4-1-2001

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Recommended Citation

Available at: http://chicagounbound.uchicago.edu/cjil/vol2/iss1/22
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The Anti-Ballistic Missile Treaty Controversy
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Whether the United States should initiate construction of a limited national missile defense system became a significant issue for the Clinton administration in the summer of 2000. Central to the national defense system discussion was a concern that such a move would violate the Anti-Ballistic Missile Treaty ("ABM Treaty") signed with the Soviet Union in 1972. The administration considered a number of different approaches to build a national missile defense system, including the possibility that the ABM Treaty could be interpreted to allow preliminary stages of construction to begin without technically violating the treaty. After considerable deliberation, the Clinton administration decided not to insist upon such a broad interpretation of the ABM Treaty. However, the discussion surrounding that possibility highlighted an important problem in international law: what happens when one party to an international treaty unilaterally changes a long-standing and previously universally accepted interpretation of the treaty?

The United States and the Soviet Union signed the ABM Treaty in the midst of the Cold War as an effort to slow the arms race by reducing the number of weapons and limiting the defense systems available to both sides. Article I of the treaty takes a strong stance against nation-wide defense systems, stating "[e]ach 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."2 The treaty limits even the testing of several kinds of defense systems in Article V: "Each party undertakes not to develop, test, or deploy AMB systems or components which are sea-based, air-based, space-based, or mobile land-based."3 The treaty leaves in place the ability to deploy very limited defense systems that are unable to protect the parties' major cities. The idea driving the limitations on defense systems was that if neither side could survive a first strike with

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2. Id.
3. Id.
a retaliatory capability intact, then neither side would have an incentive to order that first strike. Any defense system capable of defending either side's major cities was considered to be a negative contribution to the arms race, because once one side had such a defense capability the other side would work until it produced the technology necessary to pierce the system.

At the time that the ABM Treaty was signed, the United States and the Soviet Union were among the only countries with the capability of launching intercontinental nuclear ballistic missiles. The global climate concerning nuclear weapons has changed considerably since the treaty was ratified. In recent years, smaller nations such as North Korea and Iran have developed nuclear technology. The possibility that the United States may be vulnerable to a nuclear attack from such "rogue states" fueled a desire among both Congress and the Clinton administration to deploy a limited defense system despite the ABM Treaty.

In early June 2000, President Clinton met with Russian President Vladimir Putin to discuss the US plan to build a limited defense system in response to the threat from "rogue states." The plan included the construction of 100 interceptor missiles in Alaska to protect the United States from incoming missiles. Russia made it clear during the summit that the proposed missile defense system would constitute a violation of the ABM treaty. Clinton rejected Putin's suggestion that the two nations create a joint Russo-US theater defense system of a much smaller scale than the national system that Clinton proposed.

Following the summit, the Clinton administration suggested that the ABM Treaty could be interpreted to allow for the initial phases of construction of a limited defense system without violating the terms of the treaty. Article II of the ABM Treaty states that "The ABM System components . . . include those which are . . . under construction." The administration argued that the phrase "under construction" could be interpreted so that the United States could pour the cement on the project without the system actually being "under construction." The move would allow the Clinton administration to move forward with the project while buying more time to negotiate


5. There has been some controversy surrounding the validity of the ABM treaty following the breakup of the Soviet Union in 1991. Some commentators claim that Russia has succeeded to the treaty because Russia affirmed its commitment to the Treaty. Both former President Bush and President Clinton have openly accepted Russia's succession. See Michael J. Glannon, Yes, There Is an ABM Treaty, Wash Post A25 (Sept 4, 2000). Others argue that Senate approval is required any time a substantive change is made to a treaty, and because the Senate has not voted directly to affirm the treaty, it is no longer a valid agreement. See R. James Woolsey, What ABM Treaty?, Wash Post A23 (Aug 15, 2000). For the purposes of this essay, I will proceed on the premise that the ABM Treaty is now fully in force as a multilateral treaty.

6. See David Hoffman, Arms Control Reverts to a Waiting Game, Wash Post A1 (June 6, 2000).

7. ABM Treaty, 23 UST 3435 at Art 2 (cited in note 1).

with Russia. However, this interpretation would be a departure from the interpretation recognized by both sides since the Reagan administration. Since that period, even the smallest steps toward deployment of a missile defense system would constitute a breach of the treaty.

On September 1, 2000, President Clinton announced that he had decided not to authorize the deployment of the proposed national missile defense system. Thus, the decision whether to move forward with the construction of such a system has been inherited by current President George W. Bush. Regardless of the course of action that President Bush pursues, the Clinton administration's struggle with the ABM Treaty raises the question of whether it is possible to change the interpretation of a treaty after more than twenty years of action under its original interpretation.

In general, the interpretation of international treaties is left to the parties to govern, unless the treaty itself provides for interpretation by a designated tribunal or the International Court. In 1969, the Vienna Convention on the Law of Treaties ("Vienna Convention") codified some of the customary rules governing the interpretation of international treaties. Article 31 of the Vienna Convention promotes the tradition of broad rules of treaty interpretation, stating that "[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." Article 31 also states that the following factors should be taken into account when interpreting an international treaty: the context of the treaty, subsequent agreements between the parties, subsequent practices of the parties, and any relevant rules of international law applicable in the relations between the signing parties.

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9. A similar controversy over the interpretation of the ABM Treaty arose in the wake of Reagan's famous "Star Wars" speech in 1983. Reagan asserted a new interpretation of the treaty whereby the ban on development and testing of space-based ABM systems would only apply to technology current at the time of the treaty. Systems based on future ABM technology would only be governed by the provisions affecting fixed, land-based technology. Congress put a stop to this interpretation through its budgetary authority, mandating that no funds could be used for Reagan's proposed SDI tests other than those that would not contravene the original interpretation of the ABM Treaty. See David A. Koplow, Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties, 137 U Pa L Rev 1353, 1379 (1989). Congress continued to assert this budgetary control through the Bush administration. See Charles Shottwell, Joginder Dhillon, and Deborah C. Pollard, Ballistic Missile Defense for the Twenty-First Century: At the Crossroads of Global Security, Airpower (Special ed 1994).


15. Id.
Vienna Convention emphasizes a focus on the totality of the circumstances surrounding both the ratification atmosphere and subsequent actions of the parties to give effect to a treaty's true meaning. Neither the United States nor the Soviet Union signed the Vienna Convention and therefore are not bound by it. However, one can assume that the rules set forth in the Vienna Convention generally reflect customary international law, and are therefore relevant to the ABM Treaty debate. Commentors agree that international treaty interpretation is governed by general principles, as illustrated by the guidelines set forth in the Vienna Convention, rather than by hard law.

One of the most important of these principles is that the President must not interpret a treaty in a way that makes it a different instrument than the one to which the Senate agreed. Article 31 of the Vienna Convention emphasizes context as a tool for international treaty interpretation. Context can include legislative history as well as the theory of performance-interpretation, which suggests that the parties' expectations are indicated by their performance under the treaty. These broad rules share a common bond of good faith ideals, suggesting that it is not the black letter of a treaty that governs, but rather the overall tenor and context of the document that controls interpretation.

Disagreements over the interpretation of the ABM Treaty have been left to the resolution of the Standing Consultative Commission ("SCC"), established by Article XIII. The SCC left certain aspects of the treaty open-ended to allow each party to interpret the treaty as it wanted. For instance, the treaty is silent as to whether research into defense system technology is permissible, and it has been interpreted by both sides to allow research to go forward. This creates a line-drawing problem: where does research end and development of an ABM system begin? These terms were intentionally left somewhat undefined because the parties could not come to an agreement as to their interpretation. As long as the interpretation is governed by reasonableness, and the other party does not object, a variation in interpretation between the parties is acceptable.

16. Id at Art 85.
18. Id.
20. Vienna Convention at §3 at Art 31 (cited in note 13).
22. See ABM Treaty, 23 UST 3435 at Art 13 (cited in note 1).
24. See id at 829.
The dispute that occurred in the summer of 2000 between the United States and Russia over the interpretation of the phrase "under construction" highlights the need for adherence to international norms of interpretation when acting under these open-ended provisions. It is arguable, as the Clinton administration attempted to assert, that under a purely textualist approach to the phrase "under construction," preliminary steps of construction could move forward without violating the treaty. However, it is unlikely that such an interpretation would hold up under the broad rules set forth by the Vienna Convention. Those rules mandate that when parties disagree over the interpretation of a treaty provision, the terms shall be read in accordance to their "ordinary meaning." In addition, practice between the parties is an important factor in legal interpretation of a treaty.

It is clear that the Russians disagree with the Clinton administration's broad interpretation of the phrase "under construction," and this disagreement highlights its latent ambiguity. The treaty was drafted in the context of the Cold War, and its main purpose was to prevent either party from developing a nationwide defense system as a means of slowing the arms race. More than two decades of subsequent actions of the parties indicate that this has remained the goal of the parties. President Clinton stated in 1993 that it was the intention of the United States to comply with the traditional, restrictive interpretation of the ABM Treaty. This statement made it clear that, at that time, the United States would not reinterpret the treaty to create meanings which diverged from the original understanding.

In light of the past actions and understandings between the United States and Russia over the construction of the ABM Treaty, the new interpretation proposed by the Clinton administration seems little more than an attempt to manipulate the treaty language to veil what would otherwise be considered a blatant violation of the ABM agreement. One of the basic premises of international treaty interpretation is that treaties are to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty." While the technicalities of the phrase "under construction" can be manipulated in favor of taking initial steps, this interpretation is clearly just that: a manipulation. In light of the history and subsequent practices of the parties to the ABM Treaty, this new interpretation probably violates the good faith requirements of the Vienna Convention.

However, there may be a third option to allow the United States to move forward with its proposition that is built into the ABM Treaty itself. Article XV of the treaty states the following: "Each Party shall, in exercising its national sovereignty, have the right to withdraw from this treaty if it decides that extraordinary events

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25. Vienna Convention at §3 at Art 31 (cited in note 13).
27. See id at 831.
28. See ABM Treaty, 23 UST 3435 at Art 31 (cited in note 1).
related to the subject matter of this treaty have jeopardized its supreme interests." At the time that the treaty was signed, neither party contemplated the possibility that nuclear weapons would be available to countries around the world that are not governed by similar restrictions or guidelines. The idea of a rogue state having the capacity to direct a nuclear missile at the United States certainly jeopardizes this country's supreme interests. It is arguable that the global climate regarding nuclear weapons has changed enough to constitute an "extraordinary event" that would permit the United States to bow out of the ABM Treaty, should it decide that the national interest in a strong defense system outweighs the benefits of the treaty.

The established international law governing the interpretation of international treaties does not give a satisfying formula to resolve conflicts in treaty interpretations among the parties. However, it is clear that, especially in the case of international treaties governing the proliferation of nuclear weapons, such treaties have little meaning unless the parties to them respect the ordinary meaning of the document's plain language, and carry out that meaning in good faith.

29. See id at Art XV.