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NOTES

THE WAR WITH WORDS: THE STRATEGIC DEFENSE INITIATIVE IN LIGHT OF THE ABM TREATY

I. INTRODUCTION

In 1775, John Adams wrote that "[w]hen a great question is first started, there are very few, even of the greatest minds, which suddenly and intuitively comprehend it, in all of its consequences."¹ Such has been true with President Reagan's Strategic Defense Initiative (SDI). From its inception, few commentators have concurred on the legal, political, and scientific prospects of the program. One such "consequence," as noted by President Adams, that has been sharply disputed is the relationship between the Strategic Defense Initiative and the 1972 Anti-Ballistic Missile Treaty (ABM Treaty).²

Of particular importance today is the considerable controversy that has arisen regarding the correct interpretation of the ABM Treaty. Critics of SDI argue that the program, once beyond the research stage, will inevitably violate the Treaty and its accompanying documents.³ The Reagan Administration, on the other hand, contends

1. R. Blecker, *Constitutional Supremacy and Nullification in Ancient Greece* 1 (1983) (unpublished manuscript available in New York Law School Copy Center).

2. Treaty with the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, May 26, 1972, United States-United Soviet Socialist Republic, 23 U.S.T. 3435, T.I.A.S. No. 7503 (*entered into force* Oct. 3, 1972) [hereinafter ABM Treaty or Treaty].

3. See Longstreth, Pike, and Rhineland, *The Impact of U.S. and Soviet Ballistic Missile Defense Programs on the ABM Treaty*, March 1985 (report for the National Campaign to Save the ABM Treaty). See also *infra* notes 38-55 and accompanying text. Other critics include G. Smith, *How the Administration Amended the Treaty*, N.Y. Times, Oct. 23, 1985, at A22, col. 3 [hereinafter G. Smith, *ABM Treaty*]; Wicker, *Subverting a Treaty*, N.Y. Times, Oct. 25, 1985, at A27, col. 5 [hereinafter Wicker]. See also Bundy, Kennan, McNamara & Smith, *The President's Choice: Star Wars or Arms Control*, 63 FOREIGN AFF. 264 (Winter 1984-85); Drell and Panofsky, *The Case Against Strategic Defense: Technical and Strategic Realities*, ISSUES SCI. AND TECH. 46 (Fall 1984); Drell, Farley & Holloway, *Preserving the ABM Treaty: A Critique of the Reagan Strategic Initiative*, 9 INT'L SECURITY 51 (Fall 1984); P. FARLEY & S. DRELL, *THE REAGAN STRATEGIC DEFENSE INITIATIVE (SDI): A TECHNICAL, POLITICAL AND ARMS CONTROL ASSESSMENT*

that the Treaty does not prohibit the research, testing, or development of space-based defense systems,⁴ and that regardless, the program will be consistent with all United States treaty obligations, including the ABM Treaty.⁵

This Note will address: 1. the various interpretations of the ABM Treaty in light of the Strategic Defense Initiative by analyzing (a) the language of the agreement (the text), and (b) the intention of the parties that negotiated the agreement; and 2. the conditions upon which the Treaty was premised. Prior to this analysis, however, this Note will discuss briefly the purpose and mechanics of the strategic defense program and the methods of treaty interpretation.

II. THE STRATEGIC DEFENSE INITIATIVE

In 1932, Justice Brandeis wrote that the "[d]enial of the right to experiment may be fraught with serious consequences to the Nation," and that if "we would guide by the light of reason, we must let our minds be bold."⁶ President Reagan proposed such an experiment when,

(1984); Glaser, *Why Even Good Defense May Be Bad*, 9 INT'L SECURITY 92 (Fall 1984); Longstreth and Pike, *U.S., Soviet Programs Threaten ABM Treaty*, BULL. ATOM. SCIENTISTS (April 1985); G. SMITH, DOUBLETALK: THE STORY OF SALT I (1980); UNION OF CONCERNED SCIENTISTS, THE FALLACY OF STAR WARS (1984).

4. *Reagan Proposes U.S. Seek New Ways to Block Missiles*, N.Y. Times, Mar. 24, 1983, at A21, col. 5. See Meet the Press (NBC television broadcast, Oct. 6, 1985) (transcript on file at N.Y. Law School Journal of International and Comparative Law) (statements of Robert C. McFarlane). See also *infra* notes 57-86 and accompanying text.

5. THE PRESIDENT'S STRATEGIC DEFENSE INITIATIVE (U.S. Gov't Printing Off. Jan. 1985). The President has stated that he intends to adhere to the terms of the ABM Treaty. Gwertzman, *Shultz Faults Moscow Arms Plans But Calls "Real Progress" Possible*, N.Y. Times, Oct. 15, 1985, at A6, col. 3 [hereinafter Gwertzman, *Shultz Faults Moscow*]. Shultz further stated that "our S.D.I. research program has been structured and, as the President has reaffirmed . . . , will continue to be conducted in accordance with a restrictive interpretation of the treaty's obligations." *Excerpts From a Speech by Shultz at North Atlantic Assembly Meeting*, N.Y. Times, Oct. 15, 1985, at A6, col. 1 [hereinafter Shultz *Excerpts*].

The more restrictive interpretation of the treaty is read to prohibit testing and development of space-based defensive missile systems and components, but may permit experiments involving new kinds of technologies of subcomponents or adjuncts to actual systems. Mohr, *Star Wars' Dispute: Beyond the Administration's Debate Lies Question of the Soviet Reaction*, N.Y. Times, Oct. 17, 1985, at A4, col. 3 [hereinafter Mohr, *Star Wars*]. "This interpretation permits research into, but not testing or development of, systems or components based on future technology and capable of substituting for ABM interceptors, launchers, or radars." Statement of Abraham D. Sofaer Before the Subcommittee on Arms Control, International Security and Science of the House Committee on Foreign Affairs 1 (Oct. 22, 1985) [hereinafter Sofaer].

6. THE PRESIDENT'S STRATEGIC DEFENSE INITIATIVE, *supra* note 5, at 1.

on March 23, 1983,⁷ he called upon the nation's scientists and engineers to establish a comprehensive and intensive research program⁸—the Strategic Defense Initiative—aimed at eventually eliminating the threat posed by nuclear armed ballistic missiles.⁹ By exploiting recent advances in ballistic missile defense technology,¹⁰ the program is designed to seek the means to establish a non-nuclear¹¹ layered defense that will destroy attacking missiles during each phase of their flight.¹²

7. *President's Speech on Military Spending and a New Defense*, N.Y. Times, Mar. 24, 1983, at A20, col. 1. See also President's Address to the Nation, National Security, 19 WEEKLY COMP. PRES. DOC. 442 (Mar. 23, 1983).

8. The SDI program presently consists of:

research and development efforts in five broad technical areas: (1) surveillance, acquisition, tracking and kill assessment including the use of radar and infrared technologies to discriminate between warheads and decoys; (2) directed energy weapons such as lasers and particle beams; (3) kinetic energy weapons such as high performance interceptor missiles and super-high velocity guns; (4) systems analysis and battle management including development of the complex computer systems and communications networks needed to direct a massive, complicated defense system; and (5) survivability, lethality and support programs designed to protect the system itself from enemy attacks.

COMMON CAUSE, STAR WARS: QUESTIONS AND ANSWERS ON THE SPACE WEAPONS DEBATE, 12 (Feb. 1985) [hereinafter COMMON CAUSE].

9. Gwertzman, *Shultz Faults Moscow*, *supra* note 5, at A6.

10. Presently, five "futuristic technologies" are being considered as 'kill mechanisms' for a space-based defense. COMMITTEE FOR NATIONAL SECURITY, STRATEGIC DEFENSE INITIATIVE: FACT SHEET, 3 (Nov. 26, 1985) [hereinafter CNS REPORT]. These fall within several categories of lasers, particle beams and more conventional self-propelled missiles equipped with miniature homing vehicles. M. Smith, *Legal Implications of a Space-Based Ballistic Missile Defense*, 15 CASE W. RES. INT'L L.J. 52, 55 (1985) [hereinafter M. Smith, *Space-Based BMD*]. More specifically, these technologies consist of X-ray lasers, chemical lasers, particle beams, and "smart rocks" (known as kinetic-energy projectiles). CNS REPORT, *supra*, at 3, 4. For a detailed analysis of strategic defense systems and technologies, see BALLISTIC MISSILE DEFENSE (A. Carter & D. Schwartz ed. 1984) [hereinafter Carter & Schwartz]. See also U.S. DEP'T OF DEF., SDI: A TECHNICAL PROGRESS REPORT, SUBMITTED TO THE SECRETARY OF DEFENSE (June 1985).

11. Nuclear warheads no longer are required for an effective ballistic missile defense (BMD). M. Smith, *Space-Based BMD*, *supra* note 10, at 55 (referring to Weinberger, *Memorandum for the Deputy Secretary of Defense* 18 (Apr. 24, 1984)). In fact, the SDI program has been directed to emphasize non-nuclear technologies. *Id.*

12. The multi-layered defense consists of the boost, post-boost, mid-course, and terminal phases. *Id.* at 56. Each phase is designed to correspond to the four phases of a ballistic missile's trajectory. *Id.*

During the boost phase, the rocket's exhaust can be tracked and the multiple warheads have yet to be released. While this phase offers the most effective interception, it also is the most difficult: detection, discrimination, targeting, and interception would need to be accomplished generally within three minutes from the time the missile is launched. *Id.* at 56 n.25.

During the post-boost phase, "individual re-entry vehicles are being sequentially deployed by a maneuverable 'bus.'" *Id.* at 56-57 n.26. During this stage it is still possible

As a result of this program, a future President and the Congress will possess the technical knowledge necessary to support a decision on whether to develop and deploy such advanced defensive systems.¹³ In the meantime, policymakers must determine whether such a decision, if and when it is rendered, will violate the ABM Treaty.

III. TREATY INTERPRETATION: THE VIENNA CONVENTION ON THE LAW OF TREATIES

On October 6, 1985, Robert C. McFarlane, the Assistant to the President for National Security Affairs,¹⁴ publicly advanced an interpretation of the Treaty that approved and authorized¹⁵ the testing and development of the ABM systems and components based on "new technologies"¹⁶ and "new physical concepts."¹⁷ Critics of this position, however, contend that Mr. McFarlane and the Reagan Administration seem to be misinterpreting and repudiating the Treaty,¹⁸ which is presently the only bilateral arms control agreement in full force and effect between the United States and the Soviet Union.¹⁹ In an attempt to discover the appropriate method to interpret the ABM Treaty, a review of the rules and canons of treaty interpretation is in order.

to destroy several warheads at once, since they have not yet separated.

In the mid-course phase, the missile booster drops off and the warheads and decoys begin their flights through outerspace. CNS REPORT, *supra* note 10, at 2. The individual re-entry vehicles travel for twenty to twenty-five minutes before re-entering the earth's atmosphere. *Id.* To be effective, the defense system must be able to distinguish between debris, decoys, and re-entry vehicles. M. Smith, *Space-Based BMD*, *supra* note 10, at 57 n.27.

During the terminal phase, the missiles re-enter the atmosphere. At the same time, the decoys and penetration aids are slowed down and burned up. Although the defense system is more easily able to discriminate between the warheads and decoys, there are only approximately sixty seconds for interception. CNS REPORT, *supra* note 10, at 2.

For a complete discussion on the layered defense, see generally Carter & Schwartz, *supra* note 10. See also U.S. DEP'T OF DEF., REPORT TO THE CONGRESS ON THE STRATEGIC DEFENSE INITIATIVE (1985).

13. The Strategic Defense Initiative research program is designed to determine whether and, if so, how advanced defensive technologies can contribute to the realization of the President's vision. See U.S. DEP'T OF STATE, THE STRATEGIC DEFENSE INITIATIVE 1 (June 1985) [hereinafter STATE DEPARTMENT, SDI].

14. Mr. McFarlane commonly is referred to as the National Security Advisor.

15. Mohr, *U.S. Negotiators of ABM Treaty Say Reagan is 'Harpooning' Pact*, N.Y. Times, Oct. 12, 1985, at A14, col. 1 [hereinafter Mohr, *U.S. Harpooning Pact*].

16. Gwertzman, *Shultz Faults Moscow*, *supra* note 5, at A6. See *supra* note 10.

17. Mohr, *U.S. Harpooning Pact*, *supra* note 15, at A14, col. 1. See *supra* note 10.

18. Mohr, *U.S. Harpooning Pact*, *supra* note 15, at A14, col. 1.

19. Chayes & Chayes, *Testing and Development of "Exotic" Systems Under the ABM Treaty: The Great Reinterpretation Caper*, 99 HARV. L. REV. 1956 (1986).

The Vienna Convention on the Law of Treaties²⁰ (Vienna Convention) provides the general rules concerning the interpretation of international agreements.²¹ As agreed to during the negotiating period, the Commission²² adopted "a 'basic approach' which demands merely the ascription of a meaning to a text."²³ Although Professor McDougal opposed the Commission's view as "an impossible, conformity-imposing textuality,"²⁴ the Commission concluded that "the text [of a treaty] must be presumed to be the authentic expression of the intentions of the parties [and that] the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."²⁵

Article 31 of the Vienna Convention states that "[a] treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty."²⁶ Consequently, this view as-

20. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF. 39/27. [hereinafter Vienna Convention] For a reprint of the official document, see 63 A.J.I.L. 875 (1969).

21. M. Smith, *Spaced-Based BMD*, *supra* note 10, at 62.

22. The International Law Commission was the organization primarily responsible for the adoption of the Law of Treaties. See Kearney & Dalton, *The Treaty on Treaties*, 64 A.J.I.L. 495 (1970).

23. McDougal, *The International Law Commission's Draft Articles Upon Interpretation: Textuality 'Redivivus'*, 61 A.J.I.L. 992 (1967).

24. *Id.*

25. *Id.* (quoting the Report of the International Law Commission, 21 U.N. GAOR Supp. (No. 9), U.N. Doc. A/6309/Rev. 1 (1966) (*reprinted in* 61 A.J.I.L. 248 (1967)).

26. Vienna Convention, *supra* note 20, at 63 A.J.I.L. 875, 885. Article 31 in its entirety reads:

General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties

sumes that texts have plain and natural meanings that do not require interpretation.²⁷ Justice Holmes, however, noted in *Towne v. Eisner* that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."²⁸ Words, then, have no ordinary or natural meaning in isolation from their context and from the other elements of interpretation.²⁹ Therefore, despite its emphasis upon the "ordinary meaning" of the text, the Commission cannot escape references to the intent of the parties.³⁰

Oddly enough, the Commission may have recognized the shortcomings of the textual approach when it drafted Article 32.³¹ That article permits recourse to "supplementary means of interpretation" when the interpretation of a treaty pursuant to Article 31 "leaves the meaning ambiguous or obscure."³² Since Article 32 admittedly does not list

so intended.

Id.

Professor McDougal disfavors the "blindness and arbitrariness" of the "ordinary meaning" requirement. McDougal, *supra* note 23, at 993. When serving as the exclusive index, interpretation based on the text of a document is "an exercise in primitive and potentially destructive formalism." *Id.* at 997. Specifically, he objects to the manner in which the Commission confines "context" and "object and purpose" to "mere text," the latter (object and purpose) being entirely "intrinsic to the text." *Id.* at 993-94.

Instead of the Commission's rigid adherence to "textuality," McDougal favors interpretation based on the intent of the parties. *Id.*

The truth is that in the absence of a comprehensive, contextual examination of *all* the potentially significant features of the process of agreement, undertaken without the blinders of advance restrictive hierarchies or weightings, no interpreter can be sure that his determinations bear any relation to the genuine shared expectations of the parties.

Id. at 998.

27. *See id.* at 996.

28. 245 U.S. 418, 425 (1918).

29. *See* McDougal, *supra* note 23, at 995-06 n.23 (quoting Professor Briggs from the 1966 I.L.C. YEARBOOK (I), pt. II, at 188).

30. *See id.* at 997 n.28.

31. *See* Vienna Convention, *supra* note 26, at 885. Article 32 reads:

Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

32. *Id.* The "supplementary means" provided for in Article 32 are *not* limited to "preparatory work" or "the circumstances of the [treaty's] conclusion." Rather, the means suggested are illustrative, and therefore *not* exhaustive. *See infra* note 33 and accompanying text.

all of the available "supplementary means," it may be presumed that the intent of the parties is to be included. That is, since the parties' intent is not prohibited from consideration, it should not be precluded.³³

Thus, as suggested by Professor McDougal, "the text of the treaty and the common meanings of the words should be made the point of departure of interpretation, but not the end of the enquiry and that the text should be treated as but one important index among many of the common intent of the parties."³⁴ Therefore, one should consider, in addition to the text, "the circumstances of the parties at the time the treaty was entered into, the change in the circumstances sought to be effected, and the conditions prevailing at the time interpretation is being made. . . ." ³⁵

IV. THE LANGUAGE OF THE ABM TREATY AND THE STRATEGIC DEFENSE INITIATIVE

The debate over the proper interpretation of the ABM Treaty focuses on the Treaty's application to "futuristic" or "exotic" ABM systems and components, that is, those devices based on physical principles other than those that existed when the Treaty was signed.³⁶ As framed by the Honorable Abraham D. Sofaer,³⁷ the primary issue, therefore, is whether the United States and the Soviet Union may develop and test exotic ballistic missile defenses, such as those contemplated by the Strategic Defense Initiative, within the boundaries of the ABM Treaty.³⁸

As noted previously, opponents of the Strategic Defense Initiative argue that the program does, or will, violate the Treaty.³⁹ One such

33. The "elements referred to in [Articles 31 and 32] are not exhaustive of the guidelines to which recourse may be had in the process of interpretation." Stanford, *United Nations Law of Treaties Conference: First Session*, 19 U. TORONTO L.J. 59, 64 (1967) [hereinafter Stanford]. On the same topic, see Sinclair, *Vienna Conference on the Law of Treaties*, 19 INT'L & COMP. L.Q. 47 (1970).

As stated by McDougal, to base an interpretation entirely on a textual analysis "may be to impose upon one or both of the parties an agreement they never made." McDougal, *supra* note 23, at 998.

34. Stanford, *supra* note 33, at 63.

35. McDougal, *supra* note 23, at 100.

36. See ABM Treaty, *supra* note 2, Agreed Statement D, 23 U.S.T. at 3456, T.I.A.S. No. 7503, at 22.

37. Formerly a district judge of the United States District Court for the Southern District of New York.

38. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972 (1986) [hereinafter Sofaer, SDI].

39. See *supra* note 3; see also *infra* notes 43-56 and accompanying text.

critic, Gerard C. Smith, the chief negotiator of the agreement, asserts that the Treaty prohibits, as it was intended to prohibit, the development, testing, and deployment of *all* ABM systems, including those that are space-based.⁴⁰ This intention is reflected by Article I⁴¹ and Article V⁴² of the Treaty.

Article I(2) of the Treaty, for instance, declares each party's assurance not to deploy a nationwide defense against strategic ballistic missiles or to provide a base for such a defense.⁴³ Similarly, Article V(1) provides that both the United States and the Soviet Union undertake "not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based."⁴⁴

Abram and Antonia Handler Chayes⁴⁵ concur with the "straight-forward" and "comprehensive" prohibition of Article V(1), while noting that Article II(1) of the Treaty offers an "equally sweeping" definition of ABM systems: "For the purpose of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, *currently consisting of* . . . (a) ABM interceptor missiles, . . . (b) ABM launchers, . . . and (c) ABM radars. . . ."⁴⁶ Based on this language, the Chayes argue that "Article

40. G. Smith, *ABM Treaty*, *supra* note 3, at A22, col. 3. See *infra* notes 43-56 and accompanying text.

41. Article II(2) of the Treaty provides: "Each Party undertakes not to deploy ABM systems for a defense of the territory of its country and not to provide a base for such a defense, and not to deploy ABM systems for defense of an individual region except as provided for in Article III of this Treaty." *ABM Treaty*, *supra* note 2, art. II(2), 23 U.S.T. at 3438, T.I.A.S. No. 7503, at 4.

42. *Id.* art. V, 23 U.S.T. at 3441, T.I.A.S. No. 7503, at 7.

43. See *supra* note 41. Article I of the Treaty sets forth also the parties' commitment to limit ABM systems so that, except as permitted by Article III, such systems are not deployed. Article I(1), however, acknowledges also the parties' intentions "to adopt *other measures* in accordance with the provisions of this Treaty." *ABM Treaty*, *supra* note 2, art. I(1), 23 U.S.T. at 3438, T.I.A.S. No. 7503, at 4 (emphasis added). The "other measures" alluded to by Article I are discussed in the preamble and Article XI of the Treaty: They call for the achievement of "effective measures toward reductions in strategic arms, nuclear disarmament, and general and complete disarmament" and the commitment to "continue active negotiations for limitations on strategic offensive arms," respectively. *Id.*, 23 U.S.T. at 3437, 3443, T.I.A.S. No. 7503, at 3. For the view that the limitations placed on ABM systems are contingent upon the attainment of these "other measures," see *infra* notes 79-89 and accompanying text.

44. See *supra* note 42.

45. Abram Chayes, the Felix Frankfurter Professor of Law at Harvard University, and Antonia Handler Chayes, the Chairman of Endispute, Inc., authored a commentary on the "reinterpretation" of the ABM Treaty that appeared recently in the *Harvard Law Review*. See *supra* note 19.

46. *ABM Treaty*, *supra* note 2, art. II(1), 23 U.S.T. at 3439, T.I.A.S. No. 7503, at 5 (emphasis added).

II is on its face a *functional* definition. It defines the prohibited systems on the basis of performance, not technology. . . . The natural reading of the phrase 'currently consisting of' makes the system description that follows illustrative, not limiting."⁴⁷ That is, the ABM Treaty bans systems *designed to* "counter strategic ballistic missiles or their elements in flight trajectory," not merely systems *comprised of* ABM interceptor missiles, launchers, and radars.⁴⁸ According to this argument, then, the definition of ABM systems in Article II(1) includes future as well as conventional, or current, systems. Article V does not create an exception for those systems and components that do *not* "currently consist of" 1972 technology.

An exception to the Article V prohibition, however, even under the "restrictive" reading of the agreement, does exist in the Treaty. Article III explicitly permits each party to deploy fixed land-based ABM systems at two sites—one "centered on the Party's national capital," the other "containing ICBM silo launchers."⁴⁹ This exception subsequently is noted in Agreed Statement D⁵⁰ of the Treaty, which provides:

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

47. Chayes & Chayes, *supra* note 19, at 1958 (emphasis in original).

48. *Accord Report by Secretary of State Rogers to President Nixon on the Strategic Arms Limitation Agreement*, 67 DEP'T ST. BULL. 3, 6 (1972) ("Article II(1) defines an ABM system in terms of its function as 'a system to counter strategic missiles or their elements in flight trajectory,' noting that such systems 'currently' consist of ABM interceptor missiles, ABM launchers, and ABM radars."); Chayes & Chayes, *supra* note 19, at 1965 ("[T]he definition of ABM systems in Article II is cast in terms of system *function* rather than systems *technology*, and covers future as well as 'current' systems.") (emphasis added).

49. ABM Treaty, *supra* note 2, art. III, 23 U.S.T. at 3440, T.I.A.S. No. 7503, at 6. On July 3, 1974, however, the United States and the Soviet Union signed a protocol that reduced the number of permissible sites to one. Protocol on the Limitation of Anti-Ballistic Missile Systems, July 3, 1974, art. I, 27 U.S.T. 1645, 1648, T.I.A.S. No. 8276 at 3.

50. Agreed Statement D was one of seven Agreed Statements consented to and initiated by the heads of the United States and Soviet Delegations on May 26, 1972. "The statements were used as a drafting device to clarify specific points or remote possible ambiguities in more general language in the body of the Treaty. They were transmitted to the Senate as part of the Treaty." Chayes & Chayes, *supra* note 19, at 1961-62 (footnote omitted).

As provided by Article 31 of the Vienna Convention on the Law of Treaties, the entire treaty, including any agreements which the parties made in connection with the Treaty, should be considered when determining the Treaty's meaning. See M. Smith, *Space-Based BMD*, *supra* note 10, at 62. For the text of, and a discussion on, Article 31 of the Vienna Convention, see *supra* note 26.

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.⁵¹

Chayes and Chayes argue that Agreed Statement D applies solely to the Article III exception. In support of this position, they write:

[T]he Agreed Statement *does* indicate that it is confined to fixed land-based systems. The inducing clause recites that its purpose is to 'insure the fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III of the Treaty.' And as we have seen, the deployments permitted under Article III are fixed land-based systems using 1970-type technology.⁵²

Ambassador Smith also points to Agreed Statement D, which, he claims, provides that if new type systems are developed, they cannot be deployed *unless authorized* by treaty amendment.⁵³ Furthermore, in the event that any ambiguities do exist as to the proper meaning of the text or the negotiating record,⁵⁴ the Treaty provides for the establishment of a reviewing body⁵⁵ to clarify such situations.⁵⁶

A closer look at the text of the Treaty, though, reveals another interpretation, perhaps even more in keeping with the drafters' intentions. The basis of this interpretation, by now obvious, is the Treaty's

51. ABM Treaty, *supra* note 2, Agreed Statement D, 23 U.S.T. at 3456, T.I.A.S. No. 7503, at 22 (emphasis added).

52. Chayes & Chayes, *supra* note 19, at 1962 (emphasis added). Similarly, the authors note that "Agreed Statement D clarifies Article III by making explicit this prohibition against replacing any or all of the permitted deployments by exotic fixed-land based systems, except with the concurrence of the other party." *Id.* at 1965.

Ambassador Smith argues more generally that the Agreed Statement does not modify the "total ban" on the development and testing of space-based systems, as provided for by Article V. See G. Smith, *ABM Treaty*, *supra* note 3, at A22, col. 3.

53. G. Smith, *ABM Treaty*, *supra* note 3, at A22, col. 3. For an analysis of the "unless authorized" phrase, see *infra* notes 69-76 and accompanying text. For the Treaty's amendment provision, see ABM Treaty, *supra* note 2, art. XIV, 23 U.S.T. at 3445, T.I.A.S. No. 7503, at 11.

54. G. Smith, *ABM Treaty*, *supra* note 3, at A22, col. 3.

55. Article XIII(1) of the Treaty provides for the creation of a "Standing Consultative Commission" to resolve disputes arising from ambiguities in the agreement. ABM Treaty, *supra* note 2, art. XIII(1), 23 U.S.T. at 3444-45, T.I.A.S. No. 7503 at 10-11. See *infra* note 77.

56. See ABM Treaty, *supra* note 2, art. XIII(1), 23 U.S.T. at 3444-45, T.I.A.S. No. 7503 at 10-11.

application to future systems and components.⁵⁷ To this end, Judge Sofaer suggests that the "development and testing of such systems based on physical principles other than those understood in 1972 is wholly justified."⁵⁸

Although Article V(1) does indeed appear to prohibit the development, testing, and deployment of *all* ABM systems and components,⁵⁹ it instead may be read to apply *only* to those "physical principles" that were known when the Treaty⁶⁰ was negotiated and signed.⁶¹ This interpretation is supported by the "ordinary meaning" of Article II and Agreed Statement D.

The dispositive language of Article II, suggesting a "broader" interpretation of the Treaty, clearly is the phrase "currently consisting of." Contrary to the functional definition proffered by proponents of the "restrictive" view, Judge Sofaer argues that:

[t]he article II(1) definition can reasonably be read to mean that, for the purposes of the Treaty, an 'ABM system' is one that serves the functions described *and* that consists of the type of components that existed 'currently' (that is, at the time the Treaty was signed). According to this reading, the parties listed the three components not merely to cite the systems that happened then to be in use, but also to limit the scope of the article II(1) definition to ABM systems based on physical principles then in use.⁶²

Had the negotiators intended the phrase also to include all future systems, words to that effect would have been used.⁶³ Rather than reading "currently consisting of," the drafters most certainly would have cho-

57. See *supra* note 36 and accompanying text, and *infra* notes 59-76 and accompanying text.

58. Sofaer, *supra* note 5, at 2. Ambassador Nitze draws a similar conclusion, stating that "the possibility [that] new technologies [were] foreseen is clear from the language of the treaty." U.S. DEP'T OF STATE, NITZE, SDI AND THE ABM TREATY 3 (1985) [hereinafter NITZE, SDI AND ABM].

59. See ABM Treaty, *supra* note 2, art. V(1), 23 U.S.T. at 3441, T.I.A.S. No. 7503, at 7.

60. In addition to the text, reference here to the Treaty includes the Agreed Statements. See ABM Treaty, *supra* note 2, Agreed Statements A-G, 23 U.S.T. at 3456-57, T.I.A.S. No. 7503, at 22-23.

61. See Sofaer, *supra* note 5, at 5.

62. Sofaer, SDI, *supra* note 38, at 1974 (emphasis in original).

63. But see Sherr, *Legal Issues of the "Star Wars" Defense Program*, 16 TOL. L. REV. 125 (1984) [hereinafter Sherr]. "The natural interpretation of article II is that the word 'currently' was used to ensure that the listing of the 1972-era devices would not artificially freeze in time the definition of what constituted ABM system components." *Id.* at 132 (emphasis added).

sen "currently consisting of *but not limited to*."⁶⁴

Article II(2) further supports this interpretation. This section states that the ABM system components listed in Article II(1) "include those which are: (a) operational; (b) under construction; (c) undergoing testing; (d) undergoing overhaul, repair or conversion; or (e) mothballed."⁶⁵ As in the preceding section, the list provided here, as the language indicates, is limited to existing components.⁶⁶ Components not listed in Section 2, subsections (a) through (e), therefore, are not prohibited by the Treaty.⁶⁷ "Had the negotiators intended to bring future technologies within the purview of Article II(1), they could have added 'undergoing research' or 'developed in the future' to the litany of components in Article II(2)."⁶⁸

Perhaps most significant is that systems and components based on future technology are not discussed anywhere in the Treaty except in

64. Although he does not explain why such qualifying language was not considered, Sherr notes that "a member of the United States negotiating team" believed that the word "currently" was deliberately inserted into the text "at the time agreement was reached on the future systems ban [Agreed Statement D] in order to have the very effect of closing a loophole to the ban on [future ABM systems]." *Id.* (quoting R. Garthoff, Reply to Letter to the Editor, 2 INT'L SECURITY 107-09 (1977)). Dr. Raymond Garthoff was the Executive Secretary and a Senior Advisor in the United States Delegation that negotiated the Treaty. Chayes & Chayes, *supra* note 19, at 1959.

65. ABM Treaty, *supra* note 2, art. II(2), 23 U.S.T. at 3439, T.I.A.S. No. 7503, at 5.

66. See Sofaer, *supra* note 5, at 5; Sofaer, *SDI*, *supra* note 38, at 1974. But see Note, *The Legality of President Reagan's Proposed Space-Based Ballistic Missile Defense System*, 14 GA. J. INT'L & COMP. L. 329, 342 (1984) (authored by John Topping) [hereinafter Topping].

67. Topping contends that "[a]ny development of such a system based on 'other physical principles' would . . . violate the *spirit* of the Treaty." Topping, *supra* note 66, at 342 (emphasis added). Other nations, he argues, undoubtedly would object to our failure to adhere to the spirit of the accord. While certain space-based ABM systems could be tested and developed without technically violating the Treaty because of the Treaty's ambiguities, any such action certainly would "evoke criticism from the international community." *Id.* at 354.

Without considering the intentions of the parties who negotiated the agreement, however, who is to say whether the "spirit" of the Treaty includes (or excludes) ABM systems based on future technology? Indeed, it is quite plausible that the spirit of the Treaty extends only as far as those systems based on known (1972-era) technology, since it was the failure of *existing* defenses that prompted the United States and the Soviet Union to negotiate the ABM Treaty. "One of the primary motivations for the ABM Treaty was the ineffectiveness of both the United States and Soviet systems. Had either side developed an effective ABM system at this early stage [the 1950's and 1960's], it is unlikely that the treaty would ever have been signed." *Id.* at 331 n.9. See Willrich, *SALT: An Appraisal*, in *SALT: THE MOSCOW AGREEMENTS AND BEYOND* 256, 263-64 (M. Willrich & J. Rhinelander eds. 1974).

68. Sofaer, *SDI*, *supra* note 38, at 1974 n.9.

Agreed Statement D.⁶⁹ Essentially, Agreed Statement D provides that in the event that future or exotic ABM systems, that include components capable of substituting for ABM interceptor missiles, launchers, or radars, "*are created in the future, specific limitations on such systems and their components would be subject to discussion. . . .*"⁷⁰ By its very nature, this provision presupposes that futuristic systems already have been tested and developed, *prior* to discussions to negotiate specific limitations: "[I]t requires that limitations on such systems be stipulated only *after* creation of the systems."⁷¹ Hence, discussions cannot be held *until* ABM systems based on "other physical principles" are developed. Alternatively, until limitations are negotiated, no such prohibition exists.

Accordingly, Agreed Statement D does not set forth a "total ban on the development and testing of space-based systems."⁷² The provision never even refers to development or testing; instead, only deployment is considered.⁷³ Moreover, the Agreed Statement indicates that, within the framework of the agreement, future technologies are being considered for the first time. If Article II was intended to encompass all systems and components based on present *and* future technology, Agreed Statement D would not have been necessary.⁷⁴ The very fact that the Agreed Statement was added—to qualify the meaning of those terms—suggests that Article II extends only to those systems and components "based on then-utilized physical principles, not to those based

69. See ABM Treaty, *supra* note 2, Agreed Statement D, 23 U.S.T. at 3456, T.I.A.S. No. 7503, at 22; Sofaer, *SDI*, *supra* note 38, at 1975.

70. ABM Treaty, *supra* note 2, Agreed Statement D, 23 U.S.T. at 3456, T.I.A.S. No. 7503, at 22 (emphasis added).

71. Sofaer, *SDI*, *supra* note 38, at 1975 (emphasis in original).

72. G. Smith, *ABM Treaty*, *supra* note 3, at A22, col. 3.

73. See ABM Treaty, *supra* note 2, Agreed Statement D, 23 U.S.T. at 3456, T.I.A.S. No. 7503, at 22. The Agreed Statement may be read to permit deployment, in that unless "specific limitations" are established, either pursuant to Articles XIII or XIV of the Treaty, deployment is not prohibited. According to the Agreed Statement, limitations on new ABM systems are subject to discussion; hence, if the United States and the Soviet Union do not reach an agreement limiting or prohibiting future ABM systems, such systems technically may be deployed within the framework of Agreed Statement D. For the position that deployment would violate the spirit of the Treaty, see *supra* note 66.

Even in 1982, prior to the present debate over the proper meaning of the Treaty, the United States Arms Control and Disarmament Agency maintained that "should future technology bring forth new ABM systems 'based on other physical principles' than those employed in current systems, it was agreed that limiting such systems *would be discussed*, in accordance with the Treaty's provisions for consultation and agreement." U.S. ARMS CONTROL AND DISARMAMENT AGENCY, *ARMS CONTROL AND DISARMAMENT AGREEMENTS* 138 (5th ed. 1982) (emphasis added). Clearly, such a position does not advocate a prohibition of testing or development. See *supra* text accompanying notes 69-72.

74. See Sofaer, *supra* note 5, at 6; Sofaer, *SDI*, *supra* note 38, at 1975.

on other physical principles, and which Agreed Statement D defines as being 'capable of substituting for' ABM missiles, launchers, and radars."⁷⁵

This interpretation thus "avoids the difficulties of construction created by the restrictive interpretation," and thereby establishes a coherent, nonredundant reading of the Treaty that:

(1) prohibits the deployment of all systems and components based at launch sites and derived from then-utilized physical principles, except in the quantities and areas specifically permitted (article III); (2) prohibits the development, testing, and deployment of all systems and components derived from then-utilized physical principles other than those based at launch sites (article V); (3) permits the creation of systems and components based on other physical principles (Agreed Statement D); and (4) prohibits the deployment of devices based on other physical principles until agreement is reached on specific limitations (Agreed Statement D).⁷⁶

V. THE ABM TREATY AND THE INTENTION OF THE PARTIES

Although the more permissive interpretation of the treaty appears to be the more accurate one, based on the examination of the language of the agreement, ambiguities do exist.⁷⁷ Thus, to establish the precise

75. Sofaer, *SDI*, *supra* note 38, at 1975. Judge Sofaer concludes:

If article II(1) encompassed all ABM systems and components, both those based on then-utilized technology and those based on other physical principles, then the Treaty—without Agreed Statement D—would ban the deployment of all systems and components, present *and* future, except those particular systems expressly permitted under article III. Agreed Statement D would have been unnecessary for this purpose.

Id. 1975-76 (emphasis in original) (footnote omitted). *But see* M. Smith, *Space-Based BMD*, *supra* note 10, at 62. Smith argues that, while Agreed Statement D

is somewhat ambiguous, the provision for discussion on "specific limitations" on such systems implies an intention to include them within the general treaty limitations on ABM systems and their components. If the Parties had intended for no limitations to apply to such systems they would not have need to use the word "specific." When read in conjunction with Article II, the most reasonable interpretation of this agreement is that new technologies are included within the ABM Treaty's limitations. If the Parties believe a new technology is not adequately covered by the Treaty provisions they may request discussion on specific limitations.

Id. (footnote omitted). For an opposing view, see *supra* notes 69-74 and accompanying text, and *infra* note 77.

76. Sofaer, *SDI*, *supra* note 38, at 1977.

77. Although Ambassador Smith maintains that Article V of the Treaty, under which

meaning of the treaty, one first must determine the intention of the parties by analyzing the "circumstances surrounding the agreement."⁷⁸

After examining the negotiating record,⁷⁹ particularly the statements and drafts regarding future systems, Judge Sofaer concluded that a much stronger case exists for the more permissive interpretation of the Treaty than for the restrictive interpretation.⁸⁰ The judge based his decision on what each party sought to include in, and correspondingly, exclude from, the agreement. According to the record, the Sovi-

the parties agree not to develop, test, or deploy ABM systems or components, is not ambiguous, he does acknowledge the importance of construing the parties' intentions. See G. Smith, *ABM Treaty*, *supra* note 3, at A22, col. 3. He notes that if ambiguities do exist, however, they should be resolved by the Standing Consultative Commission: "[I]f the Administration is concerned about some ambiguity in the negotiating record, it should be recalled that the treaty anticipated this contingency and provided for consultational machinery to clarify any such situation." *Id.*

While Article XIII does provide for "consultational machinery" to resolve ambiguities, it does not bind either party to obligations based on the ambiguity in the absence of such resolution. Alternatively, until the parties agree to the proper interpretation of the ambiguity, whether the ambiguity exists in the text of the agreement or the negotiating record, nothing is to preclude either party from making its own determination, in good faith, as to the proper meaning. The absence of a joint resolution establishing the correct interpretation should not act as a veto prohibiting the other party from adhering to its bona fide interpretation. To allow ambiguities to preclude a party from making its own good faith determination would permit the other party to avoid resolving the discrepancy, either by refusing to negotiate pursuant to Article XIII or by negotiating without a true desire to reach an understanding. The power to veto through inaction or bad faith negotiation, therefore, should not hinder the process of resolution.

78. See Sofaer, *supra* note 5, at 6; Sofaer, *SDI*, *supra* note 38, at 1978; M. Smith, *Space-Based BMD*, *supra* note 10, at 62. See also *supra* notes 20-35 and accompanying text.

79. Because the negotiating record is classified, knowledge of the events surrounding the agreement is limited substantially to Judge Sofaer's review. Other accounts are offered by those who participated in the negotiations, including Ambassadors Nitze and Smith, and various public officials with access to the classified materials. See Chayes & Chayes, *supra* note 19, at 1966.

80. Sofaer, *supra* note 5, at 8; cf. *id.* at 3 ("My study of the Treaty has led me to conclude that its language is ambiguous and can more reasonably be read to support a broader interpretation."). Ambassador Nitze, who negotiated critical elements of the Treaty, likewise states that a "conclusion that the Strategic Defense Initiative is *a priori* inconsistent with the ABM Treaty does not reflect the intent and negotiating history of the accord." NITZE, *SDI AND ABM*, *supra* note 58, at 2.

But see Wicker, *supra* note 3, at A27, col. 5. Wicker asserts that "the fundamental issue here is not what the words may be read to mean, but what constitutes good faith between nations." *Id.* While good faith undoubtedly is essential in treaty negotiation and interpretation, Wicker seems to overlook the importance of language in treaty interpretation and, particularly when ambiguities exist, the need to evaluate the intention of the parties who negotiated the agreement. For a brief analysis of treaty interpretation, see *supra* notes 20-35 and accompanying text.

ets resisted any attempts to impose limits on systems or components based on future technology.⁸¹ They were unwilling to bind themselves to a ban on unknown devices or technology.⁸² The Soviets, however, did consent to adopt Agreed Statement D, but only upon pressure from the United States Delegation.⁸³ Although the United States sought a more comprehensive ban, the agreement was not viewed as a prohibition on the development or testing of future systems or components.⁸⁴ "[B]ecause the Soviets succeeded in avoiding a broad binding commitment regarding the development and testing of . . . components based on future technology we cannot properly be said to be bound by such a commitment."⁸⁵

What is known of the negotiating record, then, indicates that the more permissive interpretation of the treaty reflects more accurately the parties' intentions. Therefore, the ABM Treaty, based on the language of the agreement *and* the intentions of the parties, does not prohibit the development or testing of the technology presently being considered as part of the Strategic Defense Initiative.⁸⁶

81. Sofaer, *supra* note 5, at 8; Sofaer, *SDI*, *supra* note 38, at 1979. Although the United States sought initially to ban the development and testing of non-land based systems and components based on future applications of "other physical principles," the Soviets resisted such attempts, particularly with respect to laser technology. Sofaer, *SDI*, *supra* note 38, at 1979.

82. Sofaer, *supra* note 5, at 8-9; see Sofaer, *SDI*, *supra* note 38, at 1979 ("The Soviets' arguments rested both on their repeatedly expressed unwillingness to deal with unknown devices or technology and on their belief that the parties could not effectively regulate devices that had not yet been created.").

83. Sofaer, *SDI*, *supra* note 38, at 1979. Judge Sofaer concludes that:

The furthest the Soviets were willing to go with respect to regulating systems or components based on other physical principles was to adopt a side agreement (Agreed Statement D) prohibiting the deployment of any such systems and components prior to formal discussion between and agreement by the parties on specific limitations. . . . Indeed, the United States negotiators ultimately persuaded the Soviets to adopt Agreed Statement D by explaining that without it, the Treaty would leave the parties free to *deploy* future systems or components based on other physical principles.

Id. (emphasis in original). See Sofaer, *supra* note 5, at 9. For the view that even deployment may not be prohibited, see *supra* note 73.

84. See Sofaer, *SDI*, *supra* note 38, at 1979 (the Soviets specifically sought to prevent broad definitions of the terms "ABM system" and "components," and "the United States acceded to their wishes."). See *supra* notes 81-83.

85. Sofaer, *supra* note 5, at 10.

86. According to Ambassador Nitze, the Treaty was not intended to be "locked in concrete. When we and the Soviets were crafting the agreement, we envisaged a living accord—that is, one that would make allowance for and adapt to future circumstances. This was particularly so, given that the Treaty was to be of unlimited duration." NITZE, *SDI AND ABM*, *supra* note 58, at 2. See ABM Treaty, *supra* note 2, art. XV(1), 23 U.S.T. at 3446, T.I.A.S. No. 7503, at 12 ("This Treaty shall be of unlimited duration.").

VI. PREMISES OF THE ABM TREATY

Even if the ABM Treaty is read to prohibit the development and testing of systems and components within the scope of the SDI program (that is, even if the Treaty's more restrictive interpretation is deemed correct), the United States *may not*, nevertheless, be bound by its terms. Notwithstanding any Soviet violations of the Treaty, whether actual or alleged,⁸⁷ the United States and the Soviet Union ratified the Treaty upon express conditions set forth in the preamble and Article XI of the Treaty and subsequent unilateral statements.⁸⁸

The Treaty's preamble states that "the limitation of anti-ballistic missile systems . . . would contribute to the creation of more favorable conditions for further negotiations on limiting strategic arms."⁸⁹ This suggests, as does the preamble's preceding language,⁹⁰ that limitations on ABM systems were made contingent on the premise that both parties would "take effective measures towards reductions on strategic arms, nuclear disarmament, and general complete disarmament."⁹¹ In even stronger and more explicit language, Article XI states that "[t]he Parties undertake to continue active negotiations for limitations on strategic offensive arms."⁹² The purpose of such negotia-

Even though the Treaty was intended to be of unlimited duration, it was not intended to apply to unforeseen occurrences. *See supra* note 82. Agreed Statement D recognizes that the United States and the Soviet Union, "even in 1972, foresaw the possibility of changes in the strategic situation—including the possibility of new defense technologies in the future." NITZE, SDI AND ABM, *supra* note 58, at 2. The parties therefore drafted an amendment provision so that the Treaty would be adaptable to new circumstances. *See* ABM Treaty, *supra* note 2, art. XIV(1), 23 U.S.T. at 3445, T.I.A.S. No. 7503, at 11.

87. *See generally* WHITE HOUSE REPORT ON SOVIET STRATEGIC DEFENSE (1985); NITZE, SDI AND ABM, *supra* note 58; COMMON CAUSE, *supra* note 8.

88. *See* ABM Treaty, *supra* note 2, 23 U.S.T. 3435, T.I.A.S. No. 7503. Four Unilateral Statements made during the negotiations by the United States Delegation, drafted from July 1970 to May 1972, accompany the Treaty. *See infra* note 95.

89. ABM Treaty, *supra* note 2, preamble, 23 U.S.T. at 3437, T.I.A.S. No. 7503 at 3.

90. The preamble states that limitations on "anti-ballistic missile systems would be a substantial factor in curbing the race in strategic offensive arms and would lead to a decrease in the risk of outbreak of war involving nuclear weapons." *Id.*, 23 U.S.T. at 3437, T.I.A.S. No. 7503. *See infra* text accompanying note 93. Subsequent language indicates that such limitations are an essential ingredient to the "cessation of the nuclear arms race." ABM Treaty, *supra* note 2, preamble, 23 U.S.T. at 3438, T.I.A.S. No. 7503 at 4. *See also supra* note 43.

91. ABM Treaty, *supra* note 2, preamble, 23 U.S.T. at 3438, T.I.A.S. No. 7503.

92. *Id.*, art. XI, 23 U.S.T. at 3443, T.I.A.S. No. 7503 at 9. The United States Arms Control and Disarmament Agency's position is that ratification of the ABM Treaty was linked not only to the 1972 Interim Agreement on strategic offensive arms, but also to future negotiations for limiting strategic offensive arms. ARMS CONTROL AND DISARMAMENT AGREEMENTS, *supra* note 73, at 135.

tions, as the preamble indicates, is to curb the race in strategic offensive arms and decrease the risk of outbreak of war involving nuclear weapons.⁹³ However, these negotiations have *not* been actively continued, and those that have taken place since the SALT I and SALT II agreements have *not* yielded the goals sought by the ABM Treaty. The United States, therefore, has the grounds to withdraw from the treaty.⁹⁴

Ambassador Smith stated in his May 9, 1972 Unilateral State-

93. ABM Treaty, *supra* note 2, preamble, 23 U.S.T. at 3437, T.I.A.S. No. 7503 at 3.

94. Dr. G.A. Keyworth, II, the Science Advisor to the President, and Ambassador Nitze agree that the Treaty was entered into contingent upon conditions that have not been fulfilled. Keyworth states that "[w]e assumed that the ABM Treaty would be the catalyst for mutual reductions in offensive arms, and we expected to see some progress within five years. . . . It never happened. Instead of getting the reductions we hoped the treaty would bring, we got the proliferation we feared the missile defenses would bring. . . . " G.A. Keyworth II, *SDI: Worth Holding Onto*, Proposed Remarks to the Association of Old Crows at the Electronic Defense Association in Washington D.C. (Oct. 1, 1985) (available at N.Y.L. Sch. J. of Int'l & Comp. L. Office) [hereinafter Keyworth, *SDI*]. "So SDI is really a response to the failure of expectations for arms control." *Id.*

Ambassador Nitze likewise notes that when the United States agreed to limits on ABM systems, it did so under the assumption that such limitations would "make possible reductions on and comprehensive constraints on offensive missile forces." NITZE, *SDI AND ABM*, *supra* note 58, at 2. In even stronger language, Nitze asserts that "we have been unable to achieve the reductions and limitations with regard to offensive nuclear arms that were envisaged—indeed, on which the ABM Treaty was premised—when the treaty was signed in 1972. As a result, strategic offensive nuclear forces are substantially greater today than they were then." *Id.* The Ambassador states also that the SALT agreements have failed to "promote and maintain an equitable and stable balance in offensive nuclear arms." *Id.*

Since 1972, while generally remaining within the numerical limits on launchers provided by the expired Interim Agreement on offensive arms and the unratified SALT II Treaty, the Soviets have increased the number of warheads on their strategic ballistic missiles by a factor of four. Moreover, they have increased the capability of their missile force to attack hardened military targets by more than tenfold. This poses a serious and destabilizing threat to our retaliatory forces.

Id.

In the event that this threat endangers the "supreme interests" of the United States, Article XV provides a mechanism by which either party may withdraw from the Treaty. See *infra* text accompanying notes 95-97.

Secretary of State Shultz likewise argues that when the ABM Treaty was signed, it was assumed that tight limits on defensive systems would make possible real reductions in strategic offensive arms. But the Soviet Union has never agreed to any meaningful reductions in offensive nuclear arms. Instead, it has continued an unprecedented military buildup. . . . The strategy of reliance on offensive retaliations to preserve deterrence and prevent war is being called into question.

Excerpts from U.N. Speech by Shultz and Shevardnadze, N.Y. Times, Sept. 25, 1985, at A8, col. 1.

ment, "[i]f an agreement providing for more complete strategic offensive 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."⁹⁵ Article XV(2) of the Treaty provides the escape clause alluded to by the Ambassador for either party, in the event "that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests."⁹⁶ Any such determination, including one based on the failure to fulfill the Article XI and preamble requirements of the Treaty, gives that party the right to withdraw from the Treaty.⁹⁷ Since these conditions have not been fulfilled,⁹⁸ the United States has the right to abrogate the ABM Treaty.

VII. CONCLUSION

It is by no means established (beyond doubt) that the Strategic Defense Initiative is commercially viable, let alone scientifically feasible. Even if the advanced defense system *can* become a reality, there is also little agreement as to whether the program *should* be pursued. Nevertheless, because of the ambiguities in the text and the circumstances and intentions surrounding the drafting of the agreement, the United States can, and indeed should, continue to "guide by the light of reason" and proceed with the Strategic Defense Initiative. We must

95. ABM Treaty, *supra* note 2, Unilateral Statement A, 23 U.S.T. at 3459-60, T.I.A.S. No. 7503 at 25-26. The four Unilateral Statements made during the negotiation of the Treaty "were intended to clarify specific provisions of the agreements or parts of the negotiating record." ARMS CONTROL AND DISARMAMENT AGREEMENTS, *supra* note 73, at 136. Though they are not necessarily binding as law, the Unilateral Statements did accompany the ABM Treaty when it was submitted to the Congress. *Id.* at 135. Thus, Ambassador Smith's May 9, 1972 Unilateral Statement was recognized by the Congress as a condition upon which the Treaty was negotiated.

96. ABM Treaty, *supra* note 2, art. XV(2), 23 U.S.T. at 3446, T.I.A.S. No. 7503.

97. *Id.*

98. No meaningful agreements were entered into within five years of the signing of the ABM Treaty. Even SALT II, an agreement to which the United States has adhered despite the fact that it was never ratified by the Senate, was not completed until 1979, seven years after the ABM Treaty was signed. Regardless, SALT II has not been an effective limitation on offensive nuclear arms within the meaning of the ABM Treaty's preamble and Articles I and XI. See *supra* note 94. Moreover, since SALT II was negotiated, there has been no "agreement providing for more complete strategic offensive arms limitations." ABM Treaty, *supra* note 2, Unilateral Statement A, 23 U.S.T. at 3459-60, T.I.A.S. No. 7503. Therefore, the conditions upon which the ABM Treaty was premised have not been realized and, correspondingly, the "supreme interests" of the United States have been jeopardized.

"let our minds be bold" so that we may find the answers to our new great question.

Robert L. Meyers