGE FOUND. 1, 3-4 (Feb. 26, 1987) (defining the barriers of the restrictive interpretation of the ABM treaty).

45. See Brown, *supra* note 8, at 2-3 (discussing a three-layer system consisting of a space-based system using kinetic kill vehicles at the first stage of a missile's flight, exoatmospheric weapons for the late mid-course phase, and high-altitude endoatmospheric weapons for the terminal phase). The Reagan administration envisions possible deployment of this system by 1993 or 1994. *Id.*

46. See *Distant Technology*, *supra* note 39, at 24-25 (describing the report prepared by a seventeen member panel of the American Physical Society (APS) based in part upon information gained from the Department of Defense). The panel, including three Nobel Prize winners, concluded that even in the most optimal circumstances, ten or more years of intensive research were required to provide the technical knowledge necessary to evaluate the potential success and survivability of the proposed systems. *Id.*; see also Smith, *Early SDI Deployment Unfeasible, Experts Say*, Wash. Post, Apr. 24, 1987, at A16, col. 1 (statement of Kumar Patel, co-chairman of the APS study group) (arguing that based on scientific and engineering criteria, scientists would not advocate early deployment of SDI).

47. See Panofsky, *A Physicist Evaluates SDI*, ARMS CONTROL TODAY, June 1987, at 26 (stating that much of the current research does not have direct relevance to the feasibility of a strategic missile defense). Dr. Panofsky also stated that except for public relations purposes, there is no reason to discontinue SDI research within the limits of the traditional interpretation of the ABM Treaty. *Id.* at 26-27.

48. Vienna Convention on the Law of Treaties, art. 31 (1), *opened for signature* May 23, 1969, *entered into force* Jan. 27, 1980, U.N. Doc. A/CONF 39/27, *reprinted in* 8 I.L.M. 679 (1969) [hereinafter Vienna Convention]; The Vienna Convention is the principal international source of authority on the interpretation of treaties. L. HENKIN, R. PUGH, O. SCHACHTER, H. SMIT, *International Law: Cases and Materials* 387 (2d ed. 1987). Although the United States has not ratified the Convention, the United States Department of State has recognized it as the foremost authority on treaty law and practice. *Id.*; see also *Air France v. Saks*, 470 U.S. 392, 397 (1985) (stating that a United States court may look at a treaty's history, negotiating record, and practical construction when interpreting its meaning). The court should focus on the treaty's text while still seeking the treaty's evident purpose. *Id.* *But see* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 149, comment b (1965) (holding

uated in light of objectives and purposes of the parties when the agreement was formulated.⁴⁹ This method of appraisal provides the treaty with clear meaning where the text is otherwise ambiguous or misleading.⁵⁰ The purpose of a treaty is examined with regard to the entire treaty and its intended effect rather than focusing on any single provision of the treaty in isolation.⁵¹

The text of the ABM Treaty reveals that the purpose of the Treaty was to eliminate those defensive weapons that could protect either the United States or the Soviet Union from nuclear attack, thereby upsetting the balance of power.⁵² The ABM Treaty has thus far prevented either party from establishing a nationwide defense against strategic ballistic missiles.⁵³ When considering the language of the Treaty in light of its purpose, the text substantiates the argument for the traditional interpretation while it exposes the inconsistencies of the reinterpretation. Because a reasonable interpretation of the Treaty prevents either party from possessing a nationwide defense system, the United States should adhere to this traditional and reasonable view.

1. Article II

Article II is the first of four disputed provisions in the ABM Treaty.⁵⁴ Article II defines an ABM system as one that counters strate-

that under international law, when a national court interprets an international agreement it merely constitutes a unilateral national interpretation).

49. See Vienna Convention, *supra* note 48, art. 31 (1) (stating that the purpose of the treaty is relevant in determining the meaning); see also A. MCNAIR, LAW OF TREATIES 380-81 (1961) [hereinafter A. MCNAIR] (stating that closely connected with the primary duty of seeking to give effect to the common intentions of the parties is the duty to consider the overall aim and purpose of the treaty); *United States v. Kember*, 685 F.2d 451, 458 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 832 (holding that a court should interpret a treaty based on the intentions of the parties).

50. See A. MCNAIR, *supra* note 49, at 381 (stating that treaties should be interpreted as a whole and not from isolated words and phrases); see also *Day v. Trans-World Airlines*, 528 F.2d 31, 35 (2d Cir. 1975), *cert. denied*, 429 U.S. 890 (1976) (holding that when United States courts interpret a treaty they should provide a meaning for the text of the treaty consistent with the intentions of the parties when formulating the agreement).

51. A. MCNAIR, *supra* note 49, at 381.

52. C. BLACKER & G. DUFFY, *supra* note 12, at 242.

53. Chayes & Chayes, *Testing and Development of "Exotic" Systems under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956, 1957 (1986) (discussing the new interpretation of the ABM Treaty, which focuses on the text of the treaty as well as the real intent behind the treaty).

54. See *id.* at 1957-63 (discussing the debate concerning Treaty articles II, III, and IV and Agreed Statement D); see also A. SOFAER, THE ABM TREATY, PART I: THE NEGOTIATING RECORD 6-7 (May 1987) (available at the United States Arms Control and Disarmament Agency, Washington, D.C.) [hereinafter SOFAER'S NEGOTIATING RECORD] (outlining the controversial text of the ABM Treaty).

gic ballistic missiles or their elements in flight trajectory, currently consisting of ABM interceptor missiles, ABM launchers, and ABM radar.⁵⁵ The entire debate hinges on the definition of an ABM system under article II. Each party has succeeded in applying its own definition of an "ABM system" to support its position.⁵⁶

According to the traditional interpretation, article II defines an "ABM system" functionally to encompass any system designed to counter strategic ballistic missiles.⁵⁷ Supporters of the traditional view argue that the list of ABM components provided in article II only illustrated ABM systems "currently" in existence in 1972.⁵⁸ These traditionalists contend that because the listing of components in article II is only illustrative, the Treaty does not exclude future systems, such as space-based systems, from the definition of an ABM system.⁵⁹ The definition thus also includes future ABM systems using components that are not listed in article II, because they did not exist at the time of the drafting of the Treaty.

55. ABM Treaty, *supra* note 1, art. II, 23 U.S.T. 3437, 3439, T.I.A.S. No. 7503. The text of article II is as follows:

Article II

1. For the purposes of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of:

- (a) ABM interceptor missiles, which are interceptor missiles constructed and deployed for an ABM role, or of a type tested in an ABM mode;
- (b) ABM launchers, which are launchers constructed and deployed for launching ABM interceptor missiles; and
- (c) ABM radars, which are radars constructed and deployed for an ABM role, or of a type tested in an ABM mode.

2. The ABM system components listed in paragraph 1 of this Article include those which are:

- (a) operational;
- (b) under construction;
- (c) undergoing testing;
- (d) undergoing overhaul, repair or conversion; or
- (e) mothballed.

56. See Chayes & Chayes, *supra* note 53, at 1957-63 (providing definition of the traditional interpretation of an ABM system throughout the Treaty). This interpretation results in prohibitions on both current and future ABM systems and components. *Id.* But see *ABM and SDI*, *supra* note 11, at 1973-78 (applying the reinterpretation's definition of an ABM system throughout the Treaty). The reinterpretation allows for the development of future ABM systems. *Id.*

57. See Chayes & Chayes, *supra* note 53, at 1958 (noting that after article II defined an ABM system, the parties explicitly listed "current" systems). The list of "current systems" was illustrative rather than exclusive. *Id.* The definition thus applies to future ABM systems as well as those in use at the time the Treaty was signed. *Id.*

58. *Id.*

59. See *id.* at 1957-63 (explaining the traditional, or functional, definition of an ABM system); 133 CONG. REC. S6825 (daily ed. May 20, 1987) (remarks of Sen. Nunn) (arguing that the parties deliberately inserted the word "currently" in the Treaty text to ensure that the definition was not limited to then-current components).

Advocates of the reinterpretation argue that article II defines ABM systems as only those systems that counter strategic ballistic missiles with ABM interceptor missiles, launchers, or radars.⁶⁰ Interpreting article II in this literal way results in limiting the definition of an ABM system to allow for systems using components not specifically listed in article II.⁶¹ From a purely textual perspective this view appears plausible, yet in light of the purpose of the Treaty it would make little sense for the parties to have hamstrung the effectiveness of the Treaty through a gaping loophole in article II that permitted development and testing of all future defense systems not using the specifically forbidden interceptor missiles, launchers, or radar.⁶²

2. Article V(1)

Article V(1) prohibits either party from developing, testing, or deploying sea-based, air-based, space-based, or mobile land-based ABM systems.⁶³ The debate involving article V(1) also pivots on the definition of an ABM system as interpreted under article II.⁶⁴

Proponents of the traditional view interpret article V(1) as applying an illustrative definition of an ABM system.⁶⁵ They maintain that arti-

60. See *ABM and SDI*, *supra* note 11, at 1974 (quoting Sofaer as arguing that article II named specific components to provide an inclusive list of those components prohibited from future development and testing by the ABM Treaty). *But see id.* (noting that Sofaer concedes that although the traditional definition of an ABM system in article II is "plausible," the traditional interpretation renders other portions of the Treaty, particularly Agreed Statement D, superfluous). The Chayes' argue that applying Sofaer's interpretation of article II would be against the Treaty's purposes. Chayes & Chayes, *supra* note 53, at 1958.

61. *ABM and SDI*, *supra* note 11, at 1974-75.

62. See 133 CONG. REC. S6811 (daily ed. May 20, 1987) (statement of Sen. Nunn) (quoting Harold Brown as explaining that the United States would not have accepted an agreement that would allow either side to possess an ABM system simply because the system used components different from those listed under article II).

63. ABM Treaty, *supra* note 1, art. V, 23 U.S.T. 3437, 3441, T.I.A.S. No. 7503. Article V provides:

Article V

1. Each Party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.
2. Each Party undertakes not to develop, test, or deploy ABM launchers for launching more than one ABM interceptor missile at a time from each launcher, nor to modify deployed launchers to provide them with such a capability, nor to develop, test, or deploy automatic or semi-automatic or other similar systems for rapid reload of ABM launchers.

Id.

64. See *supra* note 53, 57 and accompanying text (explaining that the definition of a ABM system in article II is outcome determinative for either interpretation).

65. Chayes & Chayes, *supra* note 53, at 1957-58; see 133 CONG. REC. S6825 (daily ed. May 20, 1987) (describing the traditional interpretation of the ABM Treaty in terms of article V(1)).

cle V(1) prohibits all ABM systems, whether those mentioned specifically in article II or those based on "other physical properties" (future systems).⁶⁶ According to this view, article V(1) does not permit development, testing, or deployment of any ABM systems, including the space-based systems envisioned by SDI.⁶⁷

In contrast, advocates of the reinterpretation apply the "inclusive" definition of an ABM system.⁶⁸ This definition transforms the seemingly illustrative restrictions of article V(1) into prohibitions of only those systems or components specifically listed in article II.⁶⁹ Accordingly, supporters of the reinterpretation maintain that article V(1) would permit SDI's space-based systems.⁷⁰

Although the primary significance of article V(1) turns on the definition of an ABM system, article V(1) also provides independent support for the traditional interpretation. The plain meaning of article V(1), particularly when read in light of the purpose of the Treaty, indicates that the parties are prohibited from developing, testing, or deploying *any* space-based ABM system.⁷¹ The text in article V(1) therefore weighs heavily in favor of the traditional view through its independent definition of the kinds of ABM systems that the Treaty prohibits.

3. Article III

Article III contains the only explicit exception to the ABM Treaty's prohibitions on the deployment of ABM systems.⁷² Article III states

66. See *supra* note 57 and accompanying text (asserting that the definition of "current systems" applies to future systems as well).

67. See 133 CONG. REC. S2975 (daily ed. Mar. 11, 1987) (remarks of Sen. Nunn) (explaining the application of the functional definition of an ABM system to article V(1)). Nunn maintains that the only systems allowed under the Treaty are those fixed land-based systems described in article III. *Id.*

68. See *supra* note 61 and accompanying text (discussing the limited definition of an ABM system).

69. See *ABM and SDI*, *supra* note 11, at 1974 (explaining that application of the limiting definition of an ABM system results in applying the restrictions of article V(1) to only those ABM components specifically listed in article II).

70. See Sofaer's Negotiating Record, *supra* note 54, at 28-29 (explaining that, under the reinterpretationists' definition of an ABM system, article V(1) does not prohibit an SDI system).

71. See 133 CONG. REC. S6825 (daily ed. May 20, 1987) (remarks of Sen. Nunn) (stating that article V(1) prohibits deployment of space-based systems); *Senate Hearings*, *supra* note 35, at 231 (statement of John B. Rhinelander) (stating that debates on the Senate floor during the ratification proceedings on the ABM Treaty show that article V(1) was understood to apply to "exotic" space-based systems).

72. See ABM Treaty, *supra* note 1, art. III, 23 U.S.T. 3437, 3440, T.I.A.S. No. 7503. Article III provides:

Each Party undertakes not to deploy ABM systems or their components except that:

that each party agrees not to deploy an ABM system except for two fixed systems, the first deployed around each party's capital city and the other installed at a specified ICBM silo site.⁷³ While proponents of both interpretations agree the language of article III specifically restricts fixed land-based systems, they disagree on the extent of its application to other air or space-based systems.⁷⁴

Supporters of the traditional interpretation contend that article III provides the only exception to the Treaty's broad prohibition of ABM systems.⁷⁵ Therefore, the traditional interpretation considers the SDI program a violation of the intent of article III because article III specifically listed the only ABM systems that were deployable and this exception did not include space-based systems.⁷⁶

Conversely, because advocates of the reinterpretation apply the definition of an ABM system that only includes systems using interceptor missiles, launchers, and radars, they conclude that article III can refer only to those systems.⁷⁷ Therefore, advocates of the reinterpretation reason that article III permits deployment of SDI because article III

(a) within one ABM system deployment area having a radius of one hundred and fifty kilometers and centered on the Party's national capital, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, and (2) ABM radars within no more than six ABM radar complexes, the area of each complex being circular and having a diameter of no more than three kilometers; and

(b) within one ABM system deployment area having a radius of one hundred and fifty kilometers and containing ICBM silo launchers, a Party may deploy: (1) no more than one hundred ABM launchers and no more than one hundred ABM interceptor missiles at launch sites, (2) two large phased-array ABM radars comparable in potential to corresponding ABM radars operational or under construction on the date of signature of the Treaty in an ABM system deployment area containing ICBM silo launchers, and (3) no more than eighteen ABM radars each having a potential less than the potential of the smaller of the above-mentioned two large phased-array ABM radars.

Id.; see also Chayes & Chayes, *supra* note 53, at 1961 (explaining that article III contains the only exceptions to the Treaty).

73. ABM Treaty, *supra* note 1, art. III. See Chayes & Chayes, *supra* note 53, at 1965 (stating that the purpose of permitting both parties to deploy an ABM system at one ICBM site is to ensure that each side possesses a retaliatory strike force, thus preserving MAD).

74. See *infra* notes 76, 78 and accompanying text (explaining the positions of supporters of each view concerning article III).

75. 133 CONG. REC. S6825 (daily ed. May 20, 1987) (remarks of Sen. Nunn).

76. See Chayes & Chayes, *supra* note 53, at 1961-63 (arguing that only those systems listed in article III are deployable). *But see ABM and SDI, supra* note 11, at 1973-77 (explaining that the supporters of the reinterpretation do not believe that article III prohibits deployment of space-based systems).

77. Sofaer's Negotiating Record, *supra* note 54, at 73 (explaining that, because supporters of the reinterpretation do not include future systems within the definition of an ABM system, they do not believe that article III prohibits deployment of those systems contemplated in SDI).

does not address future systems. Supporters of the reinterpretation, however, do not explain why, according to their theory, the drafters carefully constructed the Treaty to limit *current* ABM systems yet neglected to restrict, nor even mention, ABM systems utilizing components discovered after the Treaty was formulated.⁷⁸ The only apparent explanation for this oversight is that the reinterpretation is inherently inconsistent with the Treaty.

4. *Agreed Statement D*

Agreed Statement D is one of several statements attached to the ABM Treaty used to clarify specific points and to remove ambiguity from the text of the Treaty.⁷⁹ Agreed Statement D reiterates the obligation of each party not to deploy ABM systems except for those permitted under article III.⁸⁰ Agreed Statement D also states that ABM systems and substitute components based on "other physical properties" created in the future are subject to further discussion and agreement.⁸¹

Supporters of the traditional interpretation maintain that Agreed Statement D complements article III by providing that if development and testing leads either party to contemplate deployment of a fixed land-based system using "exotics," then the parties, pursuant to Agreed Statement D, must discuss limitations on such deployment.⁸² The tradi-

78. See Chayes & Chayes, *supra* note 53, at 1962 (outlining Sofaer's argument that the parties did not address limits on future systems until they included Agreed Statement D in the Treaty).

79. See *id.* at 1961 (elaborating on the distinctions in Agreed Statement D between future systems and land-based systems).

80. ABM Treaty, *supra* note 1, Agreed Statement D, 23 U.S.T. 3437, 3456 T.I.A.S. No. 7503. Agreed Statement D provides:

Agreed Statements Regarding the Treaty between the United States of America and the Union of Soviet Socialist Republics on the limitation of Anti-Ballistic Missile Systems.

[D]

In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty, the Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty.

Id.

81. *Id.*

82. 133 CONG. REC. S2975 (daily ed. Mar. 11, 1987) (statement of Sen. Nunn) (interpreting article III as banning deployment of all "ABM Systems" or their components except for two expressly authorized sites and extending article III to ban all present and future (exotic) ABM systems and components).

tional view therefore holds that Agreed Statement D pertains only to the use of exotics in fixed land-based systems.⁸³ If the parties fail to reach agreement on the deployment of fixed land-based systems using exotics such deployment remains prohibited under the Treaty.⁸⁴

Advocates of the reinterpretation rely heavily on Agreed Statement D to support their position. They maintain that Agreed Statement D has independent meaning because it is the only section of the ABM Treaty that expressly mentions exotics.⁸⁵ Consequently, Agreed Statement D is not limited to land-based systems but also refers to future systems based on "other physical principles." In addition, supporters of the reinterpretation argue that Agreement D only prohibits deployment, and that it permits development and testing of systems based on exotics, including the types of systems envisioned in SDI.⁸⁶ Any deployment of such systems is subject to discussion and agreement between the parties.⁸⁷ Although both positions are possible, it seems unlikely that the parties would reserve all limitations on future ABM developments for any agreed statement that followed the substantive provisions of the Treaty.

B. SUBSEQUENT CONDUCT OF PARTIES

Article 31(3)(b) of the Vienna Convention on the Law of Treaties (Vienna Convention) states that the subsequent conduct and practices of the parties to a treaty is relevant in determining the meaning of that

83. Chayes & Chayes, *supra* note 53, at 1962; see *Senate Hearings*, *supra* note 35, at 225 (statement of John B. Rhinelander) (commenting that Agreed Statement D reinforces the prohibitions in articles I(2) and III on the deployment of fixed land-based systems).

84. See Chayes & Chayes, *supra* note 53, at 1962 (arguing that the purpose of Agreed Statement D is to "insure the fulfillment of the obligation not to deploy ABM systems and their components except as provided in article III of the Treaty"). The deployments permitted under article III involve limited land-based systems. *Id.*

85. See *ABM and SDI*, *supra* note 11, at 1976 (noting that the text of Agreement D, unlike the other agreed statements, closely resembles the "operative" terminology used in the articles of the Treaty). Proponents of reinterpretation, moreover, maintain that the argument for the traditional view is illogical because it holds that Agreement D duplicates other parts of the Treaty and therefore Agreed Statement D is meaningless. *Id.*

86. See 133 CONG. REC. S2975 (daily ed. Mar. 11, 1987) (statement of Sen. Nunn) (refuting the reinterpretation argument that because Agreed Statement D only addresses deployment, it permits testing and development).

87. ABM Treaty, *supra* note 1, arts. XIII, XIV, 23 U.S.T. 3437, 3444-45, T.I.A.S. No. 7503. Article XIII provides for a "Standing Consultative Commission" within which the parties can, among other things, work to amend the Treaty. *Id.* art. XIII. Article XIV provides that parties may propose amendments to the Treaty. *Id.* art. XIV.

treaty.⁸⁸ United States courts also examine the conduct of parties after the signing of a treaty to determine the scope of the treaty.⁸⁹ In this regard, the subsequent conduct of both the United States and the Soviet Union support the traditional interpretation.

As of 1985, the United States had not developed or tested a space-based ABM system using exotics.⁹⁰ In October of 1985, Secretary of State George P. Shultz announced that although the Reagan administration espoused the reinterpretation, it would only proceed with *re-searching* the feasibility of SDI.⁹¹

The United States Arms Control and Disarmament Agency (ACDA)⁹² has also explicitly endorsed the traditional interpretation. In every Arms Control Impact Statement presented to Congress from 1978 to 1985, the ACDA based its recommendations for SDI spending in accordance with ABM progress consistent with the traditional interpretation of the Treaty.⁹³ The Agency's fiscal statement for 1985, for

88. See Vienna Convention, *supra* note 50, art. 31 (3) (b) (providing that when interpreting a treaty, in addition to analyzing the ordinary meaning of the terms of the treaty in their context, one shall take into account any subsequent practice of the parties which establishes their agreement); MCNAIR, LAW OF TREATIES 424 (1961) [hereinafter L. MCNAIR] (stating that courts should consider the subsequent conduct of the parties when determining the parties' intentions under the Treaty).

89. See *Saks v. Air France*, 724 F.2d 1383, 1385 (1984), *rev'd on other grounds*, 470 U.S. 392 (1985) (stating in dicta that the court should consider subsequent conduct of the parties); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 147 (f) (stating that the practices of the parties subsequent to the signing of an agreement are taken into account when interpreting it).

90. 133 CONG. REC. S3091 (daily ed. Mar. 12, 1987) (remarks of Sen. Nunn) (stating not only had the United States not developed or tested a space-based ABM system or any system that would violate the traditional interpretation, but every administration, including the Reagan administration, has expressly endorsed the traditional view). The Reagan administration initially implemented SDI planning so that it was consistent with the traditional restrictions. *Id.*

91. See *supra* notes 41-44 and accompanying text (pointing out that while the Reagan administration's position in October of 1985 was to proceed with SDI within the limits of the traditional interpretation, by July 1986 the Reagan administration's rhetoric had shifted to the implementation of an SDI program consistent with the reinterpretation).

92. See Chayes & Chayes, *supra* note 53, at 1968-69 (explaining that the Arms Control and Disarmament Agency is the administrative agency of the United States government that monitors arms control progress and reports its findings to Congress annually); see also *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (deferring to the government agency interpretation); *Corliss v. United States*, 567 F. Supp. 162, 166 (W.D. Ark. 1983) (noting that courts should give great weight to the way in which government agencies interpret a treaty).

93. See FISCAL YEAR (FY) 1986 ARMS CONTROL IMPACT STATEMENTS, 99th Cong., 1st Sess. 225-26 (1985) (stating that the ABM Treaty prohibits development, testing, and deployment of both current and future ABM systems or components for such systems including any future technology used for space-based systems); e.g. FISCAL YEAR 1985 ARMS CONTROL IMPACT STATEMENTS, 98th Cong., 2d Sess. 252 (1984); FISCAL YEAR 1984 ARMS CONTROL IMPACT STATEMENTS, 98th Cong., 1st Sess.

example, noted that the ABM Treaty prohibits development, testing, and deployment of space-based ABM Systems or components for such systems.⁹⁴

The United States has never alleged that the Soviets have developed or tested any space-based system or components using exotics.⁹⁵ Moreover, on October 19, 1985, the Soviet Union, responding to the Reagan administration's announcement concerning its support for the reinterpretation, declared that the Treaty unambiguously prohibited any ABM system except for those fixed land-based systems allowed under article III.⁹⁶ Advocates of the reinterpretation do not deny that the Soviets endorse the traditional interpretation. Instead, they argue that the Soviets never expressed that position until the United States announced the reinterpretation in October 1985.⁹⁷

The flaws in this argument are easily exposed. First, there is the obvious explanation that until the United States announced a reinterpretation of the ABM Treaty there was no reason for the Soviets to state their position.⁹⁸ More fundamentally, however, an analysis of Soviet behavior exposes the statement as patently untrue.⁹⁹

On several occasions prior to October of 1985, the Soviets had expressed their position that the ABM Treaty prohibited development and testing of any future ABM system.¹⁰⁰ In September of 1972, for example, Soviet Deputy Foreign Minister Vasily V. Kuznetsov stated

266-67 (1983); FISCAL YEAR 1983 ARMS CONTROL IMPACT STATEMENTS, 97th Cong., 2d Sess. 321 (1982); FISCAL YEAR 1982 ARMS CONTROL IMPACT STATEMENTS, 97th Cong., 1st Sess. 393-94 (1981); FISCAL YEAR 1981 ARMS CONTROL IMPACT STATEMENTS, 96th Cong., 2d Sess. 452 (1980); FISCAL YEAR 1980 ARMS CONTROL IMPACT STATEMENTS, 96th Cong., 1st Sess. 99-100 (1979). Congress requires the ACDA to present an annual statement concerning recent developments in arms control. 22 U.S.C. § 2590 (1982).

94. FISCAL YEAR 1985 ARMS CONTROL IMPACT STATEMENTS, *supra* note 94, at 252. ACDA has also stated that this prohibition applied to future technology. *Id.* at 251.

95. 133 CONG. REC. S3091 (daily ed. Mar. 12, 1987) (statement of Sen. Nunn).

96. Pravda, October 19, 1985, *cited in* 133 CONG. REC. S2981 (daily ed. Mar. 11, 1987) (statement of Sen. Nunn) (describing the Soviet position espousing the traditional view).

97. *See* 133 CONG. REC. S2981 (daily ed. Mar. 11, 1987) (statement of Sen. Nunn) (explaining that the position of the Reagan administration is that the Soviets publicly supported the traditional interpretation only after the United States announced its support for the reinterpretation).

98. Garthoff, *History Confirms the Traditional Meaning: U.S. and Soviet Subsequent Practice under the ABM Treaty*, ARMS CONTROL TODAY, Sept. 1987, at 17; 133 CONG. REC. S3094 (daily ed. Mar. 12, 1987) (statement of Sen. Nunn).

99. *See* Garthoff, *supra* note 98, at 16-19 (providing numerous examples prior to October of 1985 when the Soviet Union either publicly or privately supported the traditional interpretation).

100. *Id.*

that the ABM Treaty placed an unqualified ban on the development and testing of exotic ABM systems.¹⁰¹ In 1976, during the SALT II negotiations, Soviet negotiator Victor Karpov stated that "currently" was specifically inserted into the text of article II to ensure that the ABM Treaty would prevent future systems as well as those already in existence.¹⁰² On June 4, 1985, Marshall Sergei Akhromeyov published an article in Pravda in which he argued that the Treaty forbade the "creation" (development or testing) of space-based ABM systems or components.¹⁰³ Careful analysis of the conduct of the Soviet Union subsequent to the adoption of the ABM Treaty, similar to that of the United States prior to October of 1985, does not suggest that either party has considered the Treaty to permit the development or testing of space-based ABM systems using future technology.

C. SENATE RATIFICATION PROCEEDINGS

The Vienna Convention points to ratification proceedings as a means for interpreting treaties.¹⁰⁴ The United States Senate ratification proceedings provide important evidence concerning the intentions of the

101. See Garthoff, *supra* note 98, at 16 (quoting First Deputy Minister of Foreign Affairs Vasily V. Kuznetsov as saying that the ABM Treaty resulted in an unqualified ban on the "creation" of mobile ABM systems).

102. *Id.* at 17.

103. Akhromeyev, *The ABM Treaty - An Obstacle in the Path of the Strategic Arms Race*, Pravda, June 4, 1985, cited in Garthoff, *supra* note 98, at 19.

104. See Vienna Convention, *supra* note 48, arts. 31-32 (explaining that it is appropriate to examine ratification proceedings in order to determine the meaning of a treaty). For example, the subsequent conduct of the parties, including the statements that they have made, constitutes evidence revealing the meaning of the treaty. *Id.* art. 31(1)(b). Article 32 provides recourse to supplementary means of interpretation where a treaty's meaning is in question. *Id.* art. 32. One such recourse is the ratification hearings of the United States Senate. *Id.* See also A. SOFAER, Office of the Legal Advisor, Department of State, THE ABM TREATY PART II: RATIFICATION PROCESS 33 (May 11, 1987) (available at the Arms Control and Disarmament Agency, Washington, D.C.) [hereinafter SOFAER'S RATIFICATION PROCESS] (noting that various scholars have referred to the Senate ratification proceedings in order to clarify the meaning of a treaty); L. MCNAIR, *supra* note 88, at 380-81 (explaining that the statements from parties to a treaty serve as an important guide to understanding the meaning of the treaty). See *Saks v. Air France*, 724 F.2d 1383, 1385 (9th Cir. 1984), *rev'd on other grounds* 470 U.S. 392, 400 (1985), *on remand* 760 F.2d 238 (9th Cir. 1985) (holding that a United States court should consider legislative history when interpreting a treaty); *Day v. Trans World Airlines*, 528 F.2d 31, 34 (2d Cir. 1975), *cert. denied* 429 U.S. 890 (1976) (holding that a court may look to the legislative history to determine the meaning of a treaty); see also *Corliss v. United States*, 567 F. Supp. 162, 164 (1983) (stating that when a treaty's text is ambiguous, reference to extraneous information is appropriate to determine the intention of the parties). The court in *Corliss*, for example, examined a report provided by the Department of State to the Senate Committee on Foreign Relations during the ratification proceedings of the Panama Canal Treaty. *Id.* at 164-65.

United States for interpretation of the Treaty through statements made to the Senate from knowledgeable government officials.¹⁰⁵ These hearings also confirm that the Soviet Union accepted the traditional interpretation of the Treaty. Their position was evident from their failure to object to statements by United States officials interpreting the Treaty prohibitions broadly.¹⁰⁶

Although Senate discussions rarely distinguished between the development of fixed, land-based ABM systems and space-based systems, where relevant the statements reflected the traditional interpretation, permitting the former and prohibiting the latter.¹⁰⁷ During the hearings, for example, Secretary of Defense Melvin Laird made the point that while the ABM Treaty did not bar the use of lasers *per se*, it did prohibit such use for space-based ABM systems.¹⁰⁸ Others made similar assertions, including General Paul Ryan, Chief of Staff of the Air Force, and Dr. John Foster, Director of Defense Research and Engineering.¹⁰⁹ It is also noteworthy that only two Senators voted against the ABM Treaty,¹¹⁰ one specifically because the Treaty prohibited the

105. See 133 CONG. REC. S2978 (daily ed. Mar. 11, 1987) (statement of Sen. Nunn) (stating that administration officials clearly interpreted the treaty to prohibit testing and development of mobile space-based ABM systems or components employing exotics).

106. See *Military Implications of the Treaty on the Limitations of Anti-Ballistic Missiles Systems and the Interim Agreement on Limitation of Strategic Offensive Arms: Hearings Before the Senate Committee on Armed Services*, 92d Cong., 2d Sess. 40 (1972) [hereinafter 1972 Armed Services Hearings] (providing comment from Senator Goldwater that a member of the Soviet Embassy was present during the Senate ratification proceedings); cf. *Anglo-Iranian Oil Company Case (U.K. v. Iran)* 1952 I.C.J. 92, 105-07 (Judgment of July 22) (criticizing the failure of the British Government to object to Iranian legislation that had significant bearing on treaty obligations between the parties).

107. See 133 CONG. REC. S2976 (daily ed. Mar. 11, 1987) (remarks of Sen. Nunn) (noting that Sofaer fails to identify even one statement in the record in which any Senator or any Nixon administration official stated that development and testing of mobile, space-based exotics was permitted).

108. 1972 Armed Services Hearings, *supra* note 106, at 40-41; see 133 CONG. REC. S2977 (daily ed. Mar. 11, 1987) (statement of Sen. Nunn) (explaining that Secretary Laird did not distinguish between the development of fixed, land-based ABMs and mobile, space-based ABMs). *But see* SOFAER'S RATIFICATION PROCESS, *supra* note 104, at 15 (noting that the statement by Secretary Laird is unclear and is considered to be internally inconsistent). Sofaer, however, does not then try to clarify the meaning of the statement or provide a different explanation. *Id.*

109. See 1972 Armed Services Hearings, *supra* note 106, at 274 (containing a dialogue between Senator Henry Jackson and Dr. John Foster). During the testimony Senator Jackson asserted that the ABM Treaty prohibits the development and testing of space-based ABM systems. *Id.* Dr. Foster responded that the United States did not have a program to develop such a system. *Id.* Dr. Foster additionally said that the ABM Treaty permits the development and testing of future ABM components that are fixed and land-based. *Id.*

110. 133 CONG. REC. S2979 (daily ed. Mar. 11, 1987) (statement of Sen. Nunn).

testing, development, or deployment of space-based systems using future technology.¹¹¹

Importantly, supporters of the reinterpretation have failed to reveal any statements during the ratification proceedings that explicitly endorse the development and testing of space-based exotics under the ABM Treaty.¹¹² Advocates of the reinterpretation, including Abraham Sofaer, instead rely on general statements such as those made by Secretary of State Rogers and Ambassador Gerard C. Smith that referred only to prohibitions on the deployment of future systems.¹¹³ Sofaer argues that Rogers and Smith would have also mentioned these restrictions as applying to development and testing of future systems had such restrictions existed.¹¹⁴

Senator Sam Nunn, the chairman of the Senate Armed Services Committee and a leading proponent of the traditional interpretation of the ABM Treaty, disputes Sofaer's views. Senator Nunn points out that neither Secretary Rogers nor Ambassador Smith stated that development and testing of future systems was prohibited because such development and testing is permitted for fixed land-based systems under article V.¹¹⁵ Senator Nunn states that although Secretary Rogers and Ambassador Smith did not say that development and testing of mobile space-based future systems was prohibited, they also did not say it was permitted.¹¹⁶ Nunn also notes that every statement made during the ratification hearings that distinguishes between fixed land-based systems and mobile space-based systems supports the traditional

111. See *Hearings Before the Subcomm. on Arms Control, International Security and Science of the House Comm. on Foreign Affairs*, 92d Cong., 1st Sess. 258 (1972) (statement of Sen. Buckley) (stating that he opposed the ABM agreement because it would have the effect of preventing the United States from developing a space-based laser system). Buckley concluded that space-based laser technology was formally excluded by the ABM Treaty. *Id.*

112. 133 CONG. REC. S2980 (daily ed. Mar. 11, 1987) (statement of Sen. Nunn).

113. See *Sofaer's Ratification Process*, *supra* note 104, at 12 (arguing that it is important that Rogers and Smith make no reference to prohibitions of testing and development of future systems).

114. *Id.* at 12-13.

115. 133 CONG. REC. S2980 (daily ed. Mar. 1, 1987) (statement of Sen. Nunn). During the ratification process, every statement that made a distinction between fixed, land-based systems and other systems supported the traditional view. *Id.* Furthermore, it was not illogical for many administration officials to emphasize the Treaty's implications only as they affected fixed, land-based systems using exotics because those were the only systems with any meaningful development in 1972. *Id.*

116. *Id.* at S2779-80. Nunn argues that simply because Rogers and Smith chose not to elaborate on specific prohibitions among systems affected by the Treaty and instead spoke of the Treaty's general restrictions, they did not intend to support any kind of reinterpretation. *Id.*

interpretation.¹¹⁷

D. NEGOTIATING RECORD

When textual analysis and reference to subsequent statements and the conduct of the parties to a treaty still leaves a treaty's meaning ambiguous, the Vienna Convention provides recourse to the negotiating record.¹¹⁸ United States courts have also shown a willingness to look at the negotiating record when interpreting a treaty.¹¹⁹ The Reagan administration's position on interpreting the ABM Treaty is that the text of the Treaty and subsequent actions of the parties are ambiguous and that the negotiating record supports the reinterpretation.¹²⁰

Amidst the controversy surrounding the meaning of the ABM Treaty, in 1985 the Reagan administration began researching the ABM Treaty and its history extensively with the intention of clarifying its meaning.¹²¹ In May of 1987, the Reagan administration declassified the negotiating report prepared by Abraham Sofaer as well as a number of "memcons" and "cables" from the negotiating sessions that allegedly supported the reinterpretation of the ABM Treaty.¹²² In re-

117. *Id.* at S2980.

118. See Vienna Convention, *supra* note 48, art. 32 (indicating that it is appropriate to use the negotiating record to confirm the meaning of a treaty where normal rules of interpretation result in ambiguity or in a particularly unreasonable interpretation); see also L. McNAIR, *supra* note 88, at 412 (1961) (explaining that in international disputes parties often introduce preparatory work as evidence of the true meaning of a treaty).

119. See *Air France v. Saks*, 470 U.S. 392, 400 (1985) (holding that the negotiating record is an appropriate source to use to interpret a treaty); *Nielson v. Johnson* 279 U.S. 47, 52 (1929) (holding that when a treaty's meaning is uncertain, one may consider the negotiations and diplomatic correspondence of the contracting parties); see also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 147(c) (stating that the circumstances surrounding the negotiation of an agreement are relevant in determining the meaning of a treaty).

120. See *Sofaer's Negotiating Record*, *supra* note 54, at 3 (stating that the text of the ABM Treaty is ambiguous and that the negotiating record suggests that the Soviet Union refused to ban testing and development of mobile ABM devices based on other physical principles); see also Chayes & Chayes, *supra* note 53, at 1956 n.1 (discussing Robert McFarlane's statement, in October of 1985, that the ABM Treaty does not prohibit research, development, or testing of systems based on new physical concepts and noting Secretary of State Shultz's remarks, in October of 1985, that President Reagan had decided as a matter of policy to follow the traditional interpretation, although the new interpretation was fully justified). *But see supra* note 45 and accompanying text (noting how the Reagan administration plans to apply the "changed" interpretation to allow full-scale development and testing of defense systems in space).

121. *Sofaer's Negotiating Record*, *supra* note 54, at 2. Since 1985, the executive branch has espoused the reinterpretation relying primarily on the classified negotiating record to support its position. *Id.* at 3.

122. See *id.*, title page (stating that the negotiating record was released to the public on May 13, 1987); 133 CONG. REC. S6810 (daily ed. May 20, 1987) (statement of

sponse to the declassified report, Senator Nunn delivered a public address in the Senate, based on the recently declassified negotiating information, and concluded that it offered support for the traditional interpretation.¹²³ Indeed, the available negotiating materials, while not entirely clear due to their informal and disjointed character, support the traditional interpretation.¹²⁴

Sofaer, in his argument for the reinterpretation, concedes that the President "allowed" the United States negotiators in 1972 to seek restrictions on future systems.¹²⁵ Sofaer makes this concession in light of National Security Directive Memorandum No. 127 (NSDM 127), an instruction from the President to the negotiators informing them to seek a treaty formulation that would avoid circumvention by future ABM systems.¹²⁶ Sofaer, however, cites this instruction as a limitation

Sen. Nunn) (noting that the negotiating record consists of a collection of cables, international working documents, prepared talking points, memoranda of conversations (memcons) and National Security Decision Memoranda (NSDMs)). Nunn also states that the documents are of unequal interpretative value emphasizing that the NSDMs are most authoritative, codifying the President's official instructions to the United States delegation. *Id.* This Comment cites these memcons and notes according to the form of citation used by Nunn and Sofaer, Airgram-number [hereinafter A-number]. See *Sofaer's Negotiating Record*, *supra* note 54, at 13 (providing a citation to these memcons and adopting the "A-number" form as the appropriate form of citation). Due to the formerly classified status of the negotiating record and its recent availability, there are only two public reports in existence, a report from Senator Nunn and one from Abraham Sofaer. This Comment therefore relies significantly on these two reports when discussing the negotiating history.

123. 133 CONG. REC. S6824 (daily ed. May 20, 1987) (statement of Sen. Nunn) (stating that although the negotiating record is unclear, it contains enough evidence to conclude that the ABM Treaty bans deployment of future systems). Nunn also notes that in a situation where the United States Senate, the majority of the negotiators to the Treaty, and four successive presidential administrations have upheld the traditional view, the burden of proof is on supporters of the reinterpretation to show that the traditional view is incorrect. *Id.* Nunn concludes that the burden is not satisfied by reliance on the negotiating record. *Id.*

124. See *id.* (statement of Sen. Nunn). Nunn concludes that the preponderance of evidence in the negotiating record supports the traditional interpretation. *Id.* But see *Sofaer's Negotiating Record*, *supra* note 54, at 3 (concluding that the negotiating record resolves the ambiguity of the Treaty in favor of the reinterpretation).

125. See *id.* at 18-19 (discussing Sofaer's interpretation of NSDM 127, described below); see also Address by Paul H. Nitze, Special Advisor to the President and the Secretary of State for Arms Control Matters, Interpreting the ABM Treaty, at 2 (April 1, 1987) (available at the Department of State, Bureau of Public Affairs, Washington, D.C., Current Policy No. 936) (stating that United States negotiators sought to regulate then-current and substitute components). NSDM 127 was a presidential directive sent to the United States negotiators outlining executive instructions regarding future ABM systems. 133 CONG. REC. S6812-13 (daily ed. May 20, 1987) (statement of Sen. Nunn).

126. *Sofaer's Negotiating Record*, *supra* note 54, at 18-19. Sofaer also quoted part of NSDM 127 as evidence indicating that the President intended to handle any future problems arising from the ABM Treaty through the joint commission and the formal review procedures established by articles XIII and XIV of the Treaty. *Id.* See *supra*

that the President imposed on the liberty of the negotiators to secure restrictions on future systems and notes that it also directed the delegation to refrain from a detailed discussion of future systems.¹²⁷ Sofaer asserts that the President's instruction was a compromise, neither rejecting a ban on future ABM systems nor permitting it to jeopardize negotiations on the practical objectives of the ABM Treaty.¹²⁸ Sofaer also concludes that future systems were not restricted because the negotiators were instructed not to press on this issue because the Soviets were unwilling to address it.¹²⁹

Sofaer's explanation, while plausible, ignores much of the informal but valuable information contained in the negotiating record that explains the unfolding of an ABM Treaty that eventually prohibited the development, testing, and deployment of future ABM systems.¹³⁰ The materials reveal, for example, that the President sought to avoid detailed discussions on future systems because the United States was reluctant to reveal too much information about United States military research.¹³¹ The President thus instructed the United States delegation to settle for a less explicit provision on exotics than was desirable in return for maintaining secrecy for research.¹³²

note 87 (describing articles XIII and XIV).

127. See *Sofaer's Negotiating Record*, *supra* note 54, at 18-19 (noting that NSDM 127 also instructed the negotiators to not invite detailed discussions of future systems).

128. See *id.* (noting Sofaer's conclusion that the instructions in NSDM 127 were to accommodate those who argued for securing restrictions on future systems without permitting the issue of future systems to hinder the course of negotiations).

129. See *id.* at 21 (stating that the Soviets would not discuss future possibilities with respect to ABM systems). Sofaer provided additional statements implying that the concept of restricting future systems was abandoned because the Soviets were not willing to discuss future systems and because NSDM 127 instructed the United States negotiators not to insist on that issue at the expense of the negotiations. *Id.* at 18-23.

130. See 133 CONG. REC. S6813 (daily ed. May 20, 1987) (statement of Sen. Nunn) (arguing that Sofaer's oversights reveal that the intent of NSDM 127 was to instruct the negotiators to bargain for restrictions on future ABM systems).

131. See 133 CONG. REC. S6813 (daily ed. May 20, 1987) (statement of Sen. Nunn) (noting that at the time sensitive military research was underway concerning lasers and particle beam weapons). United States negotiator Sidney Graybeal explained that he was in a "Catch 22" situation because he was supposed to reach an agreement on future systems but if he gave details he was "going to catch hell." Interview by Senator Nunn with Sidney Graybeal, United States Negotiator to the ABM Treaty, Feb. 4, 1987, *cited in* 133 CONG. REC. S6813 (daily ed. May 20, 1987) (statement of Sen. Nunn) [hereinafter Graybeal interview].

132. 133 CONG. REC. S6813 (daily ed. May 20, 1987) (statement of Sen. Nunn). The Soviet Union's initial hesitation regarding prohibitions against exotics is explained because they wanted to discover as much as possible about United States military programs in this highly classified area. See A-398, *cited in* 133 CONG. REC. S6812 n.65 (daily ed. May, 20, 1987) (stating that contrary to Sofaer's claim, Soviet delegate academician Shchukin did not indicate "that the parties should not attempt to deal with future possibilities"). What Shchukin said was that there might be some difficulty in

The negotiating record on specific provisions of the ABM Treaty also supports the traditional interpretation. Had the parties intended to exclude future systems from the prohibitions of the Treaty, the record would surely reflect this. As the following discussion of the specific Treaty provisions discloses, the negotiating record fails to support the reinterpretation.

1. Article II

In December of 1971, the parties agreed on the final version of article II.¹³³ The reinterpretation, relying on Sofaer's analysis of the negotiating record, alleges that the Soviets agreed to add the phrase "currently consisting of" to article II only after the United States assured them that the parties would settle questions regarding constraints on future systems elsewhere.¹³⁴ Although the United States did provide this assurance to the Soviets, this fact can be explained as consistent with the traditional interpretation of the Treaty.

Article II merely defines an ABM system and does not impose any independent constraints. It is article V(1) that addresses the substantive obligations of the Treaty.¹³⁵ Therefore, the fact that the Soviets

getting the politicians and diplomats to consider this problem because if one could not point to specific systems in or near development, the politicians and diplomats would probably not be interested in future possibilities. *Id.*; see also *id.* at S6812 (noting that Soviet negotiator Victor Karpov reinforced this Soviet theme, stating that if the United States believes that systems exist it should identify and name them so that the possibilities to limit them could become clearer). The Soviets also feared that the United States would seek prohibitions sweeping enough to include the Soviet air defense network. See A-647, cited in 133 CONG. REC. S6813 (daily ed. May 20, 1987) (statement of Sen. Nunn) (noting that the Soviets were concerned that the language of United States proposals was so broad that it could apply to elements of the Soviet air defense network, especially surface-to-air missiles and air defense radar). The United States proposal on exotics also appeared to have surprised the Soviets. Graybeal Interview, *supra* note 131, at S6813. Graybeal states that initially Karpov apparently had no instructions as to how to reply to new United States proposals on exotics. *Id.* In Graybeal's view, once the Soviet delegation received direction from Moscow regarding mobile space-based exotics, agreement was quickly reached. *Id.*

133. *Sofaer's Negotiating Record*, *supra* note 54, at 44. The Soviet negotiators agreed to this language because it alleviated their concern that its adoption would be interpreted as Soviet agreement to restrictions on substitute devices elsewhere in the Treaty text. *Id.*

134. See *id.* at 45 (noting that the Soviet negotiators explicitly communicated their position that they did not interpret article II as resolving the issue of constraints on future systems); see also 133 CONG. REC. S6820 (daily ed. May 20, 1987) (stating that the Soviets agreed to the change in article II language only after Raymond Garthoff assured them that the question of constraints would be settled elsewhere).

135. See A-540, cited in 133 CONG. REC. S6813 n.74-76 (daily ed. May 20, 1987) (statement of Sen. Nunn) (containing a passage in which the leading Soviet negotiator, Victor Karpov, stated that article II imposed no obligations as to future systems elsewhere in the Treaty but that this did not mean that the parties could not reach an

agreed to the phrase "currently consisting of" in article II only means that discussions of future systems were to take place elsewhere.

The reinterpretation's advocates also note that the Soviets accepted the change in article II only after the United States delegation agreed to drop article V(3) from the original Treaty draft.¹³⁶ Sofaer argues that this proves that the Soviets agreed to the final form of article II only after it was made clear that its adoption would not represent an agreement that other Treaty provisions would restrict ABM systems based on "other physical principles."¹³⁷ The reinterpretation's advocates draw this conclusion despite additional negotiations that reveal that the United States preserved this point elsewhere in the Treaty.¹³⁸

In support of the traditional interpretation, the negotiating record reveals that the United States withdrawal of article V(3) was contingent upon a clear understanding in the form of an agreed minute.¹³⁹ That agreed minute eventually became Agreed Statement D.¹⁴⁰ This is important because, contrary to Sofaer's theory, the ABM Treaty did contain a provision making reference to substitute devices based on other physical principles.¹⁴¹

Finally, it is worthwhile to note the views of the legal advisor to the United States delegation, John Rhinelander. Rhinelander prepared a series of memos during the last five months of negotiation, providing an analysis of each article of the ABM Treaty.¹⁴² In his final memo of

agreement concerning future systems in another part of the Treaty). Karpov then added that article V was one such place where the parties might add an additional obligation. *Id.* Additionally, the Soviets must have believed that adding the phrase "currently consisting of" to article II changed the definition of an ABM system to include future ABM systems because the change in article II represented a delicate and controversial issue within the Soviet delegation. *Id.*

136. See A-677, cited in 133 CONG. REC. S6821 (daily ed. May 20, 1987) (statement of Sen. Nunn) (noting that United States negotiator Raymond Garthoff said that it was the United States position that withdrawal of article V(3) was contingent on a "clear understanding" in the form of an Agreed Minute. This did not mean that the United States would retreat from its position that fixed, land-based ABM systems using exotics would not be deployed. *Id.*

137. *Sofaer's Negotiating Record*, supra note 54, at 45.

138. See *infra* note 140 (explaining that the content of article V(3) eventually became Agreed Statement D).

139. 133 CONG. REC. S6821 (daily ed. May 20, 1987) (statement of Sen. Nunn).

140. See 133 CONG. REC. S6821 (daily ed. May 20, 1987) (statement of Sen. Nunn) (noting that instead of retreating from its position expressed in article V(3) that fixed land-based systems using exotics should not be deployed, the United States agreed to incorporate the point in Agreed Statement D).

141. See ABM Treaty, supra note 1, Agreed Statement D 23 U.S.T. 3456, T.I.A.S. No. 7503 (containing the text of Agreed Statement D). Agreed Statement D contains a provision that refers to substitute devices. *Id.*

142. See 133 CONG. REC. S6818-20 (daily ed. May 20, 1987) (statement of Sen. Nunn) (observing that John Rhinelander prepared a series of memos to keep the Presi-

May 24, 1972, just two days before the signing of the Treaty, Rhinelander explicitly defined an ABM System to include future systems based on physical principles other than those used for current ABM components.¹⁴³ This unambiguous statement from the legal advisor to the United States delegation is irrefutable short of insisting that the United States legal advisor did not understand the correct definition of an ABM System.

2. *Article V(1)*

Proponents of the reinterpretation construe article V(1) as referring only to future versions of ABM components existing in 1972, rather than including wholly future components.¹⁴⁴ The negotiating record, however, reveals that the lead Soviet negotiator of article V, Victor Karpov, stated that article V took into account the intention of the United States to prohibit the use of future systems as well.¹⁴⁵ The supporters of the reinterpretation also argue that there is a semantic distinction between "devices" and "systems and components" that rendered article V(1) superfluous as applied to future exotic systems.¹⁴⁶ The argument is that because article V(1) included ABM "systems or components" and not "devices," it must not apply to mobile space-based exotics.¹⁴⁷ Statements of United States and Soviet negotiators, however, confirm that both sides included exotics within the term ABM "systems and components."¹⁴⁸

dent informed of the negotiations).

143. Rhinelander, *Article by Article Analysis of the ABM Treaty*, at No.4 (May 24, 1972), cited in 133 CONG. REC. S6821-22 (daily ed. May 20, 1987) (statement of Sen. Nunn).

144. See 133 CONG. REC. S6815 (daily ed. May 20, 1987) (statement of Sen. Nunn) (arguing that the Soviet Union was not willing to accept limitations pertaining to components other than those then in use).

145. See A-540, (Sept. 13, 1971), cited in 133 CONG. REC. S6814, n.50 (daily ed. May 20, 1987) (remarks of Sen. Nunn) (discussing the United States and the Soviet Union's decisions with respect to article V(1) occurring during September 15-24, 1971, and noting Karpov's affirmation that article V(1) referred to present and future components of ABM systems); A-503, (Sept. 15, 1971) *supra* note 148 cited in 133 CONG. REC. S6814 n.53 (daily ed. May 20, 1987) (remarks of Sen. Nunn) (quoting Karpov's suggestion that the negotiators should eliminate specific listings of ABM system components then in use from the Treaty language because the new formulation of article V(1) obviated its use).

146. See *Sofaer's Negotiating Record*, *supra* note 54, at 26 (explaining that ABM interceptor missiles, launchers, and radar were equated with components while replacements for these components, for example, lasers, were referred to as devices).

147. See *id.* at 32 (claiming that the use of the word "components" in article V(1) revealed the unwillingness of the Soviet Union to regulate anything other than systems or components known and then existing).

148. See 133 CONG. REC. S6815-16 (daily ed. May 20, 1987) (statement of Sen.

Once again, John Rhinelander's views are revealing.¹⁴⁹ Although Sofaer has cited Rhinelander's analysis at great length to show that the ABM Treaty permits the development and testing of mobile space-based exotics,¹⁵⁰ Sofaer avoids any reference to Rhinelander's final draft of January 24, 1972, in which he states that article V(1) prohibits the development of *any* ABM system or component, with the exception of those permitted by article III.¹⁵¹ The final version of Rhinelander's analysis clearly endorses the traditional interpretation.¹⁵²

Nunn) (noting statements from United States negotiators' Brown, Smith, and Graybeal where they used the words "future components," "future devices," and other terms interchangeably when referring to future systems that used components other than launchers, missiles, or radar). Nunn also took note of comments from Soviet representatives Trusov and Karpov where they used the terms "devices" and "components" interchangeably in discussions. *Id.* The reinterpretation argument also contradicts the reinterpretation argument regarding Agreed Statement D by claiming that Agreed Statement D represents the only provision in the Treaty limiting exotics. *See ABM and SDI, supra* note 11, at 1975 (arguing that Agreed Statement D is the only provision that refers to exotics and that the Treaty allows for their development). The word "devices," used by Sofaer to address future systems, does not, however, appear in Agreed Statement D. *See* 133 CONG. REC. S6811 (daily ed. May 20, 1987) (statement of Sen. Nunn) (stating that the term "devices" does not appear in Agreed Statement D although the supporters of reinterpretation argue that Agreed Statement D is the part of the Treaty that deals with exotics).

149. *See id.* at S6818-19 (stating that Rhinelander, the Legal Adviser to the United States delegation, prepared a series of memos during the negotiations). Each memo prepared by the Legal Advisor consisted of two parts. *Id.* The first part set forth the developing text; where discord remained, the wording was bracketed. *Id.* The second part of the memo consisted of definitive explanations, interpretations, and descriptions with the brackets removed when the delegations mutually assented to the commentary. *Id.*

150. *See Sofaer's Negotiating Record, supra* note 54, at 66-68, 72 (noting the bracketed areas of Rhinelander's analysis where reference was made to "devices" and to any obligations as to future systems using components already defined in the Treaty, with the exception of article III's limitations). For example, Sofaer acknowledged that Rhinelander used brackets in his draft of January 24, 1972 and he noted the use of brackets where a paragraph to state that article V(1) applied to any device that would perform the function of an existing component. *Id.*; *see* 133 CONG. REC. S6819 (daily ed. May 20, 1987) (statement of Sen. Nunn) (addressing Rhinelander's memo of February 24, 1972 where Sofaer suggested that a footnote in the memo of January 24, 1972 indicated that the United States and the Soviet Union were not in agreement with respect to the application of article V(1) to exotics).

151. 133 CONG. REC. S6818 (daily ed. May 20, 1987) (statement of Sen. Nunn). *But see Sofaer's Negotiating Record, supra* note 54, at 66 (explaining that Rhinelander modified his January 24, 1972 draft on February 16, 1972 when he bracketed both the portion of his analysis on article V(1) that dealt with conventional components as well as the paragraph that stated that article V(1) applies to any "device" capable of performing the function of a conventional component).

152. *See* Rhinelander, *Article by Article Analysis of the ABM Treaty*, May 24, 1974, *cited in* 133 CONG. REC. S6823 (daily ed. May 20, 1987) (statement of Sen. Nunn) (stating that Rhinelander's final memo supported the traditional restrictions and all brackets were removed). *But see Sofaer's Negotiating Record, supra* note 54, at 72-73 (acknowledging that Rhinelander dropped the final bracketed part of his anal-

3. Article III

The reinterpretation's supporters argue that article III permits limited deployment of those components specifically listed in article II, while neither permitting nor restricting deployment of substitute systems or components, including space-based exotics.¹⁵³ Sofaer's reasoning for this conclusion is that article III does not expressly prohibit "substitute" systems for then existing systems or components.¹⁵⁴ This is an unrealistic conclusion in light of the clear prohibition of such substitutes contained elsewhere in the negotiating record. Both the United States and the Soviet Union agreed that article III permitted the limited deployment of ABM interceptor missiles, ABM launchers, and ABM radar, but not the deployment of substitutes that could perform their functions.¹⁵⁵ Article III clearly prohibits the deployment of substi-

ysis of article V(1) dealing with future systems as well as the accompanying footnote without any explanation for the change). Cf. 133 CONG. REC. S6824 (daily ed. May 20, 1987) (statement of Sen. Nunn) (declaring that Sofaer's argument lacked consistency).

153. See *Sofaer's Negotiating Record*, *supra* note 54, at 56 (arguing that article II pertained only to ABM systems then in existence and therefore that article III referred only to those systems).

154. See *ABM and SDI*, *supra* note 11, at 1977 (conceding that some portions of the negotiating record support the traditional interpretation of article III). Sofaer, however, then expressed doubts about the traditional interpretation and offered an alternative interpretation without providing any support from the relevant portion of the negotiating record. *Id.*

On January 31, 1972, United States negotiator Raymond L. Garthoff handed his Soviet counterparts a five-point paper summarizing what the United States hoped were mutual points of agreement as to future systems. A-763 (April 28, 1972), *cited in* 133 CONG. REC. S6821 n.137 (daily ed. May 20, 1987) (statement of Sen. Nunn) (discussing Garthoff's five points and noting that these points established a mutually agreed upon framework for Agreed Statement D). Point four asserted that article III was to permit deployment of specified ABM interceptor missiles, ABM launchers, or ABM radars but not substitutes for these systems. *Id.* The Soviets agreed to Point Four. See *id.* (noting that the memcon of the January 31, 1972 meeting states that Point Four met with no opposition when presented to the Soviet delegation). Nunn also explained that on April 28, 1972, Oleg Grinevsky, the Soviet official appointed to reach an accord on this position *ad referendum* to the full delegation, confirmed Garthoff's interpretation of article III. *Id.* This interpretation modified the lead-in clause to article II such that it would prevent deployment of all ABM systems except for specified fixed land-based systems using then current ABM components. *Id.* Nunn's remarks also quoted Ambassador Parson's memcon of April 28, that stated "[Grinevsky] was saying that they could agree to a formulation undertaking not to deploy ABM systems or their components except as the Treaty would provide." *Id.* On February 1, 1972, United States and Soviet negotiators Allison and Trusov agreed that the text of article III would ban an ABM system using components other than those listed in article III. *Id.*

155. See A-766 (February 1, 1972), *cited in* 133 CONG. REC. S6822, n.145 (daily ed. May 20, 1987) (statement of Sen. Nunn) (noting Allison's statement that substituting a replacement component in the future for an ABM missile, launcher, or radar would create a "future" or "other" ABM System and that Soviet delegate Trusov agreed with this statement).

tute components.¹⁵⁶

4. *Agreed Statement D*

Advocates of the reinterpretation contend that Agreed Statement D is the only provision in the Treaty that addresses exotics and that it only prohibits deployment while development and testing are permitted.¹⁵⁷ Sofaer argues that without such an interpretation, Agreed Statement D merely is a restatement of article III's ban on the deployment of exotics¹⁵⁸ and a summary of procedures detailed at length in articles XIII and XIV for discussing and agreeing on Treaty amendments.¹⁵⁹ Sofaer attempts to substantiate his argument with statements contained in the negotiating record indicating the Soviet Union's willingness to discuss future ABM systems.¹⁶⁰

Sofaer's argument fails when evaluated in light of the chronological order of the negotiations and the proper context of the statements he cites. Agreed Statement D was negotiated and agreed upon before article III was completed.¹⁶¹ The formulation of Agreed Statement D took place during a period in the negotiations when the parties had already agreed to ban the development, testing, and deployment of all mobile ABM systems but had not yet agreed on the limits on fixed land-based systems.¹⁶²

Additionally, there are statements from both Soviet and United

156. See *id.* at S6822 (recounting Rhinelander's January 24, 1972 memo stating that article III would permit deployment of an ABM system employing only ABM launchers, ABM missiles, or ABM radars and also acknowledging Rhinelander's memos of February 16, 1972, asserting the same proposition). Nunn also discusses Sofaer's assertion that Rhinelander derived his conclusions from a combined analysis of article III and Agreed Statement D. *Id.* Nunn points out that Sofaer does not substantiate his assertion with any authority other than his theory that only Agreed Statement D prohibits deployment. *Id.*

157. See *supra* note 85 (discussing the reinterpretation's view of Agreed Statement D).

158. *ABM and SDI, supra* note 11, at 1975-76.

159. *Id.* at 1977.

160. *Sofaer's Negotiating Record, supra* note 54, at 54.

161. See 133 CONG. REC. S6823 (daily ed. May 20, 1987) (statement of Sen. Nunn) (noting that the parties did not agree to the text of article III until May 12, 1972). During the negotiations, the parties could not maintain a consensus as to the scope of the prohibitions in article III or its applicability to future ABM systems or components. *Id.*

162. 133 CONG. REC. S6823 (daily ed. May 20, 1987) (statement of Sen. Nunn). Even if Agreed Statement D generally reiterates article III's restriction, it was not redundant to article III at the time, nor was it possible to change the language of article III due to the short time remaining before the signing of the Treaty. *Id.* Article III was agreed upon less than two weeks before President Richard M. Nixon and Soviet General Secretary Leonid I. Brezhnev were scheduled to sign the ABM Treaty. *Id.*

States negotiators that link Agreed Statement D to the limits on fixed land-based ABM systems found in article III.¹⁶³ The Soviet negotiators stated that the Soviet Union agreed with the United States position on the subject of exotics and wished to include a joint agreement on the issue.¹⁶⁴ This understanding became Agreed Statement D.

CONCLUSION

The ABM Treaty is a delicate commitment. It is an agreement easily breached with potentially far-reaching implications. Breaches, however, are not quickly forgotten nor are new agreements readily drafted. International law, United States national security, and world stability demand a good faith interpretation of the ABM Treaty free of breach by either party.

The reinterpretation of the ABM Treaty is an attempt to manipulate the Treaty to allow for SDI development, testing, and eventual deployment. However, the text of the ABM Treaty unambiguously states that the parties shall not develop, test, or deploy ABM systems with the exception of those permitted by article III. Further, the subsequent conduct and statements of the parties unequivocally endorse the traditional interpretation. Six former secretaries of defense and the overwhelming majority of the United States ABM negotiators have endorsed the traditional interpretation.¹⁶⁵ Even the negotiating record,

163. See A-619, (December 7, 1971), cited in 133 CONG. REC. S6823 n.158 (daily ed. May 20, 1987) (statement of Sen. Nunn) (citing Soviet delegate Kishlov's statement urging that the parties include some explanation of the difference over limits on fixed land-based systems contained in article III and in article V); see also A-647 (Dec. 14, 1971), cited in 133 CONG. REC. S6823 n.159 (daily ed. May 20, 1987) (statement of Sen. Nunn) (referring to a statement from Soviet negotiator Shchukin discussing provisions for components based on new technology that could substitute for those restricted in article III.) Shchukin proposed that the decision to provide substitutes for the components limited under article III be a matter to refer to the standing committee who would seek agreement to avoid circumvention of the limits of article III. *Id.*

164. A-743, (January 26, 1972), cited in 133 CONG. REC. S6824 (daily ed. May 20, 1987) (statement of Sen. Nunn); See also *id.* (explaining Grinevsky's statement that the Soviets accepted the position of the United States as strong support for the traditional interpretation because the position of the United States distinguished among different types of exotics). The United States position banned the development, testing, and deployment of all mobile systems while only restricting the deployment of fixed land-based ABM systems. *Id.* Rhinelander also considered Agreed Statement D to be an explicit explanation of the scope of article III with respect to exotics. See 133 CONG. REC. S6824 (daily ed. May 20, 1987) (statement of Sen. Nunn) (noting that Rhinelander consistently placed Agreed Statement D within the context of article III that dealt exclusively with fixed land-based systems and that Agreed Statement D is an authoritative interpretation of article III).

165. Smith, *Ex-Secretaries Urge Adherence to ABM Pact*, Wash. Post, Mar. 10, 1987, at A7, col. 4.

while at times ambiguous, favors the traditional view.

As a matter of policy, an attempt to manipulate the ABM Treaty's restrictions is a dubious tactic. The ABM Treaty, as traditionally interpreted, has helped prevent nuclear war for fifteen years. It has also avoided an expensive defensive weapons arms race. The United States abandonment of the ABM Treaty's limitations may encourage the Soviet Union to abandon portions of the Treaty that are inconvenient for it. The Reagan administration is willing to accept these risks in order to allow for development and testing of an SDI plan that may never become reality.

There are also major political ramifications attached to the reinterpretation. Should subsequent administrations maintain the position in support of the reinterpretation, the current ABM Treaty will likely disintegrate and it is difficult to conceive of the Soviet Union agreeing to another treaty. Additionally, the rest of the world may conclude that the United States has violated an international agreement and therefore violated international law. A violation of the Treaty sets a poor example by a superpower that otherwise portrays itself as committed to the struggle for a stable international legal order.

Rather than reinterpreting the ABM Treaty, the United States should continue researching SDI without progressing into the development and testing stage until definitive evidence is obtained proving SDI's effectiveness and survivability. If such evidence is discovered, the United States could then make an informed decision as to whether pursuing SDI is worth the cost of abandoning the ABM Treaty. Additionally, at that time the United States could reopen discussions with the Soviet Union concerning ABM limitations pursuant to Agreed Statement D. This would enable the United States to protect its domestic interests while remaining in compliance with the ABM Treaty and international law.