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THE ABM TREATY

PART I:

Treaty Language and Negotiating History

May 11, 1987

Office of the Legal Adviser
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Introduction

The Anti-Ballistic Missile Treaty was negotiated between the United States and Soviet Union during 1971 and 1972, and was signed on May 26, 1972. It was considered soon thereafter by the United States Senate, which gave its advice and consent on August 3, 1972, with no reservations, conditions, or understandings. The Treaty has been in effect continuously since that time.

The ABM Treaty's application to future systems and components (those based on "other physical principles" ("OPP") than those utilized in ABM systems existing in 1972) has been discussed from time to time since its adoption. This question has taken on increasing importance in recent years, however, in light of intensified efforts by the United States and the Soviet Union in ballistic missile defense. During early 1985, studies were undertaken within the Executive Branch as to the Treaty's meaning in this regard, and the intentions of the Parties. The Office of the Legal Adviser was asked to undertake a study of the text and negotiation record of the Treaty in August 1985, and issued conclusions in October of that year. During February 1987, the President directed the Legal Adviser to prepare studies of the Treaty's ratification process, and subsequent practice of the parties.

An overall appraisal of the ABM Treaty's application to OPP devices must be based, under international law, on the treaty language, and its intended meaning as reflected in the parties' understandings. Rules have been developed for the analysis of treaties, particularly in the Vienna Convention on the Law of Treaties and by tribunals, courts, and arbitrators called upon to decide particular cases or disputes. These rules uniformly recognize the importance in any such exercise of the treaty language, and of the principle that the language must be interpreted in good faith, with the treaty's purposes in mind. International law also calls for recourse to subsequent agreements of the parties that reflect their understandings on the matters at issue, and to the "practical construction" of the treaty through the parties' subsequent conduct. In addition, recourse to the negotiating history is permitted to deal with ambiguities in the text, though the emphasis given to such history differs in various international tribunals and national courts.

Studies of the ABM Treaty beginning in 1985 focussed upon its text and negotiating history. These subjects are fundamentally important to what the parties intended in good faith, in a context in which no definitive "practical construction" was likely to have been developed. ABM devices based on OPP have only recently approached a point in their scientific development which might provide probative evidence of intentions based on subsequent conduct.

The present report is an updated version of a study completed by this office in August 1986, and sent thereafter to the Senate along with relevant parts of the negotiating record. This version deals with arguments and evidence developed or discovered in recent months. No study of this subject can be treated as totally complete.

Nothing said or found concerning the Treaty, however, has altered the conclusions reached in October 1985 that the Treaty text is ambiguous, and that the negotiating record establishes that the Soviet Union refused to agree to prohibit the development and testing of mobile ABM devices based on OPP.

Summary of Conclusions

TREATY TEXT

The ABM Treaty's impact on future devices based on other physical principles ("OPP") turns largely on three provisions: the definition of "ABM system" in Article II(1); the prohibition on development, testing, or deployment of non-fixed land-based systems and components in Article V(1); and the regulation of systems based on OPP in Agreed Statement D. The language of these provisions is ambiguous and permits more than one plausible interpretation.

Some prior USG analyses concluded that the Treaty bans the development, testing, and deployment of all future ABM systems and components that are not fixed, land-based. This "restrictive" interpretation holds that the definition of "ABM system" in Article II(1) encompasses, for all treaty provisions, systems and components based on physical principles used in 1972 ABM systems as well as substitute devices, based on other physical principles, that are able to serve the same purposes. Relying on that definition, the restrictive view argues that the prohibition of space-based and other mobile "ABM systems and components" in Article V(1) applies to then utilized ABM systems and components (ABM missiles, launchers, and radars) and also to substitute OPP devices. Under this interpretation, the Treaty allows creation (i.e., development and testing) of substitute OPP devices only if they are fixed land-based.

From a textual standpoint alone, the restrictive interpretation is problematic. It renders Agreed Statement D legally superfluous: if Article III had limited deployment of any form of ABM system or component to those fixed land-based systems specifically allowed (those using interceptor missiles, launchers, and radars), and if Article V had precluded

development, testing, or deployment of all possible systems and components that were other than fixed land-based, then the Parties would not have needed to add Agreed Statement D to the Treaty. Moreover, the Treaty's provisions, other than in Agreed Statement D, indicate that the Parties focussed exclusively on regulating ABM systems that use interceptor missiles, launchers, and radars.

An alternative reading of the Treaty is that it allows creation of all ABM systems and components based on "other physical principles," but prohibits their deployment absent consultation and agreement between the Parties. This "broader" interpretation views the Article II(1) definition as applicable in the Treaty text, as opposed to separate agreed statements, only to systems that use ABM interceptor missiles, launchers, and radars or improvements based on the same physical principles. It construes Article V(1) as prohibiting development, testing, and deployment of non-fixed land-based systems and components based on the physical principles used to create the systems and components extant in 1972. It sees Agreed Statement D as governing the creation and deployment of all OPP devices which can serve as substitutes for conventional ABM systems and components. This interpretation harmonizes all relevant provisions of the Treaty, while satisfying its central concern of preventing the deployment of all forms of ABM devices except as allowed by Article III.

A third, even broader interpretation reads the Treaty to allow deployment -- not just development and testing -- of substitute ABM devices based on other physical principles. This interpretation would undercut the avowed purpose of Agreed Statement D, which is "to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III .... "

Negotiating History

No single statement or event in the negotiating record definitively settles all the issues concerning substitute devices based on other physical principles. The record does, however, contain several clear indications of the Parties' positions on related issues and of the concerns that led them to those positions. Several conclusions can be drawn from the negotiating record.

The U.S. delegates initially proposed an explicit ban in what ultimately became Article V(1) on development, testing, and deployment of all "devices" that could in the future perform the functions of conventional mobile ABM systems and components. The Soviets rejected this language on several

occasions during August and September 1971. On September 15, 1971, Soviet negotiator (Karpov) stated in a small working-group meeting that language proposed by the Soviets covering "ABM systems and components" was intended to cover any type of "future component." The U.S. Delegation accepted this language, which unambiguously created coverage for all ABM missiles, launchers, and radars that the Parties could use in mobile modes. This language failed, however, to establish that the Soviets intended to include within the coverage of Article V(1) OPP devices that could substitute for conventional components. The definition of "ABM system" in the Soviets' proposed draft treaty on September 15 was was clearly limited to the three conventional components. The Soviets opposed, moreover, as a matter of principle, any attempt to regulate unknown systems or components. This Soviet opposition continued after the negotiation of Article V(1) in September, until the formulation of Agreed Statement D in February 1972. The U.S. delegates never contended during this period that the Soviets had already agreed to regulate unknown OPP devices in Article V (1), and the record establishes that the U.S. delegates did not believe that such an agreement had been reached.

The record also establishes that the Soviets, between September and December 1971, rejected definitions of "ABM system" in Article II(1) which would unambiguously have brought within the Treaty proper the regulation of unknown, OPP devices capable of substituting for conventional ABM systems or components. The Parties agreed as early as September 15, 1971 to find language for Article II(1) that would not prejudice their respective positions on "future" systems. The Soviets agreed to cover in Article II(1) only the ABM system then in use. On December 20 and 21, the Soviets offered to accept connecting language, including "consisting of" and "namely"; they agreed to accept the words "currently consisting of" to Article II(1) only after the U.S. negotiators assured them that the futures problem would be settled elsewhere than in Article II(1).

The Parties dealt expressly with the issue of substitute OPP ABM systems and components solely in Agreed Statement D, negotiated between December 1971 and February 1972. They agreed to allow "creation" of such devices, but to require discussion and agreement on specific limitations prior to their deployment. The introductory language of Agreed Statement D indicates that it was intended to support the deployment limitations of Article III. Nothing in the language of, or debates over, Agreed Statement D, however, expressly restricts it to fixed land-based systems; nor does the negotiating record establish the agreement of the Parties to interpret it in such

a fashion. The provision grew in part out of a proposal intended to apply to land-based ABM systems and components. Modifications and debates during the drafting process indicate, however, that the provision resulted from Soviet refusal to regulate any unknown devices, including mobile-based devices, and ultimately served to regulate all substitute OPP ABM devices, irrespective of basing mode.

Discussions during the negotiation of Agreed Statement D, and thereafter during the final drafting of Article III's introductory language, indicate that the parties believed that Articles I, II, and III together expressed their intention to bar deployment of all OPP devices. This fact does not establish, however, that Article II (1) defined ABM systems, as used in the Treaty text, to include all OPP devices. The Parties intended ultimately to regulate all ABM devices that could perform the ABM function, as reflected in the functional language of Article II(1). The Soviets refused, however, to regulate in the Treaty itself and in Article II(1) as fully written, any ABM system other than the ones currently consisting of ABM missiles, launchers, and radars. Soviets insisted on using Agreed Statement D as the vehicle for regulating OPP devices, and did not regard that provision at the time as superfluous or redundant.

DISCUSSION

I. Textual Analysis

The central feature of the Treaty is the Parties' commitment not to deploy a territorial ABM system. Article I(2) provides that: "Each Party undertakes not to deploy ABM systems for a defense of the territory of its country. . . ." Article II(1) defines "an ABM system," "[f]or the purpose of this Treaty," in functional terms ("a system to counter strategic ballistic missiles or their elements in flight trajectory") and immediately thereafter refers to contemporaneous components: "currently consisting of" ABM interceptor missiles, launchers, and radars, which are defined in terms of both function and mode of testing. Article III prohibits deployment of ABM systems or components, except for certain numbers of conventional components expressly allowed at specified launch sites. Article V(1) provides that the parties agree "not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based." Agreed Statement D, which accompanies the Treaty, provides as follows:

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

Three different interpretations of these provisions have been advanced with respect to their effect on OPP devices. The "restrictive" interpretation sees the Treaty as absolutely prohibiting development, testing, or deployment of all such devices unless they are fixed land-based. The "broader" interpretation would permit the "creation" of any such device, regardless of basing mode, but would allow deployment only after discussion and agreement between the Parties. A third, even broader interpretation would allow deployment of such devices following discussion between the Parties, even if the discussion did not result in agreement.

A. <u>The Restrictive Interpretation</u>

The restrictive interpretation rests primarily on the language of Article V(1), which on its face unqualifiedly prohibits the development, testing, or deployment of mobile "ABM systems or components." But this language does not settle the issue of the Article's applicability to ABM devices other than missiles, launchers, and radars that could serve the same functions as ABM systems or components in use when the Treaty was drafted. That issue depends on whether the term "ABM systems or components" is limited in Article V(1) to systems and components based on physical principles then in use or also includes substitutes based on other physical principles.

In attempting to answer this question, one must turn to the definition of "ABM system" in Article II(1). Proponents of the restrictive view contend that the definition in Article II (1) is purely functional, and includes all components ever created that could serve the function of countering strategic missiles in flight. They argue that the three components identified in that paragraph -- ABM missiles, launchers, and radars -- are merely listed as the elements of current ABM systems, and that all future components of a system that satisfies the functional definition are also covered by Article II(1).

This reading of the Treaty is plausible, but it has shortcomings. The Treaty's other provisions consistently use "ABM system" and "components" in contexts that reflect that the Parties were referring in the Treaty text to systems and components based on physical principles then in use. Article II(2), for example, further describes the "ABM system components listed in paragraph 1 of this Article," to include those that are operational, under construction, undergoing testing, undergoing overhaul, repair or conversion, or mothballed -- thereby indicating that the definition in Article II(1) was not merely illustrative, but was intended to describe the conventional components actually covered by the Treaty text. Article III uses "ABM system" in describing systems consisting of missiles, launchers, and radars; Article IV limits to fifteen the number of "launchers" at agreed test ranges;1/ deployment of launchers of multiple ABM interceptor "missiles" and automatic or rapid reload "launchers." In short, the Treaty is permeated with references to, and concern about, the systems or components then is use.

ABM systems based on "other physical principles" directly pose the question -- other than what? The answer seems clear -- other than those used in conventional ABM systems, and capable of substituting for the ABM systems and components listed in Article II(1). These OPP systems and components are mentioned only in Agreed Statement D. In that provision, the Parties refer to ABM systems "based on other physical principles," and including components that could substitute for ABM missiles, launchers, or radars being "created in the future." This suggests that the definition of "ABM system" in Article II(1) reflects an intent to regulate in the Treaty text only those systems and components based on then-utilized physical principles and not those based on OPP. "ABM system" in Article II(1) can plausibly be read to mean to encompass future substitute OPP devices wherever the term is used in the Treaty text. The phrase can also reasonably be read, however, to include, in addition to then-current systems and components, those developed through the application of then-utilized physical principles, analogous to modernizations or replacements under Article VII, but not those substitute ABM devices based on OPP.

1/ Some have argued that Article IV prohibits all testing of "ABM systems" other than at agreed ranges, thereby implicitly precluding the testing of OPP devices in space. This is a circular argument, depending on whether OPP devices are within the definition of "ABM systems" in Article II(1). The degree of its constraint on OPP devices is therefore no greater than that of Article V(1).

An argument could be made that Agreed Statement D applies only to fixed, land-based OPP devices, because only those devices could lawfully "substitute" for components that the Parties are allowed to deploy in Article III. This reading would give a literal meaning to "substitute," implying a physical substitution rather than a functional substitution. The provision can also reasonably be read to permit the creation but not the deployment (as prohibited by Article III) of any device that could functionally displace one or more conventional components.

The very existence of Agreed Statement D poses a fundamental problem for the restrictive view. Nothing in that Statement expressly states that it applies only to devices that are fixed land-based. The restrictive interpretation would render Agreed Statement D legally superfluous insofar as it serves to prevent deployment of OPP devices. If Article II(1) extended the Treaty text to all ABM systems and components, based on then-currently utilized physical principles as well as OPP, then the Treaty -- even without Agreed Statement D -- would have banned deployment of all systems and components other than those particular systems expressly permitted under Article III. Agreed Statement D would have been unnecessary for that purpose. 2/

Treaties are sometimes read to contain statements intended to clarify a point covered by other provisions. But such redundancy tends to undermine the viability of a proposed construction -- especially where no clarification is needed. A reading that renders provisions redundant or superfluous cannot be said to make the treaty unambiguous.

Some proponents of the restrictive interpretation have responded that redundancy is to be expected in an "Agreed Statement," which appears along with other "Common Understandings." This observation lacks force here, however. First, the other statements and understandings are not redundant. Further, Agreed Statement D - unlike Agreed Statements A, B, and C -- does not contain the word "understand," thereby suggesting only an interpretive

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2/ Reading Article II(1) to apply to present and future substitute systems and components would render largely unnecessary even Article V(1)'s ban on deployment of other than fixed land-based systems. Article III, by specifying that launchers and interceptor missiles are to be located at "launch sites," can be read as allowing deployment only of fixed land-based systems. If it is so read, and if the definition of "ABM system" covered all future substitute devices, then Article III would itself preclude deployment of all such devices other than those of a fixed land-based mode.

purpose. Rather, it is written with the operative phrase "the Parties agree," which is much closer to the language in the Treaty itself ("the Parties undertake"). Similarly, the Statement's phrase -- "In order to insure fulfillment of the obligation not to deploy" -- is close to the analogous phrases in Article VI ("To enhance assurance of the effectiveness of the limitations"), and Articles IX, XII(1), and XIII(1). In short, Agreed Statement D appears on its face to have been written as a substantive obligation rather than as merely another shared interpretation.

The restrictive interpretation also creates a scientific and practical incongruity. It would permit development and testing of devices that could substitute for ABM systems and components, so long as they were devices that were aspects of fixed land-based systems. It would prohibit development and testing of such devices if they were aspects of mobile systems. Yet the devices sought thus to be regulated would not necessarily be related to one type of system or another. A laser device, for example, might be deployable at a land-based site, or be made part of a space-based or other mobile system. A distinction among devices drawn on the basis of deployment location would make unverifiable any ban on deployment and testing of OPP, because one might not be able to know that such devices were intended only to be used in the fixed, land-based mode. This verifiability problem is avoided if the Treaty is read to restrict only the deployment of OPP devices. In this respect, the Treaty's purpose is clear and enforceable: to allow <u>deployments</u> only at certain fixed land-based areas. This purpose is protected under the broader as well as the restrictive interpretation.

B. <u>The Broader Interpretation</u>

The difficulties of construction created by the restrictive interpretation are avoided if one reads Article II(1) as referring in the Treaty text only to ABM systems and components based on physical principles underlying conventional systems then in existence. Read in this manner, the Treaty establishes a coherent, non-redundant scheme that:

-- prohibits the deployment of all systems and components based on physical principles underlying conventional systems then in existence, except in the quantities and areas specifically permitted (Article III);

-- prohibits the development, testing, or deployment of all non-fixed land-based systems or components derived from then-utilized physical principles (Article V(1));

-- permits the creation of substitute ABM systems and components based on OPP, but prohibits their deployment until agreement is reached on specific limitations (Agreed Statement D).

This interpretation also achieves results consistent with the Treaty's express and fundamental purpose: to prevent deployment of "systems or components" other than as specified by Article III. Under Agreed Statement D, ABM systems and components based on OPP could not be deployed absent agreement on specific limitations, amounting to an amendment of the Treaty. The argument has been made that allowing the "creation" of mobile ABM devices based on OPP could undermine the Treaty's prohibition against deployment of a territorial ABM system. Testing and development could be used, it is argued, to place large numbers of OPP devices in space, or to develop and hide them. The Treaty's purpose in this regard could, however, be undermined even if the Parties are limited to the narrow interpretation. A Party suspicious of purposeful evasion could discuss such matters in the SCC, and could withdraw from the Treaty if unsatisfied by the explanation given. The Treaty also contemplates, in Agreed Statement D, that the Parties should negotiate for OPP systems limitations analogous to those applicable to conventional systems.

C. An Even Broader View

Some have advanced a third interpretation of the Treaty: that the Parties are permitted to deploy OPP devices after discussion, even if they do not reach agreement on specific limitations. This interpretation is not precluded by the text of the Treaty: Agreed Statement D does not explicitly prohibit the Parties from deploying OPP devices until they agree on specific limitations. Nevertheless, the language of the Treaty casts grave doubt on this interpretation. The Treaty is of unlimited duration (Article XV(1)), and its most fundamental objective is to prevent deployment of systems that can serve the function defined in Article II(1), other than as provided in Article III. To read Articles II(1) and V(1) to apply only to current systems or components, and to read Agreed Statement D to require only discussion prior to deployment of OPP devices, would leave a substantial gap in the Treaty's coverage and thereby potentially undermine its most fundamental Purpose.

Agreed Statement D states, moreover, that its purpose is "to insure fulfillment of the obligation not to deploy ABM systems and their components except as provided in Article III." The Statement requires both discussion of "specific limitations" for substitute OPP systems or components under Article XIII, and "agreement in accordance with Article XIV of

the Treaty," upon the "creation" of such substitutes. The text thereby suggests a general prohibition against deployment of such substitute systems or components, absent agreement on specific limitations such as those contained in Articles III, IV, and VI.

* * *

In sum, the Treaty's text is subject to at least two logically defensible interpretations. The negotiating record should therefore be examined to ascertain whether it establishes the Parties' intentions respecting the Treaty's regulation of substitute OPP devices.

II. Analysis of ABM Negotiating Record[3]

A. The Initial U.S. Proposal Concerning Future Devices

In August 1970, the U.S. proposed language, as part of a comprehensive agreement on both offensive and defensive weapons, that would have prohibited "[t]esting and deployment of mobile land-based, sea-based, air-based, or space-based ABM systems or their components. . . ." (Airgram AA-284) [hereinafter "A-[number]"] The Soviets proposed a separate provision limiting ballistic missile defenses, on December 4, 1970, in which the parties would "undertake not to test or deploy mobile land-based, sea-based, air-based, or space-based ABM means (sredstva) or their components specially designed for such systems." (A-79a) A formal Soviet proposal to this effect was tabled on March 19, 1971. (USDEL SALT 566) These proposals reflect agreement in principle to prohibit testing and deployment of mobile "systems" or "means," and their "components," as the FitzGerald/Graybeal study notes (p. 15)[4]; but these exchanges were based on the premise, held, as FitzGerald writes, "from the earliest days of the SALT I negotiations, [that] the sides were agreed that the ABM agreement on which they were working was intended to place limitations on ABM systems as they then existed, i.e., systems which consisted of ABM launchers, ABM interceptors, and ABM radars." (FitzGerald 16) Until the session in Helsinki, beginning on July 5, 1971, "neither side had made any specific mention of a possible need for taking into account ABM systems that might be developed in the future and which would be able to perform the missions of the then-existing ABM system components." (FitzGerald 16-17) Subsequent discussion within the U.S. Government made clear that the formulations proposed

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[3] No single set of documents comprising the negotiating record is available. We have collected and reviewed as many of the documents in the SALT I negotiating record as we could obtain, including memoranda retained by ACDA, CIA, DOD, and the Nixon papers. This study has been occasionally revised to incorporate material that turned up from time to time.

[4] Col. Charles L. Fitzgerald and Sidney Graybeal, SALT I Negotiating History Relating to Limitations on Future ABM Systems and Components Based On "Other Physical Principles" (System Planning Corporation, March 1985) (Contract DNA001-84-C-0309) (hereinafter cited as "FitzGerald"). Colonel FitzGerald was a member of the staff of the SALT Delegations, and advisor to the Office of the Secretary of Defense; Mr. Graybeal was a representative from ACDA.

prior to July 1971 were then regarded as insufficient to prohibit the testing and deployment of future, substitute devices.

After a long dispute at the fourth SALT Session over whether to negotiate an agreement on ABM alone (the Soviet position) or whether to maintain a link between limitations on offensive and defensive weapons (the U.S. position), the ABM Treaty negotiations received a substantial boost on May 20, 1971. On that day, the United States and the Soviet Union agreed "to concentrate this year on working out an agreement for the limitation of the deployment of anti-ballistic missile systems," but linked that commitment to the negotiation of "certain measures with respect to the limitation of offensive strategic weapons." 5/

On July 2, 1971, National Security Decision Memorandum ("NSDM") 117 was issued to the U.S. delegation instructing that "the [ABM] agreement should make clear that any systems for rendering ineffective strategic ballistic missiles or their components in flight trajectory are prohibited unless permitted by this agreement." (Emphasis added.)

Disagreements existed at that time within the Delegation in several areas. It was split on the need for rigorous definitions, and on whether future systems using components other than ABM interceptors, launchers, and radars should be banned. Ambassador Gerard Smith, the lead U.S. negotiator, argued that all conceivable ABM systems should be covered by the Treaty's limitations. General Allison and Ambassador Parsons, two other members of the U.S. Delegation, objected on the ground that such constraints would be unverifiable. (USDEL SALT 794, July 12, 1971, cited in Fifth Session of the Strategic Arms Limitations Talks, July 8 - Sept. 24, 1971, Historical Division of ACDA 10-11 (Oct. 1972) (hereinafter cited as "Fifth Session of SALT"); USDEL SALT 796,

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5/ Department of State Bulletin 741 (June 7, 1971). (Emphasis added.) The language of the English and Russian texts was apparently not identical in several respects, including one "official" Russian version which, translated into English, described the agreement as limiting the "development" or "unfolding" of ABMs. Another "official" version used the word "deployment." Nonetheless, this caused sufficient internal discussion within the U.S. Government to cause the matter to be raised informally with the Soviet delegation in Vienna, and for the two sides to determine "at the highest levels" that the Russian and English versions were no different. (Memorandum from Lt. Col. DeSimone to Lt. Gen. Allison, August 21, 1971, with attachments)

July 12, 1971, and USDEL SALT 819, July 17, 1971, cited in Fifth Session of SALT 14) Washington was similarly divided on these unresolved issues. The Joint Chiefs of Staff (JCS) objected to the broad language of NSDM 117 because it would limit future ABM options, and because "exotic" ABM systems had been inadequately studied.

On July 20, 1971, the President issued NSDM 120, which provided that, pending further study, the agreement should "not prohibit deployment of possible future ABM systems other than systems employing ABM interceptor missiles, launchers, and radars." At the last minute, the delegation was instructed to leave a blank paragraph in Article 6 of the U.S. draft treaty in order to "leave flexibility for possible outcomes" of a study on future ABM systems. (W.H. to USDEL SALT 135481, July 27, 1971 cited in Fifth Session of SALT 13) The draft agreement proposed by the U.S., dated July 27, 1971, defined an ABM system as "a system for rendering ineffective strategic ballistic missiles or their components in flight trajectory." (Art. 2(1)(a)) As a result of JCS objections, however, Article 6(1) contained only the following statement:

> 1. [An appropriate provision regarding sea-based, air-based, space-based, and mobile land-based ABM systems will be tabled separately.]

The draft also contained a provision that proposed an undertaking "not to develop or deploy new missile systems or their components other than ABM systems or their components for such a role." (Article 7(1))

Within the U.S. Government, Ambassador Smith continued to argue that the United States should attempt to obtain a ban on future ABM devices. On July 28, 1971 Smith sent a back-channel cable to Henry Kissinger, then Adviser to the President for National Security Affairs, presenting Smith's personal view that a ban should be placed on deployment of next-generation technology and that Article 6 of the agreement should not limit only interceptors, radars and launchers but any other ABM system that may be developed. (Helsinki 0149) The next message from Kissinger to Smith, on August 3, 1971 conveys Kissinger's concern with the "leisurely pace" of the negotiations. Kissinger states that he anticipated after the May 20, 1971 announcement "we would be able to move expeditiously in the direction of an agreement which would be consistent with the understandings set forth at that time. . . . It now appears that we may be pursuing a plethora of esoteric issues and risking a more rapid pace by a series of diversions on matters which involve the specialized concerns of arms limitations experts but which in the final analysis

constitute barriers to achieving the kind of momentum we had hoped for." (White House 12791) (Emphasis added.) Smith responded the next day, noting that he appreciated the frank message about the "leisurely pace," but attributing it in part to the lack of guidance: "is the arrangement to be a restraint on all ABM systems or a restraint on interceptor/launcher/radar systems?" (Helsinki 0163)

In a further message for the President through Kissinger, dated August 7, 1971, Ambassador Smith appealed for permission to seek limitations on future systems:

> Before you make a decision on the 'esoteric' problem, i.e., whether an agreement should cover all ABM systems or only those using radars and missiles, I hope you will consider my personal views.
>
> ....
>
> Do we seek an ABM constraint to provide greater stability by assuring maintenance of retaliatory capability, halting a buildup of defensive systems that could threaten that capability and lessening pressures for buildup of offensive systems -- or just a temporary truce in ABMs -- until such time as more effective futuristic ABMs are developed and deployed?
>
> ....
>
> If future ABM systems are not to be limited, the burden should be allowed to rest on the USSR.

(Helsinki 0171) (Emphasis added.) The position of the Office of the Secretary of Defense (OSD), as relayed in a DOD cable to Paul Nitze (OSD representative on the Delegation) on August 6, 1971, was to attempt to ban only the deployment of all future kill mechanisms. (OSD 08062, p. 15) The Joint Chiefs of Staff opposed even a ban on deployment, arguing among other things that obtaining funds for research and development would be difficult if deployment were prohibited:

> Another concern on defensive strategic systems centers on futuristic ABM systems. As you are aware from references 1b and 1c, the Joint Chiefs of Staff strongly recommend that futuristic ABM systems not be banned. If deployment of futuristic systems were to be banned but research and development permitted, as advocated by some government agencies, such an approach would make it extremely difficult to get funds for such research and development (R&D) and

> could lead to unilateral US neglect of the field. In all likelihood, the Soviets would proceed with R&D on such systems. It seems imprudent to foreclose options on future systems that cannot now be defined or envisioned or which may be unverifiable, particularly in view of the numerical superi[ority] of Soviet offensive missiles involved in the proposed interim strategic offensive agreement. Under any circumstances, R&D programs must be kept viable to avoid technological surprise.

(Memorandum from Chairman JCS (E.R. Zumwalt, Jr.) to Secretary of Defense, "Proposed Strategic Defensive and Offensive Agreements," p.4, ¶8 (July 31, 1971))

On August 9, 1971, in an NSC Verification Panel principals' meeting, Kissinger stated his concern with delays in the negotiations brought about by the Delegation's finding "nuances" and "academic" issues, and queried "can we get the negotiations moving? It is important to get going and not lose the momentum of our May 20th agreement." Kissinger also discussed the questions of seeking an absolute ban and of "esoteric" ABM systems, expressing his view that the issue could be deferred, since it would not be a problem until at least the 1980s, and because protections already exist (periodic review, withdrawal clause, and linkage to offensive systems); Admiral Moorer, then Chairman of the JCS, feared the discussion could complicate the negotiations, and others felt that a ban on deployment could undercut Congress' willingness to fund research and development. ACDA supported banning development and testing of future exotics, as well as deployment. Others, including Deputy Secretary of Defense Packard, supported only a ban on deployment. (Telegram from OSD Salt Support Group to Nitze, U.S. Salt Delegation, pp. 21-24) These discussions were recorded by Major General Demler, and were communicated in substance by Farley to Smith on August 9. (State 145349)

On August 11, Smith wrote to Kissinger, explaining that the negotiations would move more quickly once guidance was provided on the "zero" and "futuristic" issues. (Smith to Kissinger, August 11, 1971, Nixon Papers) Kissinger wrote the same day, communicating his decision against seeking a complete ABM ban. He explained this decision in terms of the practical objectives of the May 20 agreement:

> At this point in our negotiations with the USSR I am persuaded we are within reach of an equitable agreement if we can reinforce the momentum created by

> the joint decision of May 20. Two years ago, we had all hoped that the Soviet side could be brought around to a comprehensive arms control agreement. The Soviets were aware of our interest in a complete ban on ABM systems and reductions in offensive systems. Our record on these issues is clear. But in matters affecting so directly their vital interests it is understandable that the Soviet leaders have preferred to move to an initial agreement of limited scope.
>
> Thus, the understanding of the May 20 agreement was that we would now make a major effort to agree this year on some limitations on ABMs together with some limitations on offensive systems while deferring some issues for a second stage. That decision, I believe, represented a major political commitment by the Soviet leaders and was based on a general understanding that both sides could not expect to achieve all of their objectives in one agreement.

(Nixon Papers.)

The Administration agreed, on the other hand, to allow Smith to seek a set of restrictions on future systems that would have established the restrictive interpretation. On August 12, 1971, the following instruction was issued to the U.S. ABM negotiators:

> 3. The agreement should contain a provision whereby neither side shall deploy ABM systems using devices other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the function of these components. (This provision along with that in the next paragraph, should not prohibit the development and testing of future ABM components in a fixed, land-based mode.)
>
> 4. The agreement should contain a provision whereby neither party shall develop, produce, test, or deploy: (a) sea-based, air-based, space-based, or mobile land-based ABM launchers, ABM missiles, or ABM radars; (b) ABM components other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the functions of these components.

(NSDM 127) (Emphasis added.) NSDM 127 also stated, however, that the delegation "should not invite a detailed negotiation or discussion of future ABM systems. Our objective is to reach agreement on the broad principle that the agreement should not be interpreted in such a way that either side could circumvent

its provisions through future ABM systems or components. We intend to handle any problems that may arise through the joint commission and the formal review procedures." The instructions thus accommodated both Smith's view that an effort on futures should be made, and Kissinger's view that the issue of future systems not be permitted to hinder the course of the negotiations or sidetrack the process from the practical objectives of the May 20th agreement.

On August 17, pursuant to NSDM 127, the U.S. Delegation proposed two new sections in the draft of Article 6. Article 6(1) of the draft sought to ban the deployment of substitute "devices" that could perform the functions of ABM systems or components:

> Each Party undertakes not to deploy ABM systems using devices other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the functions of these components.

(A-408, p. 9) (Emphasis added.) Article 6(2) sought to prohibit development, production, testing, or deployment of current ABM components based in any mobile mode as well as of all substitute "devices":

> Each Party undertakes not to develop or produce for or test or deploy in sea-based, air-based, space-based, or mobile land-based modes,
>
> -- ABM interceptor missiles,
> -- ABM launchers,
> -- ABM radars, or
> -- other devices to perform the functions of these components.

(Emphasis added.) 6/ Article 6(3) carried forward the U.S.

6/ Prior to this research project on the ABM Treaty, the Legal Adviser's Office had relied on what purported to be a summary of the relevant negotiating history, prepared in ACDA in December 1980. The first item in the summary was an excerpt from the memorandum of August 17, 1971, with language that led ultimately to Agreed Statement D, and which indicated an ellipsis where some text had been omitted, as follows:

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(continued next page)

draft provision prohibiting the development, production, testing, or deployment of multiple-missile launchers and automatic or rapid-reloading launchers.

In introducing the new draft of Article 6, Smith said that paragraph 1 "makes clear what we believe should be the aim of an agreement limiting ABM defenses; namely, that the Agreement would apply to all types of ABM systems, including possible future types of ABM systems, and not only to ABM systems employing ABM interceptor missiles, ABM launchers, and ABM radars." He then stated: "We believe that the Agreement should reflect this explicitly." He compared paragraph 2 to the Soviet counterpart provision tabled at that time, noting that the U.S. proposed to prohibit development and production of space-based systems, as well as their testing and deployment. He also explained that the U.S. draft extended the prohibition beyond components currently in use and would reach future types of "devices" capable of substituting for them:

> One difference between the U.S. paragraph 2 and the USSR paragraph A is that the U.S. text prohibits the development and production of, in addition to the testing and deployment of sea-based, air-based, space-based, and mobile land-based ABM interceptor missiles, ABM launchers, and ABM radars. We believe that the more complete prohibition would be in the interest of both sides. Another difference between the two texts is that the U.S. text makes clear that the obligations assumed in this paragraph apply not only to ABM interceptor missiles, ABM launchers, and ABM radars, but also to possible <u>future types of devices</u> capable of performing the functions of these components.

(A-408, p. 10) (Emphasis added.)

<u>6</u>/ (continued) Smith stated that the full text of Article 6 is as follows:

> '1. Each Party undertakes not to deploy ABM systems using devices other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the functions of these components. . .'"

The omitted material, as the text reflects, included language which would have made clear that the U.S. had also sought to have Article V of the Treaty applied to "devices" that could perform the functions of ABM components, language the U.S. negotiators in the end failed to obtain in the Treaty text.

The U.S. proposals adopted a distinction between systems and components in current use -- consisting of ABM missiles, launchers, and radars -- and future "devices" capable of performing the same functions. Both Articles 6(1) and 6(2) contained a reference to "devices" that might perform the functions of ABM interceptor missiles, launchers, or radars. Article 6(1), presumably dealing with fixed, land-based systems and components, prohibited only the deployment of such substitute devices; Article 6(2), dealing with mobile systems and components, prohibited also the development and testing of such devices. In both Articles 6(1) and 6(2), the obligations assumed were expanded to cover future, substitute systems and components by use of the word "devices."

On the same day that Article 6 was introduced, Brown asked Shchukin what he thought of the proposals. "Had we made it clear," Brown asked, "that in the first paragraph we were talking about a ban on the deployment, but not on the development and testing, of future kinds of systems, not using the usual components?" Shchukin needed time to consider the proposal, but indicated immediately the position that Soviet negotiators would repeat for the next five months -- that the Parties should not attempt to deal with future possibilities. (A-398, pp. 1-2) This point, moreover, was one of general principle, applying to the use of "devices" in both Article 6(1) and 6(2) of the U.S. draft.

On August 24, Shchukin commented on the novelty of the U.S. proposal. He said he thought the Parties had achieved an understanding that limitations should apply to systems with ABM radars, launchers, and missiles, which would be technically described and determined, and therefore could be monitored by national technical means. He asked about its meaning:

> It is proposed in Paragraph 1 that the sides be obligated not to deploy ABM systems using devices other than ABM missiles, ABM launchers, and ABM radars to perform the functions of these components. This is an entirely new provision [an "entirely new concept"] and the Soviet side is not clear on its meaning and substance. What did the U.S. have in mind in speaking of such ABM systems and such devices?

Smith replied that the U.S. would study the matter and respond. (A-424, p. 6; USDEL SALT 0955, p. 3)

On August 27, Brown responded in a prepared statement. He explained that the language of proposed Article 6(1) referred "to any present or future system which employs other means or devices to perform the functions of interceptor missiles,

launchers, or radars in rendering ineffective strategic ballistic missiles or their components in flight trajectory." (A-438, p. 13) The U.S. purpose was to obtain a commitment "that neither side will deploy ABM systems -- including possible future types of ABM systems -- which might not use ABM interceptor missiles, ABM launchers, or ABM radars." Semenov was skeptical, noting that Article 6(1) "contained a new concept of limiting devices other than ABM launchers, missiles and radars. . . . [I]t was his impression that it was doubtful if it properly applied to the subject matter of an agreement on ABM limitation." (A-438, p. 9)7/

The Soviets responded more definitively on August 31. McLean, a U.S. representative, argued that, given the Parties' desire to establish long-lasting limitations, it was "reasonable and desirable to prohibit the deployment of components which might perform the ABM mission tomorrow but which are not in existence today." General Trusov replied "that he did not consider it reasonable or necessary to include a provision covering what he called undefined ideas, maintaining that the provision in both the U.S. and Soviet drafts for review and amendment would be sufficient." Trusov argued that development, testing, and deployment of future systems would be observed by national means of verification and then dealt with in the review process. The U.S. proposal, he said, "would add an undesirable element of vagueness to our ABM agreement." McLean agreed that the review process would be necessary, but said "we also feel a need to avoid channeling

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7/ FitzGerald states, concerning this exchange: "It should be noted that Shchukin questioned only paragraph 1 of the U.S.-proposed Article 6 and not its paragraph 2 having to do with the deployment [sic], production, testing, and deployment of 'other devices' in the various mobile modes." At the same time FitzGerald concedes: "His [Shchukin's] question could, however, logically be extended to paragraph 2." (FitzGerald 21) In fact, Shchukin's focus on paragraph 1 was no more significant than Brown's having made his explanation in terms of that paragraph (A-438, Annex 1); the comments by Shchukin and Semenov were not only logically related to paragraph 2, they reflected a position that led the Soviets steadfastly to refuse to accept "other devices" in both paragraphs, as shown below. FitzGerald also attempts to suggest that Semenov's statement applied only to paragraph 1 (FitzGerald 22); but Semenov's actual comment was that paragraph 1 "was new, and contained a new concept of limiting devices other than ABM launchers, missiles, and radars." (A-438, p. 9) (Emphasis added.) That concept was also contained in paragraph 2.

arms competition in a new direction with the search by either side for ABM means not specifically constrained in the agreement." Trusov stated his understanding that Article 6(1) "referred to deployment." (A-442, p. 2)

The Soviets repeatedly returned to their arguments against "referring to any present or future systems, which employ devices other than those known to the delegation. . . ." (Trusov, 9/3/71, A-458, p. 5; see also Karpov, 9/8/71, A-540, p. 2 ("He believed it was wrong to limit means not known to anyone."); Fedenko, 9/13/71, A-498, p. 2) (This theme was of such significance throughout the negotiations that Appendix A has been prepared with Soviet and U.S. statements on the subject.) In the discussion on September 3, Trusov opposed limitations on "conjectural" systems, and felt that "if such devices now exist, they should be named and could then be the subject of further discussion and could be dealt with in the Standing Commission." (USDEL SALT 0990, para. 8) Smith replied that, "in the event that Paragraph 1 of Article 6 should not be included in an agreement, it would be a cruel illusion to the peoples of both nations to say that we had concluded an agreement on ABM systems. We should more properly say that there had been an agreement to limit ABM launchers, interceptors, and radars." (A-458) Smith had "a higher regard for Soviet weapon designers than to believe that they are content with ABM technology which dates back to the early '50s." (Id. para 9)

These comments were addressed to paragraph 1, but they all related to the U.S. proposal to regulate substitute "devices," which appeared as well in paragraph 2. And when Semenov noted that the views of each side had been sufficiently clear, he proposed "to turn discussion of [both] Paragraphs 1 and 2 of the U.S. Article 6 over to the Karpov-Graybeal Ad Hoc Committee." Smith agreed. In a discussion between Garthoff and Kishilov, the same day, Kishilov asked what the U.S. had in mind as future "devices." Garthoff referred to a paper that discussed the subject of exotic ballistic missile defenses, in which no distinction was made between land-based and other types of exotic systems. (A-455, Sept. 3, 1971, p. 3) (see infra, p. 131)

On September 8, an ad hoc committee, led by Graybeal and Karpov, met to discuss Articles 2 and 6 of the U.S. draft. The Parties could not reach agreement on Article 6(1), which was bracketed in the U.S. draft and omitted entirely from the Soviet draft of Article V. (A-540, 9/8/71 (working paper)) The Parties moved closer to agreement, however, on the provision regarding mobile systems. The Soviets proposed their own version of this provision as Article V(1):

> Each Party undertakes not to construct, not to test and not to deploy mobile land-based, sea-based, air-based or space-based ABM systems and their components, specially constructed for such systems.

(A-540) (Emphasis added.)

The FitzGerald study asserts that, "during the first half of the [September 8] meeting the discussion was devoted entirely to the U.S.-proposed paragraph 1, Article 6." It then states that the second half of the meeting discussed paragraph 2, and that "during this discussion, Karpov did not attack the U.S. proposal in paragraph 2, Article 6, concerning 'other devices to perform the functions of these components.'" (FitzGerald 24) The record of the meeting reflects, however, that discussion commenced with Graybeal's suggestion "that we start with paragraphs 1 and 2 of the U.S. Article 6 and paragraph A [also referred to as "1"] of the USSR Article V." He invited a discussion "of these paragraphs," leading Karpov to remark "that the burden of proof lies with the side making the proposal," and asking Graybeal to "clarify why the language of Article 6 had been chosen and what it was intended to do." Karpov referred to Article 6 generally, and Graybeal began his reply by stating: "Our Article 6 is . . . intended to address future ABM systems that would utilize components or devices other than launchers, interceptor missiles, or radars." (A-540, Sept. 8, 1971, p. 1)

A long debate followed, during which Karpov and Graybeal referred to paragraph 1, but in which they made points that related logically to paragraph 2's use of "devices." Karpov specifically stated "he did not believe it possible to include the present form of paragraph 1 of the U.S. Article 6 in the Agreement or Treaty." (A-540, p. 3) (Emphasis added.) He confirmed Graybeal's understanding that in Karpov's opinion the proposed U.S. definition of ABM systems in Article 2 was inadequate because it tried to deal with all ABM systems, instead of limiting coverage to "systems which use ABM launchers, ABM interceptors, and ABM radars." Finally, when the discussion turned to paragraph 2 of Article 6, Graybeal noted two differences with the Soviet Article V(1), the second of which was that "the U.S. text refers to future devices, and reflects the basic difference in view which we have been discussing in relation to paragraph 1 of U.S. Article 6."

The statements of Karpov and Graybeal make clear that Soviet opposition to dealing with unknown "devices" related, not only to the proposed regulation of such substitute "devices" in fixed, land-based systems under Article 6(1), but also to the regulation of such "devices" in mobile (including

space-based) systems in Article 6(2). The Soviet proposal itself, Article V(1) of the Soviet draft, implicitly rejected the U.S. position in Article 6(2) of the U.S. draft, because it showed the Soviet intent to regulate only ABM missiles, launchers, and radars. The FitzGerald study notes that Karpov "did not comment on the fact that it [Soviet Article V(1)] made no mention of 'other devices to perform the functions of these components' contained in the U.S. side's proposed paragraph 2." (FitzGerald 24-25) But Karpov's failure to comment on a difference that was palpable on the face of the opposing drafts seems insignificant.

The FitzGerald study contains, but does not discuss, the memorandum of conversation ("memcon") of an afternoon meeting on September 8 covering the subject "New Soviet ABM Proposal; 'Other Devices'." (A-481) At that meeting, Fedenko asked FitzGerald his "personal impression of the new Soviet proposal." Fedenko repeated to FitzGerald "the arguments Mr. Karpov had made in favor of excluding paragraph 1 of U.S. Article 6." He then "declared," without any recorded opposition by FitzGerald, "that the sides are in agreement (with the exception of OLPARs and MARCs) on the ABM components (sredstva) to be limited. These are spelled out in Article 2 of the Soviet Draft, which specifies the components to be limited, namely, ABM interceptors, launchers, and radars .... [I]f ABM means different from those presently known -- for example, some new power source, or source of light ... -- should be detected by national means, the problem could be examined by the Standing Commission." The record demonstrates as of September 8, therefore, that the Soviets opposed the regulation of "other devices" and insisted that the Treaty was intended to regulate the three components then in use.

A status report dated September 8, 1971, of the Ad Hoc Committee, signed by Graybeal, makes clear that the Soviet position on Article 6(1) was recognized by the U.S. delegation to relate as well to Article 6(2):

> At this point in time, the Soviets will <u>not</u> buy paragraph 1 of Article 6. For similar reasons, they will insist on bracketing "other devices for performing the functions of these components" in paragraph 2.

The difference between the Soviet and U.S. positions on "other devices" was once again made clear on September 13. On that day, both Karpov and Graybeal presented working papers taking into account the positions of each side on U.S. Article 6, among other issues. The FitzGerald study notes that Karpov said "the Soviet side has 'exactly the same interpretation as

the US side' on the matter of 'mobile' and 'transportable' ABM systems." But this statement undoubtedly related to the discussion on September 8 of the meaning of "mobile" and "transportable," not at all to the policy of regulating "devices" in addition to the three components of ABM systems. (See A-540, Sept. 9, 1971, pp. 1, 6-7, reporting meeting of Sept. 8, 1971) Furthermore, the FitzGerald study fails to note the contents of the working papers which are entitled to far more weight than one side's report of working group conversations. The two sides not only bracketed Article 6(1) of the U.S. draft, the U.S. working paper also bracketed the phrase that would have included "other devices" in Article 6(2):

> Each Party undertakes not to develop, test, or deploy sea-based, air-based, space-based, or mobile land-based ABM interceptor missiles, ABM launchers, [or] ABM radars [, or other devices for performing the functions of these components].

(A-540, Sept. 13, 1971 (working paper))

The difference between the Soviet and U.S. positions on Article 6(2) was in fact made explicit by Graybeal on September 13. He identified the substantive difference between the two positions as follows: "The US working paper on Article 6 reflects the current difference of opinion concerning the inclusion of paragraph 1 and the related phrase 'other devices' in paragraph 2." (Emphasis added.) Graybeal therefore expressly recognized that the phrase "other devices" was objectionable in Article 6(2) because it was related to the draft's use of the same phrase in Article 6(1). In both provisions the phrase was designed to extend the Treaty's undertakings to unknown, substitute devices that could perform the functions of presently-utilized ABM systems and components.

The difference between the Parties was also reflected in the Soviet draft equivalent of Article 6(2). The Soviet working paper of Article V(1) limited its prohibitions to ABM "systems and their components, specially constructed for such systems." Thus, while the U.S. wanted to prohibit development, testing, and deployment of any "device" that could be used to substitute for an ABM mobile system consisting of missiles, launchers, and radars, the Soviets wanted to apply these prohibitions only to existing components, which they contemplated would be specially constructed for such ABM systems. Karpov had stated on September 8 the Soviet intention to regulate only ABM missiles, launchers, and radars. This was also apparent in the Soviet working paper defining "ABM systems" as limited to the three components of known systems:

> 1. The obligations provided for under this [Treaty] [Agreement] shall apply to anti-ballistic missile (ABM) systems, i.e. the following principal ABM system components specially constructed and deployed to counter strategic ballistic missiles and their components in flight trajectory:
>
> (a) ABM interceptor missiles which are interceptor missiles, constructed, tested and deployed for an ABM role;
>
> (b) launchers constructed, tested and deployed for launching ABM interceptor missiles;
>
> (c) ABM radars which are radars constructed, tested and deployed for an ABM role.

(A-540, USSR Working Paper Article II(2), Sept. 13, 1971)

Reading the U.S. and Soviet working papers together leads to the conclusion that, when the Soviets used "ABM systems" in the context of their Article V(1), they understood such systems to exclude "other devices" as used in the U.S. working papers on Article 6(2). The U.S. working papers, in other words, implicitly equated the Soviet definition of "ABM systems" with the U.S. listing of "ABM interceptor missiles, ABM launchers, [and] ABM radars," since Graybeal and Karpov indicated the disagreement between the parties in this provision by bracketing only the phrase relating to "other devices."8/

8/ The FitzGerald study's treatment of the meeting on September 13, (FitzGerald 25), omits important details discussed above. It lists Karpov's comments, misleadingly suggests that the parties had "the same interpretation," and fails to analyze the working papers. It also omits Graybeal's explicit acknowledgement that the Soviet objection to "other devices" in Article 6(1) was related to the U.S. draft's inclusion of that phrase in Article 6(2). (FitzGerald 25) That acknowledgment undercuts the study's repeated efforts to suggest that the Soviets had a different position respecting "other devices" in Article 6(2), ultimately Article V(1) of the Treaty, than with regard to Article 6(1).

B. Reformulation of the U.S. Proposal.

On September 15, 1971, a reformulation occurred in the U.S. proposal of Article 6(2). "[T]he Soviets tabled Articles 2 and 6([Soviet] V)." (A-503, p. 1) The meeting was attended for the U.S only by Graybeal and FitzGerald, and the record is sparse. The memcon gives a description of what occurred, which the U.S. participants claim established that the Soviets had accepted the regulation in U.S. Article 6(2) of all "devices":

> The discussion started with Article 6([Soviet] V). Karpov argued that the new formulation of Soviet paragraph 1 (U.S. paragraph 2) of Article 6(V) obviates the requirement for the phrase "other devices for performing the functions of these components" appearing at the end of U.S. paragraph 2. The Soviets were proposing to eliminate specific listing of ABM system components (launchers, interceptors, and radars) and substitute the word "components" (using the literal Russian word (komponenty) for this instead of the word for "components" (sredstva) used in Article 2 when referring to launchers, interceptors, and radars. Karpov agreed with Graybeal's interpretation that the Soviet text meant "any type of present or future components" of ABM systems. Karpov said they would give favorable consideration to Graybeal's suggestion that the phrase "specially constructed for such systems" be dropped from the Soviet wording.

(A-503, p. 1)

The thesis of this memcon is echoed, and embellished, in the FitzGerald study, prepared in 1985 by the participants. In addition to stating that the Soviets had proposed a new formulation of their Article V(1) which proposed to eliminate a reference to launchers, interceptors and radars (and to read "komponenty" instead of "sredstva"), the FitzGerald study recites the following history, apparently based on "the enclosures to Attachment 7," and apparently having no other support in the memcon or any contemporaneous document:

> Graybeal and Karpov then proceeded to discuss alternative solutions for paragraph 2 of U.S. Article 6 and Soviet paragraph 1 of Article V (see the enclosures to Attachment 7). With regard to the Soviet side's proposal, Karpov said that "he would give favorable consideration to dropping the phrase

> 'specially constructed' for such [i.e., ABM] systems." Graybeal offered two versions of the U.S. side's proposal. Alternative 1 would have kept the U.S. side's proposal intact and the phrase "or other devices for performing the functions of these components [i.e., ABM interceptor missiles, ABM launchers, ABM radars]" would be bracketed as a U.S. proposal while the phrase "specially constructed for such systems" would be bracketed as a Soviet proposal. Alternative 2 would have deleted both sides' proposals for the concluding phrase and substituted for them the phrase "ABM systems or any components therefor." This alternative was based upon Karpov's agreement with Graybeal's interpretation that the Soviet text meant "any type of present or future components" of ABM systems. The discussion of Article 6 (V) ended without any agreement as to which of Graybeal's two alternatives would be used in further discussions between the Delegations.

(FitzGerald 26-27)

The U.S. Delegation reported these developments in a cable dated September 24. The cable stated generally that the text of Article V of the Soviet draft (U.S. Article 6), "including mponents for future ABM systems which are not fixed and nd-based . . . [was] agreed ad referendum. Text of Article V(3) on deployment ban on future devices, in brackets, is U.S. proposal which U.S.S.R. has firmly opposed." 9/ (USDEL SALT 1056, at 2, ¶ 8)

Any suggestion that this meant the Soviets had agreed to cover, not only conventional components, but also substitute "devices," is implicitly refuted by this same reporting cable. It states in describing Article II, that the Soviets had defined ABM systems as restricted to missiles, launchers and radars:

9/ In this connection, the U.S. delegation's cable of September 24 misstated Karpov's language by describing the Soviets as having agreed that the text of Soviet Article V(1) included "components for future ABM systems . . ."; according to the memcon he agreed only that the language would extend to "'future components' of ABM systems."

> Article II - Definitions, status (U.S. Art. 2). Entire articles remains bracketed although possible solutions were explored. U.S. had sought "definition" approach, separately defining ABM systems and the key ABM components (ABM interceptor missiles, ABM launchers, and ABM radars). Separate definition of ABM system is important in several articles (i.e., [U.S.] articles IV and V(3) discussed below). Soviets have proposed "obligation" approach, probably to emphasize that only ABM systems and not air defense systems or other radars are being limited, and more recently as reflection of their objection to limiting future non-interceptor missile/radar systems as proposed in Article V(3) (old U.S. Article 6, para. 1). Soviet approach defines ABM systems in terms only of the three named components.

(Id. at 1, ¶5)

Despite this clear indication that the Soviets had not agreed to cover future "devices" on September 15, the FitzGerald/Graybeal study suggests, and others have more recently claimed, that the Soviets did agree to such coverage on that day.

Apart from this strong evidence in the transmittal cable, reflecting the Delegation's understanding of what the Soviets meant by "ABM system" in Article II(1), the record casts grave doubt on claims that the Soviets agreed on September 15 to cover "devices" other than conventional components in Article V(1). First, Soviet Article V(1) and U.S. Article 6(2), with some minor and inconsequential rearrangement of words, had been tabled and discussed on September 13. The Soviet version tabled on both occasions did not list the three components referred to in the memcon, only the U.S. version (Art. 6(2)) had such a listing. Thus, the Soviets must have proposed eliminating the listing of components in the U.S. draft, which they claimed would eliminate the U.S. need to refer to "other devices," presumably because the Soviet version would use a Russian word for components, "komponenty," different from the word used in Article 2, "sredstva," when referring to launchers, interceptors, and radars. The Soviet draft was not changed, however. The Soviet versions of Article V(1), on both September 13 and 15, used the word "komponenty." Furthermore, the Soviet explanation for its proposal should hardly have been reassuring. To substitute "komponenty" for the listing of the three current components was of little help to the U.S., since as between "komponenty" and "sredstva," the latter was the more general expression, covering all "means," and therefore closer

in meaning than "komponenty" to "devices." 10/ (The Soviets had substituted "komponenty" for "sredstva" in Article II(1), by December 13. (A-644, p. 9). In the final Treaty, "components" does not appear in Article II(1).)

The FitzGerald study offers another textual explanation for why the Soviets in effect accepted the U.S. position on "other devices." The two alternatives that FitzGerald writes were offered by Graybeal to the Soviets, however, support a very different conclusion from the one he draws. In the first alternative, the U.S would have kept its listing of components, and would have bracketed the phrase "other devices for performing the functions of these components;" the Soviets would have deleted the latter phrase and added instead the phrase "specially constructed for such systems." (A-503, p.

10/ The memcon of a September 17 meeting of a special working group reflects the lack of significance given by the U.S. delegation to the translation issue:

> In this connection [Article II], Shaw and Chulitsky agreed on the following treatment of the "systems" and "components" problem which they thought would settle this matter finally:
>
> 1. "Systems and their components" could be translated in the last word by either "sredstva" or "komponenti" by the Soviets as they wished, so long as there is no substantive problem involved; and,
>
> 2. The Russian words "sredstva PRO" would be translated in English either as "ABM systems components" or "ABM components."
>
> Shaw said that the latter Russian phrase could not be translated as ABM "means" because that made absolutely no sense in English. Shaw regretted that no agreement had been reached within the Karpov-Graybeal group on Article II. Chulitsky agreed.

(A-511) The Soviets were allowed to use "sredstva" and "komponenty" as they wished, and the translation "means" was rejected as nonsensical, even though it could have been treated the same as "devices."

5) This difference showed once again the Soviet unwillingness to regulate unknown "devices," and their desire to limit U.S. Article 6(2) to regulating those versions of the known components listed in Soviet Article II that might be specially constructed for use in space, water, air, or as part of a mobile system on land. The second "alternative," therefore, should be read with this Soviet position in mind. In it, the Soviets suggested that the U.S. should agree to substitute the three components listed by the U.S. as well as the category of "other devices," for the general words "ABM systems and components," as contained in the Soviet draft of Article V(1). In exchange, the Soviets agreed to drop their own phrase, "specially constructed for such systems." These textual changes fail to reflect Soviet acceptance of regulation of "other devices." Rather, they indicate a Soviet willingness to drop language from the Soviet draft Article V(1), to which the U.S. had objected on grounds unrelated to the "other devices" issue, in exchange for agreement by the U.S. to drop the language extending the Treaty's regulation to "other devices."

The question remains whether, despite the lack of any textual support in the working papers, the Soviets agreed to regulate all future substitute devices when Karpov reportedly "agreed with Graybeal's interpretation that the Soviet text meant 'any type of present or future components' of ABM systems." Karpov's reported language is equally consistent on its face with the view that the Soviets continued to be opposed to regulating "other devices" in U.S. Article 6(2) (Soviet V(1)), because Karpov agreed to regulate only future "components" of "ABM systems," as he put it, and not "devices" other than those systems and components, a concept he refused to accept. The Soviet draft -- much more probative evidence than an oral statement in a working-group meeting -- remained unchanged in any relevant respect.

As indicated by the reporting cable of September 24, the words "systems" and "components" had by September 15 become words of art, the meaning of which had been developed in the Soviet and U.S. working papers of Article II. While the U.S. drafts defined "ABM system" functionally, and then separately defined the three components then used in such systems, the Soviet draft defined ABM systems to consist of the three "ABM components" then in use. The parties in fact agreed on September 15 "to leave each side's version of the entire Article 2 in brackets," and on September 15 Garthoff apparently persuaded Semenov in a separate meeting of the need to reach agreement on a version of Article II which did not prejudice the positions of the two sides on future systems. (A-515) Smith proposed the same course to Semenov on September 17,

stressing the need to regulate futures at some point or the parties might think they had limited ABM systems only to discover they had limited just ABM missiles, launchers, and radars. (A-518, p. 3) Karpov seems, therefore, to have agreed to include under the prohibitions of Soviet Article V(1) only future components of "ABM systems" -- i.e. ABM missiles, launchers, or radars, that might be devised to perform in a mobile mode, as distinguished from "other devices" that could substitute for such components.

Additional proof that the Soviets had not accepted the regulation of "other devices" in U.S. Article 6(2) is the fact of their continued opposition on September 15 to Article 6(1) of the U.S. draft, which also referred to unknown "other devices." The memcon of that date reads: "It was agreed that paragraph 1 of U.S. Article 6 would remain bracketed as a U.S. proposal." (A-503) Thus, while reportedly agreeing to cover future "components" of "ABM systems" the Soviets simultaneously refused to agree to cover future "devices" that could substitute for systems or components of the sort then in use. U.S. Article 6(1), which after September 15 became the only provision explicitly seeking to cover substitute "devices," was made Article V(3) of the Joint Draft Text on September 17, and bracketed by the Soviets. (USDEL SALT 1055, p. 7)

Had the Soviets agreed to prohibit development, testing, and deployment of all future, unknown mobile "devices" that could replace known systems or components, they should have been far more accommodating in accepting Article 6(1). One would have expected the U.S. negotiators, moreover, to refer to the agreement concerning Article 6(2) in attempting to convince the Soviets to accept the same treatment with respect to deployment of future, unknown land-based "devices" in Article 6(1). Yet, throughout the long debate, the U.S. delegates invoked no such argument.

Finally, the record demonstrates that the Soviet position against attempting to regulate future, unknown substitute devices was articulated right up to September 15, and continued unabated thereafter. On September 8 -- only seven days before Karpov's statement to Graybeal -- Karpov had made a lengthy speech opposing limits on future, unknown devices, for reasons equally applicable to U.S. Article 6(1) and to that aspect of

Article 6(2) dealing with substitute "devices." 11/ The other Soviet participant in the September 15 meeting, Fedenko, had argued vigorously just two days before against addressing future systems. 12/

These objections were not reiterated immediately after September 15, because negotiations in Helsinki were adjourned on September 24. After negotiations resumed in Vienna on November 15, however, the same Soviet objections to attempting to regulate unknown, future devices that could substitute for known systems or components continued. (Shchukin, 11/30/71, A-594, p. 2) In fact, the Soviet team did not waver from its refusal to consider dealing with unknown future devices until December 10, 1971 (A-639, p. 1), and did not actually agree to the U.S. proposal that became Agreed Statement D until February 2, 1972. (A-770, p. 1) (Shchukin, 12/14/71, A-662, p. 14;

11/ The report of the meeting includes the following summary of Karpov's comments:

> He said that he could not agree to an approach designed to prevent deployment in the future of certain systems when the systems to be limited are undefined. . . . Since the purpose of the Treaty is to limit ABM systems, the question of future systems would be a matter for the Standing Commission. . . . He asked if it would not be better for us to refer the questions of future systems to the Standing Commission. He thought that this would be the most rational approach to limiting those ABM systems which cannot be defined in technical or legal terms. (A-540, Sept. 8, 1971, pp. 2, 3, 5)

12/ According to the memcon, Fedenko reiterated the standard Soviet arguments against including any general provisions on future undefined ABM systems. He stated that the Standing Commission could handle such problems if they ever arose. The alternative, he felt, was for the U.S. to specify what systems, components or mechanisms it had in mind. If the U.S. could define what it was talking about, then national means could probably verify such activities because presumably it would be mandatory to test such conceptual devices. The Soviet side would then be in a position to determine whether such systems should be in an ABM Treaty. (A-498, p. 2)

Kishilov, 12/17/71, A-663, p. 3; Grinevsky, 12/17/71, A-667, pp. 5-6; Semenov, 12/20/71, A-681, pp. 5-6; Shchukin, 1/11/72, A-706, p. 11; Grinevsky, 1/11/72, A-710, pp. 5-7)

A subsequent exchange concerning the meaning of "systems," "components," and "devices," confirms that both sides were aware of the special meaning attributed to each of these words. In a February 1, 1972, meeting, Allison and Trusov discussed what had transpired with respect to future systems. Allison reported:

> I brought up the matter of future ABM systems as another possible problem in this category [of remaining issues that could easily be resolved], noting the recent discussions concerning an agreed interpretive statement on the subject. I said I thought we could agree on this matter if each side understood what the other had in mind, and asked Trusov if he agreed with me. He said that we had understood one another earlier but now seemed to disagree because of a word problem, and went on to speak at some length about the changing terminology in the future systems paragraph. He dwelt primarily on the subjects of "systems", "components", and "devices." I observed that both sides have had a clear understanding for some time that within the context of our negotiations when we speak of an ABM system we are referring to a system made up of three components -- ABM launchers, ABM interceptor missiles, and ABM radars. We also appear to agree that substituting a different component for one of these three in the future would result in what we refer to as a "future" or "other" ABM system. It seems, I said, that with that understanding our Delegations should be able to agree on a set of words for the interpretive statement. Trusov agreed with my observation and said that the same words -- "other systems and their components" -- should be used consistently, since that was a clear expression of what was meant, as well as the wording in which the question had originally been raised.

(A-766, p. 2) (Emphasis added.)

This exchange suggests that the semantic distinction between "devices" and "systems and components" was an important one, recognized as such by the negotiators. The participants understood that the phrase "ABM system" referred only to systems consisting of ABM launchers, interceptor missiles, and

radars. They also agreed that substituting a different component for one of the three specified would create a "future" or "other" ABM system, to be regulated by the agreed "interpretive statement" on that subject.

The subsequent history of Article V(1) casts little further light on its meaning. On September 20, the language of what the FitzGerald study terms Alternative 1 was changed to read "ABM systems or their components." Garthoff on that day characterized the draft which the parties were using as "the compromise proposal on eliminating brackets." (A-532, p. 2) (Emphasis added.) Had the Soviets agreed that "components" of "ABM systems" included "other devices" to substitute for missiles, launchers, or radars, this draft would have been more than merely a "compromise". The U.S. would have achieved all that it wanted. Yet, Garthoff said on the same day that seven areas of difference remained, including "a provision to cover future 'unconventional' ABM systems." (A-532, p. 4)

Finally, if the U.S. team really believed the Soviets had agreed on September 15 to cover substitute "devices" in Article V(1), that conclusion would presumably have been included in Ambassador Smith's report to the President for SALT V. His report contained several pages concerning the ABM Treaty but made no claim that anything was agreed concerning future systems. See Memorandum for the President, "Report of the U.S. Delegation to SALT," covering July 8 to September 24, 1971 (Sept. 28, 1971). In fact, the argument that the Soviets agreed to cover "devices" in Article V(1) during SALT V finds no support in analyses of the issue prepared during the negotiation period. A study of the ABM negotiating history by ACDA's Historical Division, dated October 1972, concluded that the Soviets had refused to agree to a ban on futures in Article V(1) during SALT V:

> They [the two sides] also agreed in article V to ban sea-based, air-based, space-based, and mobile land-based ABM systems, as well as automatic launchers; the American future-systems provision remained unagreed.

(Fifth Session of SALT ix; see also id. at 115.) A memorandum of a Verification Panel Working Group, dated October 27, 1971, analyzing open issues after the Fifth Session, treated Article V as ambiguous with respect to systems consisting of both mobile and fixed components; it also reflected the underlying difference in coverage due to disagreement on the meaning of "components" in Article II (p. 2):

> One of the differences remaining is that the U.S. version [of Article II] presents definitions of ABM systems and of certain ABM components (launchers, interceptors and radars) while the Soviet version states that the obligations of the agreement shall apply to ABM launchers, interceptors and radars. The U.S. side has maintained that some of the obligations of the agreement extend also to systems and components other than ABM systems and components (e.g., to "other phased-array radars", to early-warning radars, to surface-to-air missiles, and to non-interference with national means) and to future ABM components (viz., "devices") other than launchers, interceptors and radars.

(Id. 4) (Emphasis added.)

C. Definition of ABM System.

During the discussions of future systems or devices, resulting ultimately in Article V(1), the Parties simultaneously discussed the meaning of "ABM system." The Soviets sought, from March 1971, in Article II(1) of their draft, a definition strictly limited to the ABM systems then in use: "The obligations provided for under this Treaty shall apply to systems specially designed to counter strategic ballistic missiles and their components in flight trajectory, namely: (A) ABM launchers, (B) ABMs, (C) Long-range acquisition radars, (D) Tracking and ABM guidance radars." (USDEL SALT 566) Commencing on July 27, 1971, the U.S. pushed for a broad, purely functional meaning in Article 2(1)(a) of its proposed draft: "an anti-ballistic missile (ABM) system is a system constructed or deployed to counter strategic ballistic missiles or their components in flight trajectory." It then separately defined the three components in use, interceptor missiles, launchers, and radars. The original U.S. draft thereby potentially included within the Treaty's coverage all devices that could serve ABM functions; the Soviet draft, on the other hand, limited coverage to ABM systems with components then in use.

The Soviet proposal was modified somewhat on August 31, to add that the "obligations" in the Treaty shall apply "to anti-ballistic missile (ABM) systems, i.e. the means specially constructed and deployed to counter strategic ballistic missiles and their components in flight trajectory:" after which followed the definitions of the components. (A-540, Aug. 31, 1971 (working paper)) Karpov stated a Soviet position repeatedly emphasized -- "that the Article should [not] cover obligations other than ABM systems -- only those systems subject to restrictions." (A-540, Aug. 31, 1971, p. 1)

The components specified by the Soviets were limited on September 2 to the three presently in the Treaty, which Karpov announced were "the means to which obligations should extend." (A-540, Sept. 3, 1971, p. 1) This did not mean, Karpov stated, that other obligations did not exist in the Treaty "which will cover other systems." He thought Soviet Article V, "which corresponds to paragraphs 2 and 3 of U.S. Article 6, is a concept covered by the obligations under the Soviet Article V." (Id., p. 2) Soviet Article V(b), on which the Parties' working papers focused, dealt with multiple-missile launchers, as opposed to the single-missile launchers described in the system defined in Article II. Soviet Article V also dealt with a variety of mobile systems, as opposed to those land-based

systems in use, but Karpov's statement provides limited support for the position that the Soviets would have accepted regulation of any ABM system with substitute devices for the usual components.

A U.S. proposal on September 2 rejected the Soviet view on expanding the Treaty's regulation beyond known components. The suggestion was to define ABM missiles and radars to include types "indistinguishable from" missiles or radars tested in an ABM mode. Karpov regarded the U.S. unwillingness to give up "indistinguishable from" as "a pity," and said he would bracket the entire Soviet Article II if the words were not dropped. (A-540, Sept. 2, 1971, p. 6) Karpov returned to the subject on September 6, complaining that the U.S. draft extended beyond the "systems to be covered" by the Treaty. (A-540, Sept. 7, 1971, p. 2)

On September 8, 1971 Graybeal stated that the Parties were close to agreement on a definition of ABM system ("constructed or deployed to counter strategic missiles or their components in flight trajectory"). This definition, he argued, "would also apply to" Article 6(1) and would thereby limit future systems. Karpov objected that the Soviet purpose was to limit only systems that use ABM launchers, interceptors, and radars. (A-540, Sept. 9, 1971, pp. 3-5) (reporting meeting of Sept. 8).

At a September 13 meeting of the Ad Hoc Committee, both sides introduced new versions of Article II, and the Soviet version provided that the "obligations" of the ABM Treaty shall apply to ABM "systems, i.e., the following principal ABM system components specially constructed and deployed to counter strategic ballistic missiles and their components in flight trajectory," going on then to define missiles, launchers, and radars. (A-540) (Emphasis added.) Karpov noted that this paper incorporated the word "principal," and in connection with the descriptions of missiles and radars the phrase "for an ABM role." He felt this met American views "half-way" and hoped agreement could be reached. This change did not make clear, however, that non-principal devices would be covered. Karpov proposed that the language should be read as reflecting that Article II covered "principal" obligations, and recognized that the Treaty contained obligations on other systems, for example in the new Article VI, as noted above. Those obligations, he argued, were "complementary," and should not be confused with the basic provisions. Graybeal objected to the proposed distinction between "principal" and "complementary" obligations. He suggested a listing of the provisions to which the obligations would apply. Karpov agreed to try this approach, and said he was willing to delete "principal."

On September 15, the Soviets tabled a draft Article II(1), which changed the lead-in language to state that the "obligations provided for under Articles III, IV, VI, VII, and VIII" of the Treaty should apply to the "principal" ABM system components as described. The U.S. draft Article II(1) continued to be purely functional and contained a proposal earlier made to include in the definitions of ABM missiles and radars any type "indistinguishable" from "those tested in an ABM mode." The FitzGerald study mentions this fact, advising the reader to "note the absence of any mention of Article V (U.S. 6) in this listing. This was consistent," FitzGerald writes, "with Karpov's remarks of September 2, 1971 (para. 7 Section E, above) that Soviet Article V covered obligations on components not listed in Article II, and his September 15, 1971 agreement with Graybeal's interpretation that the wording of Article V covered all types of components." (FitzGerald 45) The study thereby suggests that the Soviets were agreeing to a different meaning for ABM system in Soviet Article V, which extended to substitute devices for ABM components.

The reading that FitzGerald suggests for the Soviet proposal on September 15 is tenuous. First, the Soviet proposal's lead-in language was presented on that date, but no discussion of it is reported in the memcon. The working paper, in fact, establishes that the lead-in language was deleted on the day it was presented, leaving the language unqualified in the obligations to which it applied. (A-503, Sept. 15, 1971, p. 4) If the lead-in language, when proposed, signified Soviet willingness to allow Soviet Article V to apply to substitute devices, its deletion (on the day Karpov agreed that Article V would apply to future "components") should have signified a Soviet intention to limit Article V by the meaning of "ABM system" in Article II. Far more likely, as noted above, the Soviet suggestion appears to have been based on the thought, briefly entertained, that mobile ABM systems could differ from those then described in Article II, not on the view that the Soviets were willing to allow such systems to include unknown substitute devices for the three ABM system components. Karpov specifically continued to reject, on September 15, the inclusion of missiles and radars "indistinguishable from" those tested in an ABM mode. (A-503, p. 2) The Soviets objected to making the agreement uncertain: "What was indistinguishable from launchers, missiles and radars?" Semenov asked. (A-518, Sept. 17, 1971, p. 4)

More fundamentally, as discussed above, the negotiating record reflects that the U.S. negotiators knew the Soviets did not want to accept a definition of Article II(1) that would

define "ABM system" to include "devices" other than missiles, launchers, and radars. The ACDA history of this period recounts the discussions concerning Article II that occurred simultaneously with those concerning Article V(1):

> On September 15, Mr. Garthoff persuaded Semenov of the need for a solution on Article II which did not prejudice the positions of the two sides on future systems. At the miniplenary two days later, Mr. Semenov said that inclusion of the future-systems provision would make the treaty amorphous and could not be considered legitimate.
>
> Later, Mr. Smith and Mr. Semenov privately agreed that an effort should be made to draft Article II without prejudicing the position of either side on future systems. At the same time, Mr. Smith said the United States attached great importance to the issue; they might think they had limited ABM systems only to discover that they had merely limited launchers, interceptors, and radars.

(Fifth Session of SALT 85 (footnotes omitted); see A-518)

An attempt was made by the U.S. to develop an acceptable compromise package on Article II during the period September 17-21. The Soviets rejected the package, although the U.S. would have deleted the phrase "indistinguishable from" in its definitions. The package was reintroduced on December 7, when some progress was made in the definitions of components, and brackets were removed from the U.S. introduction: "For purposes of this Agreement. . . ." (A-619, p. 8) Other changes were made, but a fundamental difference continued: the U.S. defined "ABM system" functionally in sub-paragraph 1(a), and then defined the three types of components in sub-paragraphs 1(b)-(d); the Soviet definition of "ABM system" was functional but added the words "and including the following components -- ABM interceptor missiles, ABM launchers and ABM radars," and then defined those three components in sub-paragraphs (b)-(d). The Fifth Session ended with the sides divided on this ground, and with both versions of Article II in brackets.

The Sixth Session began on November 15, 1971. A U.S. memcon of December 8 recites that the Soviets agreed to delete the phrase "and including the following components" from their draft of Article II. (A-626, p. 2) The Soviets, however, did not accept the U.S. draft presented the next day, which deleted that phrase, (A-633, p. 4), and presented a version on December 13 that reintroduced that language. (A-644, p. 5)

The Soviets clearly tied this language in Article II to their disagreement over the proposed regulation of substitute "devices" in Article V(3) of the Joint Draft Text ("JDT"), which the Soviets had bracketed. Article V(3) was the original U.S. Article 6(1), which was then the only remaining provision in the U.S. draft expressly incorporating language covering "other devices," barring their deployment as substitutes for systems or components deployed under Article III. Grinevsky noted on December 9 that the Soviet difficulties with Article II were "related to the differences contained in Article V. His remarks implied that . . . there should be a 'tradeoff' involving the US dropping Para 3 of Article V in exchange for Soviet acceptance of a definitional Article II as proposed by the US side." The U.S. reply sought to reassure the Soviets that a definitional approach in Article II would not be prejudicial as to the content of Article V(3):

> Garthoff stated again that the US side considered Article II to be important, that the definitional approach was non-prejudicial to Soviet as well as American positions on other articles such as Article V, and that the US position on Article V involved a matter of important substance which could not be "traded."

(A-633, pp. 1-2) The Soviets persisted in their view, contending on December 13 that the purpose of Article II "was a listing of the ABM components limited under other provisions of the agreement." (A-644, p. 3) Grinevsky again tied the issue to the difference over Article V(3) covering substitute devices:

> In particular, a feature which distinguished it [the Soviet draft] from the U.S. draft was that paragraph 1(a) of the Soviet draft presented a comprehensive description of ABM components -- i.e., ABM interceptor missiles, ABM launchers, and ABM radars -- to avoid misunderstanding in the future.
>
> In this connection, Mr. Grinevsky noted that paragraph 3 of Article V should be excluded since it is quite unacceptable to the Soviet side.

(A-644, p. 6) Parsons replied that he was pleased the Soviets had adopted the method of listing definitions, but noted that "the definitions given ABM systems were more restrictive than U.S. definitions, which take into account paragraph 3, Article V, which we consider as important and which the Soviet side said was unacceptable."

Garthoff privately suggested to the Soviets on December 17 that the futures problem could be dealt with by a new approach, in which the Parties would agree that neither side could deploy such systems or components without prior consultation and agreement through the SCC. Kishilov was reportedly interested. (USDEL SALT 1146, Dec. 20, 1971) On December 18, the U.S. delegation reported that Grinevsky had indicated serious interest in the idea of handling the future systems or components problem in the SCC:

> Grinevsky referred to previous Kishilov-Garthoff conversation concerning a possible alternative approach for handling future ABM systems and future OLPARS. He thought idea of handling both these matters through consultation and agreement in Standing Consultative Commission, prior to any deployment of future ABM systems or components, or of OLPARS, rather than through explicit treaty provisions, offered possible resolution to differences.

(USDEL SALT 1145, Dec. 18, 1971, Sec. 2, p. 2, para. 11) Shchukin apparently made the same suggestion, which was reported to the Secretary of State as the manner in which future systems might be regulated:

> Future systems. We have proposed, and the USSR has not as yet accepted, that each side undertake not to deploy ABM systems using devices other than current ABM system components to perform the functions of these components. The Soviets contend, in essence, that this amounts to trying to put a box around something that does not exist. Academician Shchukin has, however, indicated informally that prohibition of possible future ABM systems is something that might be treated in the Joint Standing Commission.

(Memo, "SALT-Principal Negotiating Issues," R. Spiers to Secretary Rogers, Dec. 20, 1971, p. 3)

Thereafter, on December 20, important developments occurred concerning Article II. Extensive debate during the morning on future systems, infra pp. 51-52, led Smith to suggest that the Parties try to speed up the process of dealing with Article II. (A-672) At lunch the same day, Grinevsky responded to a U.S. draft proposal of Article II that defined "ABM system" functionally ("a system to counter strategic ballistic missiles or their elements in flight trajectory") and then, without any connecting language, defined "ABM interceptor missiles," "ABM launchers," and "ABM radars." The following important exchange then took place:

> Grinevsky stated that the second problem was the absence of a connective between the sub-paragraph defining ABM systems, and the three sub-paragraphs following which defined components. His Delegation strongly believed that there should be some connective such as "namely" or "consisting of". Garthoff stated that the American side did not consider that a connective of this kind was either necessary or desirable. If, however, there were to be one, it should be precise. Therefore, he suggested, we might consider use of the phrase "currently consisting of" as a connective. This was clearly a new thought to Grinevsky and Kishilov and they appeared uncertain of the reaction of their side. Garthoff noted that the Soviet side, as well as the American, recognized that there could be future systems, and while the question of constraints on future systems would be settled elsewhere than in Article II, the correct way of indicating a valid connection between components and systems in Article II would be to include the word "currently."

(A-677, attachment, p. 3) (Emphasis added.) Grinevsky said he would raise the proposal with his delegation.

On the next day, December 21, the Soviets presented a revised version of Article II in which they accepted Garthoff's language. (A-678, p. 2) This agreement was incorporated into the Joint Draft Text of January 20, 1972, with the following results:

> 1. For the purposes of this Treaty an ABM system is a system to counter strategic ballistic missiles or their elements in flight trajectory, currently consisting of: ....

(A-731)

The developments of December 20-21 are described in the FitzGerald study as an "impasse" that "was suddenly broken ...." (FitzGerald 49) One might infer from this that the Soviets had changed their minds and agreed to the U.S. view that "ABM system" should be defined to apply within the Treaty text to all substitute devices. In fact, however, the Soviets agreed to the change in Article II only after Garthoff assured

them that "the question of constraints on future systems would be settled elsewhere than in Article II," (A-677, p.2) 13/ and after Garthoff and the U.S. Delegation had implemented this assurance by agreeing to drop Article V(3) of the U.S. draft and to seek instead a separate, agreed minute to the Treaty on the subject of future devices. Thus, while the latter development is not discussed in detail in the memcons, Garthoff's suggestion was made on December 20 (A-677, p. 4), and a U.S. proposal and explanation of the subject was tabled on December 21, the day on which the Soviets agreed to add "currently consisting of" to paragraph 1 of Article II. The statement makes clear that the Soviets agreed to the change in Article II because the U.S. alleviated their concern that its adoption might be taken as Soviet agreement to substantive restrictions on substitute devices elsewhere in the Treaty text:

> The Soviet Delegation has said on several occasions that it is opposed to the proposal by the United States to include a provision in the ABM agreement prohibiting ABM systems in the future which would use devices other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the functions of those components. In order to contribute to negotiating progress, while maintaining our basic position on this matter, the U.S. side is willing to drop Article V(3) if there is a clear agreed understanding as part of the negotiating record. An Agreed Minute could read as follows:

13/ As noted above, Smith had said, on September 17, 1971, in response to the same Soviet concern: "It seemed to him that we should be ingenious enough to draft Article 2 in such a way as not to prejudice the position of either side in regard to paragraph 1 of [U.S.] Article 6."
(A-518, p. 3)

> The Parties agree that the deployment limitations undertaken in Article I and Article III are not to be circumvented by deployment of components other than ABM interceptor missiles, ABM launchers, or ABM radars, for countering ballistic missiles in flight trajectory. They agree that if such components are developed and the question of deployment arises, neither side will initiate such deployment without prior consultation and agreement in the Standing Consultative Commission.

(A-678 (attachment))

The significance of this interrelated series of events for the meaning of Agreed Statement D is discussed below. The events are also significant, however, as reflecting Soviet intentions with respect to substitute devices, or future systems. The Soviets opposed attempting to regulate such devices in the Treaty text, and their position on Article II demonstrated that they realized that if the definition of "ABM system" were purely functional, then it would be read -- in light of Article V(3) -- to include devices that could substitute for the three components in current use. When the U.S. agreed to drop Article V(3), the Treaty text no longer contained any provision that referred to substitute devices, that language having been omitted earlier from Article V(1) dealing with mobile systems. At that point, and with Garthoff's additional assurance that future systems would be dealt with elsewhere than in Article II(1), the Soviets accepted the connecting language.

Thereafter, during discussions concerning what became Agreed Statement D, some significant exchanges occurred with respect to the scope of Article II. On January 26, 1972, the U.S. proposed to add a clause making Agreed Statement D applicable to all future components able "to perform the functions of ABM interceptor missiles, ABM launchers, or ABM radars":

> Garthoff explained that [the language] was intended to make more precise the intention of the sentence, which he believed both sides shared, that we were talking [in Agreed Statement D] about future system components which might take the place of ABM interceptor missiles, ABM launchers or ABM radars.

> He recalled Grinevsky's earlier reference to telescopes supplementing but not supplanting radars, and noted that we believed this additional language would help make clear that additional elements of such kinds were not the subject of the sentence.

Grinevsky rejected this proposal, noting his understanding of the roles of Article II and the Agreed Statement:

> He noted that the sentence already makes clear that reference is to future ABM system components other than the three indicated in the sentence and in Article II of the treaty. Article II made clear that these are the three components currently comprising ABM systems, and the language under discussion made clear that it was referring to precisely such system components other than the three current ones which were listed.

(A-743, p. 3)

Another exchange occurred on February 1, 1972, suggesting that both Parties assumed that Article II did not bring within its definition in the Treaty text future, substitute ABM systems or components. Trusov expressed concern about the changing terminology in the future-systems paragraph, which ultimately became Agreed Statement D. He focused primarily on the subjects of "systems," "components," and "devices," the latter of which was still in the proposed draft at that time. (See A-763, attachment 2) In a comment quoted at length on p. 35, supra, Allison "observed that both sides have had a clear understanding for some time that within the context of our negotiations when we speak of an ABM system we are referring to a system made up of three components -- ABM launchers, ABM interceptor missiles, and ABM radars." He then suggested that agreement was possible. Trusov agreed, so long as the same words ("other ABM systems and their components") are "used consistently ...." (A-766) Thereafter, "devices" was dropped from the draft, and the phrase "based on other physical principles" was accepted. The final drafting issues were resolved by April 11. (A-838)

D. Negotiation of Agreed Statement D.

The notion of regulating future systems through discussion in what became the SCC, was articulated as early as August 1971. At that time the U.S. Delegation was instructed to seek to obtain Soviet agreement to restrictions that would have banned testing and development of mobile-based OPP devices. But the Delegation was also told not to invite a detailed negotiation, and to accept an agreement that protected the basic principle, leaving problems to be worked out in the joint commission. (NSDM 127) The negotiators also mentioned the possibility of dealing with the future "devices" problem through discussion in the SCC, both before and after Article V(1) was agreed on September 15. (A-442, 8/31/71; USDEL SALT 0990, 9/3/71; A-481, 9/8/71; A-540, 9/8/71; A-498, 9/13/71; A-594, 11/30/71; A-663, 12/17/71; A-667, 12/17/71; A-681, 12/20/71; A-706, 1/11/72; USDEL SALT 1165, 1/11/71; A-710, 1/11/72) No agreement was reached concerning future systems, however, when SALT V ended on September 24, 1971. (See discussion, supra, pp. 29-42)

The Soviet view on regulating unknown systems or components was mentioned by Shchukin on November 30, 1971, soon after negotiations resumed in Vienna. He regarded the prohibitions relating to mobile systems and components as of fundamental importance, and as confirming "the importance both sides attached to preparing a draft which excluded the possibility of the deployment of ABM defenses of the territory of a country." But he was unwilling, despite this overall objective, to accept an obligation against deploying substitute "devices":

> [T]he Soviet side cannot recognize as well-founded the proposal of the US involving an obligation not to deploy ABM systems using devices other than ABM interceptor missiles, ABM launchers, or ABM radars to perform the functions of these components. The subject of a Treaty (Agreement) could only be a specific and concrete limitation of ABM systems. It would seem that prohibiting something unknown, as proposed by the US side, would create uncertainty as to the subject of the Treaty (Agreement) on limiting ABMs. Such has never been done in a serious agreement. If systems based on different technical principles should subsequently appear, they could be discussed additionally, as provided in the draft Treaty.

(A-594, p. 2) Kishilov suggested to Garthoff, after the meeting, that new language proposed by the Soviets prohibiting deployments of ABM systems to provide a territorial defense should be a partial substitute for a future-system provision. (A-592, p. 2) The U.S. rejected this proposition, but both Kishilov and Chulitsky said the Soviets would not accept a treaty provision on the issue. (USDEL SALT 1106, Dec. 1, 1971; USDEL SALT 1116, Dec. 7, 1971).

Chulitsky repeated the Soviet objections to regulating future systems on December 4, and asked the U.S. to drop Article V(3), which the U.S. representative (Aaron) refused to do. Chulitsky "also argued that the prohibition on air-based, space-based, land-based, etc. ABM systems is adequate to cover the problem of future systems." (A-613) The latter statement was consistent with the position that the Soviets had agreed to regulate future "components" consisting of missiles, launchers, and radars, but not unknown "devices." Mobile systems, especially if space- or air-based, were likely to include future versions of the components regulated in Article II. Moreover, if the Soviets were in fact understood to have agreed to regulate "devices" in the prohibition relating to mobile systems, this would have been a natural occasion to ask why they were so adamantly opposed to regulating such devices in Article V(3). No such question was asked, on December 4, or during the many debates thereafter. The disagreement was repeated on December 7, during a review of the Joint Draft Text: "Kishilov urged that some way be found to express the difference over this point in Article III rather than in Article V." Garthoff thought the dispute should remain in Article V, but promised to consider the idea. (A-619, p. 3)

On December 10, Brown made a formal statement for the U.S. concerning future systems. He urged support for Article V(3) because the Parties could effectively prohibit "the deployment of both wide area and thick regional ABM defenses" only if they prohibited the use of "devices other than ABM interceptor missiles, ABM launchers, and ABM radars to perform the function of these components." He urged the Soviets to prevent the future deployment of new systems "that could circumvent the ABM limitations both sides have proposed." Significantly, he argued that the Soviet objection to limits on possible future ABM systems "runs contrary to the precedent established in the Outer Space Treaty and the Seabeds Treaty" banning "other weapons of mass destruction." He said: "The rationale supporting the undertaking of those obligations applies fully to a corresponding undertaking in the case of possible future ABM systems." (A-642, attachment 2, pp. 1-3) This rationale also applied to Article V(1), and the U.S. delegation could have argued that the Soviets had agreed to limit substitute devices in Article V -- which is analogous to the space and seabed regimes -- but they did not.

In a session later that day, Shchukin began by reiterating the Soviet objections, and disagreeing with Brown. He stated that he could specify systems that were within the meaning of "other weapons of mass destruction," including chemical and bacteriological weapons. Brown replied that "future ABM systems" could include lasers and particle accelerators. Shchukin thought the territorial defense provision in Article I in effect banned deployment of future systems that would create a territorial defense, and otherwise he saw nothing objectionable in having new components that would do the same job as existing ones "in a more efficient and less costly manner."

Ambassador Nitze posed a situation in which a new component was developed that rendered meaningless the limit of 100 launchers and missiles. Shchukin "suggested that were such future systems to reach a stage where they could be deployed, the question would be referred to the Standing Commission, through which the necessary regulations could be worked out." Nitze found an opening in this apparently negative reaction. He asked whether he had correctly understood Shchukin:

> Was he saying that the sides would agree in principle that the provisions of the agreement should not be undermined by the development of components capable of performing functions similar to ABM components; that if such components reach a stage of development such that their deployment could be contemplated, the issue of the appropriate manner of their regulation would be referred to the Standing Commission; and that no such deployment would take place until such regulations had been agreed by Governments through the Standing Commission[?]

Shchukin replied that the Soviets "could agree to" Nitze's statement "if it were necessary," but that "it was not clear that he was holding out a commitment in the treaty to that effect." (A-639, p. 2)

On December 14, Shchukin repeated the position that "including in the treaty a provision covering something that is not known cannot be justified ...." (A-662, p. 14) Later that day, Nitze once again turned a negative Soviet position to advantage: had Shchukin meant that this was not a proper subject for the treaty, but was acceptable for a minute or protocol? Shchukin said that that had not been his intent, but added "on his own" that "it should be possible to provide that if components based on new technology were developed which would substitute for the components limited under Article III,"

the matter would be referred to the Standing Commission and an agreement on it would be reached "so that there would be no circumvention of the limitations of Article III." (A-647) (See also A-662, p. 14)

Subsequent discussions focused primarily on the need to require agreement in the Standing Commission on specific limitations on future substitutes for known systems or components, so that the limitations of Article III would not be undermined. Thus, on December 17, Garthoff suggested agreement on a separate understanding to cover future ABM systems. Garthoff "stressed that I [am] speaking about consultation and mutual agreement." (A-663, p. 3) Kishilov suggested that the matter could "be taken up in the Standing Commission for its 'determination.'" (See also A-667, Dec. 17, 1971, pp. 5-6)

Semenov repeated the Soviet view on future systems on December 20, stressing the need to avoid uncertainty and its attendant disputes. He said the goal of the delegations was "to reach agreement on limiting known ABM systems referred to in Article III .... Could the sides include in an ABM Treaty the unknown without risk of making the treaty indefinite and amorphous? ... The sides cannot and must not engage in discussion of questions not known to anyone." (A-681, pp. 5-6) Brown explained in a formal statement that the U.S. position sought to prevent the limits of Article III from being undermined through, for example, a wide-area defense, a thick regional defense, or the use of substitute components. Of particular importance is Brown's argument that, although substitute devices could conceivably perform the tasks of regulated components more effectively, "their use, not specifically prohibited by Article III, might be in numbers and locations beyond those prescribed by Article III, and thus circumvent that Article." Also, he noted, "a single future device substituting for an interceptor and launcher might in effect make many intercepts," and thus achieve a result contrary to that sought by the numerical limits of Article III. At that time, the Soviet draft of Article III prohibited the deployment of "the ABM systems or their components listed in Article II of the Treaty" outside of certain geographic locations. (A-624, p. 3)

In a conversation on December 20, after the exchange between Brown and Semenov, Smith told Semenov how importantly he viewed the need to control future systems. He made what appears to have been a final effort to regulate future systems in the Treaty text, rather than in a separate provision, through subsequent agreement in the SCC:

On future systems problem, Smith said it seemed the problem was not so far off and not so amorphous as Semenov had suggested that morning. In his statement Semenov had said that we had not been precise; however, if he would recall Dr. Brown's statement carefully, he would find one example given, referring to lasers. Smith was sure that Soviet scientists could also think of other possible future systems. It was Smith's feeling that if, as Semenov had suggested, this problem were left to subsequent handling in the Standing Commission or in some other way, this would amount to saying that we would have to put off agreement on this problem until some time in the future. He believed there would be a tendency on both sides to do their best to design systems that would not be limited by a treaty. Semenov asked if Smith had in mind a circumvention of a treaty. Smith said that technically it would not be a circumvention, but more like a "hunting license" to find ways of doing things not prohibited by treaty. He believed weapons design developed a dynamic of its own. Where a certain field was not prohibited by an international agreement, there would be strong thrusts to push development as far as technology permitted. Smith believed that what both our countries should be doing was to stop evolution of military technology in a direction that was dangerous to us both. Therefore, he had hoped that if we could conclude a first arrangement that would establish quantitative limits for the most part, and learn to live with it, in time we would also be able to get control of qualitative aspects. In the matter of future ABM systems, which had not yet been developed, it was in the interests of both countries to outlaw them before they were born.

(USDEL SALT 1149, Dec. 21, 1971)

In the course of this discussion, Smith did not suggest that the parties had already agreed to any far-reaching limitation on design of future ABM systems and components in Article V(1). (See also A-672, pp. 2-3)

Grinevsky continued meanwhile to pursue the idea of dealing "with future systems through statements on the record concerning consultation prior to deployment in the Standing Commission." Garthoff noted that his idea was for an agreed minute whereby the parties understood "that, prior to any

deployment of future systems and components, there would be consultation and agreement" in the Standing Consultative Commission ("SCC"). Grinevsky said this might be possible.

On December 21, the Soviets agreed to accept connecting language in Article II ("currently consisting of"), and the U.S. agreed to drop Article V(3) "if the Soviet side was prepared to accept the language proposed [by the U.S.] earlier that day ...." The language is quoted above, and would unmistakably have prohibited deployment prior to agreement in the SCC of future substitute components "other than ABM interceptor missiles, ABM launchers, or ABM radars ...." Grinevsky "said that the Soviet side needed to study this matter further ...." (A-678, pp. 3, 6) Semenov again rejected the regulation of future systems, but this time his remarks stressed "that inclusion of a provision on so-called 'other ABM systems' in the text of a treaty limiting ABM systems is not acceptable ...." (Emphasis added.) This suggested a significant breakthrough in the negotiation. It also suggests, however, that Semenov was asssuming that no provision then in the draft treaty regulated substitute devices. The U.S. representatives did not challenge his assumption by referring to Article V(1) or Article II.

Internal discussions also indicate that, as of December 23, 1971, the U.S. Government regarded the entire future-systems issue as unresolved. On December 21, the delegation reported that, "regarding future systems," they planned "to explore solutions involving separate understanding ... calling for consultation and/or mutual agreement through the standing commission prior to deployment of ABM systems using devices other than interceptors, launchers, and radars to perform functions of these components." (SALT 14810, Dec. 21, 1971, p. 2, para. 7) The State Department sent the following comments from Robert A. Martin and Frank H. Perez to Philip A. Odeen, NSC Senior Member for defense and arms control, apparently in preparation for a SALT Verification Panel Meeting, scheduled for December 23:

> 3. Future ABM Systems
>
> We believe that the US position on future ABM systems should be modified to meet Soviet concerns that future systems are too poorly defined and "futuristic" to be covered specifically in an agreement.

> In view of Soviet indications that the matter of future ABM systems could be handled through "consultation and agreement" in the SCC, we believe this would achieve the US aim to ban future systems. We would prefer to have it be part of the formal agreement, but it could be in the form of an explicit understanding which would make it binding on both parties to reach agreement through the SCC mechanism before deploying new ABM systems. Such an arrangement would serve to protect our interests, since we could legally challenge the Soviets if we had evidence that they were deploying ABM systems using devices other than ABM interceptor missiles, ABM launchers, or ABM radars.

(Dep't of State Memo, "SALT - Revised Issues Paper", Dec. 21, 1971)

A State Department paper dated December 22 also referred to the futures issue, and to a JCS staff recommendation to leave futures options open; but the paper recommended that efforts continue at least for a ban on deployment separate from the formal agreement:

> Future ABM Systems--The Soviets have shown flexibility on this point, but have not as yet agreed to a specific provision in the ABM agreement. JCS staff believes the U.S. should not foreclose future options, and would change the U.S. position to exclude a provision to this effect. All other agency staffs support a ban on future systems and although preferring to have it part of the formal agreement, believe it could be handled in the form of an explicit understanding binding on both parties to reach agreement in the SCC before deploying such systems. It seems preferable to pursue our current position further before exploring such a fall-back.

(Briefing Memo, "SALT - Verification Panel Meeting December 23," R. Spiers to Under Secretary, Dec. 22, 1971) The Delegation evaluated the Soviet position in a message on December 23: "It seems clear that the USSR wants a May 20 type arrangement.... The question of future systems appears to be manageable." (SALT Report, pp. 1 and 6) (Nixon Papers) By this the Delegation communicated its realization that the Soviets wanted an agreement that represented a practical, first step, along the lines contemplated by the May 20, 1971 accord. (Supra, pp. 14-19)

The SALT I Delegation prepared a report, dated January 8, to bring the Administration up to date on the futures issue as of that time and to solicit Washington comments. This report was not sent. Nevertheless, it provides additional evidence at least of what U.S. negotiators believed had been settled as of that time. The draft cable states that the Soviets continued to object to including Article V(3) of the joint draft in the Treaty text, but were willing to consider "an agreed understanding that if future ABM devices became ready for deployment, neither side would initiate such deployment without prior consultation and agreement of both Governments." The draft noted:

> that current wording of revised articles in the ad referendum Joint Draft ABM Text can be interpreted as banning future systems since:
>
> -- Article I states the Parties undertake "not to deploy ABM systems for defense of an individual region except as provided for in Article III."
>
> -- Article III, U.S. version, contains words to the effect that the Parties will deploy no more than specified levels of ABM interceptor missiles, ABM launchers, and ABM radars. Soviet version of Article III, uses phrase 'the Parties undertake not to deploy ABM system components listed in Article II ....' except in geographically prescribed areas, and 'shall not deploy more than' specified number of launchers and ABMs, thus not 'providing for' other ABM component deployments.
>
> -- Article II defines an ABM system as "currently consisting of " ABM interceptor missiles, launchers and radars, clearly implying possible other ABM components in future. These articles, considered together, can be plausibly considered to prohibit deployment of ABM systems other than the specific components permitted by Article III and defined in Article II. There is at present, however, ambiguity as to whether this interpretaion is clear to Soviets, and they may well not share this interpretation. Highlighting this application of the articles to future devices could have the undesirable effect of provoking a Soviet withdrawal of

> their agreement to the ad referendum Articles I and II. Delegation therefore believes it desirable seek to deal specifically with the issue, rather than rely solely on interpretation of these articles.

A redraft of this message, dated January 10, repeated these points, without suggesting that the Soviets be directly approached on the meaning of Article II. It proposed a series of other options, however, including an intention to "explore the Soviet interpretation of Articles I, II, and III of the ABM JDT as applied to future ABM systems...," while recognizing an agreed minute was preferable to "no explicit provision .... " They suggested the following strategy:

> If the Soviets continue to indicate that these articles in substantially their present form would be acceptable to them, and recognize that deployment of future ABM systems is not permitted under these articles without further agreement of the Parties, we would consider making an interpretative statement to this effect in the record, or explore the feasibility of an agreed minute to this effect, to replace Article V(3), noting the agreement of the Parties that the JDT is not to be circumvented by deployment of future ABM systems.

This strategy differed from that proposed in the first draft in one significant way -- it eliminated the thought of approaching the Soviets on the meaning of Article II alone, which was recognized as entailing the risk that the Soviets would withdraw ad referendum acceptance of the draft.

On January 11, 1972, Shchukin repeated the Soviet position against including unknown matters in the Treaty, but again drew the line at adding a provision dealing with unknown substitutes in an ABM treaty." Such matters, if they arose, could be discussed in the SCC. Nitze pointedly asked: "if such [substitute] components were developed and could, in fact, be deployed in a manner to circumvent the specific limitations of Article III of the treaty, would it not be appropriate that they also be subject to agreement between our Governments?" (A-706, pp. 11-12) Shchukin reiterated that Article V(3) was "not suitable" for inclusion in the Treaty. (USDEL SALT 1165, Sec. 2, p. 2, para. 11)

In a follow-up meeting that day, Kishilov produced a text which called for consultation on future substitutes, but did not mention agreement. Garthoff pressed the issue of what would happen if consultation did not lead to agreement: "Would a party, wishing to deploy such a system, be able to do so or not?" Grinevsky answered that a party could do so and that the other party could respond by withdrawing. Garthoff and Parsons argued that this was too extreme a remedy; the Parties should agree now to require an amendment before deployment could occur. At that point, Garthoff "suggested that perhaps an Agreed Minute might refer to both Article XIII and XIV." (A-710, p. 5) Kishilov initially agreed to this idea, but Grinevsky did not.

Grinevsky then stated "that the treaty referred to ABM systems, which were defined in Article II. It could not deal with unknown other systems." Garthoff challenged this view, claiming that "first, the treaty dealt not only with ABM systems comprising components identified in Article II, but all ABM systems; [and] second, the issue did not concern 'other' systems, but rather future ABM systems." Garthoff then attempted to distinguish between "other" and "future" systems or components:

> Garthoff remarked that he had noted that morning constant Soviet reference to "other" systems rather than "future" systems. But the two issues should not be confused. If there were a question as to whether some system was in fact an ABM system or component or not, that would clearly be a subject for consultation, and if there were a serious divergence perhaps there would be a need for recourse to withdrawal, as Grinevsky had suggested. However, what Garthoff was referring to -- and what the U.S. was particularly concerned about -- was precisely ABM systems and components of some new kind in the future. Garthoff repeated his reference to laser ABM interceptors as an example.

These exchanges led Grinevsky and Kishilov individually to indicate that they regarded Articles I, II, and III as together banning the deployment of future systems. The memcon noted, however, that the Soviets seemed confused: "Comment: The confusion and discrepancy between the Soviet participants over interpretation of the effect of Articles I, II, and III of the ABM draft Treaty with respect to future ABM systems, and other possible solutions, seem to indicate absence of a clear and thought-through position on the part of the Soviet delegation

at the present time." Garthoff emphasized that "it was essential to reach a common understanding concerning the effect of Articles I, II, and III on future systems or components, and to reach agreement on a position concerning this subject." (A-710, pp. 5-6)

Garthoff's analysis might itself have contributed to the confusion. His attempted distinction between "other" and "future" ABM systems had nothing to do with his point that the parties might disagree over whether something was an ABM system. The parties were using the words "other" and "future" interchangeably, in that both were meant to signify a system that served the ABM function but that relied (or in the case of "future" systems that might rely) on one or more substitute components. Neither word raised the issue of whether the system served the ABM function. Furthermore, Garthoff's arguments undercut the claimed need for an Agreed Statement. If Articles I, II, and III together banned the deployment of all forms of ABM systems, then a further provision doing so was unnecessary. The memcon's "Comment" suggests that the U.S. delegation doubted that the Soviets in fact agreed with Garthoff's interpretation, and the Soviet view that the Treaty applied only to ABM systems comprising components identified in Article II lent strong support to the U.S. delegation's doubts.

At a mini-plenary on January 14, 1972, Shchukin recalled Nitze's question of January 11 "whether so-called 'other ABM means' would be a subject not only for appropriate consultation but also for agreement." He answered:

> Both sides agree that they should assume obligations not to deploy ABM systems except as provided in Article III of the draft ABM Treaty. In order to insure implementation of this provision of the Treaty, the sides could, in the event of the emergence of ABM systems constructed on the basis of other physical principles, further discuss the question of their limitation in accordance with Articles XIII and XIV of the draft ABM Treaty.

Nitze said "he thought Academician Shchukin's words had been clear." (A-717, p. 5) Later that day, Nitze asked Shchukin to state again his position on future systems:

> I said it might be helpful if he could discuss further his last statement at today's session; I had said I thought it was clear but wanted to be sure. I said that as I understood it, he was saying that under Article III and in the light of Article I, ABM systems could not

> be deployed except as provided by Article III. Shchukin interjected "and also in the light of Article II." I went on to say "and therefore, if new systems reached a stage where they could be deployed, they would be the subject of appropriate action under Articles XIII and XIV." Shchukin said that was right; he pointed out, however, that this did not prohibit the deployment of a telescope, for instance, in support of a radar.

(A-713) (12:15-1:15 p.m) At the same time Allison asked Trusov to repeat Shchukin's statement and received a different message:

> I asked Trusov if he could repeat, so that I could be sure of understanding, Academician Shchukin's mini-plenary statement concerning future ABM systems. Trusov affirmed the Soviet position that it is premature to discuss limiting systems which are now nonexistent, and that if and when such systems appear their limitation would be subject to discussion under the provisions of Articles XIII and XIV of the draft ABM Treaty.

(A-714) (12:15-1:30 p.m) The Soviet draft on the issue, passed on that same day by Grinevsky to Garthoff, called only for discussion "in accordance with Articles XIII and XIV ...," when ABM systems "based on other [physical] principles" emerged. (A-716, p. 3) The Soviets were still avoiding a clear commitment to agree on limitations before deployment.

Subsequent discussions on the issue of future substitutes for ABM systems and components focused on the drafts exchanged by the parties. On January 20, a member of the SALT I Delegation, E. C. Aldridge, Jr., informed Dr. Wade at DOD: "The future ABM issue has been resolved as a result of a Soviet suggestion for an agreed minute and interpretation of Articles I, II, and III." (Memo, "Status of SALT VI", (Jan. 20, 1972)) The Parties eventually developed language to make clear that the provision -- which became Agreed Statement D -- required agreement on specific limitations prior to deployment, and that it applied to substitutes for both systems and components. (A-743) On January 27, 1972, for example, Garthoff argued against any change that might suggest coverage of future substitute systems but not components. He "asked if the Soviet side meant that if some new future development permitted using, for example, laser beams instead of interceptor missiles, that a system including such a new component could be deployed

without limit and without agreement. Grinevsky and Kishilov immediately replied in the negative." The language was kept in a form that applied the deployment limitations to both future substitute systems "and" components. (A-752, p. 1)

On January 26, 1972, Garthoff presented Grinevsky with a new text which had several changes in the Agreed Statement, one of which would have added "to perform the functions of ABM interceptor missiles, ABM launchers or ABM radars." He explained that it was intended to make clear that the parties were talking about substitutes for the usual components, not merely supplementing devices, such as telescopes. Grinevsky understood the purpose but adamantly opposed the change, making clear in the process that the Soviets remained committed to the view that the Agreed Statement covered future substitutes, and Article II covered the usual components: "[T]he sentence already makes clear that reference is to future ABM system components other than the three indicated in the sentence and in Article II of the Treaty." (A-743, p. 3)

Another discussion of the separate agreed statement occurred on January 31, 1972. Garthoff read to Grinevsky and Kishilov the following "Statement on 'Future ABM Systems'":

> It is understood that both sides agree that:
>
> 1. ABM systems and their components, as defined in Article II, should not be deployed except as provided for in Article III.
>
> 2. The deployment of ABM system components other than ABM interceptor missiles, launchers, or radars to perform the functions of those components is banned.
>
> 3. Devices other than ABM interceptors missiles, ABM launchers, or ABM radars could be used as adjuncts to an ABM system provided that the devices could not perform the functions of and substitute for ABM interceptor missiles, ABM launchers, or ABM radars. For example, a telescope could be deployed as an adjunct to an ABM system, whereas a laser for performing the function of an interceptor missile by rendering ineffective a strategic ballistic missile in flight trajectory could not be deployed.
>
> 4. Article III should be drafted so as not to permit the deployment of devices other than ABM interceptor missiles, ABM launchers, or ABM radars to substitute for and perform their functions.

> 5. If such devices are created in the future, their deployment could be provided for by limitations subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV.

(A-763, attachment 2) Garthoff reported in his memcon that: "After reading the talking points, Grinevsky said that he believed there was complete agreement." (A-763, p. 3) At that point, Garthoff presented Grinevksy with a proposed formulation in which the parties "agreed that in the event other devices capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, their deployment would be subject to discussion in accordance with Article XIII and agreement in accordance with Article XIV of the Treaty." The text gave Grinevsky second thoughts. He and Kishilov raised several objections, and agreed only to present it for consideration. (A-763, p. 3)

The talking points presented by Garthoff suggest a number of things about the assumptions the parties had at this time. First, they called for a ban on the deployment of "system components other than ABM interceptor missiles, launchers, or radars to perform the function of those components ...." They did not suggest that such substitutes had been regulated in Article V(1) to prohibit their development or testing. The points were not expressly limited to land-based devices. 14/ While only a prohibition on deployment could have been meant to apply to all categories of OPP systems, under either interpretation, it is noteworthy that these points do not distinguish between land-based and mobile-based systems with

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14/ Both these points are also true of the reporting cable sent by the Delegation to the Secretary of State on January 31, 1972:

> FUTURE SYSTEMS
>
> We appear to be in agreement in substance on the idea that deployment of future ABM systems based on components other than ABM interceptor missiles, ABM launchers, or ABM radars would be subject to amendment of the treaty, but we are still working out agreed language.

Similarly, in a statement to NAC reported on the same day Ambassador Smith said on this subject that "The Soviets ... agreed that deployment of ABM systems based on future technology would require amendment of the treaty." (USDEL SALT 1197, Jan. 31, 1972)

respect to development and testing. Furthermore, Garthoff's fourth point indicated that the parties felt they needed to redraft Article III to prohibit the deployment of substitute devices -- an implicit acknowledgement that Article III as then drafted would not prohibit deployment of such devices. In the subsequent negotiations, a change in Article III made clearer than in earlier drafts that only those systems and components specified in the Article could be deployed. The provision did not, however, contain language expressly prohibiting the deployment of substitutes for "systems" or "components."

Grinevsky objected on February 1 to using Garthoff's five-point paper as a new text. He "said that the Soviet Delegation had found interesting and helpful" the points given, but they thought the previous text should be used, since it "had been agreed except for a few words, and [they] did not feel that the latest US draft proposal was as good." Efforts were then made at the meeting, and later by telephone, to conclude the negotiation, with the Soviets seeking inclusion of the words "based on other physical principles." (A-769, pp. 2-3) The parties finally reached agreement on February 2 on a formulation that referred to devices capable of substituting for regular components, as well as to "other physical principles":

> 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, it is agreed that in the event ABM systems based on other physical principles and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars are created in the future, specific limitations on such systems and their components would be subject to discussion in accordance with Article III and agreement in accordance with Article XIV of the Treaty.

(A-770, p. 3) With minor changes, this formulation became Agreed Statement D. (A-838, Attachment 4)

The manner in which Agreed Statement D was adopted in the Joint Draft Text may have significance, not only for Article III, but also for the meaning of Article V(1). When the parties confirmed their acceptance of Agreed Statement D on February 3, 1972, they did so by noting their agreement "concerning Article V of the Joint Draft Text of an ABM Treaty." (A-776, p. 1) This format may have resulted simply from the fact that Parsons made a statement on that day

(entitled "Article V of the ABM JDT"), agreeing to drop Article V(3) if the Soviets accepted the interpretation relating to substitute components based on other physical principles. But the statement may also reflect an implicit assumption by the parties that the Agreed Statement was relevant to all of Article V, including Article V(1). On that same day, Smith issued a statement summarizing the results of that phase of the negotiations, which described the parties as having reached agreement on the overall problem of future technologies:

> The sides have agreed ad referendum to Delegations on an interpretation of how the provisions of the ABM Treaty would apply to ABM systems and their components based on possible future technologies.

(A-782a, p. 2) 15/

15/ When the Soviets tabled a new Draft ABM Treaty on April 11, 1972, they entitled what became Agreed Statement D in a manner that arguably suggests it was understood to relate to Article V, not merely to Article III: "DRAFT JOINT STATEMENT OF THE DELEGATIONS REGARDING ARTICLE V OF THE ABM TREATY." (A-838, Attachment 4)

E. U.S. Position on Future Systems at Conclusion of SALT VI.

The ACDA draft history of the Sixth Session (Nov. 15, 1971-February 4, 1972) summed up the results of this period on the issue of future systems by stating: "The Soviets continued to reject the American proposal for a treaty provision banning future ABM systems of a novel type." (ACDA, Sixth Session of the Strategic Arms Limitation Talks, Office of Public Affairs, p. 257) (Emphasis added.) This sentence is particularly instructive because editing on the original shows it was changed from: "The Soviets continued to reject the American proposal to include a provision banning future ABM systems of a novel type." The Soviets in fact did accept in principle a provision to ban deployment of novel ABM systems, but not in the Treaty text.

The U.S. view on what had been achieved respecting future systems by the end of SALT VI is also contained in Ambassador Smith's Report to the President for that period. The report mentions only Soviet agreement to a separate interpretation concerning deployment:

> The Soviet Delegation has accepted the substance of the U.S. proposal for an agreed interpretation prohibiting (unless the treaty were amended appropriately) the deployment of possible future types of ABM systems using devices other than launchers, interceptors or radars as substitutes for these ABM components.

Memorandum to the President, "Report of the U.S. Delegation to SALT, Vienna," from Amb. Smith, p. 7 (Feb. 16, 1972) This statement also indicates that the U.S. delegation equated ABM systems or components based on "other physical principles" in the agreed statement with "devices other than launchers, interceptors or radars."

Evidence as to the perceived scope of Article V(1), and other related provisions, after SALT VI, can be found in memoranda by John B. Rhinelander, legal adviser to the SALT delegation. Rhinelander apparently began preparing an "Article-by-Article Analysis of ABM Treaty" in January 1972. In a draft analyzing several articles, dated January 24, he notes the effort by the U.S. delegation, discussed below, to change the introductory language to Article III, to preclude the deployment of future systems in the event Article V(3) of the JDT were deleted, as had been tentatively agreed. (Memorandum, Jan. 24, 1972, p. 13) Second, in discussing Article IV, the memorandum states:

> [This Article limits the testing and development of fixed, land-based ABM systems which are based on future technology to current or agreed test ranges.] Nothing in the Treaty prohibits testing and development of ABM systems based on future technology other than paragraph 1 of Article V, which prohibits the development, testing or deployment of any ABM system, or any ABM component, which is sea-based, air-based, space based or mobile land-based.

(Id. 19-20) (brackets in original)

Finally, in an analysis of Article V(1), the memorandum takes the position that development, testing, and deployment of "devices" which could replace conventional components were prohibited:

> Paragraph 1 of Article V prohibits the development, testing or deployment of:
>
> - an ABM systems [sic] that is sea-based, air-based, space-based, or mobile land-based.
>
> - an ABM interceptor missile, ABM launcher, or ABM radar that is sea-based, air-based, space-based, or mobile land-based.
>
> - a device, which would replace an ABM interceptor missile, ABM launcher or ABM radar in an ABM system, _____ that is sea-based, air-based, space-based, or mobile land-based.
>
> Paragraph 1 of Article V, when read with Article III and Article IV, makes clear that only fixed land-based ABM interceptor missiles, ABM launchers and ABM radars may be deployed, or located at test ranges. The testing or development, as well as deployment, of ABM components for three environments - sea, air and space - as well as mobile ABM components on land, is prohibited.

Id. 21-22. As noted above, on September 15, 1971, the U.S. dropped from Article V(1) language substantively identical to that which Rhinelander included in the Article's coverage -- "other devices ... to perform the functions" of ABM missiles, launchers, or radars.

In a "Third Draft" of his analysis of the Treaty's legal effect, dated February 16, 1972, Rhinelander discussed several provisions relevant to the future-systems issue. First, he described the coverage of Article II(1) in terms that left unresolved whether he believed it extended to OPP devices:

> An ABM system is described in paragraph 1 of Article II in terms of "current" ABM components. See discussion of prohibition on deployment of future ABM systems under Article III. Examples of possible future ABM components are "killer" lasers and particle accelerators.

(Id. 9) He referred to the categories of components listed in Article II(2) as those "which are subject to provisions of the Treaty," and bracketed the proposition that it applies "to ABM systems or ABM components based on future technology. See discussions under Article III." He footnoted this statement with the following: "Not yet raised with Soviets." (Id. 11) In his discussion of the U.S. version of Article III, Rhinelander concluded that it, "in conjunction with [paragraph 2 of Article I], prohibits the deployment of 'future ABM systems'; such systems may be deployed only after consultation" and amendment. (Id. 14) He then quoted the agreed interpretation, which he said was based on Garthoff's five points. He noted, however, that "the agreed interpretation (ad referendum to Delegations) does not make clear that any deployment of 'future ABM systems' is prohibited unless the Treaty is amended," and that "the Soviets have not agreed that further clarification is necessary" along the lines of Garthoff's points. (Id.) The draft repeats the analysis of Article IV's effect on future systems, discussed above (p. 106), but adds this footnote: "Present U.S. position not clear; issue has not been raised with Soviets." (Id. 22) Finally, in his discussion of Article V(1), Rhinelander modified his January 24 draft by bracketing both the paragraph that dealt with conventional components, and the paragraph that stated that Article V(1) applies to any "device" that would perform the function of a conventional component. He also added the following footnote on these issues: "US has not made its position clear to Soviets, and Soviet position not clear." (Id. 23)

A Verification Panel Working Group issued on March 6, 1972 a paper on open issues arising from "agreed language" in the joint draft text. This document is interesting for its discussion of Article V(1), in which the question is raised whether to make clear that the prohibition on development, testing, and deployment of "ABM components (i.e., launchers,

interceptors, radars, or other devices capable of substituting for them) which are not both fixed and land-based, applies to all such components, regardless of whether other components in the ABM systems with which they are associated are fixed land-based ones." The agency representatives agreed "that this provision should apply to ABM components (viz., launchers, interceptors, radars, and other devices capable of substituting for them) which are not fixed land-based, but not to such devices as satellites providing early warning by detection of missile launch." The agency representatives recommended that Article V(1) be revised to make clear it applied to all components, or that an agreed statement to that effect be obtained. (A decision was ultimately reached to seek a revision to accomplish this result, and the Soviets accepted the proposed change in language.) (Verification Panel Working Group, "Issues Arising from Agreed Language in the Joint Draft Texts and from Associated Interpretive Statements," pp. 11-13 (March 6, 1972))

This discussion appeared to assume, without elaboration, that Article V(1) applied to devices capable of substituting for conventional components. The JCS representative did not concur in that assumption. At two points where the discussion defined "all ABM components (viz., launchers, interceptors, radars, and other devices capable of substituting for them)," the following footnote appears: "The JCS representative would delete the phrase 'and other devices capable of substituting for them'." (Id. at 12-13)

In a subsequent draft of his legal analysis, circulated with a separate memorandum dated March 20, Rhinelander indicated his acceptance of various changes proposed by Mr. Nelson of the State Department Office of the Legal Adviser, who was not a Delegation member, and repeated some of the doubts he had as to the Soviet position on future systems. On Article II(1), Rhinelander added language proposed by Nelson stating that the word "current" did not limit "the generality of the term to systems composed of such components, but would also include future systems using different components." (Id. 9) (No explanation was given by either Nelson or Rhinelander for this change.) Another change in the analysis of Article II(2) stated without further justification that the listing in Article II(1) was "illustrative but not exclusive" of the components covered by the Treaty. (Id. 12) Rhinelander continued to recommend changes of Article III to provide "a clear peg for the agreed interpretation on future systems" (id. 13); he remained of the view that the agreed interpretation did not bar deployment of future systems without such a change (id. 15).

In this draft, moreover, Rhinelander proposed that the uncertainties he had identified with respect to mobile future systems be clarified by agreement with the Soviets. Thus, in his analysis of Article V(1), he again bracketed the proposition that it covered "devices" other than conventional components, and repeated the footnote that "US has not made its position clear to Soviets, and Soviet position not clear." (Id. 24) He went on to propose, moreover, both in connection with Articles V(1) and IV, that the United States should consider approaching the Soviets to clarify the matter:

> The US should consider an agreed interpretation, or US statement, on "development or testing" as used in Article IV. This should dovetail with an interpretation on prohibited development or testing of systems for certain environments in Article V(1). This definition should apply equally to "current" ABM components and "future systems". The agreed interpretation should be keyed to agreed language in Article III.

(Id. 23) This recommendation, along with others, was recorded on March 20 in an "inventory" of possible agreed statements:

> A clear understanding that Article IV limits the development and testing of "future" ABM systems and ABM components (the deployment of which is prohibited) to current or agreed test ranges is needed. Further, what is prohibited under the "develop, test" language of Article V(1), is not clear.

(Memorandum, J.L. Malone to Hancock, ACDA GC, Mar. 20, 1972, p. 14)

The negotiating record, in sum, fails to establish that by February 4, 1972, at the end of SALT VI, the Soviets had agreed to any limit on future systems other than the arguably ambiguous separate statement, which later became Agreed Statement D. The Report to the President, and internal U.S. documents, also support this conclusion. They make no claim concerning future systems beyond Soviet agreement ad referendum to a nondeployment commitment in a separate statement. Finally, while Rhinelander's legal analysis proposed in January 1972 that Article V(1) applied to substitute "devices," in subsequent drafts through March 20, 1972 he bracketed this language, and suggested an approach to the Soviets to clarify the U.S. position and to obtain Soviet agreement.

F. Negotiation of Article III and Future Systems.

On March 19, 1971, the Soviets proposed language providing that the Parties "undertake not to deploy ABM systems listed in Article II of this treaty" more than 200 kilometers from national capitals. (USDEL SALT 566) The first U.S. proposal provided that each Party "undertakes not to deploy ABM interceptor missiles, ABM launchers, or ABM radars except in its own territory and only at one of the following...." (A-300A)

The Parties' drafts maintained this basic form, with some changes (such as Soviet mention of "components"), until April 11, 1972. On that day, the U.S. changed its lead-in to a form that more clearly suggested a total prohibition on deployment, with certain exceptions:

> Each Party undertakes not to deploy ABM systems or their components except that each Party may deploy ABM interceptor missiles, ABM launchers, and ABM radars within ....

(A-838, Attachment 2, p. 3)

This proposal stemmed from the belief, of at least one member of the U.S. delegation, that the new version would effectively preclude the deployment of all ABM systems or components other than those consisting of missiles, launchers, and radars. As early as January 24, 1972, Mr. Rhinelander wrote that the U.S. version of Article III at that time, with certain ACDA revisions, would "clearly cover future systems if Article V(3) [of the JDT] is deleted." (Memo, "Article-by-Article Analysis of ABM Treaty," Jan. 24, 1972, p. 13) A paper was presented to the Soviets by the U.S. during SALT VI, stating that Article III should be drafted to prohibit by implication the deployment of "future systems," but the Soviets did not respond. (Id., April 20, 1972, p. 13 n. 1) On April 7, 1972, Rhinelander supported the version tabled on April 11, in a memorandum to Ambassador Smith that stressed its effect on the future-systems issue:

> The major issue in the redraft of Article III (indicated in brackets in paragraph 1 of the attached) is the issue of "future systems".
>
> As you will recall, the Article III we tabled on July 27 was "neutralized" on instructions from Washington since we did not then have instructions on "future

systems". Subsequently, we proposed that "future systems" be a paragraph of what is now Article V (mobiles, etc.). I think you might recall this history if JCS opposes, as we expect they will, a text of paragraph 1 of Article III which attempts to foreclose "future systems".

I believe you should consider the following arguments in favor of an approach which prohibits the deployment of "ABM systems or their components except that each Party may ...."

(1) our instructions were explicit (deployment ban on future systems), and there has been no change in instructions;

(2) the Delegation approved the "five points" which were given to the Soviets (see ABM Analysis, p. 16);

(3) the present "agreed interpretation" on future systems would be unsatisfactory if the JCS approach were accepted (i.e., if present text of U.S. Article III is retained);

(4) it is in the U.S. interest to have the Treaty text lay as unambiguous basis as possible for the U.S. position and the "agreed interpretation."

You should note that the JCS position, at least at the staff level, is that the "agreed interpretation" does not ban deployment of future systems and would not require an amendment prior to deployment; it just requires consultation in advance of deployment.

On April 26, 1972, Grinevsky asked the purpose of the changed format, noting that it was longer than the Soviet version, and that it could simply refer to Article II instead of listing all three components. Garthoff explained that the draft had two elements: "an undertaking not to deploy ABM systems or components except as specified, and then specification of the components listed in Article II." He said if brevity was important the shortest formulation would omit the reference to Article II and simply read: "Each Party undertakes not to deploy ABM systems or ABM components except as follows: ...." After discussion, Grinevsky "suddenly exclaimed that he now understood the difference between the two formulations, and what the American approach entailed." (A-872, p. 5)

The Soviets agreed to the U.S. approach in principle on April 28. At that time, over two months after Agreed Statement D had been negotiated, Grinevsky thought the Soviets could agree to the shorter formulation discussed on April 26, "the one which omitted reference to Article II." Parsons asked if he understood correctly that the Soviets "could probably agree to a formulation undertaking not to deploy ABM systems or their components except as the Article would provide. Grinevsky said that they could, as this would ban 'other systems.'" (A-873, pp. 2-3) Thereafter, the Soviets proposed a format similar to that of the U.S., which was modified slightly and made final on May 14. (A-943, Attachment 1, p. 1) On May 6, the U.S. Delegation reported Soviet acceptance of the "US approach on lead-in [of Article III] reinforcing the interpretive statement dealing with future ABM systems...." (USDEL SALT 1289, p. 2, para. 5)

The Soviet statement that the U.S. version would ban "other systems" is noted by FitzGerald as significant. (FitzGerald 55) The Soviets had previously indicated, however, that Articles I, II, and III in combination reflected an intention to bar the deployment of any future substitute for ABM systems or components, an intention they agreed to make explicit in what became Agreed Statement D. The change could, however, have helped clarify this intent, as well as potentially achieve the objective noted by Rhinelander of convincing JCS staff that the deployment of futures was banned.

The broader question is the effect of this change, and of Grinevsky's observation, on Article II(1)'s definition of "ABM system." The argument could be made that this change showed that the Soviets had come to accept the U.S. view that "ABM systems" should be defined throughout the Treaty in purely functional terms. This assumed result, together with the references by Karpov to "collateral" obligations in the drafting of Article II(1), and his reference on September 15 to the inclusion of "any type of future component" in Article V(1), could make an arguable case for the proposition that Article V(1) should be viewed in the final analysis as applying fully to all mobile OPP devices.

This line of argument, based as it is on scattered, oral statements and unexpressed intentions, fails to undercut the strong case that can be made that the Soviets had not agreed to the U.S. view on all these issues. Rhinelander himself noted, at the same time he recommended that Article III(1) be changed, that the U.S. had failed to make its position clear on Article V(1), and that the Soviet position was unclear. On April 12,

Rhinelander summarized the results of meetings held among the delegates on April 3 and 5 in which the ambiguities in Article V(1) were discussed. The delegates decided to clarify the provision's application to systems which included both mobile and fixed components, but they decided to defer a decision whether to clarify the provision's application to mobile OPP devices:

> (c) Deferred decision whether U.S. should make statement which would make clear that development, testing or deployment of "future ABM systems" which are space-based, etc., are prohibited. (Page 24, footnote **.)

(Memo, "Summary of Delegates' Review of Issues Raised in Article-by-Article Analysis of ABM Treaty (draft March 30) ...," p. 3 (April 12, 1972)) Rhinelander has since testified that no effort was made thereafter to clarify the scope of Article V(1). (Strategic Defense Initiative: Hearings before the Subcomm. on Strategic and Theater Nuclear Forces of the Senate Comm. on Armed Services, 99th Cong., 1st Sess. 226 (1985)) In addition, no effort was made to confirm that the Soviets had come to view Article II(1) in purely functional terms as it applied to the Treaty proper.

Another draft of Rhinelander's memorandum, dated April 20, 1972, continued to keep bracketed the part of his analysis of Article V(1) dealing with future systems, along with an accompanying footnote: "US has not emphasized position in text, which is based on guidance, and the Soviet position may not be clear." The footnote was supplemented, moreover, with the following "ISSUE: Whether US should make US position in 'Four Points on future sytems; see page 13, footnote 1."(Memorandum, "Article-by-Article Analysis of the draft ABM Treaty," April 30, 1972, p. 25) The points proposed would have clarified these issues, but no such effort was made. 16/

Rhinelander apparently decided, some time between April 20 and May 24, that Article V(1) did, after all, apply to substitute "devices." In a draft of his legal analysis dated May 24, Rhinelander dropped the brackets and footnote from his analysis of Article V(1), without explanation for this change, and without any effort having been made to clarify either the

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16/ Conceivably, the "guidance" referred to by Rhinelander was that issued to the Delegation on August 12, 1971, ordering that a detailed discussion of the future systems issue should not be invited. See supra pp. 18-19.

U.S. or Soviet positions, as Rhinelander had recommended. This draft also repeated that "ABM system" in Article II(1) extends to all "future systems" based on other physical principles and capable of substituting for current components. In his description of Article III, Rhinelander stated that it limits deployment of ABM systems only to systems with current components, and that systems with substitute components can be deployed only after consultation and agreement of limitations under Agreed Statement D.

The change in Article III is unconvincing as a basis for establishing that the U.S. position of Article V(1) had somehow been accepted by the Soviets. The change in Article III was aimed at pinning down the nondeployment obligation, not at altering the definition of "ABM system" in Article II(1), which the Soviets had made clear included only systems with conventional components. The Soviets had earlier accepted the nondeployment commitment, without any change in their position on Article II(1), and both sides agreed to articulate that commitment in Agreed Statement D. The Agreed Statement was ambiguous, and the change in Article III helped to clarify its purpose. No suggestion was made at the time, moreover, that Agreed Statement D had become unnecessary to fulfill the nondeployment objective because of the change in the lead-in language to Article III. That would have been the logical consequence of the Soviets having agreed implicitly to a purely functional definition of Article II(1). Indeed, the change in Article III was characterized by the U.S. Delegation as "reinforcing" the ban on deployment in Agreed Statement D.

Finally, the revision of Article III is an inadequate basis for overcoming the far more authoritative, documentary trail left by the Soviets which they could use to argue that they had refused to agree to have Article V(1) apply to OPP devices. The U.S. proposal on Article V(1) would unambiguously have covered substitute "devices" other than conventional components; the Soviets rejected it, however, at a time their documentary proposals defined "components" to include only missiles, launchers, and radars. The initial U.S. proposal on Article II(1) was purely functional, and options offered by the U.S. for corrective language would have unambiguously covered future, substitute devices; the Soviets rejected the original proposal and the unambiguous options, and agreed to ambiguous connective language only after the U.S. agreed to drop its effort to regulate future systems in the Treaty text, in lieu of an agreed minute that barred the deployment of such systems. Negotiating the agreed understanding, moreover, was difficult, in that the Soviets refused to agree even to an express prohibition on "deployment". Given this record,

established by the various drafts of the Parties, and not merely by statements and suggestions of individual negotiators at working-group meetings, and in light of the persistent Soviet opposition to the regulation in the Treaty text of future, unknown devices, the doubts expressed in the U.S. delegation as to the coverage of Article V(1) were solidly based. Absent some form of clarification, the Soviets had made a strong record on which to claim they had agreed to bar only the deployment of future systems, before discussion and amendment under Agreed Statement D.

Conclusion

The language of the ABM Treaty, the most important source for its meaning, is ambiguous. It can be read to support either the restrictive or the broader interpretation, though on balance it lends greater support to the broader interpretation. Neither reading is conclusive. But the narrow reading renders Agreed Statement D legally superfluous as a basis for preventing the deployment without agreement of ABM systems or components based on other physical principles. The broader view results in a coherent scheme, with no significant redundancy. At a minimum, the contention some have made -- that the treaty language so clearly supports the narrow view that no inquiry into the negotiating history is proper -- is plainly untenable.

Since the Treaty can reasonably be read in more than one way, an examination of the negotiating record is appropriate to determine the Parties' intentions and understandings in drafting the Treaty's terms. The weight of the evidence from the negotiating record strongly favors the reading that would prohibit deployment of substitute ABM systems and components based on other physical principles without prior agreement on specific limitations. The negotiating record also on balance supports the view that the Soviets refused to agree to prohibit development and testing of mobile OPP substitutes regardless of their basing mode. The ambiguity of the Treaty language, and of the negotiating record, would effectively have prevented the President from enforcing the narrow interpretation against the Soviets had they decided it was in their interests to support the broad interpretation.

The case for the restrictive interpretation has been stated in various forms. One argument rests primarily on a change in the language of U.S. draft Article 6(2), in which Karpov is said to have agreed that provision would apply to all present and future "components." That change, however, was in lieu of language that would clearly have prohibited development, testing and deployment of future substitutes for mobile ABM systems or components (i.e., "other devices" able to perform the functions of conventional components). The unambiguous language proposed by the U.S. was given up by the U.S. Delegation, even though the chief negotiator had earlier said that the Treaty must "explicitly" apply to substitute devices and had expressly recognized the danger of ending up

with a Treaty that regulated only conventional components. The provision accepted by the U.S. was essentially the same as had been proposed by the Soviets prior to August 1971, when FitzGerald and Graybeal noted that neither side contemplated the regulation of future devices. The language proposed by the Soviets -- "components" instead of a specific reference to substitute "devices" -- could reasonably be claimed by the Soviets to have been intended only to expand the provision's scope to include any future "components" of the types listed in the definition of ABM systems in Article II, i.e., any future ABM interceptor missiles, launchers, or radars. The Soviet definition of "ABM system" on September 15, when Article V(1) was put into what became essentially its present form, applied exclusively to missiles, launchers, and radars. Furthermore, the Soviets took a principled position against regulating unknown, future substitutes for the systems and components listed in Article II, applicable to both Articles 6(1) and 6(2) of the U.S. draft; and the Soviets asserted their objections consistently, before and after the change made in U.S. Article 6(2), which dropped explicit coverage of substitute "devices". That change therefore failed effectively to achieve coverage, by the multiple prohibitons of Article V(1), of unknown substitute "devices" for the systems and components listed in Article II.

Supporters of the restrictive interpretation also rely on the Soviet acceptance in Article II of the words "currently consisting of." They contend that this change made the definition of "ABM system" in Article II purely functional, and signified that future substitutes for known systems or components would automatically be incorporated into the Treaty regime. The record establishes, however, that the Soviets adamantly opposed defining "ABM system" in Article II to include substitute OPP devices. The U.S. negotiators agreed with the Soviets in principle in September 1971, during the negotiation of Article V(1), that "ABM system" in Article II(1) should be defined in a manner that did not prejudice the position of either Party on future systems. Later, in December, after the Soviets had rejected the unambiguously functional definitions proposed by the U.S., they accepted the language "currently consisting of" on the basis of suggestions and assurances by Smith and Garthoff that the problem of future systems would be settled elsewhere than in Article II -- ultimately in Agreed Statement D. Finally, when the Soviets accepted "currently consisting of," the U.S. agreed to drop its draft Article V(3) from the Treaty text, setting up a situation in which the future systems problem would be dealt with in a separate, agreed statement.

During discussions related to Agreed Statement D the Soviets continued to contend that Article II covered only the three components it listed -- interceptor missiles, launchers, and radars; Agreed Statement D would cover all substitutes for such components created in the future. The phrase "based on other physical principles" distinguished between those components listed in Article II, and the substitutes referred to in Agreement Statement D. The form in which the Statement ended up being written, especially the reference to Article III and the separate mention of agreement under Article XIV, reflect discussions in which the Parties accepted the view that, absent agreement on limitations, deployment of such systems or components was prohibited.

Some support exists in the negotiating record for the argument that Agreed Statement D deals only with fixed, land-based OPP devices. The negotiating record indicates that the U.S. agreed to drop its proposed Article V(3), a provision that would have barred the deployment of fixed, land-based substitute "devices," at the same time the Soviets agreed to a separate provision on futures. Agreed Statement D was also frequently linked by both Parties to Article III, which allows only fixed land-based devices. The simultaneous agreement to drop U.S. Article V(3) and adopt Agreed Statement D, however, was based on a Soviet decision to deal with the entire futures problem in the latter provision, not just a part of the problem -- i.e., fixed, land-based systems. Little exists in the record to resolve the significance of the word "substitute," but the notion of one-for-one substitutions seems weak in connection with unknown devices. In describing the U.S. delegation's success in obtaining consent to a separate agreement on future systems, Ambassador Smith seemed to equate the notion of substitution with the phrase used in the U.S. draft with respect to both its future-systems proposals -- "perform the function of." The Soviets opposed both futures provisions on principle, and succeeded in eliminating both from the Treaty text, along with language that unambiguously would have covered future "devices."

Even assuming that the word "components" in Article V(1) could be given special meaning because of Karpov's "concession" of September 15, 1971, any value in that ambiguous statement was further undermined when the Parties, in writing Agreed Statement D, developed a clear method for addressing the problem of future substitutes for ABM systems or components. They used the phrase "systems based on other physical principles and including components capable of substituting for" regular ABM components; the section described the new components as being "created in the future." Having worked with great care to solve the problems of expressing their

desire to control deployments of such future substitutes in Agreed Statement D, the Parties would presumably have turned back to Article V to make clear that it applied to mobile systems and components based on other physical principles, had that been their intention. But they did not. They let stand language that reflected the Soviets' unwillingness to regulate unknown, substitute devices, a principle they qualified only in Agreed Statement D.

The record lends strong support to the position that the Parties had agreed to bar the deployment of all systems other than the conventional ones authorized in Article III. That position had been agreed before Article III was revised during April 1972; the revision reinforced the obligation which was ambiguously expressed in Agreed Statement D. The change in Article III prohibited the deployment of all ABM systems as defined in Article II(1), except those conventional systems and components expressly allowed, but it did not itself preclude the deployment of substitutes based on other physical principles; that remained the function of Agreed Statement D, in order to insure that the limitations of Article III were fulfilled. Nothing in the record indicates the Soviets had accepted a change in their view of Article II(1), which they regarded as defining ABM systems to include in the Treaty text those consisting of ABM missiles, launchers, and radars. No suggestion was made at the time, moreover, that Agreed Statement D became superfluous by the change in Article III. In fact, the U.S. Government and Ambassador Smith in official and personal statements thereafter repeatedly affirmed the importance of Agreed Statement D as the provision that regulated future ABM systems and components. 17/

An argument could be made that the Soviets, by accepting the change in Article III, indicated their willingness to accept a purely functional definition of Article II(1), which in turn resolved the ambiguity left in the coverage of Article V(1). For all these effects to have occurred in this

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17/ Smith later explained the relationship between Article III and the agreed statement in this manner:

> Under Article III of the treaty the sides agreed not to deploy ABM systems or their components with two exceptions, both of which only permit ABM systems which use launchers, interceptor and radars. Thus, taking the agreed understanding [sic] together with Article III, systems employing possible future types of components to perform the functions of launchers, interceptors and radars are banned unless the treaty is amended.

G. Smith, Doubletalk 344 (1980). See generally Part II of this study, containing descriptions of the effect and function of Agreed Statement D.

retroactive manner, without explicit confirmation, is unduly strained. The Soviets could reasonably reject such an argument, given the record they left both in the documentary proposals made by each side and in their statements and representations. We have been unable to find, moreover, that any U.S. team member had this series of arguments in mind. To the contrary, Rhinelander -- and presumably others -- identified as separate ambiguities the coverage of future systems by Articles V(1) and IV. An effort to clarify these ambiguities was proposed, but was not undertaken. The record therefore fails to establish Soviet agreement.

The suggestion has been made that Soviet opposition to the regulation of unknown devices was a mere ploy, designed to extract "intelligence" information from U.S. negotiators about the future systems contemplated by the U.S. The Soviets could, of course, have wanted information about the state of U.S. knowledge on this subject. To say their effort was insincere, however, is speculative, and unsupported. Their repeated statements were forcefully and consistently advanced. They persisted, and in the end succeeded in having the concept of unknown "devices" entirely removed from the Treaty text. This is hardly an indication of any lack of seriousness on their part. Their position was shared, moreover, by many American officials, including Henry Kissinger, who either thought efforts to regulate such devices was premature, or wanted the freedom to develop, test, or deploy such devices. We have found no internal communication in which any member of the U.S. Delegation suggested the Soviet objective was to obtain intelligence, rather than to limit the Treaty's coverage.

In fact, while the U.S. negotiators initially refrained from giving examples of future devices, particularly lasers, Rhinelander protested the need for such restraint as early as September 2, 1971. (Memorandum to Smith, "Article 6(1)-Lasers," referring to McLean-Krusov discussion on August 31 in A-442) On the very next day, September 3, Garthoff responded to Kishilov's query on what the U.S. meant by "devices" by referring to a paper he had supplied to Kishilov which discussed the subject to the point of revealing the basic types of systems being considered:

> Exotic BMD is anything that is not conventional. A great variety of exotic systems have been invented by ingenious engineers and scientists. Most of them are non-nuclear. Each of them seems to be feasible in theory but is formidable to design in detail. The two main categories of exotic BMD systems are supposed to kill missiles by direct hits of small non-nuclear interceptors (pellet systems) or by some kind of high-energy radiation (death-ray systems).

(F.J. Dyson, "Arms Control and Technological Change," p.10 (Center for Policy Study, University of Chicago, 1971)) Thereafter, examples of future systems were occasionally mentioned, including lasers. (A-639, 12/10/71; A-647, 12/14/71; A-681, A-672 and A-673, 12/20/71; A-710, 1/11/72; A-713, 1/14/72; and A-752, 1/27/72)

An objection could be made to reliance, in this analysis, on the internal conclusions and deliberations of U.S. negotiators. Evidence of this sort is not strictly speaking part of the negotiating record, and would be given little or no weight in a court or tribunal. This observation is true, however, only with respect to the use of one side's internal deliberations to establish that the other is bound by a certain rule or interpretation. The materials are a proper and probative source of guidance for determining what the U.S. negotiators believed was unclear or the positions they felt had not been accepted by the Soviets.

At the same time, however, this type of evidence should not be read to suggest any impropriety on the part of the U.S. Delegation. The U.S. team was engaged in a complex negotiation, simultaneously dealing with both defensive and offensive weapons. They were also operating under great pressure, especially toward the end of the negotiations, in order to reach agreements that could be signed at the Summit in Moscow, on May 26, 1972. Furthermore, the result achieved does not mean that the negotiators failed to comply with their instructions. The negotiating history reflects that the Administration had been prepared to accept a treaty that would have banned the deployment of conventional ABM systems except as allowed by Article III. Ambassador Smith and ACDA persuaded the President to authorize them to seek a regime banning all such ABM deployment, as well as the development and testing of future mobile "devices," and the instructions were issued at Smith's behest. The instructions expressly indicated, moreover, that Smith was not to invite a detailed negotiation on the futures issue, but rather to obtain an agreement that preserved the Treaty's basic purpose, with the understanding that future problems could be worked out through discussions in the joint commission already contemplated by the Parties. Smith secured Soviet consent to Agreed Statement D, which restricts the deployment of ABM systems based on OPP. In our judgment, however, the Soviets refused to consent to a ban on development and testing of mobile, OPP devices, rejecting on principled grounds provisions that unambiguously would have achieved that end.

Finally, in determining whether the Soviets agreed to the restrictive version of the ABM Treaty the proper standard is their own articulated principles and prior conduct. Officials who have dealt with the Soviets, scholars, and the Soviets themselves all agree that Soviet legal doctrine "holds that a government is bound only to the extent of its express consent." (A. Chayes, "An Inquiry into the Workings of Arms Control Agreements," 85 Harv. L. Rev. 905, 938 (1972)) U.S. studies of Soviet conduct under arms control and other agreements show a readiness to rely on ambiguity -- often created by Soviet actions or inactions -- to justify a pattern of conduct felt by U.S. negotiators to violate understandings they believed had been reached. 18/ The United States is justified in relying on Soviet doctrine and conduct concerning treaty obligations in determining its own reciprocal duties.

18/ For example, Article II of the SALT I Interim Agreement prohibited the conversion of land-based launchers of light ICBMs, or ICBMs of older types deployed prior to 1964, into land-based launchers for "heavy ICBMs" of types deployed after that time. The U.S. delegation tried repeatedly to obtain Soviet agreement to a specific definition of "heavy ICBMs" for this purpose with appropriate qualitative limitations, but the Soviet delegation insisted that an agreed definition was not needed. As a result, on the final day of the SALT I negotiations, the U.S. delegation stated for the record, without Soviet dissent, that the U.S. would consider an ICBM having a volume significantly greater than the largest light ICBM then operational to be a heavy ICBM. Nonetheless, the Soviets subsequently deployed the SS-19, which substantially exceeded the standard in the U.S. statement, and defended their conduct as being in compliance with the Interim Agreement, notwithstanding U.S. statements in the negotiating record. The U.S. thereafter concluded that it could not claim its unilateral understanding was legally enforceable.

Similarly, Article IV of the ABM Treaty provided that the limitations in Article III on deployment would not apply to ABM systems or components used for development or testing, and located within current or additionally agreed test ranges. During the negotiations, the U.S. Delegation provided the Soviets a list of current U.S. and Soviet test ranges which did

(Footnote continued on following page)

18/ (Footnote continued from preceding page)

not include the Kamchatka impact area. The Soviet Delegation neither confirmed nor denied the U.S. list. Nonetheless, when the U.S. later called Soviet attention to the installation of a new ABM radar in Kamchatka, the Soviets responded that they considered Kamchatka to have been a current test range at the time of signature of the Treaty, and that an ABM radar was permitted for testing purposes at Kamchatka. When Ambassador Nitze was asked to comment in an editorial characterizing this Soviet conduct as showing "they handled the negotiations like shyster," he concluded:

> We told them the way we interpreted the treaty language. They didn't tell us they had a different interpretation. They then claimed that the language of their unilateral statement does not specifically say that they had only one ABM test range at Shari Shagan.
>
> If that isn't negotiating like a shyster, I don't know what is.

United States/ Soviet Strategic Options: Hearings Before the Senate Committee on Foreign Relations, Subcommittee on Arms Control, Oceans and International Environment, 95th Cong., 1st Sess. 101-2 (1977).