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SDI AND THE LAWYERS: EVOLVING INTERPRETATIONS OF INTERNATIONAL ARMS CONTROL ACCORDS

The December 1987 Soviet-American summit produced an important understanding regarding President Ronald Reagan's Strategic Defense Initiative (SDI).¹ While media attention focussed on the dramatic signing of the Intermediate-Range Nuclear Force (INF) Treaty,² the superpowers' informal agreement on SDI

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1. SDI envisions the creation of a highly sophisticated defensive system designed to render the United States invulnerable to ballistic missile attack. President Reagan's dramatic televised address to the nation on March 23, 1983, is generally credited for giving birth to the program, although the concept of ballistic missile defense (BMD) had existed for some decades prior to the Reagan Administration. See Address of President Reagan to the Nation on Defense and National Security, 1 PUB. PAPERS 437 (Mar. 23, 1983). Soon after his speech, the media dubbed the President's plan "Star Wars," borrowing the name of a popular science fiction film. In January 1984, in response to the recommendation of the Fletcher Committee, the President formally established SDI as a federal research and technology program. The Department of Defense chartered the Strategic Defense Initiative Organization (SDIO) in April 1984 to coordinate achievement of SDI's goals. See STRATEGIC DEFENSE INITIATIVE ORGANIZATION, REPORT TO THE CONGRESS ON THE STRATEGIC DEFENSE INITIATIVE I-1 (1987) [hereinafter SDIO REPORT]. Later in 1984, the President asked for an annual funding rate of \$4 billion, to be increased in later years, for the SDIO and related programs. Carnesale, *The Strategic Defense Initiative*, in AMERICAN DEFENSE ANNUAL: 1985-1986 at 191 (1985). Congress has shown reluctance to grant the President's full SDI budget requests. For instance, Reagan's request for a fiscal year 1988 appropriation of \$5.8 billion for SDI was slashed in both House and Senate versions of the annual defense authorization bill. See National Defense Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-180, §221, 101 Stat. 1055 (1988) [hereinafter Nat'l Def. Auth. Act]. The Senate approved \$4.5 billion for SDI in 1987 and the House \$3.12 billion; the compromise reflects an understanding arrived at between the Administration and Congress on whether SDI complies with certain U.S. treaty obligations. See *infra* note 44-46 and accompanying text. Towell, *\$13 Billion Pared From '88 Pentagon Spending*, 46 CONG. Q. WEEKLY REP. 55, 56 (Jan. 9, 1988) and *Legislative Summary: Defense* 45 CONG. Q. WEEKLY REP. 3217 (Dec. 26, 1987). See *infra* notes 44-46 and accompanying text. Policymakers led by U.S. Sen. Sam Nunn (D-Ga.), chairman of the Armed Services Committee, have proposed substantially reorienting and limiting SDI to create a program that would principally serve to protect the nation against accidental Soviet launches. Towell, *Nunn Suggests Redirecting the SDI Program*, 46 CONG. Q. WEEKLY REP. 154 (Jan. 23, 1988).

Literally hundreds of books, articles and governmental reports trace the growth of SDI and discuss its impact on technology, arms control and foreign policy. A representative sampling follows. See generally R.W. TUCKER, G. LISKA, R.E. OSGOOD & D.P. CALLEO, SDI AND U.S. FOREIGN POLICY (1987); THE STAR WARS DEBATE (S. Anzovin ed. 1986); PROMISE OR PERIL: THE STRATEGIC DEFENSE INITIATIVE (Z. Brzezinski ed. 1986); THE STAR WARS CONTROVERSY (S.E. Miller & S. VanEvera eds. 1986); THE STRATEGIC DEFENSE INITIATIVE: NEW PERSPECTIVES ON DETERRENCE (D.G. Dallmyer ed. 1986); L. PRESSLER, STAR WARS (1985); A. CHALFONT, STAR WARS (1985) and S.D. DRELL, P.J. FARLEY & D. HOLLOWAY, THE REAGAN STRATEGIC DEFENSE INITIATIVE: A TECHNICAL, POLITICAL AND ARMS CONTROL ASSESSMENT (1984).

2. In essence, the INF Treaty bans intermediate-range nuclear forces. According to data exchanged by the two governments at the December 7, 1987, signing ceremonies, the Treaty would eliminate a total of 859 U.S. and 1,836 Soviet missiles from the nations' arsenals. The Treaty also provides for the removal of some 2000 warheads, mainly Soviet. However, this number remains inexact because the missiles to be eliminated include many that carry no warheads or that the nations have not yet deployed. Further Treaty provisions mandate the removal from Europe of U.S. warheads slated for use on West German INF missiles, the mutual exchange of resident inspection teams at missile assembly plants in both the U.S. and U.S.S.R., detailed

may prove to be as influential as the INF accord. By "agreeing to disagree"³ on whether SDI comports with U.S. treaty obligations, Reagan and General Secretary Mikhail S. Gorbachev declined to confront a difficult issue.⁴ Nonetheless, future accords still very much depend upon whether the superpowers can ultimately reach an understanding on SDI.⁵

Domestically, the debate over SDI is not confined to the technological or arms control arenas, but implicates international and constitutional law as well.⁶ SDI is subject to legal obstructions posed by several international agreements to which the United States is a party. These agreements, most notably the 1972 Anti-Ballistic Missile (ABM) Treaty with the Soviet Union⁷, potentially limit certain aspects of the research, deployment and composition of continental defense systems.⁸ According to one interpretation of the ABM Treaty⁹, SDI has already

procedures for INF missile inspection, removal and destruction and detailed procedures for Treaty compliance verification. *See Rules, Timetables: What the Pact Would Do*, 46 CONG. Q. WEEKLY REP. 150 (Jan. 23, 1988) and N.Y. Times, Dec. 9, 1987, at A1, col. 1 and A24, col. 1.

The Senate ratified the INF Treaty on May 27, 1988, by a vote of 93—5. 134 CONG. REC. S6937 (daily ed. May 27, 1988). *See also* Hook, Morehouse & Towell, *Senate Votes 93—5 to Approve Ratification of the INF Treaty*, 46 CONG. Q. WEEKLY REP. 1431 (May 28, 1988). The INF Treaty became effective when President Reagan and General Secretary Gorbachev exchanged documents of ratification. *See* 134 CONG. REC. S7137 (daily ed. May 27, 1988) (discussing ratification procedure) and Felton, *Moscow Summit: Upbeat Tone, Limited Results*, 46 CONG. Q. WEEKLY REP. 1513 (June 4, 1988).

3. After President Reagan and General Secretary Gorbachev signed the INF accord, the Administration released a joint U.S.-Soviet communique regarding SDI. The communique, which one congressional commentator called "studiedly ambiguous," did not resolve the debate over whether or not proposed testing of SDI components violated the 1972 Anti-Ballistic Missile Treaty between the Soviet Union and the United States. *See infra* note 7 and accompanying text. The Administration claimed the communique permitted SDI-related tests in outer space, in accordance with Reagan's "nonrestrictive" interpretation of the Treaty. *See infra* notes 40-44 and accompanying text. Gorbachev gave no such interpretation of the communique. Towell, *Old Adversaries Turn to Pragmatic Diplomacy*, 45 CONG. Q. WEEKLY REP. 3023 (Dec. 12, 1987) and N.Y. Times, Dec. 11, 1987, A1, col. 3.
4. Indeed, Reagan and Gorbachev's 1986 summit in Reykjavik, Iceland, foundered almost at the outset on the issue of SDI. Towell, *supra* note 3, at 3023 and N.Y. Times, *supra* note 3, at A1, col. 3.
5. *See* Towell, *On SDI and Long-Range Missiles: A Combination of Punting and Progress*, 45 CONG. Q. WEEKLY REP. 3026 (Dec. 12, 1987) and N.Y. Times, Dec. 9, 1987, at A34, col. 1 (editorial).
6. *See generally* Parkerson, *International Legal Implications of the Strategic Defense Initiative*, 116 MIL. L. REV. 67 (1987); *The Legal Issues In the ABM Treaty Fuel Debate Over the SDI Program*, 45 CONG. Q. WEEKLY REP. 272 (Feb. 14, 1987); Kennedy, *Treaty Interpretation and the Executive Branch: The ABM Treaty and "Star Wars" Testing and Development*, 80 AM. J. INT'L LAW 854 (1985); Note, *International Law Implications of the Strategic Defense Initiative*, 38 OKLA. L. REV. 893 (1985); *Prognosis for an Ex-virgin (The 1972 ABM Treaty)*, ECONOMIST 292 (Nov. 2, 1985) and Note, *The Legality of a High-Technology Missile Defense System*, 78 J. INT'L LAW 418 (1984).
7. 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], President Richard Nixon and General Secretary Leonid Brezhnev signed the ABM Treaty in Moscow on May 26, 1972. The U.S. Senate ratified the Treaty on August 3, 1972, and it took effect on October 3, 1972.
8. According to the Department of Defense, SDI involves a space-based defense system with five integrated functions: surveilling Soviet ICBM launch sites, tracking missiles through their trajectories, identifying missiles and distinguishing them from decoys, intercepting and destroying missiles and warheads, and coordinating and controlling the disparate components of the system. DEP'T OF DEFENSE, *DEFENSE AGAINST BALLISTIC MISSILES: AN ASSESSMENT OF TECHNOLOGIES AND POLICY IMPLICATIONS* 15-16 (1984).
9. *See infra* notes 30-31 and accompanying text.

placed the United States in anticipatory violation of treaty provisions.¹⁰ Analysts have proposed several solutions to alleviate this tension between the treaties and SDI.¹¹

This note surveys international agreements that SDI may violate and discusses the policies underlying these potential legal and diplomatic conflicts. Part I provides an overview of the ABM Treaty, with emphasis on the provisions involved in the present interpretation controversy. Part II considers five other international covenants containing provisions upon which SDI may ultimately encroach. Part III evaluates several policy proposals that would permit SDI to proceed consistently with American international diplomatic commitments. This part also examines how an outright abrogation of the ABM Treaty or other agreements might affect American credibility and the arms control process.

PART I: THE ABM TREATY AND ITS INTERPRETATIONS

The 1972 ABM Treaty remains the longest-lived product of the first round of Strategic Arms Limitations Talks (SALT I).¹² In drafting the document, American treaty negotiations labored against a backdrop of heated debate at home between those who supported nascent American efforts in the area of ballistic missile defense (BMD)¹³ and those who opposed BMD.¹⁴ Ultimately, the ABM Treaty substantially reflected the viewpoint of BMD opponents.¹⁵

A. Reading the Treaty

In conformity with the doctrine of mutual assured destruction (MAD),¹⁶ article I specifically prohibits either nation from deploying systems designed to

10. *Id.*

11. *See infra* note 102 and accompanying text.

12. *See infra* note 49. The United States and the Soviet Union conducted SALT I from December 1969 to May 1972. It was the first and, until the Senate recently ratified the INF Treaty, the only set of U.S.-Soviet negotiations to produce an accord on nuclear arms. *See generally* Gray, *The Missile Defense Debate In the Early 1970s*, reprinted in PROMISE OR PERIL: THE STRATEGIC DEFENSE INITIATIVE, *supra* note 1.

13. During the 1960's the United States tentatively developed the "Sentinel" system of antimissile missiles designed to protect U.S. population centers from nuclear attack. In early 1969 President Nixon announced a revision of the program, renamed "Safeguard," to defend hardened Minuteman ICBM silos. Gray, *supra* note 12, at 33.

14. In the late 1960's, domestic opponents of missile defense systems put forward three major arguments against BMD, arguments that have resurfaced in current debates over SDI. Opponents argued that, first, Congress should reject BMD because of technological unfeasibility and, second, prohibitive cost. Third, any form of strategic defense would dangerously destabilize the precarious balance between the two superpowers, which purportedly rested upon the nations' shared fear that offensive action by one would invite massive retaliation by the other. This doctrine of "mutual assured destruction" (MAD) had guided arms control theory throughout the 1960's, and strongly influenced both nations' decisions to adopt the ABM Treaty. *Id.* at 33-37. As Gerard Smith, former ambassador to the Soviet Union and one of the principal architects of SALT I, pointed out, "[e]ven in the event that one of the sides was the first to be subjected to attack, it would undoubtedly retain the ability to inflict a retaliatory blow of destructive force. It would be tantamount to suicide for the ones who decided to start the war." G. SMITH, *DOUBLETALK: THE STORY OF SALT I* at 83 (1980). Marshal N. V. Ogarkov, Chief of the Soviet General Staff, echoed Smith's remarks when he commented in the official Red Army newspaper that "in contemporary conditions only suicides can wager on a first nuclear strike." *Krasnaya Zvezda*, Sept. 23, 1983, at 1.

15. *See supra* note 14.

16. *Id.*

provide blanket protection of that nation's entire territory.¹⁷ Article III permits each country to build and maintain missile defense systems to protect two specific areas: the national capital and a single continental ballistic missile (ICBM) launch site.¹⁸ The Treaty limits each of these systems to 100 ABM launchers and a specified number of accompanying radar complexes.¹⁹ None of these restrictions, however, apply to ABM components used solely for testing and development at currently agreed-upon test sites.²⁰

Article V of the Treaty amplifies the above restrictions by prohibiting the deployment, or even the testing and development, of ABM systems or components based in space, in the air, under the sea or in a mobile format on land.²¹ Also, to prevent circumvention of these terms, the parties agreed in article VI not to give ABM capability to any weapons systems primarily designed for other purposes, such as conventional air defense.²²

The Treaty allows each nation to utilize any technical means at its disposal, within the bounds of international law, to verify compliance with the Treaty provisions.²³ Furthermore, the Treaty prevents either nation from trying to subvert the Treaty's goals through deliberate concealment of violative behavior.²⁴ For these and other purposes, article XIII establishes a joint Standing Consultative Committee (SCC) comprised of American and Soviet representatives, charged with the duty of continually examining the Treaty in light of changing external circumstances.²⁵ Article XIV of the Treaty specifically authorizes amendments designed to enhance the Treaty's viability.²⁶ Article XIV also calls for bipartisan review of the entire Treaty every five years.²⁷ Finally, article XV, while giving the Treaty unlimited duration,²⁸ allows for either party "in exercising its national sovereignty" to withdraw from the Treaty six months after giving notice of its intention to withdraw.²⁹

17. ABM Treaty, *supra* note 7, art. I, para. 2.

18. *Id.* at art. III.

19. *Id.*

20. *Id.* Agreed-upon test sites for the U.S. are the White Sands and Kwajalein Missile Ranges.

21. *Id.* However, as pointed out by Richard Godwin, Undersecretary of Defense for Acquisition, in testimony before a Senate subcommittee, "nowhere does the ABM Treaty [prohibit] 'research.' Neither the U.S. nor the Soviet delegations to the SALT II negotiations believed that it was possible to verify limitations on research." *Compliance of the SDI Program With the ABM Treaty: Hearings Before the Subcomm. on Strategic Force and Nuclear Deterrence of the Senate Armed Services Comm.*, 100th Cong., 1st Sess. 6 (1987) [hereinafter *Compliance Hearings*]. The Office of the Undersecretary of Defense for Acquisition is one of the principal U.S. governmental units responsible for overseeing compliance of new weapons with international agreements.

22. ABM Treaty, *supra* note 7, art. VI.

23. *Id.* at art. XII, para. 1.

24. *Id.*

25. *Id.* at art. XIII, para. 1, lists potential areas which the SCC should monitor. These include changes in relevant defense technologies, compliance levels of the parties, attempts by either nation to subvert or evade the Treaty and possible amendments. *Id.*

26. *Id.* at art. XIV, para. 1.

27. *Id.* at art. XIV, para. 2.

28. *Id.* at art. XV, para. 1.

29. Each superpower, under art. XV, para. 2, retains "the right to withdraw from [the] Treaty if it decides that extraordinary events related to the subject matter of [the] Treaty have jeopardized its supreme interests." *Id.*, art. XV, para. 2. The Treaty requires a withdrawing party to furnish the other with six months' prior notice and a statement of reasons for its withdrawal. *Id.* The recently ratified INF Treaty contains a nearly identical escape proposal in its art. XV. See *supra* note 2 and accompanying text.

B. Interpreting the Treaty

Since SDI contemplates a BMD of continental scope, its actual deployment as envisioned would breach article I of the ABM Treaty.³⁰ Furthermore, the Treaty even limits testing and development of a BMD to stationary, land-based BMD systems.³¹ Article V does not clearly state just what proportion of such a land-based system the U.S. could place in space.³² According to the Pentagon and the Strategic Defense Initiative Organization, this uncertainty has forced the United States to infer certain compliance standards from the black letter of the Treaty.³³

Another source of debate over ABM Treaty interpretation arises out of the document's treatment of new technologies.³⁴ Particle beams, chemical lasers, hypervelocity rail guns and other so-called "exotic" weapons systems have enjoyed consideration as components of proposed BMD systems.³⁵ Naturally, the ABM Treaty does not mention many of these new technologies; many did not yet apply to BMD at the time of the Treaty or did not yet exist.³⁶ This failure presents

30. "In general as a lawyer I would call the whole strategic defense program an anticipatory breach of contract." G. Smith, *New Wine in Old Bottles: The Reagan Administration's "New Interpretation" of the ABM Treaty*, reprinted in THE STRATEGIC DEFENSE INITIATIVE: NEW PERSPECTIVES ON DETERRENCE at 55, *supra* note 1. See also M. Smith, *The Legal Implications of Missile Defense*, reprinted in PROMISE OR PERIL: THE STRATEGIC DEFENSE INITIATIVE 381, *supra* note 1, and Chayes & Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper*" 99 HARV. L. REV. 1956, 1957 (1986).
31. "No ABM component other than a fixed land-based component may be 'tested in an ABM mode.' The term 'tested in an ABM mode' is specifically addressed in a classified agreed statement negotiated in 1978 between the U.S. and U.S.S.R. in the Standing Consultative Commission." *Compliance Hearings*, *supra* note 21. See also Chayes & Chayes, *supra* note 30, at 1957.
32. This is due in part to the absence in the Treaty or its Agreed Statements of any strict definition of "components" as opposed to "system." SDIO REPORT, *supra* note 1, at D-2.
33. In doing this, the Department of Defense has proceeded under three "working principles." These hold: (1) that compliance should be based on objective assessments of each nation's capabilities so that no double standard develops; (2) that the Treaty does not limit research and testing short of field testing of a prototype ABM component or system and (3) that the Treaty restricts only defenses against strategic ballistic missiles and not those against other forms of nuclear weaponry (such as cruise missiles, nonstrategic missiles, etc.). *Id.* at D-2 through D-3.
34. M. Smith, *supra* note 30, at 384.
35. According to SDIO, the U.S. has begun or contemplates seventeen major experiments involving such exotic systems. Principal among these: the ALPHA program, which is developing a ground-based device designed to demonstrate the feasibility for defensive purposes of space-based infrared hydrogen-fluoride lasers; the SKYLITE program, a ground-based non-ABM capable laser and laser-guidance system undergoing testing at White Sands; the ground-based Free Electron Laser program, also located at White Sands; the Hypervelocity Rail Gun research program, which will evaluate whether or not precision-guided kinetic munitions can be successfully launched from ground-based guns and other programs which are examining the feasibility of space-based kinetic kill vehicles. Because of budgetary limitations in fiscal 1988, the Neutral Particle Beam Technology Integration Experiment has been significantly reduced in scope. SDIO REPORT, *supra* note 1, at D-8 through D-14. For a critical assessment of these and other SDI research programs, see Clausen & Brower, *The Confused Course of SDI*, TECH. REV. 60 (Oct. 1987).
36. In recognizing the potential for technological development after 1972, Agreed Statement D amplifies art. XIII:
 In order to ensure fulfillment of the obligation not to deploy ABM systems and their components, . . . the Parties agree that in the event ABM systems based on other physical principles [than those outlined in the Treaty] . . . are created in

particular difficulties in interpreting article II, which defines "ABM system" as one designed "to counter strategic ballistic missiles or their elements in flight trajectory."³⁷ The principal question posed by recent Treaty interpreters asks whether or not new BMD systems that do not technically consist of "launchers", "radar" and so forth, infringe upon article I's broad proscriptions.³⁸

Most analysts during the decade or so following the Treaty's adoption apparently assumed that article I prohibited continental ABM defenses, regardless of their makeup.³⁹ A number of policy makers still adhere to this view, and bitterly criticize the current form of the SDI proposal.⁴⁰ The Reagan Administration labeled the viewpoint of these policymakers the "restrictive" interpretation of the ABM Treaty.⁴¹

The Reagan Administration, has argued since 1985 that it has not violated the Treaty by developing and testing "exotic" weapons systems that the Treaty does not specifically prohibit, *i.e.*, space-based weapons systems.⁴² The Administration maintained that Agreed Statement D provides for discussion between the parties to determine the status of not-yet-envisioned weapons systems.⁴³ Thus, SDI could move forward under Agreed Statement D even if the "restrictive" interpretation holds.⁴⁴

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.

23 U.S.T. 3456, T.I.A.S. 7503.

37. The ABM Treaty defines an "ABM system" as "currently consisting of: (a) ABM interceptor missiles . . . (b) ABM launchers . . . and (c) ABM radars." 23 U.S.T. at 3439.

38. Chayes & Chayes, *supra* note 30, at 1957.

39. G. Smith, *supra* note 29, at 57.

40. *See, e.g., Center for Defense Information, Star Wars Reality: The Emperor Has No Clothes*, 17 THE DEFENSE MONITOR 1 (Jan. 1988); Pike, *Goals of the ABM Treaty*, 40 F.A.S. PUB. INTEREST REP. 1 (Sep. 1987); R. McNAMARA, BLUNDERING INTO DISASTER 92 (1986); G. Smith, *supra* notes 15 and 30; Chayes & Chayes, *supra* note 30 and Clausen & Brower, *supra* note 35. *See also supra* note 6.

41. OFFICE OF THE LEGAL ADVISER, U.S. DEPT. OF STATE, THE ABM TREATY STUDIES, PART I: TREATY LANGUAGE AND NEGOTIATING HISTORY 7-10 (1987) [hereinafter STATE DEP'T STUDY] and Sofaer, *The ABM Treaty and the SDI Program*, reprinted in THE STRATEGIC DEFENSE INITIATIVE: NEW PERSPECTIVES ON DETERRENCE 59, 61, *supra* note 1.

42. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972, 1974 (1986). The Reagan Administration's dissatisfaction with the ABM Treaty predates SDI. American negotiators began the autumn 1982 round of U.S.-Soviet Strategic Arms Reduction Talks (START) with a plenary statement criticizing the ABM Treaty and linking U.S. compliance with START success. S. TALBOTT, DEADLY GAMBITS 317-21 (1984).

43. The Reagan administration read article II as referring "only to ABM systems and components based on physical principles underlying conventional systems then in existence [1972]." The Administration therefore concluded that the Treaty permits the creation of substitute ABM systems and components based on new principles, but prohibits their deployment without further agreement with the Soviets as to specific limitations. STATE DEP'T STUDY, *supra* note 41, at 10-11. Sofaer, *supra* note 37, at 63.

44. The State Department has considered yet a third interpretation of the Treaty, which, in the words of its legal experts, is "an even broader view." It holds that the Soviet Union and the United States are permitted to deploy exotic weapons systems based on newly developed principles, even if the parties disagree on specific limitations. This interpretation also derives from Agreed Statement D, and focuses on its failure to unequivocally prohibit the deployment of exotic devices. Even so, the State Department feels that the rest of the Treaty's language casts "grave doubt" on the validity of this interpretation. STATE DEP'T STUDY, *supra* note 41, at 11.

Congress has resolved the debate in favor of the traditional restrictive interpretation of the ABM Treaty. Autumn 1987 deliberations over defense appropriations saw both the Senate and House amend the annual authorizations bill to ban testing of BMD systems in space.⁴⁵ Furthermore, under a compromise reached with Reagan Administration aides, the House resolved that in 1988 no SDI testing would take place that would conflict with the restrictive interpretation.⁴⁶

PART II: OTHER TREATIES RESTRAINING SDI

In addition to the ABM Treaty, the United States has entered into several other arms agreements that pose potential obstacles to SDI.⁴⁷ These agreements include the Limited Test Ban Treaty,⁴⁸ SALT I,⁴⁹ SALT II,⁵⁰ the Non-Proliferation Treaty,⁵¹ and the Threshold Test Ban Treaty.⁵²

A. Limited Test Ban Treaty

On August 5, 1963, the United States, the United Kingdom and the Soviet Union signed the first treaty that limited the use of weapons in outer space,⁵³

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45. Both houses of Congress voted to amend their respective defense appropriations bills by considerable margins. The Senate, particularly, dealt the Reagan Administration a blow by rejecting, 58 votes to 38, Republican attempts to remove the Levin-Nunn restrictive interpretation rider from the Senate defense authorization bill for fiscal year 1988. Towell, *Senate Deals Reagan a Major Defeat on SDI*, 45 CONG. Q. WEEKLY REP. 2228 (Sep. 29, 1987).
 46. The compromise, Nat'l Def. Auth. Act, *supra* note 1, permitted the Pentagon to plan for more extensive SDI testing in fiscal year 1989 and beyond, but refused to allow procurement in 1988 of hardware to conduct such future tests. In return for these concessions, Congress gave the Administration slightly greater SDI funding, *i.e.*, \$3.62 billion, than what an exact average between House (\$3.12 billion) and Senate (\$4.5 billion) figures would have produced. *Legislative Summary: Defense*, *supra* note 1, at 3217.
 47. For other discussions of treaties that relate to the Strategic Defense Initiative, see Gallagher, *Legal Aspects of the Strategic Defense Initiative*, 111 MIL. L. REV. 11 (1986); Parkerson, *supra* note 6; Article, "Star Wars": *An International Legal Analysis*, 3 CAN.-AM. L.J. 169 (1986); Goldman, *The Strategic Defense Initiative: Star Wars and Star Laws*, 9 Hous. J. INT'L L. 111 (1986); Note, *The Legality of President Reagan's Proposed Space-Based Ballistic Missile Defense System*, 14 GA. J. INT'L & COMP. L. 329 (1984); Zedalis, *On the Lawfulness of Forceful Remedies for Violations of Arms Control Agreements: "Star Wars" and Other Glimpses at the Future*, 18 N.Y.U. J. INT'L L. & POL. 73 (1985); Sherr, *Legal Issues of the "Star Wars" Defense Program*, 16 U. Tol. L. REV. 125 (1984); Wulf, *Arms Control—Outer Space*, 11 J. SPACE L. 67 (1983) and Bridge, *International Law and Military Activities in Outer Space*, 13 AKRON L. REV. 649 (1980).
 48. Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, *opened for signature* Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 430 [hereinafter Limited Test Ban Treaty]. This treaty has several common names: the Limited Test Ban Treaty, the Nuclear Test Ban Treaty, the Peaceful Nuclear Explosions Treaty, and the Treaty on Underground Nuclear Explosions for Peaceful Purposes.
 49. Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures with respect to the Limitation of Strategic Offensive Arms, May 26, 1972, 23 U.S.T. 3463, T.I.A.S. 7504 [hereinafter SALT I].
 50. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms with Protocol, June 18, 1979 [hereinafter SALT II] (not ratified by the United States).
 51. Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 [hereinafter Non-Proliferation Treaty].
 52. Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests, July 3, 1974 [hereinafter Threshold Test Ban Treaty] (not ratified by the United States).
 53. Danielson, *Examination of Proposals Relating to the Prevention of an Arms Race in Outer Space*, 12 J. SPACE L. 1, 2 (1984) and U.S. ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS 34-40 (1982).

the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, commonly referred to as the Limited Test Ban Treaty.⁵⁴ Article III provides that any state may adopt the treaty⁵⁵ and most countries have indeed done so.⁵⁶

The crux of the Limited Test Ban Treaty is article I, which prohibits "any nuclear weapon test explosion, or any other nuclear explosion" in the atmosphere, outer space or underwater.⁵⁷ The Treaty does not ban underground nuclear explosions that do not cause "radioactive debris to be present outside the territorial limits" of the conducting state.⁵⁸ According to article IV, any party may withdraw from the Treaty upon three months notice if extraordinary events have jeopardized the supreme interests of that party.⁵⁹

In view of these provisions, the Limited Test Ban Treaty constrains SDI systems involving nuclear explosions. An example of such a system is the proposed Excalibur X-ray laser BMD system that relies upon nuclear explosions in outer space for laser energization.⁶⁰ The Treaty does not prohibit research, testing, and deployment of a SDI system if the research, testing, and deployment does not involve an actual nuclear detonation in the atmosphere, outer space or underwater. However, the Treaty would permit an underground nuclear detonation in developing SDI.

B. Strategic Arms Limitations Treaties

The Interim Agreement Between the United States of America and the Union of Soviet Socialist Republics on Certain Measures With Respect to the Limitation of Strategic Offensive Arms (SALT I) was concluded on May 26, 1972, simultaneously with the ABM Treaty.⁶¹ The Senate approved the agreement and it became effective on October 3, 1972.⁶² It was to remain in effect for five years, unless a subsequent, more complete agreement replaced it sooner.⁶³ SALT I complemented the ABM Treaty by limiting competition in offensive strategic missiles until further negotiations could reach more conclusive results.⁶⁴ As the end of the five-year effective period approached, the United States and the Soviet Union realized that they could not complete a successive agreement before SALT I expired. On September 23, 1977, Secretary of State Cyrus Vance issued a Unilateral Policy Declaration stating that the United States would not take any action inconsistent with SALT I⁶⁵ and thus indefinitely extended the coverage of SALT I without Senate approval.

Negotiations continued, as required by article VII of SALT I,⁶⁶ and on June 18, 1979, the United States and the Soviet Union entered into the Treaty Between

54. Limited Test Ban Treaty, *supra* note 48.

55. *Id.*, art. III.

56. U.S. Arms Control and Disarmament Agency, *supra* note 53, at 40.

57. Limited Test Ban Treaty, *supra* note 48, art. I, § 1.

58. *Id.*

59. *Id.*, art. IV.

60. Note, "Star Wars": An International Legal Analysis, *supra* note 47, at 179.

61. SALT I, *supra* note 49.

62. Pub. L. No. 92-448, 86 Stat. 746 (1972).

63. SALT I, *supra* note 49, art. VII, § 2.

64. *Id.* Preamble.

65. 77 DEP'T ST. BULL. 642 (1977).

66. SALT I, *supra* note 49, art. VII.

the United States of America and the Union of Soviet Socialist Republics on the Limitation of Strategic Offensive Arms (SALT II).⁶⁷ The SALT II Treaty provided for an effective period extending through December 31, 1985,⁶⁸ but the Senate never ratified the Treaty and it expired. Nevertheless, President Reagan initially declared that the United States would abide by SALT II as long as the Soviet Union continued to do likewise.⁶⁹ Recently, however, President Reagan announced that the United States would no longer abide by SALT II.⁷⁰

Currently, neither SALT I nor SALT II legally binds the United States. SALT "understandings" declared by the president or other government officials have no legal effect, since the Arms Control and Disarmament Act prohibits any agreement the terms of which obligate the United States to limit its armaments without express congressional authority.⁷¹ Nevertheless, because some authorities suggest that the SALT documents have some legal consequence, this note discusses the impact of these agreements on SDI.⁷²

SALT I and II restricted the development and number of offensive strategic arms. SDI potentially threatens compliance with the numerical limits set by the SALT agreements by pressuring the Soviet Union to build up offensive strategic missiles to overcome the ABM defenses. The consequence could be an arms race in precisely those areas most critical to future negotiations between the United States and Soviet Union, namely large multiple independent reentry vehicles and cruise missiles.⁷³

Although the SALT agreements generally apply to strategic offensive weapons, article IX of SALT II may apply to some systems contemplated by SDI. Article IX forbids placing nuclear weapons into earth orbit.⁷⁴ Depending on how literally the SALT II drafters intended "earth orbit" to be used, article IX could

67. SALT II, *supra* note 50.

68. *Id.* art. XIX.

69. On May 3, 1982, President Reagan stated, "as for existing arms agreements, we will refrain from actions which undercut them so long as the Soviet Union shows equal restraint." 18 WEEKLY COMP. PRES. DOC. 730 (1982). More recently, on June 10, 1985, President Reagan reaffirmed this position by stating, "I have decided that the United States will continue to refrain from undercutting existing strategic arms agreements to the extent that the Soviet Union exercises comparable restraint and provided that the Soviet Union actively pursues arms reduction agreements in the currently on-going nuclear and space talks in Geneva." 21 WEEKLY COMP. PRES. DOC. 771 (1985).

70. On May 27, 1986, President Reagan announced that the United States considered the SALT II limitations a nullity. He stated that the United States would pressure the Soviet Union for a replacement treaty to reduce superpower arsenals. The Administration's change in policy resulted, in part, from announcements that planned arming of a 131st B-52 bomber with air-launched cruise missiles later that year would exceed SALT II limits. President Reagan emphasized that he would take Soviet action on arms control into account before exceeding SALT II limits. Wash. Post, June 13, 1986, at A1, col. 2. On November 28, 1986, the United States did in fact deploy a B-52 bomber capable of carrying cruise missiles. This gave the U.S. a total of 131 cruise missile-carrying B-52 bombers and thereby exceeded the SALT II limits. Wash. Post, Nov. 29, 1986, at A1, col. 1 and A2, col. 5.

71. 22 U.S.C. § 2573 (1982).

72. *E.g.*, Bridge, *supra* note 47, at 654.

73. Clausen, *SDI in Search of a Mission*, 2 WORLD POL'Y J. 267 (1985).

74. "Each Party undertakes not to develop, test, or deploy . . . systems for placing into Earth orbit nuclear weapons or any other kind of weapons of mass destruction, including fractional orbital missiles . . ." SALT II, *supra* note 50, art. IX, §(1c).

prohibit the nuclear powered X-ray laser that would briefly pass through outer space, but would not enter a full earth orbit.⁷⁵

C. Non-Proliferation Treaty

The Treaty on the Non-Proliferation of Nuclear Weapons opened for signature on July 1, 1968⁷⁶ and has become the most widely accepted arms control treaty, with more than 125 signatory nations.⁷⁷ The Treaty revolves around article I, which prohibits nuclear weapon states from transferring nuclear technology to non-nuclear nations.⁷⁸ Similarly, article II prohibits non-nuclear weapon states from receiving or manufacturing nuclear weapons or nuclear explosive devices.⁷⁹ The Treaty does not prohibit non-nuclear weapon states from independently designing their own nuclear weapons or nuclear explosive devices.

Although the nuclear powered X-ray laser proposed as a component of SDI is not a nuclear weapon, it requires a nuclear explosive device to generate the X-ray.⁸⁰ Consequently, any plea from the United States for allied participation in research on the nuclear powered X-ray laser must exclude non-nuclear weapon allied states such as the Federal Republic of Germany, Italy and Japan.⁸¹ The United States may, however, induce and assist nuclear weapon states such as Great Britain and France to participate in such SDI research.⁸² The Treaty would not allow the United States to transfer to any state, nuclear or non-nuclear, a completed SDI system involving the nuclear powered X-ray laser.

D. Threshold Test Ban Treaty

On July 3, 1974, the United States and the Soviet Union signed the Treaty Between the United States of America and the Union of Soviet Socialist Republics, commonly referred to as the Threshold Test Ban Treaty.⁸³ The Treaty prohibits underground testing of nuclear weapons exceeding 150 kilotons.⁸⁴ Each party undertook the responsibility of verifying compliance by using national technical means⁸⁵ and agreed not to interfere with the national technical means of the other party.⁸⁶ The Senate never ratified the Treaty and thus it does not legally bind the United States.

The Limited Test Ban, SALT I, SALT II and the ABM Treaties also include provisions not to interfere with national technical means of treaty verification.⁸⁷

75. J. POURNELLE & D. ING, MUTUAL ASSURED SURVIVAL 101-02 (1984).

76. Non-Proliferation Treaty, *supra* note 51.

77. Adelman, *Bureau of Public Affairs, U.S. Dep't of State, Current Policy No. 730, reprinted in SDI: SETTING THE RECORD STRAIGHT* 3 (1985).

78. Parties to the Treaty shall not "transfer to any recipient . . . nuclear weapons or other nuclear explosive devices or control over such weapons or devices . . . ; and not in any way assist, encourage, or induce any non-nuclear-weapon State to manufacture, or otherwise acquire." Non-Proliferation Treaty, *supra* note 51, art. I.

79. *Id.*, art. II.

80. J. POURNELLE & D. ING, *supra* note 75, at 58-61.

81. Parkerson, *supra* note 6, at 145.

82. *Id.*

83. Threshold Test Ban Treaty, *supra* note 52.

84. *Id.*, art. I., § 1.

85. *Id.*, art. II, § 1.

86. *Id.*, art. II, § 2.

87. Sherr, *supra* note 47, at 135.

These provisions restrain SDI, since any space-based weapon that could destroy a ballistic missile could also destroy a satellite that serves as a national technical means of verification.⁸⁸

PART III. LEGAL AND POLICY IMPLICATIONS OF IMPLEMENTING SDI

The Strategic Defense Initiative is the culmination of the rise of a national nuclear arms policy fundamentally at odds with the doctrine of MAD.⁸⁹ The Reagan Administration embraced a new deterrence theory known as the "national defense" or "mutually assured survival" theory, which finds its roots in perception theory and the concept of extended deterrence.⁹⁰ A synopsis of the evolution of this theory illuminates the backdrop against which the current policy controversy concerning SDI unfolds.

Proponents of perception theory believe that superiority in numbers of nuclear armaments translates into political advantage in international affairs. While MAD theorists assert that no need exists for exact numerical equivalence of the nuclear arms possessed by either side,⁹¹ perception theorists argue that since 1972 the novelty of nuclear weapons has dissipated, and these weapons have come to be regarded as just another component of each nation's warfighting arsenal.⁹² Thus, the side with the greater number of nuclear weapons will ultimately exert the greater influence in world affairs. This theory resulted in the Jackson Amendment to SALT I.⁹³ Because the SDI program offers a means of

88. *Id.*

89. Arms control and political linkage had failed under the MAD regime. It followed then, that arms control should be less an exercise in political change and more a functional exercise in meeting national security interests, primarily extended deterrence. Also, national security was to be sought less in international cooperation and more in unilateral action.

Smith, *The Separation of Arms Control Talks, The Redefinition of Arms Control and Strategy*, 15 J. INT'L STUDIES 143 (Summ. 1986).

90. *Id.*

91. The amendment proposed by Senator Fulbright during the course of the SALT I Interim Agreement ratification debate is typical of this pragmatic approach. This approach encouraged the President to continue "negotiations to achieve further limitations on offensive nuclear weapons systems with the Union of Soviet Socialist Republics on the basis of overall equality, parity and sufficiency, taking into account all relevant qualitative and quantitative factors pertaining to the strategic nuclear weapons systems of the Union of Soviet Socialist Republics and the United States of America." 118 CONG. REC. 30623 (1972). Senator Jackson responded that the "Fulbright amendment would undermine the current negotiating position of the U.S. Government by justifying on a permanent basis the numerical disparities in the Soviet Union's favor that the President has accepted only on an interim basis." *Id.* at 30624.

92. [Thus] the United States cannot simply focus on the relationship between the number of survivable American warheads and the number of meaningful Soviet targets. The United States should also be concerned with comparisons of the gross number of weapons on each side. Apparently, perception theory seeks to respond to the false belief that American weapons effectively cancel out Soviet weapons the same way a sword or more troops can offset their counterparts.

Kull, *Nuclear Nonsense*, 58 FOREIGN POL'Y 28, 29 (1985).

93. The Jackson Amendment was embodied in the joint resolution approving the SALT I Interim Agreement, H.R.J. Res. 1227, 92nd Cong., 2d Sess. (1972), at the insistence of the late Washington Democrat Henry Jackson. Emphasizing the importance of equality, the amendment required "the President to seek a future treaty that, *inter alia*, would not limit the United States to levels of intercontinental strategic forces inferior to the limits for the Soviet Union." See also 118 CONG. REC. 30623 (1972).

gaining the technological edge in the nuclear balance and the position of apparent dominance that such an advantage presents, perception theory accounts for some of the support for SDI.

The second concept of strategic arms control challenging MAD is "extended deterrence,"⁹⁴ though exactly which side of the policy debate it supports is unclear.⁹⁵ The extended deterrence paradigm contemplates that with the demise of the American intermediate range nuclear force in Europe, the North Atlantic Treaty Organization (NATO) must implement a new deterrent to Soviet adventurism.⁹⁶ A shift from the use of intermediate range tactical weapons on the European battlefield to the use of American strategic nuclear weapons directed against Soviet targets should supply the needed deterrent. Proponents believe that the United States needs SDI to reduce the threat of Soviet retaliation against the U.S. mainland by reducing the civilian casualties and improving the survivability of strategic forces to make this threat effective.⁹⁷ Like perception theory, extended deterrence seeks an advantage in American defensive capability (and concomitantly, offensive capability) as the price exacted for the removal of intermediate range nuclear weapons from Western Europe.

The new theory, championed by the Reagan Administration, combines the tenets of perception theory and extended deterrence, resulting in the concept of national defense.⁹⁸ This theory seeks to restructure the nuclear arms equation from the presently existing one, in which each nation's security depends on the goodwill and self-interest of the other not to start a nuclear conflagration, to a position in which each nation internally directs its own security.⁹⁹ Among the benefits attributed to the national defense theory is that it is inherently less volatile.¹⁰⁰ Furthermore, the national defense strategy works with any number of players.¹⁰¹ This rationale found favor in the Reagan Administration, inspiring

94. The recent agreements between U.S. and Soviet arms control negotiators in Intermediate Range Nuclear Forces (INF) has moved this particular theory into the limelight. See, White, *European Perspectives on the Strategic Defense Initiative*, 15 J. OF INT'L STUDIES 211 (Summ. 1985).

95. At issue, in part, is the perennial West European suspicion that the United States seeks to separate itself from Western Europe. Some believe that the United States plans to abandon its security commitments to NATO allies [I]n the near term many in Western Europe would probably see modification of the ABM Treaty as further proof of U.S. . . . disengagement.

Nacht, *ABM ABC's*, 46 FOREIGN POL'Y 155 (1982).

96. "MAD was credible for central deterrence, but of little value for extended deterrence. The United States [holds] other vital interests besides the defense of its homeland" Smith, *supra* note 89, at 150.

97. White, *supra* note 94 and accompanying text.

98. Nitze & Sofaer, *The ABM Treaty and SDI*, 24 ATLANTIC COMMUNITY Q. 255 (Fall 1986) and see *supra* note 89.

99. A predominantly defense oriented nuclear balance would let each nation decide its own destiny under a more stable and secure system. See generally OFF. OF TECH. ASSESSMENT, STRATEGIC DEFENSES 76 (1986).

100. For example, an accidentally launched strategic missile need not result in full scale confrontation as required by the present system's "use them or lose them" mentality. See generally Weinberg & Barkenbus, *infra* note 101.

101. In an arena in which three nuclear-capable superpowers existed, perception theory (and MAD) would indicate an uncontrollable, upwardly spiralling arms race, as each nation would seek to expand its nuclear arsenal to have as many weapons as the two other powers combined. National defense theory, on the other hand, would indicate that each nation need only have sufficient means to minimize the other powers' use of offensive weapons. In a defense-oriented

both the SDI program and the promise of reduction in offensive strategic weapons during SDI deployment.¹⁰²

Although the SDI rationale is seductive in its simplicity and alluring in its promise of future offensive weapons reductions, the transition from an offense-oriented to a defense-oriented nuclear balance involves a number of hazards. Primary among these is the apparent conflict between the SDI goals and the presently existing ABM Treaty.¹⁰³

Two interpretations of the 1972 ABM Treaty presently exist, as noted above. The "restrictive" interpretation¹⁰⁴ limits SDI to laboratory research and development, short of prototype testing. Deployment of any defensive system other than fixed, land-based ABM systems pursuant to article V of the Treaty would require further discussion and agreement between the United States and the Soviet Union. The "broad" interpretation¹⁰⁵ advanced by the Reagan Administration in 1985 contends that the Treaty permits research and development of exotic ABM systems through field testing, but does not allow actual deployment.

As discussed below, three options exist for reconciling the goals of the SDI program with the language of the ABM Treaty. First, the United States could follow the Reagan Administration's broad interpretation of the Treaty.¹⁰⁶ Second, it could acknowledge reinterpretation of the ABM Treaty as a fruitless exercise and open negotiations with the Soviet Union to seek amendment of the ABM Treaty.¹⁰⁷ The last and probably the most destabilizing option, would entail unilateral withdrawal or abrogation of the Treaty by the United States. The choice between the three options: following the broad interpretation of the Treaty, cooperating in amending it or confronting the Soviet Union by abrogating the

world, the powers could strike a balance of offensive strategic nuclear weapons at a much lower level. The impetus for a large number of offensive weapons to assure that some would survive a first attack (a fundamental premise of MAD) would no longer operate. *See*, Weinberg & Barkenbus, *Stabilizing Star Wars*, 54 FOREIGN POL'Y 164 (1984).

102. *See generally* Address of President Reagan to the Nation on Defense and National Security, *supra* note 1. President Reagan envisioned a substantial reduction in the number of offensive nuclear weapons as a key goal, that the United States can attain by the implementation of SDI. The BALLISTIC MISSILE DEFENSE report published by the Office of Technology Assessment in STRATEGIC DEFENSES, *supra* note 99, reflects this policy:

In the absence of coordinated structuring of defenses and offenses on the two sides, the United States would have to anticipate and adapt in advance to a wide range of potential Soviet responses. Even if the cost-exchange ratio between defense and offense favored the defense, the transition period could bring a costly arms competition until the effects of the cost-exchange ratio asserted themselves.

Id.

103. *See supra* note 7.

104. Chayes & Chayes, *supra* note 30, at 1956.

105. Sofaer, *supra* note 42, at 1973.

106. Gross, *Negotiated Treaty Amendment: The Solution to the SDI-ABM Treaty Conflict*, 28 HARV. INT'L LAW J. 31 (Winter 1987).

107. While Professor Nacht's article predates President Reagan's announcement of the Strategic Defense Initiative, it provides an interesting discussion of the alternatives available for dealing with the ABM Treaty in the context of BMD development. "[O]pening up the ABM Treaty to renegotiation and not achieving a new agreement could lead to abrogation of the present treaty and to the collapse of any hope for the continuation of U.S.-Soviet arms control agreement." Nacht, *supra* note 95, at 168. Professor Nacht concludes, however, that "[t]he United States could reconsider renegotiation at . . . the SCC review session . . . if sufficient progress in BMD system development has been made." *Id.* at 174.

Treaty, will have a critical impact on the delicate balance which has existed for several decades.

A. Technical Compliance with the Broad Interpretation of the ABM Treaty

When the Reagan Administration initially launched the SDI program, the Administration envisioned it as a multilayered defense system incorporating exotic space-based laser systems in its first tier of defense.¹⁰⁸ Subsequent research and mounting pressure to obtain immediate results has driven the near-term program away from laser and particle beam systems to kinetic energy (*i.e.*, impact) missiles launched from orbiting space stations.¹⁰⁹ As the near-term program drifts away from the exotic technology towards more commonplace missile technology, the clash with the current ABM Treaty prohibitions becomes more strident.

The major policy issue arising from the adoption of the Reagan Administration's "broad" interpretation of the ABM Treaty concerns legitimacy.¹¹⁰ If the United States pursues a program in technical compliance with a reconstructed Treaty, which some authorities view as nullifying the fundamental purpose of the Treaty, the signal sent to the Soviet Union could be easily misunderstood.¹¹¹ American pursuit of SDI development under the broad interpretation of the ABM Treaty could undermine U.S. credibility in the international forum and denigrate the United States leadership role in world affairs. The United States may have already felt the foreign relations ramifications of adopting this policy in pursuing SDI—the Soviet Union has charged the United States with intentionally violating the ABM Treaty.¹¹²

The domestic understanding of the Reagan Administration's position leads inexorably to the legal issues underlying the interpretation of the ABM Treaty and especially the interplay of the three coordinate branches of government in determining the definitive interpretation of a treaty. The executive branch has the power to make treaties with the "advice and consent" of the Senate.¹¹³ The executive has a plenary role in negotiating treaties.¹¹⁴ Clearly, however, article II

108. SDIO REPORT, *supra* note 1, at II-4.

109. Clausen & Brower, *supra* note 35, at 60.

110. See *supra* note 106 and accompanying text.

111. Nuclear deterrence relies for its effectiveness on the accurate perception by both the U.S. and the Soviet Union of the other party's acts. Where one party's actions are no longer consonant with that party's behavior, the potential exists that incongruous messages will alarm the opponent and jeopardize the existing stability. Such action invites miscalculation by the Soviet Union, whose response may range from rapid deployment of current technology ABM systems to further build up of offensive strategic weapons. See *supra* note 106. See also, Technical Panel on Missile Defense of the George C. Marshall Institute, *SDI: Making America Secure*, 15 NAT'L REV. 36 (Apr. 1988).

112. The commentators suggest that the nicety of technical compliance with the reinterpreted treaty is perhaps geared more towards the U.S. domestic audience than towards the international community. The Soviet Union, in particular, has already rejected such compliance as repugnant to the spirit and the letter of the 1972 agreement. Marshall Akhromeyev, Chief of the Soviet General Staff, referred to the SDI program as a "direct breach" of the ABM Treaty. See Gross, *supra* note 106, at n.88.

113. The executive branch "shall have the Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2.

114. The lofty language of *United States v. Curtis-Wright Export Corp.*, 299 U.S. 304, 319, 57 S. Ct. 216, 220, 81 L. Ed. 255, 262 (1936), clearly states: ". . . the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the senate, but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."

of the U.S. Constitution provides the Senate with a voice in the determination of American commitment to executive agreements and negotiated treaties via the ratification power reserved to it.¹¹⁵ Finally, the role of the judiciary since *Marbury v. Madison* has been "to say what the law is."¹¹⁶

The issue presented by the current controversy over the "correct" interpretation of the ABM Treaty is whether the executive branch can infuse a treaty, presented and ratified by the Senate, with meaning beyond that presented to the Senate during the ratification process. The judiciary's role¹¹⁷ in resolving this dispute seems fairly clear: the interpretation of the ratified treaty as the law of the land should prove no more difficult based on the presentations made to the Senate during the ratification process than other routine judicial construction of federal law based on legislative history.¹¹⁸ The judiciary, however, has been particularly reluctant to intrude into the President's foreign affairs powers.¹¹⁹ The ABM Treaty interpretation controversy concerns not the abrogation of the Treaty, but rather the construction of the "true" meaning of the Treaty as ratified. Despite inherent difficulties in bringing the action,¹²⁰ the case appears to be one in which the powers granted to the three coordinate branches converge. Thus, the judiciary, if it chose, could play a central role in determining the content of the Treaty.¹²¹

115. Article VI provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. See also, Note, *Star Wars meets the ABM Treaty Termination Controversy*, 10 N. CAR. J. INT'L LAW AND COM. REG. 701 (1985).

116. 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60, 73 (1803).

117. Article III, section 2, clause 1 of the United States Constitution provides that "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . and Treaties made, or which shall be made, under their Authority. . . ."

118. Powell, J., concurring, notes that where "no lack of judicially discoverable and manageable standards for resolving" the case exists, the controversy is suitable for adjudication by the court. *Goldwater v. Carter*, 444 U.S. 996, 999, 100 S. Ct. 533, 535, 62 L. Ed. 2d 428, 429 (1979)(mem.).

119. In *Goldwater v. Carter, id.*, the Supreme Court declined to adjudicate an action brought by Senator Goldwater against President Carter for the latter's unilateral decision to abrogate a mutual defense treaty between Taiwan and the United States. Abrogating the treaty enabled the United States to recognize the Beijing government. The Court found the issue a nonjusticiable political dispute, noting that "the Constitution is express as to the manner in which the senate shall participate in the ratification of the treaty, [but] it is silent as to that body's participation in the abrogation of a treaty." 444 U.S. at 1002 (Rehnquist, J., concurring).

120. Generally, before any action posing a dispute between the executive and legislative branches is ready for judicial review, each branch of government must have "taken action asserting its constitutional authority." *Goldwater v. Carter*, 444 U.S. at 997 and see *supra* note 118.

121. The Levin-Nunn provision included in the 1988 defense authorization bill barred the Reagan Administration from abandoning the traditional interpretation of the 1972 ABM Treaty, without congressional consent. See *supra*, note 45. Where the restriction on the executive branch applies in an area over which the President arguably has plenary powers, the constitutional validity of such a provision could be suspect.

Senate ratification of the INF Treaty was subject to executive branch commitment to comply with the Byrd Amendment, which limits the Treaty interpretation powers of the President. The Amendment provides that the U.S. shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification. Such common understanding is based on the text of the Treaty and the President's representations to the Senate. The Amendment further provides that the U.S. shall not agree to or adopt an interpretation different from that common understanding except pursuant to Senate advice and consent to a subsequent treaty or protocol, or enactment of a statute. See 134 CONG. REC. S6853 (daily ed. May 26, 1988). This provision

B. U.S.-Soviet Negotiated Amendment to the 1972 ABM Treaty

A second alternative involves negotiation between the United States and the Soviet Union to amend the ABM Treaty to permit development and deployment of SDI systems by both parties. In spite of the article XV, paragraph 1 provision that "this Treaty shall be of unlimited duration",¹²² the article XIV requirement that the parties meet at five year intervals to "review" the Treaty,¹²³ coupled with the creation of the SCC in article XIII,¹²⁴ indicates that the parties did not regard the Treaty as immutable. Rather, article XIV, paragraph 1 specifically provides that "each party may propose amendments to this Treaty."¹²⁵

Although American attempts to open negotiations with the Soviet Union to amend the Treaty to allow field testing and deployment of SDI could itself provide a public relations bonanza, linkage of the negotiations to sizable reductions in strategic offensive weapons could result in genuine Soviet interest in transforming nuclear arsenals to a defense-oriented balance. Such proposals may be met with greater receptivity by both the U.S. domestic audience and world opinion, and could lend the endeavor an aura of legitimacy which some commentators view the first alternative discussed above as lacking. The concept of defense protected build-down is advanced by several foreign policy commentators as the best means of enhancing national security as well as superpower nuclear stability.¹²⁶ Article XIII empowers the SCC to "consider possible changes in the strategic situation which will have a bearing on the provisions of this Treaty."¹²⁷ The SCC is the logical starting point of any U.S. effort to gain the cooperation of the Soviet Union in substituting the new national defense deterrence theory for the current regime of MAD.

The domestic legal situation surrounding good faith attempts by the United States to open treaty negotiations appears to be less inflammatory than the interpretation controversy. Since it is wholly within the executive branch's province to negotiate treaties with foreign powers, the United States could initiate talks related to the amendment of the ABM Treaty unhampered by congressional action.¹²⁸ The ABM Treaty serves as the cornerstone of U.S.-Soviet arms control agreements. Should the United States go forward with SDI testing, altering the Treaty by amendment rather than by technical compliance with a broad interpretation of the Treaty should improve the chances of preserving cordial relations between the two countries. Even if the parties ultimately cannot reach a consensus

is prophylactic in nature and has no affect on the ABM interpretation controversy. Hook, *supra* note 2, at 1434.

122. See *supra* note 28 and accompanying text.

123. See *supra* note 27 and accompanying text.

124. See *supra* note 25 and accompanying text.

125. See *supra* note 26 and accompanying text.

126. See Weinberg & Barkenbus, *supra* note 101.

127. See *supra* note 25 and accompanying text.

128. *U.S. to Submit Anti-Missile Treaty*, N.Y. Times, Jan. 22, 1988, at A3, col. 4. The proposed treaty codifies the current American position that neither the United States nor the Soviet Union should withdraw from the ABM Treaty through 1994. The Soviet draft of the protocol calls for "compliance and nonwithdrawal" from the ABM Treaty for a 10-year period. The American proposal reflected the Reagan Administration's refusal to engage in negotiations on what testing the ABM Treaty permits, and insisted that this issue be kept separate from the question of continued nonwithdrawal.

on a Treaty amendment, conducting negotiations in good faith reduces the potential for misunderstanding between the parties.

C. Treaty Abrogation

The difficulties in amending or reinterpreting the ABM Treaty may make abrogation of the Treaty a logical step for an administration intent on deploying a strategic defense system. The ABM Treaty¹²⁹ permits either party to withdraw "if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests."¹³⁰ The withdrawing party alone has the responsibility for making a good faith determination of whether events have jeopardized its supreme interests.

The United States entered into the ABM Treaty believing that once the two nations restricted antiballistic missile development, significant offensive weapons control would follow.¹³¹ In an appendix to the Treaty, the United States delegation emphasized: "If an agreement providing for more complete strategic arms limitations were not achieved within five years, U.S. supreme interests could be jeopardized. Should that occur, it would constitute a basis for withdrawal from the ABM Treaty."¹³² Thus, the current absence of a comprehensive U.S.-Soviet strategic weapon limitation agreement may be an extraordinary event which justifies a U.S. withdrawal from the ABM Treaty under article XV.¹³³ International law permits termination of a treaty in conformity with the provisions of the treaty.¹³⁴

Where conditions have changed drastically since the signing of a treaty, another principle of international law—the change of circumstances doctrine, *rebus sic stantibus*—applies.¹³⁵ Article LXII of the Vienna Convention on the Law of Treaties explains that a change of circumstances may not be invoked as a ground for terminating a treaty unless the existence of those circumstances constituted an essential basis of the party's consent to be bound by the treaty, and that party's obligations are substantially altered.¹³⁶ Applying the doctrine to

129. ABM Treaty, *supra* note 7, art. XV, para. 1.

130. *Id.*, art. XV, para 2. The article further provides that the withdrawing party give six months notice prior to withdrawal.

131. According to the MAD rationale, with ABM systems severely limited, neither side would have any incentive to significantly increase its offensive ballistic missile capabilities. W. VAN CLEAVE, *FORTRESS USSR* 13 (1986).

132. ABM Treaty, *supra* note 7, at Unilateral Statement A.

133. It is unclear whether the recent INF accord with the Soviet Union is an "agreement" under Unilateral Statement A. The Reagan Administration believed that the SALT accords do not satisfactorily protect U.S. strategic interests. Since the Senate has not ratified them, the SALT accords may not constitute an "agreement" under Unilateral Statement A. See Note, *The Legality of a High Technology Missile Defense System*, *supra* note 6, at 421.

134. Vienna Convention on the Law of Treaties, U.N. Doc. A/Conf. 39/27 (1969), reprinted in 8 I.L.M. 679, 699 (1969).

135. The policy behind the doctrine of changed circumstances involves the fact that treaties may remain in force for a long time and may place unnecessary burdens on one of the parties due to a fundamental change of circumstances. If the aggrieved party can withdraw from the treaty due to the circumstance, this induces the other party to negotiate a solution by legal means. T.O. ELIAS, *THE MODERN LAW OF TREATIES* 121 (1974).

136. A fundamental change of circumstances which has occurred with regard to those existing at the time of the treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty

the ABM Treaty, the unexpected failure to achieve limitations in offensive weapons may be a fundamental change of circumstances, because the United States identified timely limits in offensive strategic arms as essential to its supreme interests.¹³⁷ Both parties considered progress in limiting offensive strategic arms an essential premise of the ABM Treaty.¹³⁸

For the doctrine of changed circumstances to apply, the absence and failure of arms control agreements must also radically transform the United States obligation not to deploy antiballistic missiles. The current Soviet ICBM force, because of increases in both numbers and capabilities,¹³⁹ poses a greater threat to the United States than it did at the time of the signing of the ABM Treaty.¹⁴⁰ The United States could argue that the failure of arms control and the corresponding improvement in Soviet offensive power has undercut the strategic equality between the superpowers. America based its acceptance of the ABM Treaty upon the doctrine of MAD.¹⁴¹ Inequality in strategic arms deployment renders MAD obsolete.¹⁴² Without the premise of MAD, the United States obligation not to deploy prohibited missile defenses becomes dangerously unrealistic.¹⁴³ Supporters of the Treaty do not consider the failure to limit offensive weapons a fundamental change of circumstances, since both sides have participated in the arms race and have remained in rough parity.¹⁴⁴

unless:

- (a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
- (b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty

Vienna Convention, *supra* note 134, art. LXII, para. 1.

137. See *supra* note 132 and accompanying text.

138. ABM Treaty, *supra* note 7, Preamble. See Parkerson, *supra* note 6, at 126.

139. See G. KEYWORTH, SECURITY AND STABILITY: THE ROLE FOR STRATEGIC DEFENSE 3 (1985). Brzezinski, Jastrow & Kampelman, *Defense in Space is not Star Wars*, N.Y. Times, Jan. 27, 1985, §6 (Magazine), at 28, 29.

140. Speaking before the Senate Armed Services Committee, Assistant Secretary of Defense Richard Perle stated:

It is true that in 1972 the Soviet Union possessed no credible capability to destroy a significant portion of the U.S. ICBM force in a pre-emptive strike. At present, however, the Soviet force of SS-18 Mod 4's alone has the capability to threaten a significant percentage of the U.S. ICBM force. U.S. ICBMs, on the other hand, have no comparable capability to threaten the prompt destruction of the Soviet land-based ballistic missile force.

Soviet Treaty Violations: Hearings Before the Committee on Armed Services, United States Senate, 99th Cong., 1st Sess. 59 (Feb. 20, May 7, 1985), at 50 [hereinafter *Senate Hearings*].

141. See *supra* note 14 and accompanying text.

142. Note that an American nuclear policy shift away from MAD in favor of strategic defense is not in itself a fundamental change of circumstances. The change must be in objective conditions so that a state cannot alter a factor that lies solely within its control to justify a treaty withdrawal under art. LXII. See I.M. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 107 (1973) and Gross, *supra* note 106, at 59.

143. This view holds that the asymmetry in U.S. and Soviet strategic capabilities invites Soviet nuclear risk-taking, since the U.S.'s lack of strategic defense reduces the credibility of U.S. deterrence. See M. DEANE, *STRATEGIC DEFENSE IN SOVIET STRATEGY* 114 (1980).

144. The MX and Midgetman missile systems as well as the hardening of ICBM silos exemplify U.S. responses to Soviet nuclear expansion and the maintenance of strategic equality with the Soviet Union. See Gross, *supra* note 106, at 59.

The degree of parity between U.S. and Soviet strategic forces is difficult to determine because the countries utilize different nuclear weapon delivery systems. See REPORT OF THE PRESIDENT'S COMMISSION ON STRATEGIC FORCES, SCOWCROFT COMMISSION REPORT II at 4 (1984). The Carter

Beyond the failure to limit offensive nuclear weapons, another possible "fundamental change" that has occurred since the signing of the ABM Treaty is the recent development of laser and other advanced technologies.¹⁴⁵ The Treaty's specific provisions for future advances in technology¹⁴⁶ make it unlikely that the U.S. can characterize the emergence of exotic space weapon technology as "not foreseen by the parties," as required by the change of circumstances doctrine.¹⁴⁷ Moreover, the increased attractiveness and feasibility of ballistic missile defense brought about by new technology does not in itself radically transform the United States obligation not to deploy strategic defense systems.¹⁴⁸

Another relevant international law principal concerns the right to terminate a treaty based on a breach of a treaty obligation.¹⁴⁹ Due to the absence of an effective international legal system, the threat of withdrawal for breach is the only means by which parties can ensure that their treaties will be observed.¹⁵⁰ In order to promote stability in international agreements, international law limits the doctrine to withdrawal for material breach only. Article LX of the Vienna Convention defines material breach as "a violation of a provision essential to the accomplishment of the object or purpose of the treaty."¹⁵¹

In 1984, the United States government determined that the radar at Krasnoyarsk in central Siberia violated the ABM Treaty.¹⁵² Yet, despite this finding, the radar installation does not necessarily constitute a material breach that would allow the United States to terminate the Treaty. Because the ABM Treaty attempts to prevent a nationwide ballistic missile defense system in which radar plays an integral part, the provision of the Treaty banning radar (Agreed Statement F) is "essential to the accomplishment of the object or the purpose of the treaty"; therefore, a breach of Statement F would constitute a material breach.¹⁵³ However, the Treaty does allow radar for satellite tracking¹⁵⁴, and the intended use of the Krasnoyarsk radar is disputed.¹⁵⁵

Administration determined that the U.S. and the U.S.S.R. had comparable strategic power. H. BROWN, DEP'T OF DEF. FISCAL YEAR 1982 ANNUAL REPORT 43 (1982). Only two years later the Reagan Administration maintained that "... the Soviets have acquired a margin of nuclear superiority in most important categories." C. WEINBERGER, DEP'T OF DEF. FISCAL YEAR 1984 ANNUAL REPORT 34 (1984).

145. See *supra* note 35 and accompanying text.

146. ABM Treaty, *supra* note 7, Agreed Statement D.

147. Vienna Convention, *supra* note 134, art. LXII, para 1.

148. Note, *Star Wars Meets the ABM Treaty: The Treaty Termination Controversy*, *supra* note 115, at 721.

149. Vienna Convention, *supra* note 134, art. LX, para. 1. For a review of the withdrawal for material breach doctrine, see B. SINHA, UNILATERAL DENUNCIATION OF TREATY BECAUSE OF PRIOR VIOLATIONS OF OBLIGATIONS BY OTHER PARTY 5, 34 (1966).

150. See 2 Y. B. INT'L L. COMM'N 253, 255 (1966).

151. Vienna Convention, *supra* note 134, art. LX, para. 3.

152. *The President's Unclassified Report to Congress on Soviet Noncompliance with Arms Control Agreements*, reprinted in *Senate Hearings*, *supra* note 140, at 21.

153. ABM supporters assert that the Krasnoyarsk radar violates the express language of the Treaty, but the radar is only of marginal importance. Bundy, Kennan, McNamara & Smith, *The President's Choice: Star Wars or Arms Control*, 63 FOREIGN AFF. 264, 275 (1985).

154. ABM Treaty, *supra* note 7, Agreed Statement D.

155. The Soviet Union maintains that it intends to use the Krasnoyarsk radar only for satellite tracking. A Central Intelligence Agency study that concluded that the installation was not well designed to serve as an antiballistic missile radar supports this contention. See Gordon, *CIA is Skeptical that New Soviet Radar is Part of an ABM Defense System*, NAT. J. 523, 526 (Mar. 9, 1985). But see Wall St. J., Feb. 25, 1988, at 20, col. 1.

Although the Krasnoyarsk radar may be a technical violation of the Treaty, the United States, in order to confer legitimacy on its actions, should base its case for abrogation on blatant and unequivocal Soviet violations.¹⁵⁶ Due to the complexities and consequences of determining material Treaty violations, the United States has chosen not to use the Krasnoyarsk radar situation as grounds for termination of its Treaty obligations.

When applied to the ABM Treaty, neither the right to terminate a treaty for material breach nor the doctrine of changed circumstances offers an indisputable reason to abrogate. Using these international law doctrines to supplement the withdrawal provisions of the Treaty,¹⁵⁷ the United States can legally withdraw from the ABM Treaty. However, this is an extremely limited conclusion, since termination of the ABM Treaty, while legal, may have a chilling effect on U.S.-Soviet relations and impair the United States overall reputation as a treaty partner.

Although the United States might legally terminate the ABM Treaty under international law, neither domestic nor international law indicates which branch of the United States government has the authority to abrogate the Treaty. The Constitution, while designating the Executive and the Senate as the treaty-making institutions,¹⁵⁸ does not state which branch has the power to terminate treaties. Moreover, the dual nature of a treaty—it functions as both an agreement with a foreign country and a law of the United States—means that termination must be effective both internationally and domestically. Clearly, the President, with the approval of two thirds of the Senate, can terminate the domestic and foreign status of the ABM Treaty. The widespread support of the arms control process and the controversial nature of SDI, however, make a congressional mandate against the ABM Treaty unlikely. The issue of whether the President, acting alone, can abrogate the Treaty becomes increasingly important as SDI progresses to the advanced research and deployment stage.

Constitutional scholars have long debated the issue of treaty termination.¹⁵⁹ Those against unilateral presidential termination of treaties emphasize the historical role of Congress in taking such action.¹⁶⁰ Since treaties are the law of the United States, treaty abrogation by the President alone usurps the lawmaking authority of Congress and blurs the separation of powers.¹⁶¹ Proponents of the President's authority contend that the power to terminate treaties is part of the

156. Gross, *supra* note 106, at 54.

157. ABM Treaty, *supra* note 7, art. XV. See *supra* notes 130-134 and accompanying text.

158. U. S. CONST. art. II, §2, para. 2.

159. For a brief overview of the opinions of those commentators who espouse the President's unilateral treaty termination power, see SENATE COMM. ON FOREIGN RELATIONS, 95TH CONG. 2D SESS., MATERIALS ON TERMINATION OF TREATIES: THE CONSTITUTIONAL ALLOCATION OF POWER, reprinted in M. GLENNON & T. FRANCK, UNITED STATES FOREIGN RELATIONS LAW VOLUME II 378-79 (1980). For a discussion of those experts who assert that legislative participation is needed to terminate a treaty see SENATE COMM. ON FOREIGN RELATIONS, 96TH CONG. 1ST SESS., REPORT OF THE COMMITTEE ON FOREIGN RELATIONS, reprinted in M. GLENNON & T. FRANCK, *supra* at 432-33.

160. Scheffer, *The Law of Treaty Termination as Applied to the United States De-Recognition of the Republic of China*, 19 HARV. INT'L L.J. 931, 1008 (1978). See also E. CORWIN, THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS 115 (1917).

161. McDougal & Reisman, *Who Can Terminate Mutual Defense Treaties?*, NAT'L L.J. 19 (May 21, 1979).

President's plenary power to conduct foreign relations.¹⁶² In the absence of express constitutional limitations on the President's power to terminate treaties, "there is a strong presumption that no such limitation was intended."¹⁶³

*Charlton v. Kelly*¹⁶⁴ provides some guidance in this unsettled area of constitutional law. In *Charlton*, the plaintiff alleged that Italian Government violations of the U.S.-Italy extradition treaty invalidated the treaty.¹⁶⁵ The Supreme Court concluded that since the executive department waived its right to terminate the treaty, it remained in force.¹⁶⁶ The Court recognized the President's power to unilaterally determine the status of a treaty that another party had violated.¹⁶⁷ The *Charlton* case supports a President's power to unilaterally terminate the ABM Treaty, only for a withdrawal based upon a Soviet breach¹⁶⁸ or a fundamental change of circumstances.¹⁶⁹

The presidential power recognized in *Charlton* differs markedly from the power to affirmatively terminate a validly binding international agreement, such as the ABM Treaty. The Supreme Court recently refused to decide a case involving such an affirmative termination. In 1978 President Jimmy Carter, acting without legislative consent, notified the Republic of China that the United States was withdrawing from a defense treaty between the two nations.¹⁷⁰ President Carter wanted to end the treaty not as a result of any treaty violations, but as a step toward the recognition of the Beijing government. Senator Barry Goldwater (R-Ariz.) led the congressional challenge against the President's unilateral action. In *Goldwater v. Carter*,¹⁷¹ justiciability problems prevented the Court from allocating the treaty termination power.¹⁷²

Without a judicial determination on the merits of the case, the mutual defense treaty's one-year notice period closed without withdrawal of the notice of termination and President Carter achieved his objective. Despite the fact that *Goldwater* did not settle the treaty termination controversy, President Carter's actions provide a strong precedent for unilateral executive termination of treaties that contain express provisions for termination through notice.¹⁷³

162. See *supra* note 114. See also L. TRIBE, AMERICAN CONSTITUTIONAL LAW 159-63 (1978) and RESTATEMENT (REVISED) FOREIGN RELATIONS LAW OF THE UNITED STATES §339 (Tent. Draft No. 6, 1985).

163. Nelson, *The Termination of Treaties and Executive Agreements by the United States: Theory and Practice*, 42 MINN. L. REV. 879, 887 (1958).

164. 229 U.S. 447, 33 S. Ct. 945, 57 L. Ed. 1274 (1913). See also *Terlinden v. Ames*, 184 U.S. 270, 22 S. Ct. 484, 46 L. Ed. 534 (1902) (the Court would not review the question whether an extradition treaty was in effect after Prussia became a part of the German Empire since the executive department had acted as though the treaty were still valid).

165. 229 U.S. at 452-53.

166. *Id.* at 476.

167. See Scheffer, *supra* note 161, at 988.

168. See *supra* notes 149-56 and accompanying text.

169. See *supra* notes 135-48 and accompanying text.

170. Mutual Defense Treaty Between the United States of America and the Republic of China, 6 U.S.T. 433, T.I.A.S. No. 3178, 248 U.N.T.S. 213 (entered into force March 3, 1955). Article X contains the withdrawal provision: "This Treaty shall remain in force indefinitely. Either Party may terminate it one year after notice has been given to the other Party."

171. See *supra* note 119 and accompanying text.

172. For a detailed discussion, see Note, *Executive Action, Goldwater v. Carter, and the Allocation of the Treaty Termination Power*, 15 GA. L. REV. 176 (1980-81).

173. *Id.* at 177. Note that the ABM Treaty in article XV provides for termination through notice. See *supra* note 130.

PART IV. CONCLUSIONS

Although many critics argue that SDI violates the spirit of the ABM Treaty, most analysts of SDI's international legal implications agree that the United States has not yet breached any international agreement. While future events may disprove the Reagan Administration's "broad" interpretation of the Treaty, continued development of SDI will almost certainly place the United States in violation of several specific ABM Treaty provisions discussed above. Depending upon the course of SDI research, the program may conflict with certain other international accords which prohibit, among other things, the testing of nuclear-based weapons systems or weapons designed to destroy satellites. To avoid these diplomatic difficulties, the United States may desire to modify or even to withdraw from the ABM Treaty; the Treaty specifically permits both these options. A final option is outright repudiation of the Treaty. However, the cost of such a move in terms of U.S. credibility as a treaty partner may simply be too great. Furthermore, if the Senate refuses to support such action, it is doubtful that the President is constitutionally empowered to act alone. As the viability of MAD wanes and newer theories of deterrence become prominent, which rely heavily on missile defense, it seems inevitable that the tension between the ABM Treaty and SDI goals will continue to grow.

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