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# THE ABM TREATY, NEW TECHNOLOGY AND THE STRATEGIC DEFENSE INITIATIVE

*Frances V. Harbour\**

On October 6, 1985, Robert C. McFarlane, then National Security Advisor, announced on NBC's *Meet the Press* that the 1972 Anti-Ballistic Missile (ABM) Treaty<sup>1</sup> permitted the development and testing of strategic defense systems based on "new physical concepts."<sup>2</sup> This "new interpretation" of the Treaty, he asserted, would give the United States new latitude in the early stages of President Ronald Reagan's ballistic missile defense project, the Strategic Defense Initiative (SDI).<sup>3</sup>

McFarlane's statement set off a furor both inside and outside the Reagan Administration. It is not clear from the public record whether McFarlane had cleared the statement first with the President. It is certain that Secretary of State George Schultz, among others, was caught by surprise.<sup>4</sup>

Dismayed reactions from the Congress and from North Atlantic Treaty Organization (NATO) allies, together with questions from within the Administration, forced a retrenchment in position. Schultz announced the results on October 14. The new interpretation was "fully justified," said the Secretary of State, but this was a "moot point" because the Reagan Administration intended to continue its SDI program "in accordance with a restrictive interpretation of the [ABM] Treaty's obligations."<sup>5</sup>

Correct or incorrect, the point is anything but moot. The "new interpretation" of the ABM Treaty has taken on a role of its own in the debate surrounding SDI. From the beginning, the Reagan Administration's position marked one side of a domestic and international debate. Reams of material have been produced supporting and criticizing the new interpretation. Nor has the tone of debate moderated over time. For example, in May 1988 the Defense Science Board's Strategic Defense Milestone Panel wrote bluntly, "There is not a force acting on the SDI program that is more damaging or more insidious than the present

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1. Officially known as the Treaty Between the United States and the Soviet Union 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]. See the Appendix to this article for the relevant articles and paragraphs of the ABM Treaty referred to in the text.
2. Interview of McFarlane on *Meet the Press* (Oct. 6, 1985); reprinted in 85 DEP'T ST. BULL. 33 (Dec. 1985).
3. See, e.g., U.S. DEF. DEP'T DEF. SCI. BOARD, REPORT OF THE STRATEGIC DEFENSE MILESTONE PANEL 6, 7 (1988) [hereinafter STRATEGIC DEFENSE MILESTONE PANEL].
4. GARTHOFF, POLICY VERSUS THE LAW: THE REINTERPRETATION OF THE ABM TREATY 3 (1987).
5. Address by Secretary of State Schultz to the North Atlantic Assembly, entitled *Arms Control, Strategic Stability and Global Security* (Oct. 14, 1985); reprinted in 85 DEP'T ST. BULL. 23 (Dec. 1985).

debate on the 'narrow versus broad' interpretation of the ABM Treaty."<sup>6</sup> Supporters of the strict interpretation, for their part, strongly agree that the effect has been "insidious," but they agree with equal heat that the outcome of the debate is important.

### WHO CARES ANYHOW?

In spite of all the verbiage, the important differences between the two sides come down to one set of obligations in a complex treaty. The central question in the debate is whether the ABM Treaty permits the development and testing of space-based ballistic missile defense (BMD) systems or components that are not traditional ABM launchers, interceptor missiles or radars. Certainly this is not as important a question as whether development, testing or deployment of BMD is a good idea from a strategic, political or economic standpoint. But it is nevertheless a question worth answering in its own right for several reasons.

First of all, as suggested above, a "broad" versus "narrow" interpretation has clear implications for the future of the SDI program. The debate has already led Congress to refuse to fund tests not within the strict interpretation of the ABM Treaty. Through compromise, the Reagan Administration was able to keep the limitations on testing only implicitly linked to the Treaty. However as SDI advances further beyond the unverifiable laboratory research stage—which both sides agree is allowed—there will be greater and greater temptation for the United States to go beyond a limiting definition.

Space-based BMD testing, or any other mobile testing of models against ballistic missiles, would be forbidden by the old understanding of what is allowed. It would be permitted by the new, if the technology involved did not use ABM launchers, ABM interceptor missiles or traditional ABM radars. This sort of testing could give a more direct, more accurate and perhaps less expensive reading of the capabilities of the new technology applied for something like its intended purpose. On the other hand, unleashing immature BMD technology while damaging the ABM Treaty could prove an expensive, destabilizing mistake, especially if the technical hopes of SDI advocates turn out to be overly optimistic.

On the whole, Congress prefers a stricter definition of the obligations of the ABM Treaty than did the Reagan Administration. Congressional commitment to the strict interpretation is unlikely to change during the administration of President George Bush. Major changes seem unlikely since one of the more important bases of the new interpretation is that the treaty to which the Senate thought it gave its advice and consent was not the treaty actually negotiated with the Soviets; only the treaty negotiated with the Soviets is binding. This contention strikes to the heart of the Senate's treaty powers. Any administration which makes a reinterpretation claim will probably find that congressional-executive relations, always prone to problems, can become even more strained. In particular, congressional suspicion that the executive branch feels free to tell the Congress one thing and negotiating partners something else will make the domestic aspect of negotiating international treaties—especially arms control treaties—that much harder.

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6. STRATEGIC DEFENSE MILESTONE PANEL, *supra* note 3, at 6.

A presidential claim of reinterpretation would have an impact on future arms control treaty hearings. One would expect the Congress to impose more stringent requirements for the provision of the negotiating record; one would also expect longer delays in the ratification process and more formal interpretations by the Senate of its understanding of the specific provisions of a treaty.

Indeed, there is evidence that this process has already begun. In May 1988 the Senate imposed a formal condition to the Intermediate-Range Nuclear Forces (INF) Treaty that a future president may not reinterpret the treaty in contradiction to the statements of administration witnesses.<sup>7</sup>

The spotlight on the negotiation and ratification process in the ABM case puts new emphasis on the formal negotiation record outside the text itself. The raising of stakes has made the domestic negotiations over position even more highly politicized, and over smaller issues. Because what is in the negotiating record has become more consequential politically, agreement among the various constituencies within the executive branch about what may be said during international negotiations may also become more difficult than in the past.

When internal domestic political processes surrounding treaty negotiation become more difficult and chancy, it cannot help negatively affecting the prospects for either arms control or international law. If the Senate stiffens its requirements for ratification, other nations will feel confirmed in their already existing suspicions that negotiations with the executive branch are not to be considered binding on the Congress.

Conversely, a unilateral reinterpretation by the executive does not help U.S. credibility. It also whittles away at other countries' willingness to engage in negotiations with the United States. The Soviet Union and smaller nations will grow reluctant to enter into agreements with the United States, and they may even grow cynical in their own interpretations of treaty obligations. One of the main reasons countries allow themselves to be bound under treaty and by other international laws is to encourage the cooperation of others. If the fabric of mutual constraint is unjustifiably weakened in the case of one treaty, all of international law is weakened.

Thus, if the U.S. government is to accept the broad interpretation instead of the narrow one, it is important that it make certain that its credentials are legally impeccable. However, the language of the Treaty itself, the subsequent practice of the two parties and the negotiating record each suggests that the legal foundation for the broad interpretation is very shaky.

#### **THE ISSUES IN THE DEBATE**

Those who believe in the strict interpretation and those who have adopted the broad interpretation actually share opinions on more aspects of the ABM Treaty than those on which they disagree. The two sides agree that the Treaty permits 1972-type ABM systems to be deployed at one site (formerly two). Both agree that there can be no testing, development or deployment of mobile ABM systems that use ABM launchers, ABM interceptor missiles or ABM radars, or any of those components individually, without amending or abrogating the Treaty.

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7. *Senate's Condition to the Treaty*, N.Y. Times, May 28, 1988, at 4, col. 1.

(The provision thus includes space-based interceptor missiles such as those envisioned by many proposed SDI system architectures.)

Both sides accept that the Treaty forbids deployment of ABM systems or components utilizing other physical principles than were available in 1972, although the two differ on the exact source of the ban. They agree that the testing and development of fixed land-based systems is permitted within agreed test ranges and that "research" into new forms of technology is allowed.<sup>8</sup>

On the other hand, in order to arrive at such different conclusions regarding exotic space-based technology, the two sides treat key portions of the Treaty quite differently from one another. The most important portions of the Treaty for the debate are articles II and V and Agreed Statement D. The two sides also differ, to a lesser degree, on articles I, III and IV.

Article II defines ABM systems. Article V, paragraph 1, forbids testing, development, and deployment of mobile ABM systems. Agreed Statement D requires the parties to negotiate specific limits before deploying any ABM systems or components "based on other physical principles."

Broad interpretationists hold that Agreed Statement D's guidance on the deployment of "exotic" systems and components is the only limitation the Treaty places on such systems.<sup>9</sup> For their part, the proponents of the strict interpretation argue that Agreed Statement D reinforces the obligation—set up by the network of strictures in articles I, II, III and V—not to deploy exotic space-based or other mobile systems or components. They argue in addition that testing and development of future space-, air-, or mobile land-based ABM technology is forbidden by articles II and V, paragraph 1. However, testing and development of fixed land-based technologies is implicitly allowed by articles IV and V and by Agreed Statement D.<sup>10</sup>

Judge Abraham D. Sofaer, formerly the State Department's legal advisor, and arms control advisor Paul H. Nitze present the most detailed and knowledgeable analyses of the broad interpretation of the ABM Treaty allowing testing and development of space-based exotic technologies. In the analysis that follows, Sofaer's and Nitze's ideas and arguments will provide the main source for statements about the broad interpretation of the ABM Treaty.

On the side of the strict interpretationists, John Rhineland and Raymond L. Garthoff are among the key representatives. They have not only examined the text and historical record in detail but, like Nitze, were principal negotiators on the ABM Treaty. To this list must be added United States Senator Sam Nunn (D-Ga.), whose analysis of the Treaty text, ratification process and subsequent practice is virtually without precedent in congressional history. Their arguments provide the basis for an understanding of the strict interpretation.

#### WHO IS CORRECT?

Under international law, the place to begin analysis is with the plain sense of the Treaty.

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8. See, e.g., U.S. DEP'T ST. BUREAU PUB. AFF., PERMITTED AND PROHIBITED ACTIVITIES UNDER THE ABM TREATY, POL. NO. 886 (1986)(prepared by Paul Nitze) and Rhineland, *U.S. and Soviet Ballistic Missile Defence Programmes: Implications for the 1972 ABM Treaty*, 2 SPACE POL'Y 140, 141 (1986).
  9. See PERMITTED AND PROHIBITED ACTIVITIES UNDER THE ABM TREATY, *supra* note 8.
  10. See Rhineland & Rubin, *Mission Accomplished: An Insider's Account of the ABM Treaty Negotiating Record*, 17 ARMS CONTROL TODAY 5 (Sept. 1987).

**Textual Analysis: Article II**

For the purpose 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. . .; (b) ABM launchers. . .; and (c) ABM radars. . . .<sup>11</sup>

Article II is in many ways the most important of the core articles of the ABM Treaty. If an ABM system is defined in terms of components in article II, rather than in terms of its function, then no matter what the intention of the parties shown by other Treaty articles, future components and systems that do not include the 1972 elements would not necessarily be implied by the phrase “antiballistic missile systems and components.” In particular, it would be difficult to argue that the article V, paragraph 1 ban on testing space-based and other mobile ABM systems includes those based on “other physical principles.” Agreed Statement D’s ban on deployment of exotic systems and their components would be left as the Treaty’s sole limitation on future technology—as the broad interpretationists argue. It is therefore important to settle this question first.

Sofaer argues that a functional definition is not the most plausible understanding of article II, paragraph 1. He contends that “an ABM system is one that serves the functions described and that consists of the type of components that existed ‘currently.’”<sup>12</sup> As evidence, he suggests that the ABM Treaty itself “consistently use[s] the terms ‘ABM system’ and ‘components’ in contexts that indicate the parties were in fact referring to systems and components based on then-utilized physical principles.”<sup>13</sup>

Based on the text, Sofaer is clearly wrong in his main conclusion about article II. The list of current components in article II, paragraph 1, as quoted above, may only be read to mean that ABM launchers, ABM interceptor missiles and ABM radars were the elements that made up an ABM system *in 1972*. In English grammar, a comma followed by a participial phrase (*i.e.*, “currently consisting of”) indicates a nonrestrictive clause. A nonrestrictive clause simply adds information to the main body of the sentence. For example, the sentence, “Tom ate the pies, throwing away their crusts,” gives information about Tom’s behavior. “Tom ate the pies throwing away their crusts,” on the other hand, indicates that he ate only the lively pies. The former adds information about the subject, Tom. The latter restricts the class of pies, the direct object. In the same way, the list of elements in article II, paragraph 1 *adds information about* the current shape of the system. It does not restrict the class of ABM systems to missiles, launchers and/or radars. This may be a very fine point, however. As Rhinelander points out in an article written with James P. Rubin, the addition of the adverb “currently” flags the fact that there could be “ABM systems” made up of different kinds of components. “Otherwise,” he notes, “the word ‘currently’ would not be necessary.”<sup>14</sup>

Sofaer’s, Nitze’s and other broad interpretationists’ contention that “ABM systems” and “components” might not mean those which are based on future

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11. ABM Treaty, art. II, para. 1.

12. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1974 (1986).

13. *Id.*

14. Rhinelander & Rubin, *supra* note 10, at 5.

(post-1972) technologies is completely overturned by the language of Agreed Statement D. It reads in part: “[T]he Parties agree that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missile, ABM launchers or ABM radars are created in the future. . . .”<sup>15</sup> This phrasing explicitly indicates that an “ABM system” or “component” may indeed be based on forms of technology not available in 1972.

Moreover, unlike article II, the language of Agreed Statement D does indicate that its obligations are limited to certain kinds of systems, those exotic ABM systems with components that may be substituted for ABM missiles, launchers and radars. The “and including” phrasing is precisely the formulation that article II would have been required to utilize, had Sofaer’s analysis of its meaning been correct.

On the other hand, Sofaer is correct that there are some places in the Treaty where the language should be read to mean then-current systems. These are the articles whose language explicitly deals with launchers, interceptor missiles and radars. Examples he does not cite are the specific and limited permissions to deploy given by article III. Of course, the general unspecified prohibition on other deployments also found in article III must include forms of technology other than those available in 1972, by the article II definition.

#### **Textual Analysis: Article V, Paragraph 1 and Agreed Statement D**

Each party undertakes not to develop, test, or deploy ABM systems or components which are sea-based, space-based or mobile land-based.<sup>16</sup> In order to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in [a]rticle 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 components would be subject to discussion in accordance with [a]rticle XIV of the Treaty.<sup>17</sup>

The second key difference between the narrow and broad interpretations lies in the meaning of article V, paragraph 1, and in the implications of Agreed Statement D. The proponents of the narrow interpretation contend that article V, paragraph 1 limits development and testing as well as deployment of space-based exotic systems, even though it does not say so explicitly. Those who support the loose interpretation argue that only Agreed Statement D limits exotic ABMs; and thus testing of such systems is allowed.

The evidence on this point supports the strict interpretation. That is, article V, paragraph 1 includes future systems based on 1972 ABM technology; and therefore Agreed Statement D is not the sole limitation placed by the ABM Treaty on exotic systems. The textual case on article V, paragraph 1 is a simple one. As the previous paragraph demonstrated, the term “ABM system” in article II is functional and includes ABM systems with components beyond the 1972 list. Thus, whenever the term “ABM system” appears in the Treaty text, if

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15. ABM Treaty, Agreed Statement D.

16. ABM Treaty, art. V, para. 1.

17. ABM Treaty, Agreed Statement D.

otherwise unmodified, it includes exotic systems based on forms of technology not yet available in 1972. By definition then, when article V, paragraph 1 forbids development, testing and deployment of mobile ABM systems—including those based in space—a reader must understand this to mean, in the words of article II, any “system to counter strategic ballistic missiles or their elements in flight trajectory.”<sup>18</sup> This means that the narrow interpretationists are correct about the limits on testing in article V, paragraph 1.

The same line of reasoning leads to the conclusion that Agreed Statement D is not the Treaty’s only limit on the deployment of future systems. Article V, paragraph 1 prohibits the deployment of *any* mobile “ABM systems” whether based on land, at sea or in space.<sup>19</sup> Another layer is added by article I which forbids the parties “to deploy ABM systems for a defense of the territory of its country” and pledges them “not to provide a base for such a system.”<sup>20</sup> As Rhinelanders has pointed out, “Space-based and other mobile ABM systems, by their very nature, cannot be confined to a single site, and are therefore nationwide defenses by definition.”<sup>21</sup>

The ban on mobile ABM systems in article V, paragraph 1 would not, by itself, have limited deployment of fixed land-based systems of any description. However, Agreed Statement D requires that deployment of any ABM system or component “based on other physical principles,” be based on negotiation of “specific limitations” and so picks up deployment of land-based systems.<sup>22</sup> Article III, taken with article II as a definitional base, means that, under the Treaty as currently written, deployment of all ABM systems that do not correspond to article III’s launch, missile and radar patterns may not be deployed. Deployment of ABM systems “based on other physical principles” is thus forbidden by a network of articles I, II, III and V, and Agreed Statement D.

It is true, as Sofaer points out, that this network provides a redundant set of limits on deployment.<sup>23</sup> However, Garthoff has a good rejoinder to this point when he argues that “there are other redundancies in the treaty and even in Sofaer’s reconstituted treaty. And there is no rule that you have to have no redundancies.”<sup>24</sup>

### Subsequent Practice

If the language of a treaty is not fully clear, an important potential source of clarification under international law is the subsequent behavior of the parties. Consistent behavior is thought to give evidence of the original intentions of the signatories and even in some cases to lend independent legal weight to their obligations. Unilateral changes in behavior related to a treaty do not generally affect its status.

The definition of what constitutes an ABM system, as supported by the actual behavior of the United States and Soviet Union after signing the ABM

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18. ABM Treaty, art. II, para. 1.

19. ABM Treaty, art. V, para. 1.

20. ABM Treaty, art. I, para. 2.

21. Rhinelanders & Rubin, *supra* note 10, at 5.

22. ABM Treaty, Agreed Statement D.

23. Sofaer, *supra* note 12, at 1976.

24. GARTHOFF, *supra* note 4, at 24.



Treaty, is more difficult to deduce than might appear at first glance. In a rather peculiar and limited sense, subsequent practice supports the argument that the definition of an ABM system is limited to ABM launchers, ABM interceptor missiles and ABM radars. The only "ABM" systems developed, tested or deployed by either the United States or Soviet Union have had these very characteristics.

More importantly for both the definitional issue and the question of limits on development and testing, however, is that the obverse is true. No one contends that either side has undertaken full-scale testing or deployment of a space-based exotic ABM system or its components. No testing or deployment is the outcome one would expect if the strict interpretation of articles II and V is the correct one. Nevertheless, as Sofaer and others have pointed out, the weight of this fact is weakened by the sheer technical difficulties which would have been encountered had either the United States or the Soviet Union desired to act differently.

Lack of opportunity for actual practice lends special importance to statements indicating the U.S and Soviet positions on the issue. In this case, public officials and official publications of both nations have routinely used the term "ABM system" in a functional way to mean any system "to counter strategic missiles or their elements in flight trajectory." Official statements have generally remained consistent with the apparent belief that testing of space-based exotic systems is forbidden by the Treaty.

### Ratification Hearings

The first statements about future technology were made during the ABM Treaty ratification hearings. It is true, as Sofaer argues, that during the ratification hearings many statements on future technology focused on deployment, and not on testing or development.<sup>25</sup> However, these so-called "inconsistencies" cannot be read to support either the broad or narrow interpretation. They are simply not relevant to the central controversies in the reinterpretation debate, since no one on either side argues that deployment is ultimately permissible. As Nunn points out, what Sofaer has not done is to identify any statements requiring a repudiation of the strict interpretation of the Treaty.<sup>26</sup>

There are, however, a number of passages supporting the narrow interpretation. For example, at the beginning of a paragraph in his official report entitled *Future ABM Systems*, then Secretary of State William Rogers wrote, "[Article II, paragraph 1] defines an ABM system in terms of its function as a 'system to counter strategic ballistic missiles or their elements in flight trajectory,'" He noted that these systems "currently" (in 1972) were made up of ABM missiles, ABM launchers and ABM radars.<sup>27</sup> More explicitly on the question of testing and development of exotic systems and components, Acting Army Chief of Staff General Bruce Palmer told the Senate Armed Forces Committee, which was holding hearings on the military implications of the Treaty, that it "does not

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25. Sofaer, *supra* note 12, at 1983.

26. Nunn, *Interpretation of the ABM Treaty, Part I: The Senate Ratification Proceedings*, 133 CONG. REC. S2973 (daily ed. Mar. 11, 1987).

27. *Strategic Arms Limitations Agreements Transmitted to the Congress*, 67 DEP'T ST. BULL. 1 (1972).

prohibit. . .development in the fixed land-based system. We can look at futuristic systems as long as they are fixed and land-based.”<sup>28</sup>

These and other quotations support the conclusion that the executive branch understood the term “ABM system” in a functional sense and apparently believed at the time of its ratification that the Treaty banned development, testing and deployment of space-based ABM systems, as well as components based on unfamiliar forms of technology.

The reports of the Soviet ratification process that have reached the United States are not adequate to judge between the narrow and broad interpretations. Although research was mentioned, there is no evidence that the development and testing of exotic technology was specifically discussed.<sup>29</sup>

### Later Statements

Statements by both U.S. and Soviet officials before MacFarlane’s October 1985 television interview also seem to support a strict interpretation of the ABM Treaty.

For the United States, as Nunn pointed out in a March 1987 speech, Sofaer and the broad interpretationists have “not identified any official statements prior to October 1985 in which the U.S. government expressly took the position that the Treaty permitted testing and development of mobile [or] space-based exotic [systems].”<sup>30</sup> Documents including the Arms Control and Disarmament Agency’s annual compilations of arms control agreements stated from 1972 on that deployment of new ABM technology is not permitted without consultation. Again, however, as with the ratification hearings, this is not a point contented by either side in the ABM Treaty reinterpretation debate.

The president’s annual Arms Control Impact Statements cast light on the development issue. From 1979, when the first detailed impact statement was issued, to the 1985 statement, the last one before the Reagan Administration’s announcement of the broad interpretation, all of the statements explicitly used the term “ABM system” (or its equivalent “ballistic missile defense” (BMD) system) in a way which indicates the term includes systems not based on 1972 technology and makes clear that exotic systems may not be developed or tested. For example, the 1984 report argued, “The ABM Treaty prohibition on development, testing and deployment of space-based ABM systems or components for such systems applies to directed energy technology (or any other technology) used for this purpose.”<sup>31</sup> The evidentiary weight of the Arms Control Impact Statements is enhanced when one recognizes that they were compiled through a rigorous interagency process before submission to Congress.

There were also strong indications before the announcement of the Reagan Administration position that the Soviet Union did not consider the limits on

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28. *Military Implications of the Treaty on the Limitation of Anti-Ballistic Missile Systems and the Interim Agreement on Limitation of Strategic Offensive Arms: Hearings Before the Senate Comm. on the Armed Forces*, 92nd Cong., 2nd Sess. 443 (1972) (statement of Gen. Palmer).

29. See GARTHOFF, *supra* note 4, at 76 (quoting Grechko, *An Important Contribution to Strengthening Peace and Security*, *Pravda*, Sept. 30, 1972) and Rhineland, *supra* note 8, at 139.

30. Nunn, *Interpretation of the ABM Treaty Part II: The Subsequent Practice*, 133 CONG. REC. S3091 (daily ed. Mar. 12, 1987).

31. FISCAL YEAR 1984 ARMS CONTROL IMPACT STATEMENTS, H.R. DOC. No. 382-15, 98th Cong., 1st Sess., at 266-267 (1983).

testing and development on the Treaty to refer exclusively to 1972-era technology or components. One example arose in March 1976 during the second round of the Strategic Arms Limitation Talks. Soviet Ambassador Victor Karpov, who had been involved in the negotiations surrounding article II of the ABM Treaty, opposed using the word "currently" in one of the provisions of the new text. It had been appropriate in article II of the ABM Treaty, said Karpov, because that Treaty had been unlimited in time, and new kinds of systems had been expected to emerge.<sup>32</sup>

Even more to the point, Colonel General Nikolai Chervov, in charge of Soviet arms control matters for the Soviet General Staff, said in an April 1983 interview that the ABM Treaty, and article V, paragraph 1 in particular, "bans both sides from developing [an ABM] defense based on new physical principles—lasers, microwave radiation beam weapons and so forth."<sup>33</sup> General Secretary Mikhail S. Gorbachev, Chief of the General Staff Sergei Akhromeyev and other Soviet officials also made statements consistent with the strict interpretation of the Treaty in the period before the reinterpretation.<sup>34</sup>

Soviet official opinion continues publicly to support the strict interpretation. There is no reliable way, however, to determine whether there is merit in the argument that the Soviet's sole motive is to keep the United States bound by the strict interpretation. Therefore, Soviet statements made after October 1985 will not be examined in this paper. The fact that the Soviets have since objected to the reinterpretation does have some legal weight, though, since if they had not, the new position could be considered legally acceptable to them.

It is clear that between 1972 and 1985, in both the United States and the Soviet Union, the official treatment in action and word of the development and testing of "new technology" ABM systems corresponded to the narrow interpretation of the ABM Treaty. That this was not a central issue does not affect the status or direction of the relevant practice.

It is also true that both sides made statements about the acceptability of such research. Undoubtedly, research was undertaken by both sides. Moreover, both sides said that, under the Treaty, deploying exotic systems was unacceptable without prior negotiation. Such statements are simply not relevant to the reinterpretation debate, although they affect both nations' BMD programs, because these issues are not in debate by either side. Thus, it is correct to say that the broad Reagan Administration interpretation of the Treaty on the testing question was a new phenomenon and that the strict interpretation was, and is, the traditional one.

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32. Garthoff, *U.S. and Soviet Subsequent Practice Under the ABM Treaty: History Confirms the Traditional Meaning*, 17 *ARMS CONTROL TODAY* 17 (Sept. 1987).

33. GARTHOFF, *supra* note 4, at 82 (quoting from an interview with Chervov in *Pravda* (Bratislava edition), Apr. 29, 1983).

34. See, e.g., Garthoff, *supra* note 32, at 18 (quoting an interview with Akhromeyev in *Pravda*, June 4, 1985) and *Gorbachev Interview*, *TIME* (Sep. 9, 1985). There are also reports of a May 1985 statement by a member of the Soviet delegation to the Standing Consultative Commission, see *infra* note 52 and accompanying text, asserting that new forms of ABM technology could not be tested in space. See GARTHOFF, *supra* note 4, at 82; Statement by Rhineland before the Subcomm. on Arms Control, Internat'l Security and Sci. of the House Comm. on Foreign Aff., 98th Cong., 1st Sess. (Feb. 26, 1987).

### ABM Negotiation History

It is in the ABM Treaty's negotiation history that the strongest evidence for the broad interpretation can be found. On balance, however, even in this area the strict interpretation of the Treaty seems the more likely one. There are two critical points related to the Treaty's negotiation history that lend plausibility to the traditional strict interpretation.

The first is the position of the American negotiators. In 1971 presidential advisors instructed them to obtain a ban on testing and development, as well as deployment, of futuristic mobile systems. The delegation received these instructions in National Security Decision Memorandum (NSDM) 127, which was dated August 12, 1971.<sup>35</sup> The negotiators were told, however, to leave the door open for testing and developing new kinds of fixed systems such as the land-based lasers whose future seemed so bright at the time. Nevertheless, they were instructed to seek to prevent the deployment of any kind of novel system without prior amendment to the Treaty. This was not an easy charge, especially since they were also to avoid advertising the loophole they were trying to create.<sup>36</sup>

At the time, members of the U.S. delegation believed they had achieved their goal. For example, in his role as legal counsel, Rhinelandt wrote a series of memoranda registering "open" and "settled" issues in the Treaty text and recording the delegation's consensus on the meaning of various articles. His final memo, dated May 20, 1972, read in part, "[Article V, paragraph 1] prohibits the development, testing, or deployment of. . .[any] device capable of substituting for an ABM launcher, ABM interceptor missile or ABM radar that is sea-based, air-based, space-based or mobile land-based (such as an air-based 'killer' laser)."<sup>37</sup> With the exception of Nitze, who later became a Reagan Administration official, the major negotiators continue to believe that the ABM Treaty does not allow the development and testing of mobile systems "based on other physical principles."<sup>38</sup>

The second major point in favor of the strict interpretation stems directly from the history of article V, paragraph 1 and Agreed Statement D. The delegation originally proposed a single draft article in response to NSDM 127. The first paragraph of the article was supposed to limit development, testing, and deployment of mobile systems, explicitly including "other devices to perform the functions of" ABM launchers, ABM interceptor missiles, and ABM radars.<sup>39</sup> The draft article's second paragraph was supposed to limit deployment of *any* exotic ABM system, including fixed systems. Thus, the original intent of the delegates

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35. *Part I: Language and Negotiating History*, 133 CONG. REC. S6626-27 (daily ed. May 19, 1987) (containing NSDM 127, Aug. 12, 1971, as well as several other negotiation documents declassified by the State Dep't Off. of the Legal Advisor) [hereinafter OLA Declassified Negotiation History].

36. *Id.*

37. Memorandum from John Rhinelandt to the U.S. Arms Control Delegation, entitled *Article by Article Analysis of the ABM Treaty* (May 24, 1974).

38. See Smith, Keeny, Rhinelandt & Garthoff, *Sofaer's Last Stand?*, 17 ARMS CONTROL TODAY 14-16 (Oct. 1987) and address by Nitze to the Johns Hopkins School of Advanced International Studies, entitled *Interpreting the ABM Treaty* (Apr. 1, 1987).

39. OLA Declassified Negotiation History, *supra* note 35, at S6627 (quoting declassified Negotiation Document A-408).

in regard to the text became article V, paragraph 1 was partly to limit new forms of technology. The two clauses were split because the Soviets were prepared to limit the mobile systems in September 1971, but were not willing to agree to limit deployment of future fixed systems until February.<sup>40</sup>

U.S. negotiators agreed to remove the specific references to exotic technology in what ultimately became article V, paragraph 1 only because the Soviet delegation assured them that the novel systems and components were still covered by the new language. In early September 1971, the Soviets proposed that the article read that the parties would not develop, test or deploy "mobile land-based, air-based or space-based ABM systems or their components." Karpov, the chief Soviet negotiator on article V, told the Americans on September 15 that his proposal "obviate[d] the requirement for the phrase 'other devices for performing the functions of these components.'"<sup>41</sup> In response to an American question, he agreed "that the Soviet text meant 'any type of present or future components' of ABM systems."<sup>42</sup>

Karpov's statement is highly significant. Not only did it make possible the American acceptance of the Soviet language, but it is the strongest possible evidence that the Soviets accepted the American position on development and testing of exotic space-based systems. As Nunn has pointed out, Karpov's reply "was an authoritative statement made by the senior Soviet official handling this matter at a formal negotiation session that had been called for the express purpose of concluding a final deal on this issue."<sup>43</sup>

On the other hand, the plausibility of the broad interpretation is enhanced by the fact that, in the fall of 1971, the Soviet draft of article II specifically defined ABM in terms of components, and not by function. Moreover, the Soviets continued to object to limits on future systems later on in the fall of 1971, after the draft proposal that became article V, paragraph 1 was accepted.

Of these two points, the second presents a more serious objection. That the Soviets in late 1971 still limited article II's definition of "ABM system" to stated components is not a real problem for strict interpretationists since, as early as September 2, Karpov acknowledged that the Treaty would ultimately include limits wider than the components listed in article II. He specifically mentioned the proposed article on mobile systems.<sup>44</sup> Furthermore, negotiators on both sides frequently used the term "ABM system" and "future ABM systems" in ways that indicated they meant to include exotic technology.<sup>45</sup>

Questions raised by continued Soviet objections can be settled by remembering that there were many good reasons why the Soviets continued to object to undefined technology—reasons that had nothing to do with mobile ABM systems. In particular, in the fall of 1971, the Soviet delegation had not yet

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40. GARTHOFF, *supra* note 4, at 53, 62 and 68.

41. OLA Declassified Negotiation History, *supra* note 35, at S6629 (discussing Negotiation Document A-503).

42. *Id.*

43. Nunn, *Interpretation of the ABM Treaty Part IV: An Examination of Judge Sofaer's Analysis of the Negotiating Record*, 133 CONG. REC. S6814 (daily ed. May 20, 1987).

44. OLA Declassified Negotiation History, *supra* note 35, at S6644-45 (Negotiation Document A-540).

45. *Id.* at S6656 and S6659-60 (Negotiation Documents A-613 and A-677).

agreed to the other part of the American draft article, to wit, the banning of *all* futuristic systems, including fixed land-based lasers. In the context of the time, when opposing future systems the Soviets need not have specified fixed land-based systems. The correct understanding of the unmodified term would have been clear to both sides since the disposition of mobile systems had already been settled.<sup>46</sup>

On several occasions, the Soviet delegation explicitly endorsed the limitation on new kinds of systems. For example, negotiator Vadim Chilutsky said in December 1971, "The prohibition on air-based, space-based, land-based [and other] ABM systems is adequate to cover the problem of future systems."<sup>47</sup>

Perhaps equally important, the Soviets expressed worry that the ABM Treaty could be used to degrade their air defense system, especially their surface-to-air missiles and radars. This is a thread running through the negotiations surrounding article II as well as the two U.S. draft articles on future systems.

The importance of the air defense issue to the Soviets is illustrated by the following example. In December 1971, the Soviets rapidly abandoned all objections to a functional definition of ABM systems in article II when the Americans added the connecting phrase "currently consisting of" between the Americans' functional definition and the Soviets' list of components.<sup>48</sup> This new formulation gave a functional definition of ABM systems, which for the first time distinguished between exotic technologies and air defense, since air defense technology was excluded from the list of current components of an ABM system. When they objected to unspecified future systems, the Soviets were making sure that upgraded air defense was not being forbidden by article II. They needed to know just what the U.S. delegation had in mind when it wanted to limit future systems.<sup>49</sup> Neither side addressed the subject specifically. Both sides were trying to acquire information about the shape of the other's research into exotic land-based technology, such as lasers. At the same time, however, negotiators were averse to sharing information about their own country's programs. The mutual fishing expedition did nothing to help the clarity of the written record.

On balance, then, the strict interpretation of the ABM Treaty seems to better explain its negotiators' intentions, as evidenced by what survives and has been declassified from the written record. The U.S. participants clearly intended to limit development, testing, and deployment of space-based and other mobile exotic systems, and to ban only deployment of fixed ABM systems. The Soviets apparently agreed to this, although they accepted the ban on testing, development and deployment of novel mobile systems more easily than the ban on deployment of fixed systems based on new principles. There are genuine ambiguities in the record, but there are good reasons to conclude that most apparent inconsistencies come from trying to interpret a written record of a dynamic—and deliberately confusing—negotiating process, and doing so apart from the context in which it was written.

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46. GARTHOFF, *supra* note 4, at 53-54 and Nunn, *supra* note 43, at S6817.

47. OLA Declassified Negotiation History, *supra* note 35, at S6656 (Negotiation Document A-613).

48. GARTHOFF, *supra* note 4, at 44.

49. Rhineland & Rubin, *supra* note 10, at 8.

### CONCLUSION

After looking closely at the ABM Treaty text, the subsequent practice of the two parties and the unclassified portion of the negotiating record, the most sensible conclusion is that both parties to the Treaty intended its prohibitions on testing and development to cover space-based technology not based on familiar principles and components. They wrote this language into the Treaty in 1972 and have consistently so acted and spoken since. They also apparently intended to allow development and testing of exotic, fixed, land-based systems, but while preventing actual deployment without amendment to the Treaty. In 1972, this latter point was probably more important to the parties than was controlling potential space-based systems, as the introduction of fixed laser systems appeared to be just over the horizon. The more general prohibition on the deployment of exotic technologies may be redundant, but it is not inconsistent with a desire to limit mobile ABM systems even more closely than fixed ones. In light of these conclusions, it would seem that a more proper description for the narrow interpretation would actually be the "rigorous interpretation," because its position is so well supported by so many forms of evidence.

In actual practice, the Reagan Administration never violated its understanding of the strict interpretation of the ABM Treaty. Congress put it on notice that no test during fiscal years 1987 or 1988 that violated the narrow interpretation would receive funding, although the Administration was able to negotiate an agreement to keep the congressional limitation from being explicitly linked to the Treaty. In the summer of 1988, there was no indication that Congress would allow any wider testing during fiscal 1989—that is, up until September 30, 1989. Indeed, a legislative desire for even tighter reins on testing and a decided preference for fixed, land-based technology, at least for the short run, seemed to be the rule in both the authorization and appropriations committees of the House and Senate.

For the Bush Administration, future history will depend on a number of factors. While Vice President, Bush was a strong supporter of President Reagan's Strategic Defense Initiative. Bush supported development and testing of new ABM technology, including SDI. He held on several occasions that such testing and development did not violate the ABM Treaty.<sup>50</sup> But whether President Bush's Administration can put its leader's views into practice will depend on the disposition of the 101st Congress. There is also the issue of bureaucratic and technical momentum. As even a limited strategic defense research program develops a history and a constituency, more realistic tests and even deployment—inside or outside the traditional interpretation—are likely to become more politically attractive. Thus the debate over the implications of the ABM Treaty for SDI is by no means dead yet.

It is important to keep the argument over the testing of space-based exotic systems in context, however. Even if the strict interpretation of the treaty is applied to SDI, it would not keep the program confined to the laboratory. This is partly because a number of key concepts in the ABM Treaty are not defined in purely legal terms.

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50. See, e.g., *Candidate's Forum: The Republicans*, 18 *ARMS CONTROL TODAY* 9 (March 1988).

For instance, article II says that an "ABM system" currently consists of ABM launchers, ABM interceptor missiles and ABM radars. Article V, paragraph 1 says that mobile ABM systems and components may not be developed, tested or deployed. But nowhere in the Treaty are components defined. The negotiating record is clear on the point that "adjuncts" to ABM launchers, ABM interceptor missiles and ABM radars are permitted—but what is an "adjunct?" Agreed Statement D says that "components capable of substituting for" missiles, launchers and radars may not be deployed. Does that mean all testing of mobile components is subject to the threshold? Would a system that was "popped up"—that is, one launched on warning of an attack but not permanently based in space—be considered mobile? Is there a line, other than the ability to verify activity by national technical means, that can distinguish clearly permitted research from forbidden development and testing? Does a verification threshold mean that, if the other side can detect something, it is forbidden? What if the test in question does not involve an ABM "component?" Even the question of what constitutes an ABM system or component "based on other physical principles" remains open. Are kinetic energy weapons "based on other physical principles?" They would destroy ballistic missiles in flight by breaking them up with guided or unguided pellets. This proposal follows the same basic principle as a bullet fired from a gun—or a slingshot—but is it covered by the Treaty?

The only specific guidance on testing comes from article IV's requirement that tests be kept to agreed test ranges and from a 1978 Agreed Statement giving some criteria for the term "tested in an ABM mode." Neither of these offers much advice on testing technologies aside from ABM launchers, ABM interceptor missiles or ABM radars, though.

So far, SDI has kept to what the Defense Department has concluded is the narrow interpretation by keeping voltage and sensing capabilities down; by not linking "sub-components" into networks where they would constitute a system (component?) capable of substituting in its entirety for one of the familiar three; and, most of all, by not aiming the new technology at any object in ballistic orbit. As early as 1990, however, a test has been scheduled which would involve the simulation of a Soviet missile in flight. Would tracking it constitute a test of an "ABM component" in "an ABM mode?" Many arms control advocates would say so, although the Pentagon has argued in the negative.

Moreover, tests of antisatellite weapons are currently forbidden by Congress, but apparently not by the ABM Treaty. Much of the technology useful against satellites may also prove to have BMD capabilities. Judgment may become even more difficult in the future as scientists develop technology that does not correspond precisely to the purpose of one of the traditional components, *e.g.*, a directed energy weapon that has, in addition to its ability to destroy warheads, a capacity to discriminate between reentry vehicles and decoys.

Even with a rigorous interpretation forbidding development and testing of exotic space-based ABM technologies, there are many critical questions remaining to be answered about just what is permitted and what is forbidden. These should be dealt with in the Standing Consultative Commission created by the Treaty<sup>51</sup>

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51. ABM Treaty, art. XIII, para. 1.



or by other bilateral bodies or even at summit meetings between the U.S. and Soviet heads of state. They should not be further obfuscated by doubtful interpretations of matters that traditionally had been relatively clear.

Both sides in the debate see the broad interpretation as a first step in the breaking down of the ABM Treaty—or of the United States breaking out. Thus a final reason for careful consideration before accepting a new interpretation of the Treaty is the importance of the Treaty itself, both as a military entity and as a symbol of successful arms control. Supporters of the ABM Treaty believe it has been a successful limitation on an otherwise irresistible technology that, first of all, could have led to an expensive arms race; second, would have been destabilizing in a crisis; third, was politically unpopular in areas of potential deployment; and fourth, would have been easy to overwhelm in any event in an era of developing multiple warhead technology.<sup>52</sup> Treaty supporters also argue that seriously weakening or destroying the Treaty could discredit the arms control process in general by decapitating its most prominent member. If any of these problems hold for future ballistic missile defense—and many independent scientists and scholars believe they do—it would be a powerful argument against threatening the stability provided by the ABM Treaty.

At this stage, considerably more must be learned about the potentialities of BMD before any rational decision can be made about the deployment of any system much beyond a limited fixed-site one. Notably, a study sponsored by the American Physical Society in 1987 concluded that it will be a decade or longer before scientists can make any informed judgments about how well directed energy weapons will perform as BMD components.<sup>53</sup> An Office of Technology Assessment study issued during the spring of 1988 warned that adequate research plans have apparently not been laid in order to counter a number of potential Soviet anti-SDI countermeasures.<sup>54</sup> Compounding this is the danger of depending on intricate computer software that cannot be fully field tested before the day it is called upon to coordinate the national defense. The combination of problems, the study concluded, would leave a “significant probability” of the system’s “catastrophic failure” in the event of war. These are grim assessments. But even if these conclusions turn out to be overly pessimistic, Americans clearly have not yet the knowledge to make a sensible decision on strategic grounds, let alone economic or political ones, about deploying SDI.

A limited, fixed-site BMD system employing launchers and missiles within defined ceilings, such as that advocated by Nunn and his Senate allies, would be permissible under the ABM Treaty. A decision to go forward with such a system must take into account many factors, strategic, political and economic. Much, if not all, of what the United States needs to know about more advanced systems can be discovered over the next decade or so, and within the parameters of the narrow interpretation. In the meantime, it would be both unnecessary and

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52. OFF. OF TECH. ASSESSMENT, *BALLISTIC MISSILE DEFENSE TECHNOLOGIES 51-54* (1985) (contains overview of arguments against ABM defenses).

53. See generally AM. PHYSICAL SOC’Y, *SCIENCE AND TECHNOLOGY OF DIRECTED ENERGY WEAPONS* (1987).

54. See generally OFF. OF TECH. ASSESSMENT, *SDI: TECHNOLOGY, SURVIVABILITY AND SOFTWARE* (1988).

imprudent to rupture the ABM Treaty in order to pursue a technology whose value to the United States is at best open to question.

**APPENDIX: TREATY BETWEEN THE UNITED  
STATES OF AMERICA AND THE UNION OF  
SOVIET SOCIALIST REPUBLICS ON THE  
LIMITATION OF ANTI-BALLISTIC MISSILE  
SYSTEMS\***

The United States of America and the Union of Soviet Socialist Republics, hereinafter referred to as the Parties,

Proceeding from the premise that nuclear war would have devastating consequences for all mankind,

Considering that effective measures to limit anti-ballistic missile systems would be a substantial factor in curbing the race in strategic offensive arms and would lead to a decrease in the risk of outbreak of war involving nuclear weapons,

Proceeding from the premise that the limitation of anti-ballistic missile systems, as well as certain agreed measures with respect to the limitation of strategic offensive arms, would contribute to the creation of more favorable conditions for further negotiations on limiting strategic arms,

Mindful of their obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons,

Declaring their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to take effective measures towards reductions in strategic arms, nuclear disarmament, and general and complete disarmament,

Desiring to contribute to the relaxation of international tension and the strengthening of trust between States,

Have agreed as follows:

**ARTICLE I**

1. Each Party undertakes to limit anti-ballistic missile (ABM) systems and to adopt other measures in accordance with the provisions of this Treaty.

2. Each Party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense, and not to deploy ABM systems for defense of individual region except as provided for in Article III of this Treaty.

**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 ABM mode;

(b) ABM launchers, which are launchers constructed and deployed for launching ABM interceptor missiles; and

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\* 23 U.S.T. 3437, T.I.A.S. No. 7503 (1972).

(c) ABM radars, which are radars constructed and deployed for an ABM role, or of a type tested in an ABM mode. . . .

### **ARTICLE III**

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

(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 [intercontinental ballistic missile] 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 the 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.

### **ARTICLE IV**

The limitations provided for in Article III shall not apply to ABM systems or their components used for development or testing, and located within current or additionally agreed test ranges. Each Party may have no more than a total of fifteen ABM launchers at test ranges.

### **ARTICLE V**

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. . . .

### **ARTICLE XIII**

1. To promote the objectives and implementation of the provisions of this Treaty, the Parties shall establish promptly a Standing Consultative Commission, within the framework of which they will:

(a) consider questions concerning compliance with the obligations assumed and related situations which may be considered ambiguous;

(b) provide on a voluntary basis such information as either Party considers necessary to assure confidence in compliance with the obligations assumed;

(c) consider questions involving unintended interference with national technical means of verification;

(d) consider possible changes in the strategic situation which have a bearing on the provisions of this Treaty. . . .

### **ARTICLE XIV**

1. Each Party may propose amendments to this Treaty. Agreed amendments shall enter into force in accordance with the procedures governing the entry into force of this Treaty.

2. Five years after entry into force of this Treaty, and at five year intervals thereafter, the Parties shall together conduct a review of this Treaty. . . .

**AGREED STATEMENT 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 components would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty. . . .