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THE ABM TREATY

PART II:

Ratification Process

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I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

This is the second of three parts of a study of the ABM Treaty's application to so-called "future" ABM devices. The purpose of this three-part study is to ascertain the scope of the President's lawful discretion in interpreting the Treaty's meaning on this issue. The first part, completed in August 1986, and rewritten in the light of newly-found materials, examines the Treaty language and negotiating history. It concludes that neither the Treaty nor its negotiating history establishes that the Soviet Union agreed to be bound to the view that Article V(1) prohibits the testing and development of mobile ABM devices based on other physical principles ("OPP") than those used in the ABM systems defined in Article II(1) of the Treaty. A third part of this study will examine subsequent agreements and practices of the Parties to determine the extent to which they establish agreement as to the application of the Treaty to OPP systems.

The President possesses broad authority to interpret treaties to which the United States is a party. In exercising this authority, the President must follow the principles of international law that govern the process by which the meaning of treaties is determined. He is also generally required, by the Constitution, to abide by conditions limiting his authority that are adopted by the Senate pursuant to the advice-and-consent process, or by the Congress pursuant to subsequent legislation. He should also give appropriate weight to any understanding as to the meaning of treaties that is clearly expressed in the course of their adoption.

The process by which the Senate gives its advice and consent is thus a source of guidance to the President in two respects. First, the Senate can adopt conditions which become part of the resolution of ratification of the treaty, and therefore can have a direct bearing upon the mutual obligations of the parties. Second, the process can also provide a similar range of guidance to the President as a matter of domestic law.

This part of the ABM study examines the complete, relevant ratification record of the Treaty, and analyzes its background and contents. It then describes and applies to the ratification record the controlling principles of international and domestic law. In summary, it reaches the following conclusions:

A. The Ratification Record

Some officials in the Executive Branch had concluded prior to the ratification process that the ABM Treaty should be interpreted to prohibit the development and testing of mobile, OPP devices; others may have doubted this conclusion. ACDA attorneys prepared a draft transmittal package for the ABM Treaty which specifically advanced the view that the development and testing of mobile OPP, ABM devices was prohibited. That package was not used, however. Instead, a package was sent to the Senate that stated only that deployment of future OPP, ABM devices was barred, but was silent on the specific question of the development and testing of mobile devices. In the course of the ratification proceedings, Executive Branch witnesses made inconsistent statements -- in one instance, in the same colloquy (e.g., JCS witnesses before the SASC) -- concerning how the Treaty deals with development and testing of mobile OPP ABM systems. The Administration may not have had a clear and uniform view on this issue, and in any event its representatives failed to communicate a clear and consistent view to the Senate.

The testimony of Secretary of State Rogers, Secretary of Defense Laird, and Ambassador Gerard C. Smith was consistent with the transmittal package. In response to specific questions, as to whether development of laser ABM systems is permitted by the Treaty, Ambassador Smith replied in the affirmative without qualification. Pursuant to questions, however, and consistent with guidance apparently cleared by NSC staff, a written response to a question to Secretary Laird and answers by Dr. Foster of DOD and Joint Chiefs of Staff witnesses stated that the development and testing of fixed, land-based laser devices was permitted. These responses were intended to reassure the Senators involved that laser development would continue. Some Senators inferred from these responses, however, that development and testing of non-fixed, land-based devices was precluded. That inference was confirmed by Dr. Foster and one JCS witness, and was otherwise unchallenged.

This Senate record on advice and consent fails to establish that the Senate's consent to ratification was based on a generally held understanding of the Senate that the Treaty prohibits development and testing of mobile OPP devices. That issue was relatively insignificant as compared to the other issues posed by the Treaty and the Interim Agreement. It caused no Senator to suggest incorporating any condition, reservation, or understanding in the resolution of

ratification. The issue was not mentioned in the SFRC Report (which noted only that deployment of exotic ABM systems is prohibited), and the Senate in no other manner indicated as a body a generally held understanding or intent concerning this question. The Senate was not informed of aspects of the negotiating history that would have enabled Senators to conduct a full examination of the specific issue.

B. Legal Conclusions

The study draws separate conclusions, based on this ratification record, with respect to (1) its effect upon the treaty obligations of the U.S.; and (2) its effect upon the President's obligations to the Senate. Each set of conclusions is based on an analysis of governing legal principles.

1. International legal obligation

We find no basis in the ratification record for requiring the Administration to revise its position that the Soviets refused to bind themselves during the negotiations to the narrow interpretation of the ABM Treaty. Executive representations to the Senate on the questions at issue led to no Senate action in the resolution of ratification or otherwise that was communicated officially to the Soviet Union. The representations were therefore a matter of internal concern, and a form of evidence that could not be relied upon by the United States to create obligations on the part of the Soviet Union. The representations to the Senate can, however, for international purposes, be considered as "supplementary" materials in an overall appraisal of the Treaty's meaning under international law.

2. Domestic legal obligation

The ratification record likewise provides no basis for a conclusion that the President is bound to the narrow view as a matter of domestic law. The record fails to meet this standard, because of ambiguities and inconsistencies in the Executive Branch statements and testimony offered to the Senate, and because of the absence of any indication on the record that the Treaty's treatment of development and testing of mobile OPP devices was a significant factor in the Senate's adoption of the Treaty. Moreover, considering the Senate's often utilized practice of recording its intention to bind or influence the Executive, the record fails to reflect a generally held understanding by the Senate that would bind the

President on the specific matter at issue. Governing standards for interpreting legislative intent in connection with domestic legislation would not accord such a record binding force as a matter of law. The President should be entitled to at least the same degree of flexibility in exercising his authority to interpret treaties, in the conduct of foreign affairs.

The President should, however, give appropriate weight to any understandings reflected in the ratification record even though they may not be binding as a matter of law. The record contains Executive representations to the Senate which support the restrictive interpretation, which were apparently cleared in the government by NSC staff, and upon which Senators could justifiably have relied in granting advice and consent. The legal issue is one which requires the President to consider all relevant factors in exercising his judgment.

II. THE RATIFICATION PROCESS

The ABM Treaty was presented to the Senate on June 13, 1972, along with the Interim Agreement on Certain Measures With Respect to the Limitations of Strategic Offensive Arms. These agreements raised many issues in Congress other than the question of the Treaty's applicability to substitute devices for ABM systems and components.* Relative to these issues, the

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* Among the questions that received the vast bulk of Congress' attention during the hearings and floor discussion were: consideration of the strategic balance that would exist after the agreements were adopted; specific offensive systems possessed by both the Soviet Union and the United States; the Soviet advantages in warheads, throw weight, etc.; the likelihood and timing of the Soviets converting to MIRV warheads and of developing a mobile ICBM; the survivability of U.S. forces, especially Minuteman; the philosophy of mutual assured destruction; difficulties in verification; whether DOD had conditioned its approval of these agreements on Congress' adopting a range of modernization programs, including the B-1 bomber; the utility of a National Command Authority ABM Defense in Washington, D.C.; the credibility of 100-interceptor ABM sites; the legal and political effects on the Soviets of unilateral statements by U.S. negotiators, including those relating to the definition of "heavy" missiles; and even the war in Vietnam, where North Vietnam had recently violated its agreements by invading the South.

subject of substitute devices for ABM components received minimal consideration.

The legal adviser to the U.S. Delegation, Mr. Rhinelander, among others, had argued within the Executive Branch before June 13, 1972 that the regulation of OPP "devices" was included in Article V(1) and therefore that their development and testing was prohibited. A draft transmittal package based on Mr. Rhinelander's position was prepared but not used. Instead, the transmittal package actually sent stated in a clear manner only that the deployment of OPP devices was barred. During the hearings, the testimony of Secretary of State Rogers, the principal negotiator Ambassador Gerard C. Smith, and Secretary of Defense Laird, was consistent with that view. Moreover, in response to specific questions as to whether laser ABM systems may be developed under the Treaty in the context of discussing Article V, Smith replied in the affirmative without qualification except to say that deployment is prohibited. Pursuant to questions, however, and consistent with guidance circulated for clearance by the NSC staff in the Executive Branch, a written response to a question to Secretary Laird and verbal answers by Joint Chiefs of Staff witnesses stated that the development and testing of fixed, land-based laser devices was permitted. However intended, these statements permitted the inference that development and testing of a mobile OPP device would be precluded. The few Senators interested in this issue drew that inference, which was confirmed by one JCS witness, and was otherwise unchallenged.

The record fails, however, to establish that the impermissibility of development and testing of mobile OPP devices was a generally held understanding of the Senate in granting its advice and consent to the ABM Treaty. That issue was relatively insignificant as compared to the other issues posed by the Treaty and the Interim Agreement. It caused no Senator to suggest any condition, reservation, or understanding, and it was not mentioned in the SFRC Report (which noted only a prohibition on the deployment of exotic types of ABM systems). Finally, the Senate was not informed of aspects of the negotiating history that would have enabled Senators to conduct a full examination of the background and intentions of the parties with respect to development and testing of OPP devices.

A. Background of Executive Branch Position

Part I of this study establishes that, during the negotiation of the ABM Treaty, the Soviet Union rejected

proposed U.S. Treaty language which unambiguously would have prohibited the development and testing of mobile OPP ABM systems. Some members of the U.S. Delegation apparently believed, however, that the language agreed to could be interpreted to achieve the same result. (Others appear to have doubted this conclusion.) During January 1972, the attorney for the SALT I Delegation, John Rhinelander, began to prepare a section-by-section legal analysis of each aspect of the ABM Treaty, apparently contemplating that such an analysis would be included in the transmittal package to the Senate. (Discussion of the positions taken in various drafts by Rhinelander is contained in Part I of this study.) In his draft dated May 24, 1972, Rhinelander clearly stated that the Treaty would prohibit the development, testing, and deployment of "devices" that could substitute for conventional mobile or space-based ABM systems or components. (Neither this nor any comparable detailed legal analysis was presented to the Senate.)

Also during May 1972, the ACDA General Counsel's office prepared a series of drafts of the proposed transmittal package for the ABM Treaty and Interim Agreement. The earlier drafts appear to have drawn heavily from Rhinelander's analysis, and stated the same explicit conclusions with respect to "devices" that could substitute for conventional ABM systems, consisting of ABM missiles, launchers, or radars. For example, the early drafts stated with respect to Article V(1):

> Article V, paragraph 1, prohibits the development, testing or deployment of an ABM system or ABM component that is sea-based, air-based, space-based, or mobile land-based, <u>or a device capable of substituting for</u> 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. This provision, when read with Articles III and IV, makes clear that only fixed, land-based ABM interceptor missiles, ABM launchers and ABM radars may be deployed at operational sites, or located at test ranges. The deployment, as well as the testing or development, of "current" or "future" ABM components for three environments -- sea, air and space -- as well as mobile ABM components on land, is prohibited. Mobile land-based in this context means any ABM system or ABM component that is not a permanent, fixed type . . . . [emphasis added] 1/

These drafts were substantially revised, however, before submission to the Senate, so that they ultimately tracked the Treaty language much more closely. The final drafts circulated by ACDA prior to completion of the transmittal package eliminated references to "other devices," described the Article V(1) prohibition without specific reference to future systems, and included a separate section on future systems which described only a prohibition on deployment. Furthermore, Executive Branch documents, including briefing papers and talking points for possible witnesses, prepared during this period, deal with the issue of future systems in differing ways. Some documents appear to follow the Rhinelander analysis, while others refer only to prohibitions on deployment of future systems. (A more detailed description of these documents is contained in Appendix A.)

B. Analysis of Ratification Record

Excerpts of all portions of the ratification record relevant to the issue of substitute devices based on other physical principles ("OPP") are provided at Appendix B. The following discussion analyzes the substance and implications of those materials, quoting or paraphrasing the most pertinent portions.*

1. Letter of Submittal

The Secretary of State's June 10 letter of submittal clearly indicates the Executive Branch's understanding that, absent amendment, the Treaty prohibits the deployment of future systems based on OPP and including components capable of substituting for ABM interceptor missiles, ABM launchers, or ABM radars. The Secretary's letter makes no statement concerning the development and testing of such systems or components.

The letter states that "Article II defines an ABM system as 'a system to counter strategic ballistic missiles or their elements in flight trajectory.'" It notes in a separate

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* We have examined classified hearing transcripts where possible; in some cases, requests to review such material remain pending with Congressional committees. We are aware of no classified material, however, that would alter this report's conclusions.

sentence that Article II "indicates that such systems currently consist of ABM interceptor missiles, ABM launchers and ABM radars." Similarly, the section on "Future ABM Systems" states that "Article II(1) defines an ABM system in terms of its function as 'a system to counter strategic ballistic missiles or their elements in flight trajectory', noting that such systems 'currently' consist of ABM interceptor missiles, ABM launchers and ABM radars."

The Letter of Submittal also states, in a section on "Development, Testing, and Other Limitations," that testing and development of "ABM systems and components" is limited to those which are fixed, land-based, due to the prohibitions in Article V(1):

> Article V limits development and testing, as well as deployment, of certain types of ABM systems and components. Paragraph V(1) limits such activities to fixed, land-based ABM systems and components by prohibiting the development, testing or deployment of ABM systems or components which are sea-based, air-based, space-based, or mobile land-based.

The transmittal package contains no statement that development and testing of space-based or other mobile OPP systems or components is prohibited. Rather, the separate section of the Secretary of State's report on "Future ABM Systems" speaks only of a prohibition on "deployment" of future systems that might be "developed" in the future:

> (3) Future ABM Systems
>
> A potential problem dealt with by the Treaty is that which would be created if an ABM system were developed in the future which did not consist of interceptor missiles, launchers and radars. The Treaty would not permit the deployment of such a system or of components thereof capable of substituting for ABM interceptor missiles, launchers, or radars: Article II(1) defines an ABM system in terms of its function as "a system to counter strategic ballistic missiles or their elements in flight trajectory", noting that such systems "currently" consist of ABM interceptor missiles, ABM launchers and ABM radars. Article III contains a prohibition on the deployment of ABM systems or their components except as specified therein, and it permits deployment only of ABM

> interceptor missiles, ABM launchers, and ABM radars. Devices other than ABM interceptor missiles, ABM launchers, or ABM radars could be used as adjuncts to an ABM system, provided that such devices were not capable of substituting for one or more of these components. Finally, in the course of the negotiations, the Parties specified that "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." (As explained below, Article XIII calls for establishment of a Standing Consultative Commission, and Article XIV deals with amendments to the Treaty.)

This separate section differs sharply from the restrictive interpretation that appears in the original ACDA drafts. It also does not refer to the prohibitions on development and testing in Article V, and the previous section on "Development, Testing, and Other Limitations" does not refer to OPP systems. Finally, the section includes an explicit reference to Agreed Statement D, and treats it as the place in the Treaty in which the Parties "specified" their obligations with respect to OPP systems and components "to insure fulfillment of the obligation not to deploy ABM systems and components except as provided in Article III. . . . "

It has been argued that nothing significant can be drawn from these (and similar) statements in the ratification record because they are accurate on their face; under either interpretation the deployment of future systems is banned. 2/ These statements are, in fact, not necessarily inconsistent with the narrow interpretation. Yet, one may attach substantial significance to the fact that the transmittal letters -- and later testimony of Secretary Rogers and Ambassador Smith -- did not advance the restrictive interpretation.

First, these statements do not address application of the Treaty to development and testing, which was a significant and extensively debated issue during the negotiations. These

statements were made after the legal counsel for the ABM negotiating team had finished his memorandum on the Treaty's meaning, explicitly adopting the narrow view, and in clear contrast with the language used by ACDA in the original draft transmittal package. If the draft language proposed by the ACDA General Counsel's office had been used, it would have made clear that the Administration had adopted the narrow view. Furthermore, Mr. Rhinelander's suggestion of separate annexes analyzing the legal effect of each agreement was also not adopted. The Rhinelander memorandum was not submitted, nor any other legal analysis. (At one point, immediately after discussing the development of the ABM laser, Senator Jackson noted that "[w]e still do not have . . . what the State Department said would be made available later, a so-called interpretation of the agreement.") 3/

It is argued that a correct explanation of the narrow interpretation would have been so lengthy and technical in character that it is not surprising to find it omitted from the Secretary's statement. 4/ This argument is unconvincing. The narrow interpretation would have been simple to convey in one sentence in a manner that would have been adequate, for example: "Fixed, land-based ABM systems or components based on other physical principles may be developed and tested, but not deployed; but other ABM systems or components based on such principles may not be developed, tested or deployed." Such a statement is no more complicated or lengthy than many of the other statements in the transmittal package. Alternatively, the transmittal letter could have used, in its discussion of Article V(1), the language concerning "devices" contained in the original ACDA draft.

Mr. Rhinelander has suggested another explanation. He states that his initial version was very long and detailed, that it was cut down to no more than one-third of its original length, and that in the process the explanation on this issue became "blurred," leaving "an implication which I think people read into it, because of the way it was written on future system deployment only with the fixed land-based systems." 5/ Other attorneys involved in the process of drafting and clearing the transmittal documents have stated that the differences in these drafts are attributable to a decision to produce a document which tracked the Treaty provisions rather than elaborated upon them. Those with whom we have spoken -- Charles Van Doren and Steven Nelson -- state that this decision had no connection with any other purpose and reflected no disagreement with the Rhinelander analysis. They also note that the Executive Branch was primarily concerned at the time with land-based laser systems. 6/

Whatever may have motivated this failure to convey ACDA's carefully prepared position, the transmittal letters left the Senate uninformed of ACDA's conclusion concerning mobile forms of substitute devices. The claim in both Rhinelander's legal memorandum, and in the original draft transmittal package, was that the United States had obtained full coverage of future "devices," even though that word appeared nowhere in the Treaty, and was in fact rejected by the Soviets.

The negotiating record or a discussion of it would have revealed to the Senate that the Soviets had not agreed to block the development and testing of mobile OPP "devices." The Administration decided, however, as Ambassador Smith advised, not to reveal portions of the negotiating record. In a memorandum to Henry Kissinger, Assistant to the President for National Security Affairs, dated June 6, 1972, Ambassador Smith recommended that agreed matters be described to the Senate and set forth in full in an enclosure if they were initialed, but that "other matters on which there is agreement, or on which we have made our unilateral position clear, would not be set forth in an enclosure but would be reflected in the analysis of the agreements in the Secretary's letter . . . ." 7/ He explained:

> (1) If we compile what could be inferred to be an exhaustive list of materials we consider authoritative aids to the interpretation of these agreements, we could prejudice our future ability to draw on other excerpts from the negotiating history to help clarify what was intended. It is impossible to foresee all the points on which such interpretive questions might arise. . . .
>
> (2) While the parties are unquestionably in agreement on some other matters of comparable importance to those in the initialed statements, there are considerable variations in both the degree and form in which the negotiating record evidences such agreement. To set forth the available evidence of agreement in each case might be confusing (as in the shades of difference in the statements on standstill arrangements, the substance of which can be simply stated), or raise unwarranted doubts as to whether the Parties in fact are in agreement on such points (as in the case of the understanding on what would be a significant increase in the dimensions of an ICBM silo). 8/

During the hearings on the ABM Treaty, the negotiating record and instructions were requested once by Senator Cooper and once by Chairman Fulbright. 9/ On both occasions, Secretary Rogers replied that the Senate had no need for the record. 10/ He nevertheless said the Administration intended to rely upon the record if doubts arose as to the Treaty's meaning:

> [If] there are questions of interpretation that arise in the future, we certainly will go back and look at the memoranda because there wasn't a complete transcript kept of the plenary sessions 11/

2. Hearings before the Senate Foreign Relations Committee

Hearings before the SFRC commenced on June 19, 1972, with the testimony of Secretary Rogers and Ambassador Smith. Their testimony postdated the ACDA legal drafts, and also the guidance on future devices dated June 16. Yet, the testimony of these witnesses -- important because of their respective positions as Secretary of State and principal negotiator of the ABM Treaty -- stated only that deployment of OPP systems or components was prohibited.

During their testimony, both Secretary Rogers and Ambassador Smith referred repeatedly to the prohibition on deployment of future systems, but at no time to a restriction on development or testing of mobile OPP devices.* Ambassador Smith in fact at one point asserted that no inhibition exists in the Treaty on modernizing conventional ABM systems, except

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* A draft of Secretary Rogers' statement that was transmitted by the Executive Secretariat of the State Department to the White House on June 19 had the following sentence typed in, but apparently stricken out by hand, in the paragraph dealing with "future types of ABM systems depending on such devices as lasers or particle accelerators":

> Development and testing of such devices for fixed land-based systems is not prohibited.

This sentence did not appear in the statement actually delivered to the Committee by Secretary Rogers. Nothing in the file indicates who deleted the sentence or why. (See Appendix A for changes in the transmittal papers.)

that they cannot be "deployed" in other than fixed land-based configurations, and then went on to note only that deployment of laser ABM systems is prohibited:

> Senator AIKEN. Is the ABM system getting obsolete? If the lasers can be used to knock out the SAM's, wouldn't they be effective against other types of missiles also?
>
> Mr. SMITH. Senator Aiken, I think it is an entirely different problem with respect to the use of lasers to help guide offensive missiles and from their use to guide defensive missiles, but we have covered this concern of yours in this treaty by prohibiting the deployment of future type technology. Unless the treaty is amended, both sides can only deploy launchers and interceptors and radars. There are no inhibitions on modernizing this type of technology except that it cannot be deployed in mobile land-based or space-based or sea-based or air-based configurations. But the laser concern was considered and both sides have agreed that they will not deploy future type ABM technology unless the treaty is amended.

For the reasons described above, what is not said in Ambassador Smith's statement is significant, since he was presumably familiar with Rhinelander's analysis, and could easily have responded with a clear assertion of the narrow interpretation. In his answer to Senator Aiken, in particular, Ambassador Smith uses the nondeployment language for OPP devices specifically in connection with Article V(1) configurations.

The testimony by non-Administration witnesses was inconclusive. The only clear statement to the Committee on this matter came from Senator Buckley, who opposed the Treaty in principle; he focussed on future ABM systems and, in fact, indicated that he would vote against ratification of the ABM Treaty in part because he believed it prevented the development, testing and deployment of such systems to defend the American people. He said on the issue of OPP devices:

> Thus the agreement goes so far as to prohibit the development, test or deployment of sea, air or space-based ballistic missile defense systems. This clause, in Article V of the ABM Treaty, would have the effect, for example of prohibiting the development and testing of a laser-type system based

in space which could at least in principle provide an extremely reliable and effective system of defenses against ballistic missiles. The technological possibility has been formally excluded by this agreement.

There is no law of nature that I know of that makes it impossible to create defense systems that would make the prevailing theories obsolete. Why, then, should we by treaty deny ourselves the kind of development that could possibly create a reliable technique for the defense of civilians against ballistic missile attack? Why should we not at least be in a position to deploy such a system with the least possible delay in the event that we should find it necessary to terminate the agreement under the conditions allowed in Article XV or should we fail to negotiate a satisfactory successor agreement to SALT I?

3. Hearings before the Senate Armed Services Committee

The question of limits on future systems received more thorough treatment in the hearings held by the Senate Armed Services Committee. Senator Jackson, in particular, returned to the issue several times.

Secretary Laird's initial exchange with Senator Jackson on June 6 did not clarify the issue. Secretary Laird evidently took Senator Jackson's questions as relating to whether any constraints existed outside the Treaty and associated statements, which of course he answered in the negative. In response to Senator Jackson's question as to any "prohibition . . . on research, tests, and development for the ABM," Secretary Laird inserted for the record a quotation of the text of Articles IV, V and VII and Agreed Statements D and E, indicating that there is "nothing indirect or direct that applies to research and development outside of the agreement, the protocol, and treaty that have been released by the President."*

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* Senator Jackson asked Secretary Laird what the Treaty provided. Secretary Laird responded: "It provides that research and development can continue, but certain components and systems are not to be developed." This response in its original form ended with the word "continue"; the qualifying language was added to the transcript by hand.

Secretary Laird's answers to Senator Dominick are again not definitive, although they might be taken to imply that the Article V prohibitions apply to space-based laser and other future systems. In particular, he responded in the negative when asked if the Soviets were restricted in further R&D on "MIRV, FOBS, lasers, and all other new weapons of capabilities not expressly forbidden," but cited Article V of the ABM Treaty when asked if SALT impeded satellite-based counterforce system developments.

A DOD answer to a question submitted for the record by Senator Goldwater expressly states that no restrictions exist on the development of lasers (an OPP device) for fixed, land-based ABM systems: *

> With reference to development of a boost-phase intercept capability or lasers, there is no specific provision in the ABM treaty which prohibits development of such systems.
>
> There is, however, a prohibition on the development, testing, or deployment of ABM systemswhich are space-based, as well as sea-based, air-based, or mobile land-based. The U.S. side understands this prohibition not to apply to basic and advanced research and exploratory development of technology which could be associated with such systems, or their components.
>
> There are no restrictions on the development of lasers for fixed, land-based ABM systems. The sides have agreed, however, that deployment of such systems which would be capable of substituting for current ABM components, that is, ABM launchers, ABM interceptor missiles, and ABM radars, shall be subject to discussion in accordance with article XIII (Standing Consultative Commission) and agreement in accordance with article XIV (amendments to the treaty.)

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* Some read this answer as being internally inconsistent, given the reference to boost-phase intercept capability in the first sentence, and to contain an important element of uncertainty as to its meaning in the present context.

The first extensive discussion in these hearings of the problem of future ABM systems was between Senator Jackson and Dr. John Foster, Undersecretary of Defense for Research and Engineering. In response to questioning by Senator Jackson on June 22, Dr. Foster said that land-based laser systems may be developed and tested but not deployed, providing a basis for inferring that space-based laser systems may not be developed, tested or deployed. In particular, their exchange contained the following:

> Senator JACKSON. . . . Specifically, there is a limitation on lasers, as I recall, in the agreement and does the SAL agreement prohibit land-based laser development?
>
> Dr. FOSTER. No, sir; it does not. . . . What is affected by the treaty would be the development* of laser ABM systems capable of substituting for current ABM components.
>
> Senator JACKSON. . . . Article 5 says each party undertakes not to develop and test or deploy ABM systems or components which are sea based, air based space based or mobile land based.
>
> Dr. FOSTER. Yes, sir; I understand. We do not have a program to develop a laser ABM system.**
>
> Senator JACKSON. If it is sea based, air based, space based, or mobile land based. If it is a fixed land-based ABM system, it is permitted; am I not correct?
>
> Dr. FOSTER. That is right.

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* The original transcript reads "development," but indicates a change to "deployment" was intended. The change does not appear in the printed version. Senate transcript, p. 310.

** The following language appearing immediately after the sentence in the text was deleted from the original transcript: "and such a program through the development and tests is prohibited by the treaty." Senate Transcript, p. 310.

> Senator JACKSON. . . . You can't do anything; you can't develop; you can't test and finally, you can't deploy. It is not "or".
>
> Dr. FOSTER. One cannot deploy a fixed land-based laser ABM system which is capable of substituting for an ABM radar, ABM launcher, or ABM interceptor missile.
>
> Senator JACKSON. You can't even test; you can't develop.
>
> Dr. FOSTER. You can develop and test up to the deployment phase of future ABM system components which are fixed and land based.*
>
> My understanding is you can develop and test but you cannot deploy. . . .
>
> Senator JACKSON. . . . [B]ut it says each party undertakes not to develop, test or deploy ABM systems or components which are sea based, air based, space based, or mobile land based.
>
> Dr. FOSTER. That is correct.

Ambassador Smith's testimony on the fifth and sixth days of the hearings, June 28 and July 18, can be read strongly to imply that the Treaty does not constrain the development and testing of space-based laser systems. In response to a question from Senator Smith as to whether the Treaty would "affect development of a laser ABM system," Ambassador Smith said:

> Senator Smith[,] one of the agreed understandings says that if ABM technology is created based on different physical principles, an ABM system or component based on them can only be deployed if the treaty is amended.
>
> Work is [sic] that direction, development work, research, is not prohibited, but deployment of systems using those new principles in substitution

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* The original answer was edited to add the words "up to the deployment phase of future ABM system components which are fixed and land based." Id. at 311. The original therefore read simply: "You can develop and test."

for radars, launchers or interceptors, would not be permitted unless both parties agree by amending the treaty.

Ambassador Smith also had the following exchange with Senator Goldwater:

Senator GOLDWATER. . . .

One, under this agreement are we and the Soviets precluded from the development of the laser as an ABM?

Mr. SMITH. No, sir.

On July 19, however, in the course of an extended colloquy among Senators Goldwater, Jackson and Dominick, and Generals Palmer, Ryan and Leber, JCS witnesses, amid answers reflecting uncertainty, ultimately stated that "futuristic" systems can be developed if they are fixed land-based.*

The first exchanges among these individuals led to statements consistent with the broad interpretation, under which deployment of future devices would be banned, but not development:

Senator GOLDWATER. I was interested -- again, you might be able to answer it -- if anyone acquainted with laser can see its application as we progress in the science to ABM use in a very perfect way, an inexpensive way compared to what we are doing. It was my interpretation of the Secretary's remarks we would no longer engage in such development.

General PALMER. I would like to correct my statement.

I was referring to the deployment of such systems. There is no limit or understanding of a limit on R. & D. in the futuristic systems, but would require an amendment of the treaty or further agreement to deploy such a system.

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* We have been unable to locate an original transcript of this day's proceedings.

Senator GOLDWATER. Then what you are saying, if the Army or any of our research and development agencies suddenly came along with a breakthrough that would enable us to get the power to develop the optical mechanism, would it mean that we couldn't deploy the antiballistic missile capability?

General RYAN. That's correct.

General PALMER. That's correct.

Senator GOLDWATER. Do you both believe that?

General PALMER. Without further agreement.

. . . .

General LEBER. Senator, I think we have been over this ground before when Dr. Foster was before the committee, and if I may I will try to expand and hopefully clarify it.

The only limitation in the treaty, and it is in the ABM treaty; it is not in the interim offensive agreement at all, is that either side, the Soviets or the United States, would not use a laser device to substitute for any other component part of the ABM system. You could use laser technique to improve any of your existing components -- radar, interceptor -- those are the main components, but if you propose to substitute, for example, a laser device for the interceptor, that would be prohibited, an amendment to the treaty would be required for deployment.

That is a very narrow area now that we are talking about; it has nothing to do with ICBM's, nothing to do with the defense systems in general. The only restriction is that you would not substitute a laser device for one of the components of your ABM system.

The interpretation that such devices may be developed only if they are fixed land-based was suggested later by Senator Jackson in an exchange with Senator Goldwater:

Senator JACKSON. Yes, but under article V of the ABM treaty "Each Party undertakes not to develop,

test or deploy ABM systems or components which are sea-based, air-based[,] space-based, or mobile land-based."

Senator GOLDWATER. Fixed based.

Senator JACKSON. The fixed-base ABM is exempt.

Senator GOLDWATER. Fixed based.

Senator JACKSON. The fixed-baseve [sic].

Senator GOLDWATER. We could then replace the Sentry with the laser if it became effective?

Senator JACKSON. The prohibition runs to sea based, air based, space based, or mobile land based ABM's.

Senator GOLDWATER. Not fixed land?

Senator JACKSON. That's right. That is exempt. I am just pointing this out. In those other areas, it is prohibited and, development is also prohibited. How are you going to handle that? Tests can be detached. There are certain national means available to check on testing and deploying, but I am underlining, Senator Dominick, the key word, "development." And I just cite that as an illustration. As I understand it, the Joint Chiefs have no knowledge of the means of monitoring "development," except that, later, there will be consultations under the agreement.

General PALMER. Let me try to clarify that, Senator Jackson.

The treaty, as you have just read, does limit radars[,] launchers and missiles; it does not limit R&D on futuristic systems. We could not deploy such a new system, however . . . .

Soon thereafter, General Ryan distinguished between space-based "components" and those that are fixed, land-based, stating that development of only the latter was permitted:

Senator GOLDWATER. You were never consulted but were any members of the Chiefs? Was the Chairman of the Joint Chiefs ever brought into this whole

question of research and development of a laser or any other additions or subtractions of the weapon system?

General RYAN. My interpretation of the paragraph which you just read, Senator Jackson, is that each party undertakes not to develop, test, or deploy ABM systems or components which are sea based, air based, meaning in the atmosphere, space based, outside of the atmosphere, or mobile land based.

Senator JACKSON. Yes sir.

General RYAN. It doesn't mean that fixed, land based cannot be developed.

Senator JACKSON. Yes, I said that. Now, what I am saying, General Ryan, is that you are prohibited from developing a system that is sea based, air based, space based, or mobile land based?

General RYAN. That is correct.

These witnesses indicated that the JCS were fully aware of and had agreed that ABM development was confined to fixed, land-based systems. (Only Palmer explicitly linked this proposition to OPP devices.) In particular, the following exchange occurred:

General PALMER. On the question of the ABM, the facts are that when the negotiation started the only system actually under development, in any meaningful sense, was a fixed, land-based system. As the negotiations progressed and the position of each side became clear and each understood the other's objectives better, it came down to the point where to have agreement it appeared that -- this is on the antiballistic missile side -- this had to be confined to the fixed, land-based system. The Chiefs were consulted. I would have to go to a closed session to state precisely the place and time. They were consulted on the question of qualitative limits on the AB side and agreed to the limits that you see in this treaty.

Senator JACKSON. Even though it can't be monitored?

General PALMER. Yes.

Senator JACKSON. I just wanted that; so the Chiefs went along with the concept here that involved --

General PALMER. A concept that does not prohibit the development in the fixed, land-based ABM system. We can look at futuristic systems as long as they are fixed and land based.

Senator JACKSON. I understand.

General PALMER. The Chiefs were aware of that and had agreed to that and that was a fundamental part of the final agreement.

The final witness before the Senate Armed Services Committee who had anything relevant to say was Admiral Zumwalt, Chief of Naval Operations. In a statement for the record he described examples of Soviet behavior he would regard as sufficient to warrant withdrawal from the Treaty. Among the potential violations he listed was "Deployment of . . . sea/air/space-based ABM systems."

4. Hearings before the House Foreign Affairs Committee

Secretary Rogers' testimony, delivered on July 20, described the Treaty's coverage of future devices in the same language as his submittal letter. He placed discussion of future devices in a separate paragraph from his description of Article V, and then stated only that deployment of such devices is proscribed:

> The commitment to low ABM levels is further enhanced by several important qualitative limitations. We and the Soviet Union have agreed not to develop, test or deploy:
>
> 1. ABM systems or components that are sea based, air based, space based, or mobile land based. . . .
>
> Such undertakings are important. It may be of even greater importance that both sides have agreed that future types of ABM systems based on different physical principles, for example, systems depending on such devices as lasers, that do not consist of ABM interceptor missiles, launchers, and radars, cannot be deployed even in permitted areas. So there is a limitation on what may be employed in the ABM systems now in operation and it prohibits the deployment of new esoteric systems in these areas.

Nothing of further significance on the issue of substitute OPP devices occurred in these hearings.

5. Hearings before the House Armed Services Committee

In hearings before this House Committee, Ambassador Smith used the same language as he did in previous appearances, stating unambiguously only that deployment of future devices was precluded. The Committee staff memorandum for members states that the Treaty "defines an ABM system as one to counter ICBM's in flight trajectory and one consisting of ABM interceptor missiles, ABM launchers and ABM radars" (emphasis added). We have found no information explaining the reason for this variance of the Treaty language by the staff.

On July 27, Admiral Moorer, Chairman of the JCS, engaged in an exchange with Congressman Whitehurst on the subject of qualitative improvements to ABM systems. He read Agreed Statement D in response to questioning as to the possibility of technical breakthroughs, and he stated that no restraint exists on research and development:

> Mr. WHITEHURST. You have no means of surveillance, though. For example, if we achieved this technically, then we would be obliged to advise the Soviets that we have this capability?
>
> Admiral MOORER. Only if we deployed it in the configuration of an ABM weapons system. But there is no restraint on research and development.

Admiral Moorer had, on June 2, provided a memorandum to Secretary of Defense Laird regarding measures to be taken to guard against a degradation in national security posture. Annex A of this memo, Subject: Summary of the ABM Treaty and the Strategic Arms Limitation Agreement, contained the following summary of the Treaty contents:

> (4) Each side agrees not to develop, test or deploy:
>
> Multiple launchers;
> Rapid reload launchers;
> Landmobile, sea-based, air-based or space-based ABM systems or components thereof;
> Multiple warhead ABM interceptors. . . .
>
> Should ABM systems based on different physical principles be created in the future, specific limitations will be subject to discussion and to the amendment provisions of the Treaty.

Another portion of this memo, Annex C, Subject: Verification Considerations, (regarding ABM systems and the U.S. ability to monitor the terms of the agreement and to detect violations) stated the following:

> . . . (3) Banned Systems. Developments or improvements in Soviet ABM systems to provide multiple launchers, rapid reload, multiple warhead interceptors, or sea/air/space-based systems probably would be detected during the testing phase. New systems of these types require extensive testing prior to deployment. If such a new system were tested, the United States could detect that it was a new system. This would focus attention on the testing even though the exact nature of the system might not be known.
>
> Future Systems. Development and testing of future systems (e.g., laser, long-wave infrared, and charged particle) are not prohibited by the Treaty. However, the United States would monitor Soviet activity in this area as part of the overall surveillance of the USSR and its military capabilities.

6. Hearings before the Appropriations Subcommittees

Hearings on the Department of Defense Appropriations for Fiscal Year 1973, held before appropriations subcommittees in the Senate and the House, provided an opportunity for some additional discussion of future technology in the ABM context. In the Senate hearings, Secretary Laird and Admiral Moorer cited the restrictions in Article V of the ABM Treaty when questioned by Senator Young about prohibitions on research and development. At the same time, Secretary Laird assured the Senator that the limitation would not have an impact on existing programs: it applied "only in certain areas, and it does not affect any of our current ongoing programs in the ABM field to any substantial degree at all." In the hearings on the House side, the discussion of ABM technology seemed also to be focussed on land-based systems. Neither hearing shed significant light on the current issue.

7. Report of the Senate Foreign Relations Committee

The Report of the Senate Foreign Relations Committee is traditionally an important source of guidance on the Senate's understanding of a treaty. In addition to an explanation of any formal conditions, reservations, or understandings, the

Committee uses this report to record its views on matters of importance to the Senate. The Committee report on the ABM Treaty contains nothing that would indicate that the issue of future OPP devices was a matter of particular concern, beyond the clear understanding that the deployment of any such device was prohibited, without prior amendment of the Treaty. Thus, the report quotes from the Secretary of State's analysis of the Treaty, which recites the prohibition of Article V(1), and then states as a separate point: "Perhaps of even greater importance as a qualitative limitation is that the parties have agreed that future exotic types of ABM systems, i.e., systems depending on such devices as lasers may not be deployed, even in permitted areas." 12/ This separate treatment of "exotics," stating a limitation only on deployment, is the only statement on this issue actually quoted in the Senate Report. Otherwise, the Report is a brief summary of the issues considered by the witnesses who appeared.

The Report also contains a separate section entitled "Committee Comments." In it, the Committee expressed its "doubts over the wisdom and feasibility of a Washington ABM defense," but nonetheless gave its unanimous approval to the Treaty. 13/ Had the Committee regarded the issue of development and testing of "exotics" as significant, it could have given its views on that issue in a similar manner. The Committee expressed no views, however, on whether the Treaty restricts development and testing of mobile OPP ABM systems.

8. Report of the House Foreign Affairs Committee

The House report contains a brief description of the ABM Treaty. Its reference to the provisions at issue specifies only that the deployment of systems or components based on "new technology" is banned. 14/ The House Report also contains a section entitled "Support for Unilateral Statements by the United States." It refers to "several significant unilateral statements" made by the U.S. delegation. The Report states: "The committee strongly supports those unilateral statements by the U.S. negotiators and would view actions inconsistent with those statements by the Soviets as a grave matter affecting the national security interests of the United States." 15/ The Committee expressed no other views, however, on the current issue.

9. Congressional Debates

Several references to the question of future ABM systems occurred in statements on the floor concerning the ABM Treaty and the Interim Agreement. The subject of future devices was,

however, a minor aspect of the issues discussed. The statements of Senators Fong and Fulbright include the same type of general language contained in the statements by Secretary Rogers and Ambassador Smith, stating only that the deployment of OPP devices was barred. Senator Fong's statement is particularly strong in this suggestion:

> The principal provisions of the ABM treaty may be summarized as follows:
>
> First. Limits each side to one ABM site for the defense of its respective capital and one site each for the defense of an ICBM field.
>
> Second. Limits each side to a total of 200 ABM interceptors, 100 at each site.
>
> Third. Limits the number and the size of ABM radars at each site.
>
> Fourth. Allows research and development on ABM systems to continue, but not the deployment of exotic or so-called future systems.

Senators Buckley and Thurmond, however, with differing degrees of clarity, opposed the Treaty in part because they believed it prohibited the development and testing of space-based future systems. No Senator appears to have taken exception to their interpretive statements. Senator Thurmond said:

> Under the treaty, we also give up the right to deploy any land-based ABM systems of a new type, should they be developed. At the same time we undertake "not to develop, test, or deploy ABM systems or components which are sea-based, air-based, space-based, or mobile land-based."
>
> . . . .
>
> It also prevents us from developing new kinds of systems to protect our population. The most promising type appears to be the laser type, based on entirely new principles.

Senator Buckley clearly expressed his belief that development of space-based lasers was prohibited, as he had during the hearings:

> Thus the agreement goes so far as to prohibit the development, test or deployment of sea, air or space based ballistic missile defense systems. This clause, in article V of the ABM treaty, would have the effect, for example, of prohibiting the development and testing of a laser type system based in space which could at least in principle provide an extremely reliable and effective system of defenses against ballistic missiles. The technological possibility has been formally excluded by this agreement.
>
> There is no law of nature that makes impossible the creation of defense systems that would make the prevailing theories obsolete. Why then should we by treaty deny ourselves the kind of development that could possibly create a reliable technique for the defense of tens of millions of civilians against ballistic missile attack? Why should we not at least be in a position to deploy such a system with the least possible delay in the event that we should find it necessary to terminate the agreement under the conditions allowed in article XV?

He opposed, as a matter of principle, any restraint even on the deployment of devices that might protect the American people.'

C. Conclusion

Much of the material and testimony provided to the Senate and its Committees was inconsistent and inconclusive on the Treaty's treatment of development and testing of mobile OPP devices. The most authoritative sources of Executive Branch position -- the transmittal documents and the testimony of Secretary Rogers and chief negotiator Smith -- expressed in clear language only a prohibition on the deployment of OPP devices. (In response to specific questions, Smith said no restrictions exist on developing laser ABM systems.) An earlier draft of the transmittal documents was prepared which would have made ACDA's position on the issue absolutely clear. Every portion of that draft that advanced the restrictive interpretation was deleted, however. Furthermore, nothing was said by Executive Branch officials before the Committee on Foreign Relations, or by the Committee in its Report, that indicated a clear view on restrictions of OPP devices beyond deployment. Other issues were regarded by the Senate as of far greater importance than the question of development and testing of mobile OPP devices.

In the course of the ratification proceedings, Executive Branch witnesses made inconsistent statements -- in one instance, in the same colloquy (e.g., JCS witnesses before the SASC) -- concerning how the Treaty treats development and testing of mobile OPP ABM systems. The Administration may not have had a clear and uniform view on this issue, and in any event its representatives failed to communicate a clear and consistent view to the Senate. During the course of the hearing before the Senate Armed Services Committee, however, the Administration provided answers in writing and orally that in varying degrees could be read to support the restrictive interpretation. The position taken, apparently on the basis of guidance circulated on June 16, 1972, was that the Parties could engage in development of fixed, ground-based lasers, for ABM purposes. This statement implied that development of any mobile OPP device was prohibited, though that position was not expressed with clarity and directness. Nevertheless, the answers, particularly those given by DOD and JCS officials, reasonably led the few Senators who focussed clearly on this issue to conclude that the Treaty precludes the development and testing of space-based lasers.

No indication exists in the ratification record that the Senate as a whole placed any importance on adherence to the narrow interpretation as a predicate to its willingness to give advice and consent. The few Senators expressing strong views on the subject (Buckley, Goldwater, and Jackson) were concerned that the Treaty lacked sufficient flexibility for development and testing of "exotics" that might provide an effective ABM defense. Senator Jackson was upset that DOD might have cancelled its work on lasers, and was evidently satisfied by the reassurance that fixed, land-based research and development of ABM lasers would continue. Senator Buckley opposed even the commitment not to deploy future systems. No evidence exists in the record that any Senator, other than Senator Buckley, made the restrictive interpretation a condition or even a factor in the vote to approve the ABM Treaty. Given the little attention paid it, the complexity of the issue, and the overwhelming popularity of the Treaty, no evidence exists that the Senate would have failed to approve either the "broad" or "narrow" interpretation.

The record reflects that the Administration failed to advise the Senate of the conflicts and ambiguities in the negotiating history of the Treaty with respect to the issue of future OPP devices. In particular, the Senate was not informed of the refusal of Soviet negotiators to accept U.S. language that would have made clear that Article V(1) prohibited the development and testing of future, space-based "devices" other

than the three components listed in Article II. The transmittal documents were devoid of material that would have reflected the dispute between the Parties over the meaning of "ABM systems and components." An Administration decision was made that the negotiating record not be provided, though Secretary Rogers noted that it would be referred to in resolving future uncertainties. Most fundamentally, perhaps, the Senators who exhibited a strong interest in the issue of future devices were not informed of the persistent, principled opposition of the Soviet negotiators to the regulation of such devices.

III. LEGAL EFFECTS OF RATIFICATION PROCEEDINGS

This section addresses the legal effects of Senate proceedings pursuant to the advice-and-consent power, with particular reference to the ABM Treaty. The effect of ratification proceedings on the international obligations of the United States is distinct from their effect on the obligations of the President to the Senate under the U.S. Constitutional system. The two questions, although related, are treated separately in the following analysis.

The Senate is able to have a powerful -- even decisive -- impact on the international obligations of the United States during the advice-and-consent procedure. The Senate may consent to the treaty as submitted or reject it; and it has available established procedures - particularly the resolution of ratification - for requiring that the treaty be subject to specified conditions. The Executive is obliged to take appropriate steps to ensure that the treaty partners are bound with respect to those conditions which have a bearing on their international obligations. Senate determinations not properly communicated to treaty partners may constitute evidence of the meaning attached by the Senate to a given treaty provision, but will not become binding aspects of the international obligation.

The Senate may, under appropriate circumstances, impose obligations upon the President under the U.S. Constitutional system with respect to the application of a treaty, irrespective of their effects upon treaty obligations of the U.S. under international law. The interests of the U.S. are not served, however, when the result of such actions is to impose more stringent limitations on the U.S., under domestic law, than are imposed on the other party or parties to the

treaty, under international law. Further, such potentially unilateral obligations should not be lightly inferred, particularly with respect to obligations bearing on vital defense and foreign policy interests of the U.S., since the President must have considerable latitude in treaty interpretation to be able to protect U.S. national interests, and since the domestic status of a treaty derives from its international character. Whether the Senate has imposed such an obligation, or indicated its preferences or opinions, is judged by prior Senate practices and traditional standards of legislative interpretation.

A. Effect on International Obligations

1. Interpretations adopted by the Senate as express conditions to its advice and consent

The granting of advice and consent by the Senate is an integral part of this nation's process of treaty ratification. In the exercise of this power, the Senate may seek to establish authoritatively the meaning of a treaty on any question, in such a manner as to ensure that it would be binding on the other party or parties if they (and the President) choose to proceed with ratification. This can be done by incorporating the proposed interpretation as a condition in the Senate's resolution of ratification -- the document by which the Senate formally grants advice and consent -- and requiring the President to take appropriate action in connection with ratification to ensure that the other party is legally bound.

In the case of a bilateral treaty, the practice of the Executive Branch has generally been to seek the agreement of the other party (by exchange of diplomatic notes) to all the conditions in the Senate's resolution of ratification which affect the rights and obligations of the parties, and then incorporate them into the U.S. instrument of ratification -- which is provided to the other party and embodies U.S. acceptance of the treaty. 16/ To cite a few examples of this process, the Senate has attached reservations or other conditions to its resolution of ratification for a number of bilateral tax treaties, to which the Executive Branch obtained consent by bilateral agreement and incorporated into the ratification instruments. 17/ The same was true for a number of bilateral treaties of friendship, commerce and navigation, 18/ and certain bilateral treaties with Mexico concerning boundary waters. 19/

In the case of the SALT II and Panama Canal Treaties, the Senate concerned itself in greater detail with the precise manner in which the Executive Branch would ensure that the other party would be legally bound with respect to various questions of treaty interpretation that were thought to be of particular importance. The Senate conditioned its advice and consent to the Panama Canal Treaties 20/ on a series of amendments, reservations, understandings and other conditions, some of which addressed the meaning of treaty provisions. 21/ The resolutions of ratification in connection with these treaties required that the President include in the U.S. instruments of ratification all conditions in the Senate's resolutions. In certain respects, the resolutions required that both the U.S. and Panamanian instruments include a specific condition, or that a bilateral instrument called a protocol of exchange, which was to be signed by the two parties, include the condition. 22/

In considering the SALT II Treaty, 23/ upon which the Senate never acted, the Senate Foreign Relations Committee (SFRC) decided to specify explicitly what was required of the President for all conditions. It proposed a three-part resolution of ratification, consisting of: (1) "provisions that do not directly involve formal notice to or agreement by the Soviet Union," including a few interpretive statements and a number of instructions to the Executive Branch not intended for communication to the Soviet Union; (2) "provisions that would be formally communicated to the Soviet Union as official statements of the position of the United States Government in ratifying the Treaty, but which do not require their agreement," including a number of interpretive statements; and (3) "provisions that would require the explicit agreement of the Soviet Union for the Treaty to come into force," concerning the legal status of certain associated documents. 24/

The Committee report indicated that the President would be bound vis-a-vis the Senate with respect to the conditions in all three categories, but that the three categories differed with regard to their effect on the Soviet Union. 25/ With respect to the third category, the Committee stated that even the formal inclusion of the conditions in the U.S. instrument of ratification might not be sufficient to bind the Soviet Union, and that the Senate therefore should require the President to obtain express Soviet agreement, either through inclusion in the protocol of exchange or some equally effective legal instrument. 26/

In the course of giving advice and consent in 1986 to the Supplementary Extradition Treaty with the United Kingdom, 27/

the Senate included in its resolution of ratification, among other things, amendments to the Treaty imposing certain limits on extradition obligations under the Treaty. 28/ The Executive Branch subsequently secured U.K. acceptance of the Treaty as amended in an exchange of notes prior to the time of ratification. 29/

These examples illustrate the following points with respect to bilateral treaties: (1) the Senate may, through its resolution of ratification, oblige the President to take action to ensure that the other party is legally bound to an interpretation of treaty terms; (2) the Senate has acted with full awareness that the clearest way to bind the other party is to secure its express acceptance through a protocol of exchange, an exchange of notes, or some other written agreement; (3) in the absence of such agreement, some degree of doubt will always exist as to whether the other party is legally bound to an interpretation even when contained in the resolution of ratification and the U.S. instrument of ratification; and (4) by implication, the other party is not normally bound by an interpretation as to which it is not given formal notice (and does not consent) prior to the exchange of instruments of ratification, even if the Senate had expressed its adherence to that interpretation. (In the latter two cases, any previous rejection of the interpretation, or treaty text embodying it, by the other party during negotiations would be an important element casting doubt on its binding character.)

These conclusions are generally consistent with the standard U.S. and international authorities on treaty interpretation. 30/ Article 31 of the Vienna Convention on the Law of Treaties 31/ provides that treaties must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." 32/ Senate ratification resolutions often effectively rewrite the terms of a treaty. Where the U.S. formally communicates the Senate's conditions, reservations, or understandings, which are not "terms" strictly speaking, they may constitute evidence of the treaty's purposes. Further, as indicated above, the practice of the Executive Branch has generally been to seek the agreement of the other party to all conditions which affect the rights and obligations of the parties. Our experience in negotiations with the Soviet Union confirms the wisdom of this practice.

2. Interpretations stated in the ratification record but not made conditions to the Senate's advice and consent

In sharp contrast to Senate actions that are contained in the resolution of ratification and formally communicated to treaty partners, interpretations of a treaty discussed before, or presented by Executive witnesses to, the Senate in general have far less weight in the process of treaty interpretation for the purpose of determining international obligations. In general, interpretations discussed before or presented to the Senate are not legally binding under international law, unless agreed to by the other party. Such interpretive statements may have probative value on the issue of the Treaty's international effect, depending on the degree and manner in which the other party officially is put on notice of it (if at all), and the character of any response. 33/

How the record of internal ratification proceedings fits into the scheme of the Vienna Convention on the Law of Treaties is unclear. The internal ratification proceedings of one of the parties to a treaty may shed light on that party's understanding of the meaning intended by its terms and the object and purpose of the treaty. Standing alone, however, such proceedings are not part of the "context" of a treaty, or any of the other primary interpretive materials cited in Article 31. 34/ Such evidence might, however, qualify under Article 32 as "supplementary means of interpretation" and appears to have been treated as such by various scholars. 35/ Internal ratification records are therefore, at best, no higher in status in the interpretation of treaties for international purposes than the negotiating record.

The Convention does not indicate what relative probative weight should be given to ratification proceedings; presumably this would depend on their content, significance, and all other relevant circumstances. But the content of such proceedings must always be considered with caution, in that they reflect the views expressed in the internal processes of only one of the parties. (Particular caution is in order where the other party's ratification proceedings are secret or otherwise unavailable.)

The American Law Institute's Restatement of Foreign Relations Law of the United States (Revised) 36/ seems consistent with this analysis. Section 325 and the official commentary to that section essentially repeat the elements of Articles 31 and 32 of the Vienna Convention concerning the "context" of a treaty and "supplementary" means of interpretation. 37/ The commentary also notes that this

section of the Restatement differs somewhat from the approach ordinarily taken by U.S. courts, in that such courts are more likely to look outside an instrument in determining its meaning and the intent of the parties, particularly as regards the negotiating record. 38/ The commentary also points out that U.S. courts, when determining the domestic legal effect of international agreements, tend to take greater account of internal U.S. materials, such as committee reports and debates, than would be the case in the determination of international obligations. 39/

A November 1977 Senate Foreign Relations Committee Staff Mememorandum, The Role of the Senate in Treaty Ratification, 40/ also draws a clear distinction between the effect of ratification proceedings on U.S. international obligations, as opposed to U.S. domestic law:

> Expressions, etc., Not Included in the Resolution of Ratification. The Committee's report on a treaty is essentially designed to explain the treaty to the Senate and give the Committee's understanding as to what certain articles mean. At times these reports go to great lengths in interpreting the provisions of treaties which set a new course, such as the North Atlantic Treaty and subsequent mutual defense treaties. The Committee reports, although purely domestic documents and of no concern to other party(ies), have value to the Executive and Judicial Branches in interpreting the intent of the Senate. They serve as legislative history in the event questions should arise over the meaning of a treaty.
>
> Statements and colloquies by the floor manager of a treaty serve a similar purpose. [Emphasis added.] 41/

This characterization of internal ratification proceedings, for the purpose of international obligations, as "purely domestic documents" of "no concern to other parties" is an accurate appraisal. Where, in a particular case, the U.S. Government acts formally to communicate to the other party an interpretation contained in domestic proceedings, the interpretation could have probative weight in determining what the parties intend, depending on the manner in which the statement is communicated and the response (if any) made by the other party.

These views are also consistent with Executive Branch practice with respect to treaty ratification proceedings in recent years. For example, the Department's Legal Adviser stated the following in 1979 in response to a question about the legal effect on the Soviet Union of statements of understanding or interpretation that might hypothetically be adopted by the Senate in SALT II but not included in the resolution of ratification:

> Statements of understanding or interpretation not included in the Senate's resolution of ratification and the U.S. instrument of ratification accepted by the Soviet Union would not be legally binding per se. However, if provided to the Soviet Union prior to the exchange of instruments of ratification, and not contradicted by the Soviets, they would constitute persuasive evidence of the manner in which the Parties interpret the Treaty. 42/

Thus the evidentiary weight of such statements in the ratification record -- even, in this hypothetical case, of statements included in a resolution (other than the resolution of ratification) adopted by the Senate as a whole -- depends initially on the degree to which the other party is officially made aware, prior to ratification, of the interpretive statement as the position of the U.S. Government.

In fact, the SFRC was not prepared, during its consideration of SALT II, to rely on the Senate's ratification record to establish the international obligations of the Soviet Union on various interpretive matters. Notwithstanding extensive assurances by the Executive Branch to the Committee on interpretations of the SALT II documents, 43/ the Committee insisted that the points of concern to it be incorporated into the resolution of ratification. The resolution was therefore written to contain an express requirement that, depending on the particular point in question, the President either obtain the explicit agreement of the Soviet Union, or communicate the point formally to the Soviet Union as the official position of the United States, prior to the exchange of instruments of ratification. 44/

Similarly, in the case of the Panama Canal Treaties, a number of interpretive questions arose during ratification hearings, which neither the Executive Branch nor the Senate was satisfied to resolve through placing statements in the ratification record. In the case of a difference of opinion concerning the right of the United States to take action in

defense of the Canal and to enjoy certain priorities in access to the Canal, it was pointed out during the SFRC hearings that the United States was interpreting the Neutrality Treaty in a manner contrary to the way it was being interpreted by certain Panamanian officials. 45/ Accordingly, President Carter and General Torrijos agreed on a joint statement of understanding, which was made public and provided to the Senate. 46/ Nonetheless, the Senate considered this insufficient, and insisted on the inclusion of the substance of this understanding in the resolution of advice and consent and the instruments of ratification. 47/ In particular, Senator Robert Byrd (the Majority Leader), in testifying before the SFRC during markup of the Treaty, stated that:

> In view of all of this, there should not be any doubt about our right -- and about the recognition of that right by the Panamanians -- to defend the canal. However, because this will be a matter of importance to future generations -- and so that there can be no question about the interpretation as enunciated by General Torrijos and President Carter in their joint statement -- I have consistently taken the position that the substance of the October 14 statement should be formally approved and incorporated in appropriate language and through the proper parliamentary technique by the Senate. Senator Baker, the minority leader, has expressed similar concerns, and he and I have, upon several occasions, discussed the necessity for the Senate to take some formal, positive action in this regard. . . . 48/

Similarly, in response to written questions from Senator Helms about the legal effects of an understanding attached to the resolution of ratification for the Genocide Convention, 49/ the Departments of State and Justice replied, in pertinent part, that "[t]he scope of the obligation accepted by the United States is the obligation set forth in the instrument of ratification." 50/

In some instances, the Senate has accepted assurances from the President regarding the meaning of a treaty without requiring that such assurances be made part of the resolution of ratification. For example, regarding the 1963 Limited Test Ban Treaty, 51/ various Senators were concerned that the Treaty might be interpreted to prohibit the use of nuclear weapons during war, even though the President's transmittal message, 52/ testimony by the Secretaries of State and Defense and memoranda from their legal counsels, 53/ and the

SFRC Report 54/ all stated that the Treaty did not do so. The Senate declined to add a reservation on this point to its resolution of ratification, as proposed by Senator Long, only after it had received additional written assurances from President Kennedy. 55/ In each such case, however, a judgment was apparently made by Senators that the interpretation in question was already sufficiently clear as between the parties that no additional action was necessary to ensure that the obligation would be part of the treaty. 56/

In an early case, the Supreme Court considered the effect upon the grant of lands to certain Indian tribes by treaty of a proviso that was adopted by the Senate but not clearly conveyed to the Indians. The Court noted the proviso could have no force as a legislative act, and refused to give it force as a condition to the treaty:

> There is something, too, which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigencies of a particular case may demand it. The proviso never appears to have been called to the attention of the tribes, who would naturally assume that the treaty, embodied in the Presidential proclamation, contained all the terms of the arrangement. 57/

The British Government sought, in Sullivan v. Kidd, 58/ to rely upon the fact that it had insisted upon a certain interpretation of a convention it negotiated with Japan similar to the one at issue. The Supreme Court refused to give any weight to this claim, because no evidence demonstrated that this insistence was brought to the attention of the U.S. negotiators.

These conclusions are consistent as well with the writings of major international legal scholars. Certain passages from Lord McNair's treatise The Law of Treaties have been cited in support of the proposition that internal ratification proceedings are an important guide to the meaning of a treaty for the purposes of determining the international obligations of the parties. 59/ A review of those passages, however, shows that McNair was not referring to ratification proceedings. He was dealing instead with the British Government's practice of strongly asserting its own interpretation of a treaty whenever it became aware that a

different interpretation was being expressed. The examples cited by McNair occurred prior to 1920, 60/ and later treatise writers do not even discuss the matter. It seems doubtful, therefore, that the practice was widely followed. 61/ McNair himself apparently advanced this proposition as a matter of political prudence rather than legal obligation. 62/

McNair addressed the significance of statements made during internal ratification proceedings in his section entitled "Admissibility of Preparatory Work." 63/ In that section, he cites a case in which statements made during Senate ratification discussions were used to determine the intent of the parties by a German civil court after finding that the negotiating history of the treaty in question did not shed light on the meaning of the provision in dispute. 64/ The U.S. Government later took issue, however, with the use by the German Government of Senate ratification proceedings; Secretary of State Hughes instructed the U.S. Ambassador in Berlin as follows:

> Should occasion arise, you may orally explain to the German Foreign Office that expressions of opinion as to the meaning of the treaty of August 25, 1921, such as those to which the Foreign Office refers, occurring in general debate, cannot be regarded as affecting the interpretation of that treaty. 65/

McNair describes the use of such material as the type of preparatory work inappropriate for use in treaty interpretation, because of its unilateral character. 66/

3. Effects of attempts to accord controlling weight to statements at ratification proceedings

The interests of the United States would be undermined by adopting the view that statements made in the internal ratification proceedings of one party are authoritative in determining the international obligations of the other parties, at least in the absence of appropriate formal notification. In practice, where the U.S. expects a particular understanding of a treaty to be authoritative, it communicates that position formally to the other party, and generally seeks that party's express agreement, particularly if that party had previously rejected that understanding or treaty language which embodied it. This is in keeping with the various requirements under the Vienna Convention that actions affecting status and obligations under a treaty be in writing and be communicated to the other

party or parties. 67/ To attempt to depart from these principles would create unmanageable problems, and would in any event be ineffective in creating mutually enforceable obligations.

First, the United States regards itself as having no duty to monitor, or respond to, statements made in the ratification proceedings of other nations, unless the statements are formally communicated. Rather, the U.S. regards itself as entitled to rely, and does rely, on the written instruments concerning the treaty and upon authoritative statements of the foreign government properly communicated. To cite one recent example, questions arose in the case of the Panama Treaties concerning the Panamanian interpretation of key provisions in the Canal Treaty. As the Executive Branch made clear at the time, the U.S. could not assume the role of interpreter and arbiter of such foreign statements, and had the right instead to rely on the official positions and communications of the Panamanian Government. 68/

If the U.S. were charged with knowing what went on during foreign internal proceedings, we would, among other things, have to detail legally and technically trained personnel to observe such proceedings, make judgments about legal and constitutional systems with which we are not familiar, and in many cases introduce a visible U.S. presence in domestic bodies of other countries that might have negative political consequences. For many multilateral treaties, the U.S. first learns that other states have ratified only after the internal ratification procedures have been completed. Typically, little or no information is received by the U.S. about the internal ratification processes of other States, except such statements as may be communicated in the ratification instrument itself.

Second, we could not successfully insist that other nations are required to monitor and respond to statements at ratification hearings in the U.S. Senate. Like the U.S., other states do not regard themselves obliged to follow our domestic activities. They rely upon the written instruments and other formal communications as the proper means for conveying the views of the United States on the meaning of treaties. To the extent we might be successful in pressing the view that statements at our own ratification hearings can be used as evidence of a treaty's meaning, we would be forced to accept a comparable obligation with respect to the proceedings of other states, based upon the principle that rules of treaty interpretation are equally binding upon all states. 69/

Third, statements contained in ratification proceedings will vary in the authority to which they are entitled to be viewed, and each nation will have its own sets of values in this regard. The importance which the Senate as a whole attaches to particular statements will also vary, and will often be speculative. The ultimate question -- whether the Senate as a whole would have insisted upon a meaning given in particular testimony on a particular issue -- will generally be impossible to know.

These considerations are particularly apparent in the specific case of the ABM Treaty proceedings. The question of future systems was not a major issue of debate, compared to the many other questions of interpretation and substance that occupied the attention of Senators and Executive Branch witnesses. The materials which had the highest level of formality and authoritative character, namely the President's transmittal package, the Committee reports, and the resolution of ratification itself make clear only that the deployment of OPP devices is prohibited. The testimony of Secretary Rogers and chief negotiator Smith was to the same effect. And, in response to specific questions on whether the Treaty permits development of laser ABM systems, Ambassador Smith replied in the affirmative without qualification. Only during the questioning of other Executive Branch witnesses, none of whom was a negotiator, and in two statements made on the Senate floor, is material found which supports the narrow interpretation with varying degrees of clarity. The most authoritative such statement, moreover, was submitted later for the Committee record, and at least one other such statement emerged through the editing of transcripts. 70/

The suggestion has been made that the statements by U.S. officials at the ABM ratification hearings constituted a form of communication to the Soviet Union because a Soviet official was evidently in attendance, at least at times. 71/ This suggestion is untenable as a matter of legal practice. As discussed above, the ABM ratification record contains inconsistencies and ambiguities and such a rule would have implications with respect to the many other issues discussed in the ratification proceedings. Doubts would be created as to what message on each issue is authoritative, and the Soviet Union could attempt to rely on the versions most favorable to its interests. The U.S. would be prejudiced by such a practice, especially in its dealings with the Soviet Union and other states that have no legislative ratification process, or none that is open and observable. Such governments might well argue that the U.S. is estopped to deny statements made during U.S. ratification proceedings, but we would be unable to cite such unilateral internal proceedings in disputes with them.

In any event, the suggestion that such "communications" can have legal effect with respect to the Soviet Union has been flatly rejected by Soviet officials. During bilateral discussions in 1981, the U.S. participant referred to a statement relating to the interpretation of the ABM Treaty made by Ambassador Smith, on a different point than OPP systems, to the Senate during the ratification hearings. The U.S. delegate noted that the Soviets had never objected to Ambassador Smith's interpretation. The Soviet participant replied that Smith's statement was an internal matter and that the sides were bound by the letter of the agreement and not by one side's interpretation. 72/

Mr. Graybeal, an ABM negotiator, commented on the matter of unilateral U.S. interpretations on September 25, 1979, during an SFRC hearing on SALT I compliance:

> What about Soviet compliance with the agreement "as presented to Congress"?
>
> The language of the agreement, the agreed statements and the common understandings reflect what could be negotiated and what is binding on the two parties.
>
> Presentations to Congress can help explain the language and how it was derived, but they should not change the meaning of the language or the scope of the provisions of the agreement. 73/

This problem would be compounded, moreover, whenever such proceedings include classified material unavailable to a foreign party that may be significant in the overall assessment of what the Senate understood the treaty to mean. No foreign representative could have any assurance of having received, under these circumstances, a complete understanding of the proceedings.

For these reasons, the evidentiary value of ratification proceedings must be judged, in the context of determining international obligations, by reference to the degree to which their substance is formally communicated to the foreign government in question, and the manner in which the foreign government responds. The ABM Treaty ratification process contains no formally adopted or communicated condition, reservation, or understanding on the questions at issue.

B. Effect on Domestic Obligations

The President is charged under the Constitution with the authority and responsibility to implement treaties with foreign powers, and in doing so he has broad latitude in interpreting the meaning of treaty provisions. 74/ In particular, the President has authority to negotiate and resolve treaty interpretation questions with foreign parties to a treaty, a process that has been carried out with respect to the ABM Treaty through the bilateral Standing Consultative Commission, as well as in other diplomatic channels. 75/ The President's judgments on the meaning of treaties, and those of other Executive Branch officials charged with such duties, are routinely accorded "great weight." The Supreme Court has made clear that the President also has authority, in proper circumstances, to change an interpretation of a treaty, just as the Executive Branch is empowered to change its view of a law, and courts have deferred to the current interpretation in such cases, provided it is consistent with the intent of the parties. 76/

Nonetheless, the President is required, under the Constitution, to abide by valid conditions adopted by the Senate during the advice-and-consent procedure, or by the Congress pursuant to subsequent legislation. In effect, he is subject, domestically, to the same range of constraints with which the Senate is able to determine or influence the nation's international obligations. He must also give appropriate weight to any understanding as to the meaning of treaties that is clearly expressed in the course of their adoption.

1. Interpretations contained in instruments with binding force under U.S. law

Congress as a whole may bind the President as a matter of domestic law to a particular treaty interpretation by its incorporation into an appropriate statutory vehicle. One historical example of such a practice was the adoption in the Panama Canal Act of 1912 of a provision authorizing the President to exempt certain U.S. vessels from canal tolls, 77/ thus writing into U.S. law -- at Executive Branch request -- a particular interpretation of the 1901 Hay-Pauncefote Treaty with the U.K. 78/ Such situations are common, since treaty provisions must often be implemented in the U.S. by domestic legislation, based upon assumptions about how the treaty is to be interpreted. 79/ Indeed, Congress may enact

legislation inconsistent with U.S. obligations under a treaty, in which case the President is bound to carry out the later-enacted statute. 80/

The Treaty of 1901 provides an interesting precedent, because it involved a "reinterpretation" by the President. In December 1911, President Taft expressed the view that, since the U.S. had built the Canal, it had the power to exempt its own vessels from tolls, and Congress accepted that view. When President Wilson was elected, however, he asked Congress to repeal the statute, because the act was "in plain contravention of the treaty." Congress agreed, in part upon the basis of the negotiating history, 81/ and the reinterpretation became law. A statute was plainly necessary in that instance to undo what an earlier statute had established.

The President is generally bound under the U.S. Constitutional system to implement any interpretation of a treaty contained in the Senate's resolution of ratification as a condition on its advice and consent, however stated, provided that he proceeds with ratification. The binding character, under U.S. law, of such formal conditions is reiterated by the Restatement, 82/ by decisions of U.S. courts, 83/ and by the statements and practice of the Executive Branch and the Senate. 84/

For example, in the case of the SALT II Treaty, the Senate Foreign Relations Committee recommended that the Senate rely squarely on its power to direct the President to comply with conditions that were not even intended to be communicated to the Soviets. As indicated above, the Committee's proposed resolution of ratification included three different categories of conditions: the first for those conditions to which the President was required to obtain explicit Soviet agreement; the second for conditions which the President was required to communicate formally to the Soviets but as to which Soviet agreement was not required; and the third for "provisions that do not directly involve formal notice to or agreement by the Soviet Union."

The Committee Report recognized that these categories would have differing effects on the obligations of the Soviet Union; but the Committee specifically intended that the President be bound with respect to all three categories:

> All such conditions or qualifications to advice and consent would be equally binding upon the President in accordance with their terms, regardless of the category in which they appear in the

> resolution. The difference in category would be a function of the desired involvement of the Soviet Union, as determined by the purpose of the proposal. But insofar as the U.S. President is concerned, he could not bring the Treaty into force without accepting the terms of each condition in the resolution regardless of category. Failure by the President to agree to, observe and implement any of these conditions would violate the basis upon which the Committee recommends that the Senate give its advice and consent to the Treaty. 85/

To ensure that its intentions in this regard would be respected by the Executive Branch, the Committee sought and received assurance from Secretary of State Vance that the President would proceed on the understanding that the provisions in each category would be equally binding on the President. 86/ These procedures would have represented the most definitive action to date by the Senate through the advice-and-consent process to bind the President expressly even where the other treaty party might not be bound.

The Montreal Aviation Protocols 3 and 4 87/ provide another illustration. These protocols amended the Warsaw Convention of 1929 to modernize the rules applicable to international air carriage of passengers, baggage, and cargo. They raised the liability limits of carriers, without proof of fault, and generally promoted speedier settlements and more efficient handling. The SFRC supported ratification, but wanted to insist upon a satisfactory supplemental compensation plan for accident victims, failing which the Protocols would be denounced; and the Executive branch was also to continue actively to negotiate for higher limits on liability for carriers. The SFRC recognized that incorporation into the resolution of ratification of these "provisos" would have no international effect, but recommended their adoption for the purpose of binding the President:

> These three conditions were adopted by the Committee as "provisos" rather than as "reservations" or "understandings", as such, because they are matters between the Senate and the President and need not appear as provisions of the U.S. instruments of ratification. Nevertheless, if adopted by the Senate, they would have the same force and effect as any other condition included by the Senate -- whatever its designation. In short, the President can proceed to ratify the Protocols only by accepting the conditions placed upon U.S. ratification by the Senate. 88/

We are not here considering the legality of particular Senate efforts to bind the President to conditions having no international effect. The point here is to describe Senate practice as it relates to such efforts.

2. Expressed intentions and interpretations not incorporated into instruments with binding force under U.S. law

Less authoritative expressions of the Senate's intent than expressions in the resolution of ratification may be entitled under some circumstances to substantial weight, notwithstanding the possibility of their resulting in domestic obligations inconsistent with U.S. international obligations. Section 314 of the Restatement states that "[w]hen the Senate gives its advice and consent to a treaty on the basis of a particular understanding of its meaning, the President, if he makes the treaty, must do so on the basis of the Senate's understanding."89/

Two views have been expressed as to the proper use of such ratification materials in the interpretation of a treaty. One view holds that there is a significant difference between the legislative record of domestic statutes, on the one hand, and the ratification record of treaties, on the other. The Department of Justice, Office of Legal Counsel, has provided the following statement of this view, drawn from its memorandum at Appendix B:

> In determining the weight to be assigned to that record, it should be observed that, conceptually, the constitutional division of treaty-making responsibility is essentially the reverse of the division of law-making authority. Congress initially agrees upon and enacts the language of domestic legislation, while the President reserves the right to determine whether that legislation will go into effect (subject, of course, to the override of any veto). Treaties, however, are proposed and negotiated by the President, subject to the approval or disapproval of the Senate. Given this conceptual framework, it is clear that the portions of the treaty ratification record that should be accorded more weight as to the treaty's meaning are the representations of the executive -- the draftsman, in effect, of the treaty. Statements by individual senators, or even groups of senators, are certainly entitled to no more consideration -- and perhaps less -- than the limited weight such statements are given in the

interpretation of domestic legislation when they are not confirmed by the legislation's sponsor in colloquy or otherwise.

The Justice Department analysis gives the following further explanation of the weight to be accorded to Executive Branch statements under various circumstances:

> The weight to be given to an interpretive statement made by an executive branch official to the Senate during the ratification process will likely depend upon such factors as the formality of the statement, the identity and position of the executive branch official making the statement, the level of attention and interest focused on the meaning of the relevant treaty provision, and the consistency with which members of the executive branch adhered at the time to the view of the treaty provision reflected in the statement. All of these factors affect the degree to which the Senate could reasonably have relied upon the statement and, in turn, the weight that courts will attach to it. At one extreme, a single statement made by a middle-level executive branch official in response to a question at a hearing would not be regarded as definitive. Rather, in interpreting the domestic effect of a treaty, the courts would likely accord such a statement in the ratification record a degree of significance subordinate to more direct evidence of the mutual intent of the parties, such as the language and context of the treaty, diplomatic exchanges between the President and the other treaty parties, the negotiating record, and the practical construction of the provision reflected in the parties' course of dealings under the treaty. Moreover, courts often give substantial weight to the executive branch's current interpretation of the treaty, in recognition of the President's unique role in shaping foreign policy and communicating with foreign governments, and, accordingly, would be unlikely to bind future chief executives on the basis of an isolated remark of an executive branch official in a previous administration. In general, therefore, less formal statements made by the executive branch before the Senate (such as the one described in the preceding hypothetical) will be but one source of relevant evidence to be considered in interpreting an ambiguous treaty provision.

A second view is that the ratification record of a treaty has generally the same function and effect, for purposes of U.S. domestic law, as the legislative record of a statute, and should be analyzed in much the same way. Under this view, Congressional reports, debates and other forms of legislative history may be determinative in the interpretation of laws, depending on their relevance, clarity and other factors. Similarly, the Senate's reports, debates and other forms of ratification history may have substantial weight in the interpretation of a treaty, depending on their relevance, clarity and other considerations, including the Executive Branch's interpretation.

The official commentary to Section 314 of the Restatement states in part that:

> A treaty ratified (or acceded to) by the United States with a statement of understanding becomes effective in domestic law (§131) subject to that understanding. If no such statement is made, indication in the record that the Senate ascribed a particular meaning to the treaty is relevant to the interpretation of the treaty by a United States court in much the same way that the legislative history of a statute is relevant to its interpretation. . . .
>
> Although the Senate's resolution of consent may contain no statement of understanding, there may be such statements in the report of the Senate Foreign Relations Committee or in the Senate debates. In such case, the President must decide whether they represent a general understanding by the Senate, and if he finds that they do, must respect them in good faith. 90/

Similarly, as noted above, the 1977 Senate Foreign Relations Committee Staff Memorandum, The Role of the Senate in Treaty Ratification, states that Committee reports and floor statements "have value to the Executive and Judicial Branches in interpreting the intent of the Senate" and "serve as legislative history in the event questions should arise over the meaning of a treaty." 91/

The principles applied in evaluating legislative history are reasonably well established. The General Accounting Office's 1982 study entitled Principles of Federal Appropriations Law provides the following guidance:

> A fundamental principle basic to the interpretation of both Federal and State laws is that all statutes are to be construed so as to give effect to the intent of the legislature. . . . The legislative history may be examined as an aid in determining the intention of the lawmakers when the statute is not clear . . . , or when application of the statutory language would produce an absurd or unreasonable result . . . , or if the legislative history provides "persuasive evidence" of what Congress intended. 92/

The GAO study also suggests a rough ranking in importance of different forms of legislative history in determining legislative intent, which is generally consistent with that adopted by U.S. courts in interpreting U.S. statutes. 93/ Committee reports are generally the most persuasive indicia of Congressional intent. 94/ Statements of individual legislators are accorded a less authoritative status, 95/ with those of floor managers and sponsors being relatively more important than those of other legislators. 96/ In connection with treaties, the transmittal documents and the testimony of negotiators during ratification proceedings are given particular weight, and statements of Executive officers may in general be accorded more weight than those of individual legislators. 97/

The Supreme Court has imposed a strict standard of proof, however, for deriving from legislative history an intention to limit the Executive discretion to interpret specific provisions of a statute. The Court recognized, in Japan Whaling Association v. American Cetacean Society, 98/ the principle that the President and his officers "may not act contrary to the will of Congress when exercised within the bounds of the Constitution." 99/ But the "will of Congress" is carefully determined, with a discriminating evaluation of the legislative record, and a search for evidence that Congress intended to preclude the result reached by the Executive by speaking "directly . . . to the precise issue in question." 100/ "Furthermore, if a statute is silent or ambiguous with respect to the question at issue," the Court defers to the construction of the Executive department entrusted with the matter, "unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress." 101/

In the Japan Whaling Association case, the Supreme Court considered whether the Secretary of Commerce possessed any discretion to fail to certify that the taking of whales by a