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SDI AND THE ABM TREATY: PROBLEMS OF NEGOTIATION AND INTERPRETATION

by Leon E. Irish

"For 13 years the [ABM] Treaty has been universally understood to mean what it says: that any ABM system based in space is out-lawed. Now the claim is that it means the opposite. . . . How can the plain meaning have been transformed? By an "interpretation" that ought to embarass the most brazen lawyer in town."

—Anthony Lewis
The New York Times
Oct. 14, 1985

"[I was] astonished by the rather large gap between what the [ABM] Treaty said and what was attributed to it."

—Philip Kunsberg
assistant deputy under-secretary of defense for policy
The Washington Post
Oct. 22, 1985

Celebrating the ABM Treaty. On October 3, 1985, six former Democratic and Republican Secretaries of Defense—Harold Brown, Clark M. Clifford, Melvin R. Laird, Robert S. McNamara, Elliot L. Richardson, and James R. Schlesinger—celebrated the thirteenth anniversary of the ABM Treaty—the treaty between the United States and the Soviet Union on the Limitation of Anti-Ballistic Missile Systems.[1] The ABM Treaty, signed in 1972, constitutes one of the two arms limitations agreements produced by the SALT I talks.[2] It remains the only bilateral arms control treaty in full force and effect between the two superpowers, and "it represents a very large measure of what we have to show for four decades of US-USSR arms control negotiations."[3] As part of the celebration, the six former Secretaries of Defense issued a statement:

> [W]e call upon the American and Soviet governments both to avoid actions that would undermine the ABM Treaty and to bring to an end any prior departures from the terms of the treaty . . . . We urge President Reagan and General Secretary Gorbachev to reach agreement in Geneva to negotiate new measures which would prevent further erosion of the treaty and assure its continued viability.[4]

Common understanding of the ABM Treaty. As commonly understood by leading national defense and arms control institutions and experts in the United States, the ABM Treaty generally bans the development, testing, and deployment of ABM systems and components, including those based on new technologies or physical principles and those that are sea-based, air-based, space-based, or mobile land-based.[5] In other words, while permitting research, the ABM Treaty bans the development, testing, and deployment of all existing and future anti-ballistic missile systems or components, not just those based on 1972 technologies, with an exception permitting development and testing at ABM test ranges of fixed land-based systems and components.

The ABM Treaty and SDI. Thus read and applied, the ABM Treaty stands as a major obstacle to the Strategic Defense Initiative (SDI) program announced by


ABM
TREATY
USA

President Reagan on March 23, 1983. Put the other way around, the SDI program (sometimes called "Star Wars") poses a serious threat to the ABM Treaty. McGeorge Bundy, George F. Kennan, Robert S. McNamara, and Gerard S. Smith recently predicted that, "The Star Wars Program . . . will destroy the Anti-Ballistic Missile (ABM) Treaty, our most important arms control agreement."[6]

The SDI program would alter the strategic balance that has governed superpower relations for the past 40 years.

The president's hope. At the base of SDI lies President Reagan's vision of a new era of strategic weaponry and defense in which dramatic technological innovations would be harnessed to protect against the threat of a nuclear holocaust:

> What if free people could live secure in the knowledge that their security did not rest upon the threat of instant U.S. retaliation to deter a Soviet attack, that we could intercept and destroy strategic ballistic missiles before they reached our own soil or that of our allies?[7]

The SDI program would alter the strategic balance that has governed superpower relations for the past 40 years. Instead of a "balance of terror" under which nuclear attacks are deterred by the threat of massive retaliatory destruction, SDI supposedly would create a "defense in depth" or a "layered defense" in which defensive weapons, many of them based in space, would again be superior to offensive ones.

SDI. Using a combination of startling new technologies, an SDI weapons system would defend against possible intercontinental ballistic missiles launched by the Soviet Union by intercepting and destroying them when they are launched ("boost phase intercept"), while they are in flight ("midcourse intercept"), and before they strike their targets ("reentry phase intercept"). The new weapons and components involved in this exotic new defense system might include X-ray and chemical infrared lasers, particle beam weapons, kill assessment sensors, battle management computers, space-based, diffraction-limited mirrors, exoatmospheric homing interceptors, and hypervelocity electromagnetic railguns, to mention only some of the possibilities.

SDI debate. Whether these technological innovations are possible, whether they would be sufficiently reliable, whether they would dangerously disrupt the stability of the present balance of power, whether vast resources should be spent on such programs, and whether SDI is a concealed attempt by the United States to use its technological superiority to establish a first strike capability against the USSR, are all issues that are being hotly debated. Few political and military issues have greater importance for the security and wellbeing of the world. At the heart of the SDI debate, however, there are also critically important lawyers' questions of treaty interpretation. For, if the ABM Treaty, which has unlimited duration, precludes all aspects of the SDI program except laboratory research, the other questions become largely moot—unless the United States is willing to take the politically unpalatable course of withdrawing from the only arms control agreement it has with the Soviet Union.[8]

Reinterpretation of the ABM Treaty. The day after the six former Secretaries of Defense celebrated the 13th anniversary of the ABM Treaty and called on the US and the USSR to "avoid actions that would undermine the ABM Treaty," the Special Arms Control Policy Group, chaired by then-National Security Advisor Robert C. McFarlane, met behind closed doors in Washington. At this meeting they adopted a "reinterpretation" of the ABM Treaty that would permit research, development, and testing of SDI weapons; only actual deployment would be banned.[9] Two days later, while appearing on "Meet the Press," McFarlane surprised the world by announcing that testing and development of ballistic missile defense weapons and components was "approved and authorized by the treaty" rather than prohibited.[10]

Policy compromise. A storm of protest and controversy erupted. Gerard C. Smith, the chief US negotiator of the ABM Treaty, denounced the new interpretation as erroneous and said it would make "a dead letter of the ABM Treaty.[11] The very next Friday, October 11th, President Reagan met privately with Secretary of Defense Caspar Weinberger, a strong supporter of the new interpretation, McFarlane, Kenneth Adelman, director of the Arms Control and Disarmament Agency, and Secretary of State George Shultz. After what was described as a "knock down, drag out meeting," during which Shultz backed his position with "a subtle threat of resignation," a modified view emerged: the new interpretation was adopted, but it would not be applied. In other words, the Reagan administration intended to operate under the former, restrictive interpretation of the ABM Treaty, under which only SDI research was permissible, even though it adopted the new, broad interpretation as legally correct and fully justified.[12]

Perle's wisdom. Assistant Secretary of Defense Richard N. Perle, whose office had originated the reinterpretation of the ABM Treaty, subsequently stated that the decision of the administration to abide by the restrictive interpretation was temporary.[13] Asked whether the Soviets would be within their rights to go ahead with research, testing, and development of exotic ABM weapons now that President Reagan had formally adopted the reinterpretation, Perle replied,

"That's correct."[14] In fact, according to the recently released Arms Control Impact Statement for 1986, the Reagan administration will resort to the broader interpretation now unless Congress approves the funds that have been requested for SDI.[15]

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Russian reaction. The administration's curious "we can do it but we won't (for now)" approach did not put an end to the controversy. On October 19th Marshal Akhromeyev, the Soviet chief of the general staff and first deputy minister of defense, published an article in *Pravda*, which the Soviet Embassy had translated and published in *The Washington Post*. Marshal Akhromeyev called the US "reinterpretation" of the ABM Treaty "deliberate deceit:"

> Such "interpretations" of the ABM Treaty . . . . contradict reality. Article 5 of the treaty absolutely unambiguously bans the development, testing and deployment of ABM systems or components of space or mobile ground basing and, moreover, regardless of whether these systems are based on existing or "future" technologies.[16]

Negotiator's reaction. In testimony, first before the House and then before the Senate, John B. Rhinelander, the legal adviser to the US SALT I delegation and a principal in the drafting and negotiating of the ABM Treaty, provided a step-by-step recreation of the negotiations on the key issue of "exotic systems," arguing strenuously that the Reagan reinterpretation is wrong: "If the administration sticks with it as the best legal interpretation of the treaty, then the administration has effectively repudiated the ABM Treaty as a legal instrument." Rhinelander argued that the reinterpretation leads to an absurd conclusion. In 1972 the USSR ballistic missile defense (BMD) capability lay principally in existing technology and its ability to produce and deploy such BMD weapons in large numbers. The US advantage lay in its potential to develop new BMD weapons based on other physical principles—so-called "exotic systems." It is absurd to think, argued Rhinelander, that the Russians agreed in 1972 to a perpetual ban on the development, testing, and deployment of BMD weapons based on current technology while leaving the US free not only to conduct SDI research but to develop and test BMD weapons based on such exotic technologies.[17]

Rhinelander said, "If the administration sticks with it as the best legal interpretation of the treaty, then the administration has effectively repudiated the ABM Treaty as a legal instrument."

Questions and problems. The remarkable "reinterpretation" of the ABM Treaty by the Reagan administration raises many troublesome questions. Some reasonable conjectures may be made by way of answering some of these questions. For example, was this reinterpretation reached and announced unilaterally by the United States instead of being pursued privately through the Standing Consultative Commission (SCC)? This commission was created under the ABM Treaty to deal with questions of interpretation and compliance and to consider possible amendments to the treaty in light of "possible changes in the strategic situation."[18] From what is available publicly, we know in fact that the Reagan administration has raised the SDI problem privately with the USSR.[19] The USSR, however, has continued to level strong public criticism at the SDI program. For example, First Secretary Gorbachev told the editors of *Time* that SDI was "the first stage of the project to develop a new ABM system prohibited under the treaty of 1972."[20] From these public denunciations it is reasonable to conclude that no progress has been made on the issue at the SCC or in the Geneva arms talks. The administration, or at least key members of it, apparently decided that it was necessary to have some information on the unilateral US reinterpretation available in the public domain.

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Why now? Another key question arises from the fact that no SDI projects will be beyond the research state until the early 1990s.[21] If no question of violating the ABM Treaty would arise for half a decade, why was the question raised and pushed to a presidential decision in 1985? A plausible explanation presented itself when Secretary of Defense Weinberger's letter to President Reagan on arms control was leaked to the press just

prior to the 1985 Geneva Summit. There had been strong pressure on the president to agree at the summit meeting that the US would not take SDI beyond the research phase. In his letter, Secretary Weinberger urged President Reagan to reject "any agreement to limit the SDI program according to a narrow and, I believe, wrong interpretation of the ABM Treaty" because such an interpretation "would diminish significantly the prospects that we will succeed in bringing our search for a strategic defense to fruition."[22] In short, the Defense Department seems to have pushed hard now for the broader "reinterpretation" in order to head off an effort to reaffirm the narrower interpretation at the Geneva Summit.

How did this happen? Beyond these interesting political questions, however, and the enormously important impact that reinterpreting the ABM Treaty will have on national security and arms control policies, there are basic questions of negotiation and interpretation of agreements that fall squarely within the lawyer's province. Is it possible that a short agreement—only 16 articles and four printed pages—dealing with such vitally important subjects, an agreement that was negotiated for two and one-half years by leading diplomats, lawyers, and technical experts, could be unclear or ambiguous on such a key point? On the other hand, is it really believable that the United States government would cynically "gut" a major treaty with the Soviet Union by publicly adopting an interpretation of it that has no foundation?[23] And, if the treaty is not clear, how and why did that happen?

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Sorting it out. On politically charged and hotly debated issues such as SDI and the ABM Treaty, there will never be a single view, and perhaps there is no single "truth." In this case the problem is exacerbated by the fact that the negotiating history is classified and thus wholly unavailable in the preparation of this article. The heart of this question lies in the language of the treaty itself, however, and that is fully available.[24] Further, in their testimony before Congress, John Rhinelander and Abraham Sofaer, the legal adviser to the State Department, have provided enough details of the way the treaty was negotiated and how they analyze it to permit a useful discussion of the key questions. In fact, to understand the core of the disputed issue—whether the Reagan administration's reinterpretation of the ABM Treaty to allow development and testing of SDI weapons is legitimate—it is necessary to examine only a few short provisions of the ABM Treaty.

The text. Article II(1) of the ABM Treaty provides that, "For 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 . . .; (b) ABM launchers . . .; and (c) ABM radars . . . ." Article II(2) makes it clear that ABM interceptor missiles, launchers, and radars are "components." Article V(1) of the treaty provides that, "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."

The only question is whether the SDI weapons systems that are being considered constitute "ABM systems or components" within the meaning of Article II.

The core question. Although any lawyer would immediately begin to wonder what is encompassed by such key terms as "system," "develop," "test," and so forth, these issues have nothing to do with the core question. It is perfectly clear that Article V(1) bans the development, testing, and deployment of "ABM systems or components" in any sea, air, space, or mobile land-based mode. We also know that the SDI program is aimed at producing weapons that can "counter strategic ballistic missiles or their elements in flight trajectory" and that every variation of SDI receiving serious consideration involves placing some "components" in space. Accordingly, the only question is whether the SDI weapons systems that are being considered constitute "ABM systems or components" within the meaning of Article II. If so, then the development or testing of such systems or components is clearly forbidden by Article V(1).

Definitions that would have been clear. If Article II(1) had said that an ABM system was "any current system to counter strategic ballistic missiles, etc.," we would have no doubt that the term did not extend to BMD weapons based on physical principles or technologies not in use in 1972. If, on the other hand, Article II(1) had said that an ABM system was any system to counter strategic ballistic missiles, etc. "whether based on current or new physical principles or technologies," then we would have no doubt that new BMD weapons based on SDI technologies would be covered.

Ambiguity at the core. Article II(1) takes neither of these approaches. Instead, it defines an ABM system functionally ("a system to counter strategic ballistic missiles, etc.") and then adds the elusive phrase "currently consisting of." Since the functional definition would by itself embrace new as well as old systems,

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does the "currently consisting of" phrase limit the treaty to ABM systems currently in use? Or does it merely indicate that the parties were aware that technologies were likely to change and that the functional definition was to extend to new technologies as they emerged, even though 1972 systems currently consisted only of certain kinds of missile interceptors, launchers, and radars?

Sofaer's gloss. Judge Sofaer, the legal advisor to the State Department, argues that Article II(1) "can more reasonably be read to mean that the systems contemplated by the treaty are those that serve the functions described *and* that currently consist of the listed components."[25] It is clear, however, that there is no "and" in the text, and to read one in means forcing a meaning on a text that is not clearly there, at least in the language of the treaty as such.

Negotiator's explanation. John Rhinelander states that the "currently consisting of" phrase was added at the insistence of the US negotiators in order to make clear that reference to ABM systems or components in the treaty were not limited to traditional technology.[26] Because other easily available language, such as that mentioned above or the traditional "including" phrase, would have made this point clear, while the natural meaning of the "currently consisting of" phrase does not, this explanation is not persuasive.

A balanced interpretation. The key phrase—"currently consisting of"—does not clearly limit the application of the main part of the definition, which is purely functional and broad enough to encompass either new or traditional technology. Accepting the ambiguity of the key phrase, considerable weight would be given to the perpetual nature of the ABM Treaty and the sweeping nature of its declared purpose to "achieve . . . the cessation of the nuclear arms race . . . and general and complete disarmament." As the Restatement reminds us, an international agreement is to be interpreted in good faith in accordance with the ordinary meaning of its terms and in light of its object and purpose.[27] A perpetual treaty intended to end the arms race could not achieve that purpose unless it dealt with both new and old technology. Accordingly, though the question would not be free from doubt, an unbiased analysis limited to the text of the treaty itself would probably favor the restrictive interpretation, that is, the interpretation of the ABM Treaty under which development and testing of both new and old BMD weapons that are sea, air, space, or mobile land-based are prohibited. This, of course, would not explain how a major treaty could be unclear on such a key point.

Agreed Statement D. The problem, however, does not stop here. In addition to the text of the treaty itself, which was signed by Brezhnev and Nixon, there are seven "Agreed Statements" that were agreed upon and initialed by the heads of the US and USSR delegations on the same day that the general secretary and the president signed the treaty. Agreed Statement D provides as follows:

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

Interpreting superfluousness. At first reading this seems a startlingly superfluous provision. If, by virtue of the broad, functional definition of "an ABM system" in Article II(1), the treaty does embrace all ABM systems, whether based on new or traditional technology, and since Article V(1) bans the development, testing, or deployment of ABM systems or components, why would it be necessary to have an agreed statement that merely reiterates that ABM systems or components based on "other physical principles" may not be deployed (unless the parties agree to amendments to the treaty, as provided in Article XIV)?

Agreed Statement D seems to confirm that the "currently consisting of" phrase in Article II(1) restricts the definiton of ABM systems and components governed by the treaty to those based on traditional technology.

Giving meaning to Agreed Statement D. On the other hand, if the parties felt that Agreed Statement D was necessary in order for it to be clear that ABM systems based on new physical principles could not be deployed without amendment of the treaty, this would provide strong indication that the treaty itself does not extend to new technologies. In other words, Agreed Statement D seems to confirm that the "currently consisting of" phrase in Article II(1) restricts the definiton of ABM systems and components governed by the treaty to those based on traditional technology. This would mean that the Article V(1) ban on development, testing, and deployment of "ABM systems or components" does not extend to BMD weapons based on new technologies, such as SDI. If this were so, then SDI weapons would be limited only by the Agreed Statement D restriction on the deployment of systems and components based on other physical principles—development and testing of SDI weapons, as well as research, would be entirely permissible.

It is possible, of course, that the parties had different views....If this were the case—and apparently the classified record provides grounds for thinking that it was — then the most that either party could be held to under the agreement would be the minimum to which they had mutually agreed.

The Agreed Statements are more agreements than statements. Nor can Agreed Statement D be dismissed on the ground that it is merely interpretative of treaty provisions and hence its redundancy can be ignored. By its terms, Agreed Statement D comprises a separate agreement between the parties. Moreover, though two of the seven Agreed Statements to the ABM Treaty seem largely to elaborate on treaty provisions, the others seem clearly to create new substantive agreements between the parties.[28] It is possible, of course, that the parties had different views. The US might have regarded Agreed Statement D as merely interpretative, because it somehow usefully explained treaty provisions that (in the understanding of US negotiators) dealt with ABM systems based on other physical principles. The Soviets, however, might have regarded Agreed Statement D as an additional agreement between the parties, for in their view the treaty did not deal with such new systems. If this were the case—and apparently the classified record provides grounds for thinking that it was[29]—then the most that either party could be held to under the agreement would be the minimum to which they had mutually agreed.[30] Here the minimum mutual agreement would seem to be that ABM systems and components based on other physical principles could not be deployed without consultation and amendment of the treaty.

The administration's view. This analysis seems to coincide with that taken by Judge Sofaer and appears to be the approach that lies at the base of the administration's "reinterpretation" of the treaty.[31] In order to avoid a conclusion that Agreed Statement D is entirely superfluous, the administration reads the Article V(1) prohibition on development, testing, and deployment as being limited only to BMD weapons based on 1972 technologies. Under Agreed Statement D, the parties separately agreed that new technologies such as SDI would be banned from deployment, but not with respect to development and testing. There is considerable force to this view.

Article V and fixed land-based systems. There are at least two more turns to the story, however, one relating to the provisions of the treaty itself and the other a US negotiator's explanation of how the text came to be as it is. Article V(1) bans development, testing, and deployment of ABM systems and components that are sea, air, space, or mobile land-based. It does not deal with fixed land-based ABM systems. They are dealt with in Article III, which deals only with deployment: "Each Party undertakes not to deploy ABM systems or their components except that . . ." each Party is allowed one limited ABM system around its capital city and one around an ICBM silo base.[32]

Without Agreed Statement D, the natural interpretation of the text would favor the conclusion that the treaty reaches both new and old technology.

The treaty summarized. Since the only ABM systems that may be deployed under Article III are limited fixed land-based systems, since Article V(1) prohibits development, testing, or deployment of sea, air, space, or mobile land-based ABM systems, and since the treaty is silent on research, the net result under the ABM Treaty is that (1) all ABM research is permitted, (2) development and testing at ABM test ranges is also permitted for fixed land-based ABM systems,[33] but they may not be deployed, and (3) development, testing, and deployment are prohibited for sea, air, space, and mobile land-based ABM systems. Although not entirely straightforward, the text of the treaty clearly says this much. The key question left open by the text of the treaty is that discussed above: does the definition of "an ABM system" include new as well as traditional technology? Again, without Agreed Statement D, the

natural interpretation of the text would favor the conclusion that the treaty reaches both new and old technology.

Fitting the pieces together. Now, consider again the language of Agreed Statement D. By its express terms, it was included only "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 . . . ." Yet, Article III bans deployment of all "ABM systems or their components." If the treaty definition of "ABM system" in Article II extended to new systems as well as traditional ones, it would be wholly unnecessary and redundant for Agreed Statement D to state that ABM systems based on "other physical principles" cannot be deployed unless the parties agree to amend the treaty to permit such deployment. The matter is made even more confusing because, other than the precatory reference to Article III in the initial clause of Agreed Statement D, that statement seems addressed to ABM systems based on new physical principles generally, whether fixed land-based (such systems are the only real subject of Article III; deployment of all other ABM systems is prohibited in Article V(1)), sea-based, air-based, space-based, or mobile land-based.[34]

There is no question that the treaty is at least confusing and ambiguous on the core question of whether it applies only to traditional ABM systems.

Keeping the exotic fixed land-based option open. From the account given by a key US negotiator, it appears that the question of "exotic systems" was not part of the initial negotiations but was inserted by the US after the drafting had progressed considerably. Soviet drafts, however, had prohibited "space-based" ABM systems, as did the US drafts. Although the US government was divided for some time with respect to "exotic systems," and in fact tabled its first draft on the subject with the key article omitted, the US Joint Chiefs of Staff were adamant about preserving the option to develop and test fixed land-based laser weapons. The US government adopted this position and advocated a ban on development, testing, and deployment in all other modes. This view was ultimately accepted by the Russians and explains the somewhat odd relationship between the texts of Article III (explicitly prohibiting all but the most limited deployment of land-based ABM systems and implicitly permitting development and testing as well as research with respect to fixed land-based systems) and Article V(1) (explicitly banning development, testing, and deployment of sea, air, space, and mobile land-based ABM systems and implicitly permitting all research).[35]

Was there agreement that "exotics" were covered? Although the US position eventually prevailed, John Rhinelander points out that "the Soviets initially balked at discussing, let alone agreeing to any limitations on 'exotic systems.'"[36] The two delegations established a working group that proceeded ad referendum—that is, without instructions but on the basis that their work product would be taken back to their delegations and governments for approval or rejection. Although the working group apparently reached agreement "that current Article V(1) covered 'current' as well as 'exotic' technologies,"[37] it was only later that (i) the phrase "currently consisting of" was added to Article II(1) and that (ii) Agreed Statement D was negotiated by the parties. US negotiators are said to have sought the addition of the "currently consisting of" phrase in order "to make clear that references to ABM systems or components in the treaty were not limited to 'traditional' technology."[38] This explanation is hard to accept, however, for without this phrase the functional part of the definition would have more clearly covered new technologies than does present Article II(1), and other phrases, such as "including," would have had a less restrictive flavor.

The Russians' "exotic" resistance. Paradoxically, despite the US advantage in new technologies, it was the US that sought, and the USSR that resisted, a ban on exotic weapons. Furthermore, both before and after the working group agreed that the treaty covered new as well as current technology, the Soviets refused to accept an "other devices" provision proposed by the US to the effect that "Each party undertakes not to deploy ABM systems using devices other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the functions of these components."[39] If the treaty language truly reached new as well as old technologies, there would have been no need for an explicit ban on "other [new] devices," and such language would have been superfluous. Moreover, as a key US negotiator points out, the Soviets balked at this language for the specific reason that they wanted no provisions dealing with "exotics,"[40] an objection they would not have had if they had previously agreed that all new as well as traditional ABM systems were banned. Thus, surprisingly, the conclusion that seems more clearly substantiated by the sequence of the negotiations is not that the parties agreed that the text extended to new technologies, but that the Soviets rejected the ad referendum position of the working group that the new technologies were covered.

The source of Agreed Statement D. Although the Soviets rejected the "other devices" language proposed by the US, either for the text of the treaty or as an Agreed Statement, they proposed language that eventually became Agreed Statement D. It was the US, not the Soviets, that insisted upon the insertion of the initial clause that references Agreed Statement D

only to Article III. John Rhinelander's explanation of Agreed Statement D seems inconsistent. He states that, although it "refers to, and interprets Article III only," the references to other physical principles and components capable of substituting for traditional ABM components "are equally applicable to Article V(1)."[41] He agrees that "the language admittedly could be clearer," but admits that the US never sought an Agreed Statement confirming that Article V(1) covered "exotic systems."[42]

Drawing conclusions. What conclusions can be drawn from this long and rather complicated examination of the ABM Treaty? There is no question that the treaty is at least confusing and ambiguous on the core question of whether it applies only to traditional ABM systems. The text of the treaty, when read in light of its stated object and purpose and without reference to Agreed Statement D, would on balance lead to the conclusion that ABM systems based on new technologies are covered by the treaty.

In short, far from being clearly wrong, the Reagan administration's reinterpretation of the ABM Treaty seems in fact to be the more plausible interpretation, based upon the whole text and the available, unclassified record.

Once that language is carefully reexamined in light of Agreed Statement D, however, the balance shifts. Further, the negotiating history supplied by John Rhinelander in fact seems more strongly to support the interpretation he opposes than it does the restrictive interpretation for which he offers it. Although it is certainly correct to state that Agreed Statement D did not amend the treaty,[43] it is equally clear that a treaty is to be interpreted in light of any agreement relating to it that is made by the parties in connection with the conclusion of the treaty.[44] On the basis of this principle, and the established principle that all related parts of an agreement must be read together to give meaning and consistency to the whole, analysis based on the entire text and the public record militates in favor of a conclusion that the ABM Treaty prohibits deployment but not research, development, or testing of space-based BMD weapons based on new physical principles, such as SDI weapons.[45]

In short, far from being clearly wrong, the Reagan administration's reinterpretation of the ABM Treaty seems in fact to be the more plausible interpretation, based upon the whole text and the available, unclassified record. This conclusion, of course, does not provide the answer to more ultimate questions, such as whether SDI weapons will work, whether enormous sums should be spent to create them, and whether the pursuit of such weapons will enhance or jeopardize the prospects for peace. Whatever the answers may be to these larger questions of how best to seek security in a world of increasingly exotic weapons, however, it is best to begin the analysis with a clear-eyed and realistic understanding of what the ABM Treaty does and does not prohibit.

FOOTNOTES

[1]Press Release, National Campaign to Save the ABM Treaty (Oct. 3, 1985).

[2]The Interim Agreement on Strategic Offensive Arms, which was signed by General Secretary Brezhnev and President Nixon in Moscow on the same day, froze the levels of strategic ballistic launchers for a period of five years. The official texts and negotiating histories of the ABM Treaty, the Interim Agreement, and other treaties relevant to arms control can be found in U.S. Arms Control and Disarmament Agency, Arms Control and Disarmament Agreements (1982).

[3]Chayes, "The ABM Treaty and the Strategic Defense Initiative," 5 Pace L. Rev. 735, 737 (1985).

[4]Press Release, supra note 1.

[5]See, e.g., each of the Arms Control Impact Statements prepared for the Committees on Foreign Affairs and Foreign Relations of the House of Representatives and the Senate for fiscal years 1979-1985; Office of Technology Assessment, Ballistic Missile Defense Technologies 10 (1985); Department of Defense, Report to Congress on the Strategic Initiative, App. B (1985); Furniss, "President Reagan's Strategic Defense Initiative," 16 Toledo L. Rev. 149, 150 (1984); Scowcroft, "Understanding the U.S. Strategic Arsenal," in Nuclear Arms: Ethics, Strategy, Politics 65, 82-83 (R.J. Woolsey ed. 1984); Slocomb, "Arms Control: Prospects," Id. at 133, 136; Kerr, "Implications of Anti-Satellite Weapons for ABM Issues," in Space Weapons—The Arms Control Dilemma 107, 108 (Jasani ed. 1984).

[6]Bundy, Kennan, McNamara & Smith, "The President's Choice: Star Wars or Arms Control," 63 For. Aff. 265, 273 (1985).

[7]President Reagan's March 23, 1983 speech.

[8]Under Article XV of the ABM Treaty, either party may withdraw on six months' notice accompanied by a statement "that extraordinary events related to the subject matter of this treaty have jeopardized its supreme interests." For obvious political reasons, neither side would want to be seen to be withdrawing from the ABM Treaty. It has been reported, however, that President Reagan has decided to continue converting B-52 bombers to carry cruise missiles even though doing so will place the US in violation of the overall limits of the unratified but heretofore complied with SALT II agreement by December 1986. Time, May 19, 1986, at 18.

[9]The Washington Post, Oct. 22, 1985, at A10.

[10]Id.

[11]Id.

[12]The Washington Post, Oct. 17, 1985, at A4.

[13]Id.

[14]Id.

[15]The New York Times, May 19, 1986, at 1.

[16]The Washington Post, Oct. 25, 1985, at A24.

[17]Statement of John B. Rhinelander on "Exotic Systems and the ABM Treaty," before the House Foreign Affairs Subcommittee on Arms Control, International Security, and Science, Oct. 22, 1985; Statement of John B. Rhinelander on "Exotic Systems and the ABM Treaty" before the Subcommittee on Strategic and Theatre Nuclear Forces of the Senate Committee on Armed Services, November 21, 1985 (hereinafter "Rhinelander Senate Statement").

[18]Art. XIII, ABM Treaty.

[19]E.g., Nitze, "SDI and the ABM Treaty," FPI Policy Study Group Papers 21, 24 (Aug. 1985).

[20]Time, p. 24 (Sept. 9, 1985).

[21]See Furniss, "SDI Myths and Realities," 16 Toledo L. Rev. 149, 151 (1984). Lt. Gen. Abramson, the Director of the Defense Department's Strategic Defense Initiative Organization, testified to a Senate Armed Services Subcommittee that the first decisions to go beyond research will probably have to be made in 1991. The Washington Post, Nov. 18, 1985, at A1.

[22]The New York Times, Nov. 16, 1985, at 7.

[23]If the reinterpretation was so groundless as to amount to an abrogation of the treaty, the question would then arise whether the president acting alone, through "reinterpretation" or otherwise, has the power to terminate a treaty without the advice and consent of the Senate, a question that is currently confused and unsettled. See Goldwater v. Carter, 444 U.S. 996 (1979).

[24]The ABM Treaty was signed in both English and Russian, with both languages being equally authentic. No effort has been made here to analyze the Russian text.

[25]Sofaer, "The ABM Treaty and the SDI Program," U.S. Dept. of State Bureau of Public Affairs, Current Policy No. 755 at 2 (reprint of statement by Abraham D. Sofaer before the Subcommittee on Arms Control, International Security, and Science of the House Foreign Affairs Committee on Oct. 22, 1985 (hereinafter the "Sofaer House Statement").

[26]Rhinelander Senate Statement at 8, 18.

[27]ALI Restatement of the Foreign Relations Law of the United States (Revised), Tentative Draft No. 6, Vol. 2 & 325 (April 12, 1985).

[28]Agreed Statements B and F seem largely interpretative, the former specifying the agreed potential of the smaller phased-array ABM radar mentioned in Article III(b)(3) and the latter clarifying that large space-tracking and verification radars are not ABM radars under the treaty. Agreed Statement A, however, grandfathered certain radars around Moscow that otherwise would have been subject to the treaty limits, Agreed Statement C added the requirement that the two fixed land-based ABM systems that could be deployed had to be at least 1300 kilometers apart, Agreed Statement E extended the Article V(2) limit on one missile per ABM launcher to limit each ABM interceptor missile to one independently guided warhead, and Agreed Statement G extended the Article IX ban on transferring ABM systems or components to other states to prohibit transfers of technical descriptions or blueprints for such systems.

[29]"[T]he record reflects that they [the US negotiators] failed to obtain the ban they sought and that we could never have enforced such a ban against the Soviets. Treaties, like other agreements, are enforceable only to the extent they create mutual rights and duties." Sofaer House Statement at 3.

[30]Unless, perhaps, the terms of the treaty so clearly imposed a broader agreement that the actual, sincere belief of the parties was not reasonable. In other words, when the language of an agreement is clear beyond any cavil or doubt, the parties will not be heard to say that it meant something else. In light of the textual ambiguity of the ABM Treaty, this is clearly not the case here.

[31]Sofaer House Statement at 2-3.

[32]Under a 1974 Protocol the parties agreed to limit themselves to only one of these two options. The Soviets have chosen to maintain the Galosh ABM system around Moscow. The United States opted for an ABM system around the ICBM base near Grand Forks, North Dakota, but deactivated it in 1976.

[33]Subject to certain limits set out in Article IV.

[34]If the introductory clause of Agreed Statement D were read to limit it to fixed land-based ABM systems the deployment of which is restricted by Article III, it might be possible to construct an argument under which Agreed Statement D limits the term "ABM systems" in Article III to traditional technologies, while Articles II and V use it in the expansive sense to include both new and traditional technologies, with the result that Article V(1) would ban the development and testing of space-based new technologies such as SDI. Such an interpretation, however, seems too strained and fanciful to attract serious consideration unless there is a solid basis for it in the classified record.

[35]See G. Smith, Doubletalk: The Story of SALT I 263-65 (1980); J. Newhouse, Cold Dawn: The Story of SALT 230-31, 237 (1973).

[36]Rhinelander Senate Statement at 16.

[37]Id. at 17.

[38]Id. at 18.

[39]Id. at 19; see C. Smith, Doubletalk: The Story of SALT I 265, 343-44 (1980).

[40]Rhinelander Senate Statement at 19.

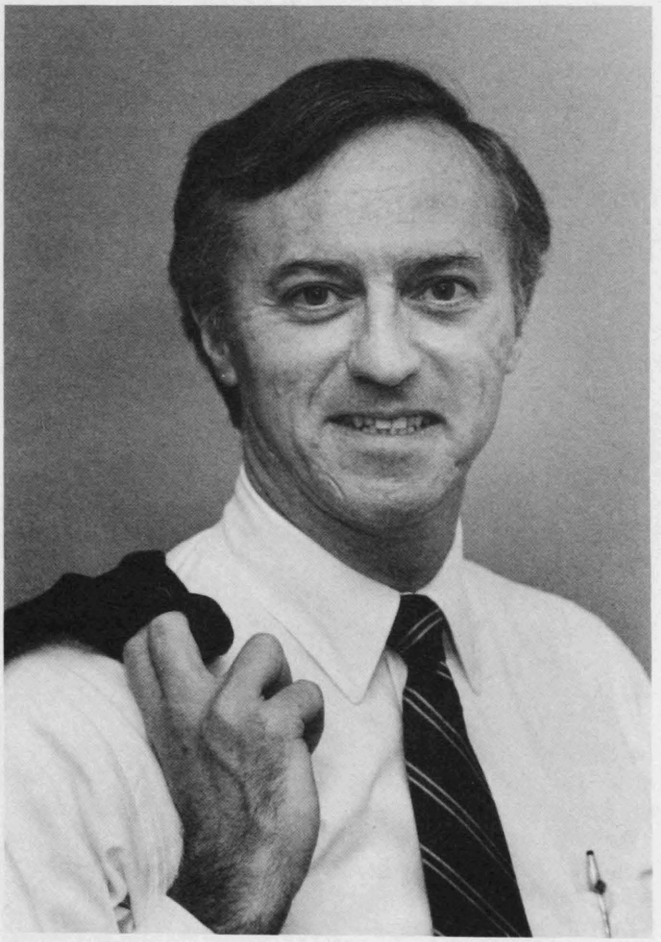
[41]Id. at 20.

[42]Id. at 20, 21.

[43]Id. at 20.

[44]See Vienna Convention on the Law of Treaties, Article 31(2)(a) (1969).

[45]Nor do the parties seem to have consistently interpreted the ABM Treaty to ban development and testing of BMD weapons based on new technologies. The Soviets seem not to have spoken publicly on the subject until recently, see Rhinelander Senate Statement at 3 and note 16 supra, and the Americans seem, despite a recent coalescence of views behind the Rhinelander interpretation, historically to have held divergent positions, with much support originally for the broader interpretation. See "Analysis of U.S. Post Negotiation Public Statements Interpreting the ABM's Treaty Application to Future Systems," pp. 2-9, prepared by the Office of the Legal Adviser, Department of State (Oct. 29, 1985); but see Rhinelander, Responses to Additional Questions for Hearings before the House Foreign Affairs Subcommittee on Arms Control, International Security, and Science 16.30 (Jan. 2, 1986). The official US text and history of the ABM Treaty has always favored the broader interpretation. See U.S. Arms Disarmament Agreements: Texts and Histories of Negotiations 138 (1982).



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