# THE REINTERPRETATION OF THE ABM TREATY: POLICY VERSUS THE LAW?

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> No nation that placed its faith in parchment or paper while at the same time it gave up its protective hardware ever lasted long enough to write many pages in history ... The argument, if there is any, will be over which weapons, and not whether we should forsake weaponry for treaties and agreements.[1]
>
> President Ronald Reagan, 1981

> I know, too, of cases that have occurred in the past when people, sometimes as the result of slanderous information and sometimes merely on the strength of suspicion, have become frightened of each other and then in their anxiety to strike first before anything is done to them, have done irreparable harm to those who neither intended nor even wanted to do them any harm at all.[2]
>
> Xenophon, *The Persian Expedition*

## I. INTRODUCTION

In the late 1960s the United States and the Soviet Union agreed to begin the Strategic Arms Limitation Talks ("SALT"). From November 1969 to May 1972, SALT provided a forum for the US and the Soviet Union to negotiate and discuss aspects of their strategic nuclear weapons. On 26 May 1972, President Richard Nixon and Soviet leader Leonid Brezhnev signed three treaties which codified the results of the US-Soviet discussions and negotiations up to that date, known collectively as "SALT I". These were a

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1. M Stephenson and J Weal *Nuclear Dictionary* (London: Longman, 1985) 6-7.
2. *The Persian Expedition* (trans R Warner) (New York: Penguin Books Ltd, 1949) 82. Quoted by R D Glasser *Nuclear Preemption and Crisis Stability, 1985-1990* (Canberra: Australian National University, 1986) xi.

statement of Basic Principles of Relations between the US and the USSR; the Treaty between the US and the USSR on the Limitation of Anti-Ballistic Missile Systems (the "ABM Treaty"); and the Interim Agreement and Protocol on Strategic Offensive Missiles.[3]

SALT I was the first arms control agreement in which the superpowers actually limited the number of the nuclear weapons that they could deploy. The Interim Agreement set numerical limits on the number of strategic missile launchers (not warheads) that could be deployed by each superpower over the next five years.[4] This covers offensive nuclear weapons. Defensive nuclear weapons are covered by the ABM Treaty. An antiballistic missile is a missile designed to intercept and destroy incoming enemy missiles and warheads.[5] The Treaty allows each superpower to deploy two weapons systems to defend against attacking nuclear missiles. The ABM Protocol of 1974 reduced the number of permitted defensive systems from two to one, either the national capital or an Inter-Continental Ballistic Missile ("ICBM") field.[6]

The ABM Treaty bans the development and testing, as well as deployment, of space-based and other mobile ABM systems or system components.[7] It seeks to prevent either side from building a territorial defence against strategic ballistic missiles. In 1983, however, President Reagan announced "a program to counter the awesome Soviet missile threat with measures that are defensive". He called on the American scientific community "to give us the means of rendering these nuclear weapons impotent and obsolete".[8]

This speech set in motion the program called the Strategic Defence Initiative ("SDI"), essentially a program to establish a space "shield" to destroy attacking enemy ballistic missiles - an ABM system. The ABM Treaty bans the testing and deployment of such a system; therefore, the philosophy of deploying a national defence is directly opposed to the

3. Stephenson and Weal supra n 1, 155.
4. E Semler, J Benjamin and A Gross *The Language of Nuclear War* (New York: Harper and Row, 1987) 246. For the full text of the ABM Treaty, see M Bunn *Foundation for the Future* (Washington, DC: Arms Control Association, 1990) 162-167; and R L Garthoff *Policy Versus the Law* (Washington, DC: Brookings, 1987) 108-17.
5. Semler et al ibid, 15.
6. Arms Control Association *Arms Control and National Security* (Washington, DC: Arms Control Association, 1989) 71.
7. Garthoff *Policy* supra n 4, vii.
8. M Bundy *Danger and Survival* (New York: Vintage Books, 1988) 570.

philosophy behind the ABM Treaty, which is based on the abolition of national defences.

In October 1985, the Reagan administration announced a major reinterpretation of the ABM Treaty to facilitate the SDI program.[9] This "broad" interpretation holds that the Soviet Union never agreed to include restrictions on the development and testing of "exotic technology systems"[10] essential to SDI and that because of the structure of the Treaty and the record of its negotiation, these restrictions do not apply to systems based on new technologies. Reinterpretation provides the US with "legal" justification for avoiding the Treaty's provisions and it would allow development and testing of the space-based components of SDI.[11] President Bush has chosen to follow his predecessor's line on SDI generally and the ABM Treaty specifically. The central issue, and the question which this paper will seek to address, is whether this claim, this "broad" interpretation of the ABM Treaty, is justified.

After a closer examination of both the ABM Treaty and the Strategic Defence Initiative, it will be argued, through an examination of the principles or rules of treaty interpretation - treaty language, subsequent practice, the negotiating record, and the ratification process - that the traditional or "narrow" interpretation of the Treaty is correct, that the "broad" interpretation renders the Treaty almost meaningless. Further, it will be argued that treaties are the supreme law of the land, made by the President with the advice and consent of the Senate and are binding in international law. As Senate has not consented to the reinterpretation of the ABM Treaty, it will be suggested that the unilateral reinterpretation of the Treaty by the Reagan administration which the Bush administration clearly proposes to continue, calls into question US credibility regarding its Treaty obligations, has disturbing implications for superpower arms control, and raises fears of US unilateralism. Finally, it will be argued that the broad interpretation is not the result of serious legal analysis, as is required, but of political and policy imperatives. The last part of the paper deals with recent developments in the US-Soviet relationship which occurred this year, specifically those changes affecting strategic arms control and proposed congressional action to break out of the ABM Treaty.

9. Arms Control Association supra n 6, 72.
10. Ibid, 73.
11. A B Sherr *The Other Side of Arms Control* (Boston: Unwin Hyman, 1988) 234-235.

## II. THE ANTI-BALLISTIC MISSILE TREATY

US strategic doctrine in the post-1945 era has been based on the theory of deterrence. As Colin Gray has stated, from 1945 until the present, "the concept of deterrence has been the master leitmotiv for Western policy-makers and strategic theorists".[12] Deterrence is a simple concept: it can be described as "the creation by a state seeking to prevent military aggression of a situation in which the potential costs of the aggression risk outweighing the potential gains".[13] Since the mid-1960s, a concept of deterrence termed Mutual Assured Destruction ("MAD") has been generally held to be the basis of US deterrence policy. It grew out of the doctrine termed "flexible response". Through the 1961 Single Integrated Operational Plan ("SIOP"), flexible response identified a spectrum of military targets together with some non-military ones. It was made possible by improved US strategic capabilities. However, the counterforce aspect (nuclear attacks against military targets) of flexible response drew enormous criticism, primarily criticisms of its first-strike aspects.[14] Publicly, the US appeared to retreat; flexible response gave way to Mutual Assured Destruction.

MAD places great emphasis on the survivability of second-strike, retaliatory capabilities. In theory, the Soviet Union would be deterred from attacking the US through fear of a US retaliatory strike, a strike which would threaten the Soviet Union with unacceptable damage. To this end, the survival of US second-strike forces was emphasised. Neither side, even if it struck first, could destroy the other side's capacity to return the strike, to strike back. MAD is inherently defensive in nature and the ABM Treaty, through SALT I, endorses this MAD deterrent, defensive policy.

With respect to the post-1945, or nuclear, era it is correct to say, as Hedley Bull has, that SALT I at the time represented "the most important formal arms control negotiations" of that period.[15] Although the US and the Soviet Union had signed, in 1963, the Partial Nuclear Test Ban Treaty, and the Non-Proliferation Treaty in 1968, both dealt with issues which were not of central importance to the strategic nuclear weapons or policies of both superpowers.

12. C S Gray *Nuclear Strategy and National Style* (Lanham: Hamilton Press/Abt Books, 1986) 97.
13. Stephenson and Weal supra n 1, 47.
14. F Kaplan *The Wizards of Armageddon* (New York: Simon and Schuster, 1983) 315-317; L Freedman *Evolution of Nuclear Strategy* (London: MacMillan Press 1981) 239-244.
15. H Bull "The Moscow Agreements and Strategic Arms Limitation" (1973) 15 Canberra Papers on Strategy and Defence 1.

SALT was first proposed in 1967 by the US President Lyndon Johnson, at Robert McNamara's urging. McNamara's specific objective was to keep the deployment of ABM systems to a minimum, so as to prevent the evolution of first-strike capabilities.[16] By 1969, ABM systems had become the primary security issue; Nixon's ABM deployment program received congressional authorisation by only one vote.[17] ABM systems by this time were judged to be futile, destabilising and costly-futile because "in a competition between offensive missiles and defensive systems, the offense would win ...", and destabilising because "they would speed up the arms race, as both sides developed and deployed not only defensive systems, but also offensive systems to overpower, evade, or attack ... the opposing ABM defence; ... [and] because each side would fear the purpose or the capability of the other's ABM [especially against a weakened retaliatory strike]...."[18] Thus McNamara's and Henry Kissinger's concern with preventing the evolution of first-strike capabilities.

Both President Nixon and Henry Kissinger, his National Security Adviser, realised that, given the state of US-Soviet relations, any physical disarmament was too ambitious a goal. Indeed, the Interim Agreement and Protocol on Strategic Offensive Missiles, together with the ABM Treaty, the two agreements which comprised SALT I, only limited ICBMs to those under construction or deployed as at the time of the signing of the agreement.[19] The main focus of the SALT I agreement was the ABM Treaty. In terms of American nuclear doctrine and international security in the 1970s, 1980s and 1990s, the Treaty was, and is, of great significance.

As mentioned, the ABM Treaty endorses the MAD deterrent, defensive policy. Article I of the Treaty states, "Each party undertakes not to deploy ABM systems for a defence of the territory of its country".[20] Survivability of retaliatory forces was coupled with the vulnerability of both the American and Soviet populations to nuclear attack; if one's population was exposed to nuclear attack from the retaliatory forces of one's enemy, then one would not initiate a nuclear war.

16. See Kaplan supra n 14 for an analysis of the evolution of McNamara's strategic thought.
17. R L Garthoff *Detente and Confrontation* (Washington, DC: The Brookings Institute, 1985) 131.
18. S D Drell, P J Farley and D Holloway "Preserving the ABM Treaty" (1984) 9 International Security 52.
19. J G Stoessinger *Crusaders and Pragmatists* (New York: W W Norton & Company, 1970) 129.
20. S Brown *The Faces of Power* (New York: Columbia University Press, 1983) 340; Garthoff *Detente* supra n 17, 127-198.

In essence, the US and the Soviet Union reached agreement, through the ABM Treaty, to adhere to the doctrine of MAD by limiting their deployment of defensive missile systems.[21] SALT I in many respects was the culmination of the ABM debate of the late 1960s and a move away from flexible response. In signing the Treaty, both the US and the Soviet Union surrendered any right to defend their societies against the other's nuclear weapons. (Because of the link between defences and the offenses needed to overcome them, the Treaty also laid the basis for curbing the ongoing strategic offensive arms race.) The ABM Treaty is therefore the backbone of today's arms control regime and is relied upon by the world.[22] The ABM Treaty is the only bilateral strategic arms control agreement in force; it is central, again, to the arms control process. Its demise would, in all probability, end the era of arms limitation by agreement or treaty.[23]

Members of the US Senate during the SALT I/ABM Treaty ratification hearings of 1972, as well as various US officials since 1972, adopted the historical/narrow/traditional interpretation of the ABM Treaty.[24] Then Secretary of Defence Laird explained to the Senate, in 1972, that while research was permitted for futuristic components under Article V, that provision did, however, prohibit the development, testing and deployment of components that were not fixed-site and land-based.[25] Ambassador Gerard Smith, head of the US SALT delegation said, and says, much the same thing.[26] The Senate, then, gave its consent to a treaty that, in line with Article V, banned the development, testing and deployment of "exotic technology" (or "other physical principles" in Agreed Statement D of the ABM Treaty, referring to exotic technology ABM systems such as lasers and particle beams) ABM systems and components other than fixed, land-based systems.[27]

Moreover, the Nixon administration described the Treaty to the Senate as banning development and testing of all mobile ABMs, whether based on

21. D G Gross "Negotiated Treaty Amendment: The Solution to the SDI-ABM Treaty Conflict" (1987) 28 Harv Int'l LJ 38.
22. J Newhouse *The Nuclear Age* (London: Michael Joseph, 1989) 233; Arms Control Association supra n 6, 71.
23. A Chayes and A C Hayes "Testing and Development of 'Exotic' Systems under the ABM Treaty: The Great Reinterpretation Caper" (1986) 99 Harv L Rev 1956.
24. A B Sherr "Sound Legal Reasoning or Policy Expedient?" (1986-1987) 11 International Security 78.
25. Ibid.
26. A Chalfont *Star Wars* (London: Weidenfeld and Nicolson, 1985) 106; Gross supra n 21, 37.
27. Sherr "Sound Legal Reasoning" supra n 24, 80.

traditional or exotic technologies. Richard Nixon stated in 1988 that "[a]s far as what was presented to the Senate was concerned, it was what we call the 'narrow interpretation'".[28] The reinterpretation of the Treaty in the 1980s and 1990s was not foreseen by anyone either for or against the Treaty in 1972 and was, as a result, not really addressed.[29] The Senate voted overwhelmingly to give the Treaty the force of law, believing that, in ratification, it was abolishing the development and testing of space-based ABMs.[30]

The negotiating record demonstrates that all but one of the US negotiators of the ABM Treaty believed that the Treaty prohibited the development, testing and deployment "of all space-based and other mobile-based ABM systems and components, regardless of whether they use 1972-era or newer technologies. This view of the Treaty is clear from the ordinary meaning of the Treaty text, the Treaty's negotiating record, the United States legislative history, and the subsequent practice of both the US and the Soviet Union. We believe that a careful reading of the classified negotiating record will support our position".[31] In this letter from the US negotiators of the Treaty, they concluded that the Soviet negotiators shared their view.

Former US State Department Legal Adviser Abraham D Sofaer has argued, before Congress and in a number of articles, that the Soviet negotiators repeatedly refused to limit future ABM systems.[32] Much of the negotiating record has now been released, however, and it is possible to follow the course of events in the negotiations.[33] The record, as recounted by Raymond Garthoff, taken together with the text of the Treaty, clearly shows a network of inter-related and mutually reinforcing provisions designed to ban the development of all mobile ABM systems.[34]

The subsequent practice of the two parties to the Treaty with respect to ABM systems also supports the negotiating record in demonstrating that both parties, prior to the 1985 reinterpretation, held to a narrow interpretation of the ABM Treaty. Indeed, for the Soviets, the Treaty has become something of a Russian "icon".[35] From 1972 through to 1985, as Senator Sam Nunn has stated, the Soviets "were on notice of US adherence to the traditional view"

28. Bunn supra n 4, 68; Garthoff *Policy* supra n 4, 13.
29. Garthoff *Policy* supra n 4, 71.
30. S Talbott *Master of the Game* (New York: Alfred A Knopf, 1988) 135.
31. Bunn supra n 4, 59.
32. See A D Sofaer "The ABM Treaty and the Strategic Defence Initiative" (1986) 99 Harv L Rev 1972-1985.
33. See Bunn supra n 4, 63 and Garthoff *Policy* supra n 4, 67-68.
34. Garthoff *Policy* supra n 4.
35. Newhouse supra n 22.

and "made no objection".[36] And Soviet affirmations of the traditional interpretation have been made continuously since 1972. Viktor Karpov, one of the Soviet ABM Treaty negotiators, stated in 1976 to the US SALT II delegation that he took for granted the traditional interpretation; and Marshal Sergei Akhromeyev, a former chief of the Soviet general staff, published an article on the ABM Treaty in the 25 May 1985 issue of Pravda in which he elaborated a traditional interpretation.[37]

US statements from 1972 onwards also reflect this traditional, narrow interpretation. Writings and statements by US SALT negotiators set forth this interpretation.[38] Finally, every year since 1978, the US Arms Control and Disarmament Agency has been required to prepare an Arms Control Impact Statement for presentation to Congress. All of these statements, including those prepared by the Reagan administration, explicitly endorse the traditional interpretation. The 1985 statement says: "[t]he ABM Treaty prohibition on development, testing and deployment of space-based ABM systems, or components for such systems, applies to directed energy technology ... used for this purpose".[39]

It makes little sense for the Soviet Union to accept the broad interpretation of the Treaty, given that, since 1972, the US has always been better prepared by far to take military advantage of new ABM technologies than the Soviets; it is therefore unlikely that the Soviet Union would agree to an imbalance, and unlikely that they will "consent to remain in an agreement that purports to maintain it".[40]

Soviet response, then, to the Reagan interpretation could have been predicted. The official position appeared in the 19 October 1985 issue of Pravda, again written by Marshal Akhromeyev. It states, in part, that the new interpretations

> are deliberate deceit. They contradict reality. Article V of the treaty absolutely, unambiguously bans the development, testing, and deployment of ABM systems ... regardless of whether these systems are based on existing or future technologies ... Only such and no other interpretation of the key provisions of the ABM Treaty ... was worked out and adopted by the two sides in the course of talks on this treaty. The present

36. S Nunn *Congressional Record - Senate* (Washington, DC: US Government Printer, 1987) S3094.
37. Garthoff *Policy* supra n 4, 81-83. For a detailed analysis of Soviet attitudes toward the ABM Treaty, see J Voas *Soviet Attitudes Towards Ballistic Missile Deterrence and the ABM Treaty* (London: Brassey's for the IISS, 1990).
38. Nunn supra n 36, S3093-S3094.
39. Chayes and Hayes supra n 23, 1968-1969.
40. Sherr "Sound Legal Reasoning" supra n 24, 82.

> aim of the US administration is clear: to prepare a 'legal base' for carrying out all stages of practical work within the framework of the SDI program....[41]

This view is reflected by Soviet officials involved in negotiating the ABM Treaty, the current Soviet disarmament chief and the former deputy foreign minister.[42]

The one blemish on the Soviet position, which the US has been quick to take advantage of, involves the Krasnoyarsk radar in the Soviet Union, a large phased-array radar prohibited by the ABM Treaty except as an early warning radar deployed along the national periphery.[43] At the ABM Treaty Review Conference in 1988, the US announced that it would have to consider whether this violation constituted a "material breach" of the Treaty. That finding would permit the US to abrogate or suspend the ABM Treaty.[44]

There is general agreement that the radar is a violation of the Treaty, but the USSR has also been anxious to remove the radar as an issue blocking arms control. Members of the Supreme Soviet have said that building the radar was a mistake, and that for many years the government was unaware of what the military was doing at Krasnoyarsk.[45] Construction at the site has now been halted.

The traditional interpretation, then, of the Treaty is this: it expressly prohibits development and testing of mobile/space-based ABMs and there is no exception for ABMs using exotic technology (defined earlier). The reinterpretation, the rationale for which - SDI - is explained and analysed in the next section, is based upon the interrelationship of several key articles in the text of the Treaty: these are Articles II(1), III, IV, V(1), and Agreed Statement "D".

## A. Provisions of the ABM Treaty

Article II(1) states:

> ... 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]

41. Garthoff *Policy* supra n 4, 86-87.
42. Ibid, 87.
43. Arms Control Association supra n 6, 148.
44. Ibid.
45. Newhouse supra n 22, 385.
46. See Bunn supra n 4, 162-167.

The traditional interpretation defines the term "ABM system" as a system to counter ballistic missiles, and as implicitly covering future systems (that is, the clause listing "current" components is only illustrative). The reinterpretation sees this article as ambiguous, but reasonably limits the definitior to components current in 1972 (that is, it excludes exotic technologies, or SD] technology).[47]

Article III states:

> Each Party undertakes not to deploy ABM systems or their components except ... [for two designated, fixed, land-based systems....]

The traditional interpretation has Article III banning all "ABM systems" except the two authorised; by using the term "ABM systems" (defined in Article II), prohibition on deployment extends to future ABM components as well. The reinterpretation holds that the ban on deployment applies, again, only to components currently in use at the time that the treaty was signed in 1972.[48]

Article IV states that the Article III limitations do not apply to the development and testing of ABM systems within agreed test ranges. The traditional interpretation holds that Article IV bans all development to agreed test sites, and that consistent with Article II, this applies also to exotics. Given the interpretation of Article V banning the development and testing of mobile/space-based exotics, the only exotics which can be tested are land-based. The reinterpretation holds that, again, Article IV refers only to 1972 components; exotics may therefore be tested anywhere.[49]

Article V(1) states:

> Each Party undertakes not to develop, test or deploy ABM systems or components which are sea-based, air-based, or mobile land-based.

The traditional interpretation applies this ban to all mobile/space- basec ABM systems. The reinterpretation holds that the ban applies only to "then-current" components, excluding mobile/space-based ABM systems.[50]

Finally, Agreed Statement "D", unlike the above articles, anticipated the development of ABM systems "based on other physical principles" tha might be "created in the future", and refers to the ban on deployment o various ABM systems.[51] Traditionally, this complements Articles III and IV

47. Nunn supra n 36, S2975.
48. See Sofaer supra n 32, 1972-1985.
49. Ibid.
50. Nunn supra n 36, S2975.
51. Talbott supra n 30, 240.

According to the 1985 reinterpretation, however, this provision is ambiguous. It should be read as referring only to deployment, as only deployment is explicitly stated. This would permit testing and development.[52]

The rationale behind the 1985 reinterpretation of the ABM Treaty by the Reagan administration was to permit development of the Strategic Defence Initiative. Before undertaking an examination of the principles and rules of treaty interpretation, the Strategic Defence Initiative will be analysed to understand what the ABM Treaty interpretation of 1985 seeks to allow.

## III. THE STRATEGIC DEFENCE INITIATIVE AND THE ABM TREATY REINTERPRETATION

On 23 March 1983, President Reagan proposed his solution to the problem of security in an age of nuclear deterrence. He launched the SDI, a program designed to create an impenetrable shield to protect the US against a Soviet missile attack, and therefore to remove the need to threaten nuclear retaliation in order to deter attack.[53] On that date, President Reagan addressed the US nation on what would be termed the Strategic Defence Initiative ("SDI"). He stated that "deterrence of aggression through the promise of retaliation ... has worked". He continued, however, that his advisers, in particular the Joint Chiefs of Staff, had underscored the necessity "to break out of a future that relies solely on offensive retaliation for our security ... What if free people could live secure in the knowledge that their security did not rest upon the threat of instant US 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?" Reagan concluded that: "Tonight, consistent with our obligations of the ABM Treaty and recognizing the need for closer consultation with our allies, I'm taking an important first step. I am directing a comprehensive ... effort to define a long-term research and development program to begin to achieve our ultimate coal of eliminating the threat posed by strategic nuclear missiles".[54]

The purpose of SDI was to determine whether protection against strategic ballistic missiles was technologically feasible, with the clear implication that, if so, the US would build strategic defences. SDI is an ABM system and it clearly violates the ABM Treaty, in letter and in spirit. For the ABM Treaty

52. Nunn supra n 36, S2975; Talbott, ibid.
53. R McNamara *Blundering into Disaster* (London: Bloomsbury, 1986) 89.
54. R Reagan "Launching the SDI" in Z Brzezinski (ed) *Promise or Peril* (Washington, DC: Ethics and Public Policy Centre, 1986) 48-50.

has as its theoretical underpinning the doctrine of MAD and it was Reagan's unwillingness to accept the prospect of permanent vulnerability to total destruction - the heart of MAD and the object of the ABM Treaty - that led him to launch SDI.[55]

In 1985, the Reagan administration announced a new interpretation of the Treaty that would change the scheme of the Treaty. The new, broad interpretation held that the term "ABM systems and components" meant only those based on 1972 technology. This meant that "exotic" technology (lasers and particle beams, for instance) would not be included in the term under the reinterpretation. This would eliminate any legal barriers - that is, the ABM Treaty - to the development and testing of those devices which form the core of SDI.[56] As Arms Control Today reported, "[t]he new US strategic defence program poses a direct threat to the ABM Treaty, which is the keystone to the entire framework of existing arms control agreements".[57] The Bush administration clearly supports the reinterpretation.

The reinterpretation is largely the work of former US State Department legal adviser, Abraham Sofaer. As legal adviser, Sofaer established a record of interpreting international law to support unilateral action by the US; for example, he supported the Administration's decision to deny the International Court of Justice's jurisdiction after the Court ruled against US support for the Nicaraguan contras.[58] As Talbott writes, "presented with the broad interpretation of the ABM Treaty, Sofaer made SDI legal".[59]

In the following section, through an analysis of the principles of treaty interpretation, it will be argued that the narrow interpretation of the ABM Treaty is correct, and that the reinterpretation raises grave questions of US credibility as a treaty and arms control partner, and the legality of the reinterpretation.

55. Bundy supra n 8, 571.
56. Sherr *Other Side* supra n 11, 219.
57. S Keeney "The Uncertain Future of Arms Control" (July-August 1985) Arms Control Today 2.
58. Talbott supra n 30, 243.
59. Ibid.

## IV. TREATY INTERPRETATION

International law has developed a series of principles or rules for treaty interpretation. Perhaps the most useful expression of these principles can be found in the Vienna Convention on the Law of Treaties. The Convention was signed by the US in April 1970.[60] In 1971, the US Department of State declared that the Vienna Convention was "recognised as the authoritative guide to current treaty law and practice".[61] These principles or rules of treaty interpretation are not to be held absolute; they are, as Professor Starke writes, relative to the specific text and to the specific problem to be addressed.[62] Fitzmaurice has pointed out that there are three main schools of thought on the subject of treaty interpretation. He labels them the "intentions of the parties" or "founding fathers" school; the "textual" or "ordinary meaning of the words" school; and the "teleological" or "arms and objects" school.[63] He concludes that "[t]he ideas of these three schools are not necessarily exclusive of one another, and theories of treaty interpretation can be construed (and are indeed normally held) compounded of all three ... All three approaches are capable, in a given case, of producing the same result in practice...."[64]

The terms and words of a treaty are to be construed according to their plain and natural meaning. Article 31(1) of the Vienna Convention, "General Rule of Interpretation", states that a treaty should 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". This principle of grammatical interpretation and intention and purpose of parties was affirmed by the International Court of Justice in the *Advisory Opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organisation.*[65] Similarly, the purpose of the agreement in the *Case Concerning the Application of the Convention of 1902 Governing the Guardianship of Infants*[66] was held to be relevant. Charles Cheney Hyde

60. Nunn supra n 36, S2976.
61. J G Starke *Introduction to International Law* 10th edn (London: Butterworths, 1989) 436.
62. Ibid, 478. See also I Brownlie *Principles of Public International Law* (Oxford: Clarendon, 1990) 603-605 on the law of treaties; and D J Harris *Cases and Materials on International Law* (London: Sweet and Maxwell, 1983).
63. G G Fitzmaurice "The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points" (1951) BYIL 1.
64. Ibid, 1-2.
65. ICJ 1960, 150.
66. ICJ 1958, 55.

refers to this principle as "respect for 'plain terms'" and that the meaning of a treaty must be read as a whole, not from particular phrases taken out of context.[67] There are other, significant, judgments of the International Court of Justice which confirm that the textual approach to the interpretation of treaties is established law. The most important in this respect are *Conditions of Admission of a State to Membership in the United Nations*[68] and *Competence of the General Assembly for the Admission of a State to the United Nations*.[69] The *Aegean Sea Continental Shelf Case*[70] deals in part with the limitations of a "purely grammatical" approach. Finally, Lord McNair has written that, in addition to ascertaining the common intention of the parties, the overall aim and purpose of the parties should be referred to.[71]

The aim and purpose, or object, of a treaty is Starke's second principle of interpretation,[72] but recourse should be had to the object only if words and phrases are doubtful. In *Nicaragua v United States*,[73] the International Court of Justice held that a treaty between the two was breached by US actions which deprived the treaty of its object and purpose. This principle has also been applied by the Court, perhaps most significantly in the *Ambatielos Case (Preliminary Objection)*.[74] In that case, a Declaration, to be read with a bilateral commercial treaty negotiated between the United Kingdom and Greece which had replaced another such treaty, provided for the arbitration of "claims based upon the provisions of the [old treaty]". Greece argued that the Declaration applied to claims which had arisen during the period of the old treaty but which were brought after the new treaty had been negotiated, as well as to such claims brought before the new treaty had been negotiated. The Court supported the argument made by Greece, in the following terms: "If the United Kingdom Government's interpretation were accepted, claims based on the Treaty of 1886, but brought after the conclusion of the Treaty of 1926 would be left without solution. They would not be subject to arbitration under either Treaty, although the provision on whose breach the claim was based might appear in both and might thus have been in force without a break since 1886. The Court cannot accept an interpretation which

67. C C Hyde "The Interpretation of Treaties by the Permanent Court of International Justice" (1930) 24 Am J Int Law 1,4.
68. ICJ 1948, 57.
69. ICJ 1950, 4.
70. ICJ 1978, 3.
71. Nunn supra n 36, S2976.
72. Starke supra n 61, 479-480.
73. ICJ 1986, 14.
74. ICJ 1952, 28.

would have a result obviously contrary to the language of the Declaration and to the continuous will of both Parties to submit all differences to arbitration of one kind or another".[75]

Article 31(3)(b) of the Vienna Convention on the Law of Treaties states that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" should also be taken into account.[76] This principle can be demonstrated with reference to the *Competence of the ILO with Respect to the Agricultural Labour Case*: "If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty. The Treaty was signed in June 1919, and it was not until October 1921, that any of the Contracting Parties raised the question whether agricultural labour fell within the competence of the International Labour Organisation. During the intervening period the subject of agriculture had repeatedly been discussed and had been dealt with in one form and another".[77]

Article 32 of the Vienna Convention states:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty ... 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.[78]

Starke and Hyde both make similar points. With reference to the *Case Concerning United States Diplomatic and Consular Staff in Teheran*[79] Starke writes that a treaty "should be given an interpretation which 'on the whole' will render the treaty 'most effective and useful'," or "[enable] the provisions of the treaty ... to have their appropriate effects", and that recourse to extrinsic materials may be had if the clear words are not contradicted as a result.[80] Hyde also makes the point that, provided the clear words are not contradicted, recourse to the preparatory work may be had, and when there is the existence of a "broad design to make possible the achievement of a particular end", courts would be "loathe to yield to a construction subversive of such a

75. Ibid, 45.
76. Nunn supra n 36, S2976.
77. (1922) Pub PCIJ Series B, Nos 2 and 3, 1, 39-40.
78. Nunn supra n 36, S2976.
79. ICJ 1980, 3.
80. Starke supra n 61, 480-481.

purpose and tending to thwart it".[81] The Permanent Court of International Justice recognised that the preparatory work of the treaty can be referred to in the problematic *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder*[82] but qualified its comments by stating that part of the preparatory work of the 1919 Treaty of Versailles could not be admitted in order to assist the interpretation of the Treaty because not all of the parties to the case had participated in the drafting of the Treaty. The Court stated that "three of the Parties concerned in the present case did not take part in the work of the Conference which prepared the Treaty of Versailles; ... accordingly, the record of this work cannot be used to determine, in so far as they are concerned, the import of the Treaty; ... this consideration applies with equal force in regard to the passages previously published from this record and to the passages which have been reproduced for the first time in the written documents relating to the present case...."[83]

Under the principles of international law codified in the Vienna Convention on the Law of Treaties, treaty interpretation is based above all on the treaty text, the terms of which are to be interpreted with reference to their "ordinary meaning", in their context, and in the light of their objectives. If this text is ambiguous, recourse is then had to the subsequent practice of the treaty signatories. If no answer is arrived at, supplementary or extrinsic evidence is considered.

It is my argument that, no matter what source of interpretation is used, the result is the same: each supports the traditional or narrow view of the ABM Treaty, prohibiting the development, testing and deployment of all space-based and mobile ABM systems and components, no matter the technology. Moreover, in reinterpreting the Treaty, the Reagan administration ignored these principles of interpretation; no reference was made to subsequent practice, the President did not "respect" the understanding of the Senate of the ABM Treaty at the time of ratification.[84] In the end, reinterpretation was based solely on alleged ambiguities in the Treaty text.

The Sofaer/Reagan/Bush interpretation did not, and does not, adhere to the above traditional "rules" of treaty interpretation. The Treaty language was challenged not on its intent but on how it was put together. Only parts of the negotiating record were reviewed. Abraham Sofaer, as mentioned, was an advocate of SDI, and "saw his task as conforming the ABM Treaty to serve

81. Hyde supra n 67, 13, 10.
82. (1929) Pub PCIJ Series A, No 23, 5.
83. Ibid, 42.
84. Bunn supra n 4, 61.

the policy purpose of the President".[85] Questions of interpretation of treaties, given the primacy of treaty commitments - that they represent a solemn engagement between nations - require rigorous legal analysis, not analysis to serve policy ends.

In this paper, I have looked at the ABM Treaty with respect to principles of treaty interpretation and the narrow versus the broad interpretation. On the basis of the US and Soviet negotiating record, Senate understanding of the Treaty, and the subsequent practice of the Treaty parties, I conclude that the ABM Treaty should be interpreted in its traditional, historic and narrow meaning. Above all, if the text is examined completely, and with reference to the plain words of the Treaty, the result and conclusion are the same: the Treaty was reinterpreted with policy objectives to be achieved - SDI.

In 1987, the Senate Foreign Relations Committee stated that they could find no evidence "to contradict the conclusion that the Reagan administration's reinterpretation of the ABM Treaty constitutes the most flagrant abuse of the Constitution's treaty power in 200 years of American history".[86] This was with reference to Senate understanding of the ABM Treaty. Louis Henkin has written that "[t]he President can only make a treaty that means what the Senate understood the treaty to mean when the Senate gave its consent. The Senate's understanding of the treaty to which it consents is binding on the President...."[87] The Senate's understanding was that the ABM Treaty should be interpreted in a narrow sense.

The reinterpretation makes no sense in light of the Treaty's object - to render vulnerable population centres, to limit (not expand) ABM systems. Testing and deployment of space-based defences would obviate both the Treaty and MAD. The Treaty does not provide for testing, except at agreed sites. Both Treaty partners intend to maintain MAD, even if they reduce their missiles and warheads; the Treaty should be interpreted as limiting SDI to laboratory research.[88]

85. Garthoff *Policy* supra n 4, 101.
86. Bunn supra n 4, 68.
87. Ibid, 71.
88. Gross supra n 21, 51.

## V. THE ABM TREATY, ARMS CONTROL, AND US-SOVIET RELATIONS

Both George Bush and his Secretary of Defence, Richard Cheney, have committed themselves to the deployment of SDI as soon as is feasible. Cheney stated that he "would advocate the abrogation of the [ABM] Treaty" as soon as an SDI system was ready for deployment.[89] So, despite recent changes within the Soviet Union, the Bush administration has chosen to follow its predecessor's line on SDI generally, and the ABM Treaty specifically.

In September 1989, the Soviet Union agreed to sign a Strategic Arms Reduction Talks ("START") agreement without agreement on how to interpret the ABM Treaty. In early August 1991, the US and the Soviet Union finally signed a START agreement. The agreement attempts to set equal ceilings on the strategic nuclear forces maintained by both signatories. The Treaty sets a limit of 1600 on strategic nuclear delivery vehicles - intercontinental ballistic missiles, submarine-launched ballistic missiles and heavy bombers that deliver strategic nuclear weapons. The Arms Control Association estimates that the US will retain about 9000 strategic warheads, while the Soviet Union will have roughly 7000.[90] START will force the Soviet Union to reduce heavily its biggest land-based missiles - the SS-18 - the weapons (primarily in terms of accuracy) most dangerous to the US. These missiles cannot be replaced by any other large or "heavy" missile. The Treaty does allow strategic nuclear force modernisation. New US systems will carry more powerful and accurate nuclear warheads. For example, modernisation of cruise missiles will occur, which the Treaty was deliberately designed to allow.[91]

The START Treaty involves the reduction of the US stockpile of missiles and bombers that deliver strategic warheads by about twenty-nine per cent; the Soviet arsenal will be cut by thirty-six per cent. Yet, because of the steady build-up of nuclear arms during the decade when the Treaty was being negotiated, the cuts will simply scale the size of both strategic arsenals back to where they were when the talks began. The Soviet Union, as stated above, is obviously willing and prepared to sign a START Treaty without agreement on how to interpret the ABM Treaty - the START Treaty was, after all, signed

89. Bunn supra n 4, 11.
90. For details of the agreement, see "The Summit: Good Fellas" Time 5 August 1991.
91. For the Soviet reaction, see "Soviets Fear 'outdated' US Line on Future Arms Cuts" The Financial Review 31 July 1991.

in early August 1991. Real, deep strategic arms reductions were not made, however, in this most recent agreement, and the Soviet position is that deep cuts in offensive ballistic missile warheads will be possible only if the ABM Treaty is preserved in something like its present form. The Soviet position, furthermore, is that US withdrawal from the Treaty will mean the finish of deep cuts in offensive weapons through the START process. The ABM Treaty issue therefore requires resolution, if only to preserve the arms control process. The Soviet Union has responded to US consideration of large-scale ballistic missile defence by making the preservation of the ABM Treaty an implicit condition for deep cuts in ballistic missile warheads.

The US is now considering large-scale ballistic missile defence, therefore abrogating unilaterally the ABM Treaty. The Senate Armed Services Committee, in late July 1991, endorsed deployment of a defence against ballistic missiles.[92] Senator Sam Nunn, the chairman of the Committee and previously a supporter of the ABM Treaty, now wants to deploy defences against limited attack using ground-based missiles.[93] The plan involves "one or an adequate additional number of ABM sites" and the "optimum" use of space-based sensors. It would double funding for the development of SDI. The initial deployment, under this plan, would consist of 100 interceptors in North Dakota.[94] Analysts have worked out that six such sites would be needed to cover all of the continental US.[95] The plan is contained in the proposed Missile Defence Act, and it was passed by the Senate Armed Services Committee on a 16-4 vote.[96]

The New York Times, in response to the plan, editorialised that the proposed Act "could shake the 40-year nuclear standoff. It could even revive the arms race ... [The plan] would shred the 1972 ABM treaty, which limits defences to 100 interceptors at a single site ... The Nunn plan would break the psychological barrier against ABM deployments on the ground, invite deployments in space, and trash a treaty that has held back the arms race for 20 years".[97]

92. "Senate Panel, in Surprise, Backs Missile Defense" International Herald Tribune 29 June 1991.
93. "Anti-Ballistic Missiles" International Herald Tribune 30 July 1991.
94. Ibid.
95. "Defences, at Last" Asian Wall Street Journal 30 July 1991.
96. Ibid.
97. "Anti-Ballistic Missiles" International Herald Tribune 30 July 1991.

The response of the Soviet Union to this US consideration of large-scale ballistic missile defence has been to make preservation of the ABM Treaty an implicit condition for deep cuts in ballistic missile warheads. Clearly, then, meaningful arms control would be a thing of the past if the US were to withdraw from or materially violate the ABM Treaty, options seriously being considered. Yet does it make any sense to speak in terms of a Soviet response, given the apparent breakup and disintegration of the Soviet Union, a disintegration which received added momentum from the failure of the August coup against President Gorbachev? The possibility exists that the US will have to deal not with one Soviet nuclear arsenal, but with an arsenal that is controlled perhaps by different republics. The Soviet centre and republics obviously need to reach agreement on who controls parts of the Soviet arsenal; Russia is setting up its own army, and Soviet forces have moved many nuclear weapons from distant republics to Russia. Some estimates now place ninety per cent of the Soviet nuclear arsenal in Russia; the remainder are primarily in the Ukraine and in Kazakhstan.[98] The more likely possibility is that these weapons will come entirely under either Soviet or Russian control. In either case, there is absolutely no reason to expect that the Soviet position regarding the ABM Treaty will change or that recent events in the Soviet Union have forced Soviet or Russian national security perceptions to change. Finally, the turmoil in the Soviet Union, if anything, should provide greater incentive for the US to maintain the ABM Treaty in its current form, and to interpret it in the traditional manner. Given the current uncertainties, there is much to be gained through providing assurances and guarantees.

Any US withdrawal from the Treaty would, in line with Article XV, require six months' notice. Alternatively, treaties may be discharged through the *rebus sic stantibus* doctrine, where a "fundamental change in the state of facts which existed at the time the treaty was concluded" may be invoked as a ground for withdrawal.[99] Article 62 of the Vienna Convention refers to a "fundamental change of circumstances" and conditions; the US would likely cite SDI, yet Article 62 bars a party from initiating a change unilaterally to justify treaty withdrawal.[100]

The US, as Bunn writes, "has a substantial security interest in the rule of law in international relations".[101] International law requires that states must

98. D Hodgkinson "After the Coup: The Uncertain Future of Arms Control" (1991) 98 SANA Update 8.
99. Starke supra n 61, 473.
100. Gross supra n 21, 59.
101. Bunn supra n 4, 73.

honour obligations undertaken. The Reagan/Bush reinterpretation with no real legal foundation would call into question the credibility of all US treaty commitments. The Soviet Union would be free to carry out reinterpretations of their own. Nuclear security demands good faith compliance. With regard to US-Soviet relations, the arms control process could continue in a more stable framework, with the Soviet Union or its successors no longer fearing a nuclear strike under cover of a defensive SDI shield. A restatement of the US position - now, support for the narrow interpretation of the ABM Treaty - would appear to be in the best security interests of the United States.

## VI. CONCLUSION

I have argued that, with reference to well-established rules or principles of treaty interpretation, the correct interpretation of the 1972 ABM Treaty is the historical or narrow meaning given to its terms. The Reagan administration and now the Bush administration, have sought to give a broader meaning to the terms and spirit of the treaty, above all to allow work on the Strategic Defence Initiative to proceed without any legal barrier. In seeking this reinterpretation they have both violated canons of treaty interpretation, and sought strained legal reasoning to give effect to policy and political imperatives. I have sought to identify the importance, for both US and Soviet national security, of the ABM Treaty, and its importance, through MAD, to the arms control process. Taken altogether, the available evidence, in my opinion, both confirms and requires a narrow reading or interpretation of the ABM Treaty.