**Is Honesty Still the Best Policy: Considering Legal Options for Missile Defense and the Antiballistic Missile Treaty**

_Hillary A. Smith*

---

**TABLE OF CONTENTS**

I. **INTRODUCTION** ........................................... 200

II. **THE ANTIBALLISTIC MISSILE TREATY** ......................... 202
   A. Historical Basis for the ABM Treaty .......................... 202
   B. Violation or Breach of the ABM Treaty ........................ 204
      1. The ABM Treaty—Breach by an Earlier Action ............ 205
      2. The ABM Treaty—Null and Void ............................ 205
         a. The Dissolution of the U.S.S.R. ....................... 206
         b. End of MAD, Soviet Nuclear Threat ................. 208
   C. Amendment of the ABM Treaty .................................. 210
      1. Prior Successful Amendment as Precedent ............... 210
      2. Arms Limitation Structure Permits Amendment .......... 212
   D. Withdrawal from the ABM Treaty ............................. 213

III. **POSSIBLE RESPONSES TO UNITED STATES MISSILE DEFENSE** .... 215
   A. Forceful Response ............................................ 215
      1. Self-Defense ............................................. 216
      2. Reprisal .................................................. 218
   B. Potential International Court of Justice Action .......... 219
   C. International Backlash ...................................... 220

IV. **CONCLUSION** .............................................. 222

---

* J.D. 2003, University of Georgia School of Law; B.A. 2000, Agricultural Economics, University of Georgia.
I. INTRODUCTION

I am going to ask my friend to envision a world in which a terrorist thug and/or a host nation might have the ability to develop—and deliver a weapon of mass destruction via a—via [sic] a rocket . . . At the very least, it should be in our nation’s advantage to determine whether we can shoot it down. And we are restricted from doing that because of an ABM treaty that was signed during a totally different era. The case cannot be even—the case is more strong today than it was on September 10th that the ABM is outmoded, outdated and reflects a different time.¹

It is clear from the words of the president of the United States, George W. Bush, as he addressed the nation and the world on October 11, 2001, that the United States intends to—at the very least—develop and test a missile defense shield. This shield, if deployed, would protect all of the United States from the threat of incoming nuclear weapons.²

The world is an entirely different place since the terrorist attacks on September 11, 2001 with a renewed threat from rogue nations and groups. The state of missile defense is also different—it is now on an accelerated, deliberate and well-defined course of action.³ Missile defense is not a new idea. What is new, however, is the current Bush administration’s intensified push for not only the development but also the deployment of a missile defense shield that would protect all of the United States.⁴ This invigorated attempt is spurred on by the terrorist attacks on the World Trade Center in New York City and on the Pentagon in Northern Virginia.⁵ Even political foes of

⁴ Bill Gertz, Rumsfeld orders tests limited to comply with ABM Treaty, WASH. TIMES, Oct. 26, 2001, available at 2001 WL 4165141 (noting that the Bush administration’s policy on missile defense diverged sharply from the policy of the Clinton administration, who opposed a missile defense system in order to preserve the ABM Treaty).
⁵ President Bush, supra note 1 (stating that “the world faces a different threat after September 11, 2001”).
President Bush, who had previously opposed missile defense, seem to be reconsidering their position in light of these terrorist attacks. This dramatic push for a national missile defense system creates a new and urgent need to reexamine the ABM Treaty and United States missile defense.

The dilemma that has enveloped the missile defense issue arises from the ABM Treaty of 1972. This Treaty specifically prohibits the deployment of any missile defense system. How to amend, interpret or withdraw from the Treaty is the subject of great debate between the president, Congress and the world. Now, the debate is much more focused—the Bush administration has said it will end the Treaty if no settlement can be reached in order to develop and deploy a missile defense shield over the United States irregardless of its effectiveness against the type of terrorism that occurred on September 11, 2001. As the world waits to see what the next phase will be in the United States’ war on terrorism, the world is left to ponder how a post-ABM Treaty world will function.

This Note will, in light of current missile defense efforts, consider the available options for ending the United States’ commitment to the Treaty: breach, amendment or withdrawal. The author will attempt to determine which option for dealing with the Treaty is preferred through the consideration of potential responses the United States should expect from each of its proposed actions. The Note will analyze self defense and reprisal, possible responses from the International Court of Justice, and the potential repercussions in the international arena in considering the recommended course of action for the United States.

6 See id. (pointing out that Senator Levin (D-Michigan, Chairman of the Armed Services Committee) has recently dropped legal provisions curbing missile defense development in light of the September 11th attacks), and compare with Richard Norton-Taylor article, infra note 57, at 59 (highlighting strong Democratic opposition to the Bush administration’s missile defense proposal).


II. THE ANTIBALLISTIC MISSILE TREATY

Signed May 26, 1972 as part of the Strategic Arms Limitation Talks (SALT), the Antiballistic Missile (ABM) Treaty has shaped three decades of United States defense and international arms policy. The 1964 SALT process formally began in November 1969 after President Johnson proposed freezing strategic offensive and defensive weapons. The result of the SALT I process was the ABM Treaty and the Interim Agreement on strategic offensive arms. To understand the contemporary fury surrounding the seemingly certain U.S. withdrawal, breach or amendment of the Treaty, it is critical to understand the basis for the Treaty.

A. Historical Basis for the ABM Treaty

The Treaty, signed during the height of the Cold War, focused on reducing the number of nuclear weapons in the United States and the Soviet Arsenal. The Treaty is based on the doctrine of Mutual Assured Destruction (MAD). Behind MAD was the idea that if either nation attacked the other, the attacking nation would be doomed because of certain retaliation. While both nations maintained the ability to counter an attack, neither had the power to counter a counter-attack. Thus, according to the theory of MAD, neither country would start a nuclear war that ensured their destruction.

MAD, as the cornerstone of the ABM Treaty, was thought to ensure protection for both superpowers. MAD would lose its effectiveness, however, if either nation had the ability to defend against an incoming missile strike. Moreover, if the Soviets were aware of the United States’ ability to

---

11 ABM Treaty, supra note 7; see also infra notes 76-77 and accompanying text.
15 Id.
16 Id. (“The key, though, was that each side had to be able to retain a sufficient retaliatory capacity to destroy the other side in the event of a preemptive first strike. If both sides retained such a capability, neither side had an incentive to attempt a first strike.”); see also Ivan Eland, Abrogation of the ABM Treaty, 4 NEXUS 59 (1999).
17 Kinsel, supra note 14.
18 See Eland, supra note 16, at 59 (“But if the United States built a defensive ABM system,
thwart an attack, they would develop offensive missile forces that could penetrate the United States' missile defense system. This never-ending, dangerous and expensive cycle was the reason the ABM Treaty was created and signed by the two nuclear Superpowers of the Cold War, as "the ABM Treaty was originally adopted to enhance nuclear stability."20

The ABM Treaty specifically states that "[e]ach party undertakes not to develop, test or deploy ABM systems or components which are sea-based, air-based or mobile land-based."21 Article III did allow each country to deploy one ABM system within 150 kilometers of their capital city and one other system; but neither system could protect the entire nation.22

The Missile defense proposal of the George W. Bush administration seems to violate the terms of the ABM Treaty.23 For much of the last twenty years, political and defense leaders have searched for ways to creatively interpret or maneuver around the ABM Treaty; this is no longer the case as the current Bush administration ended the ABM Treaty to pursue Missile defense.24

In light of an assured deployment of missile defense, as proposed by the Bush Department of Defense, the author will attempt to analyze the options for dealing with the ABM Treaty: violation or breach, withdrawal, or amendment. The author will not attempt to determine whether the president or Congress has the constitutional authority to make or prevent such a decision.

---

19 Id.

20 Id. at 61 (quoting Dr. Henry Kissinger on his understanding and reasoning of the ABM Treaty).

21 ABM Treaty, supra note 7, art. V § 1.

22 See Eland, supra note 16, at 61. This provision was later amended in 1974 to allow each nation to deploy only one ABM system, still limited by the restriction of the site not protecting the entire country or containing more than 100 missile interceptors and warheads. See also id., art. 3.


24 White House Press Secretary Ari Fleischer, Briefing Reporters at the White House (Aug. 3, 2001) (transcript available at 2001 WL 21896815). "He (the President) is prepared to move beyond the ABM Treaty, because it is the responsibility of the President to protect the American people ... ."; see also Barry Schweid, US Quits Treaty in Favor of Missile Defense, HARRISBURG PATRIOT, Dec. 14, 2001, at A05, available at 2001 WL 31857904.
B. Violation or Breach of the ABM Treaty

A treaty is a contract between nations.\(^{25}\) Even though treaties are not specifically governed by private contract law, contract custom still applies requiring that parties are to act in good faith.\(^ {26}\) The subject of good faith is a cornerstone of international law such that all countries and parties to treaties are expected to uphold this basic principle.\(^ {27}\) Good faith adherence to the terms of agreement has long plagued the ABM Treaty as every U.S. administration has tried to creatively interpret the Treaty rather than adhere strictly to the Treaty’s terms.\(^ {28}\)

The current situation of impending ABM Treaty violation is quite similar to the situation of the suspected Soviet “breakout” in the early 1980’s—a technological advancement in weaponry and the subsequent deployment of that weaponry will violate the terms of the Treaty.\(^ {29}\) To proceed with the current proposal without giving notice of withdrawal is ‘breaking out’ of the Treaty and is the equivalent of a breach of contract or a violation of the terms of agreement.\(^ {30}\) Legally this is a possibility and could be considered an option that is preferable to withdrawing from the Treaty.\(^ {31}\) It may be that the United


\(^ {26}\) See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 8 I.L.M. 679, 690 (highlighting the duty to carry out a treaty in good faith; the United States is not a party to the Vienna Convention) [hereinafter Vienna Convention].

\(^ {27}\) See Tariq Hassan, Good Faith in Treaty Formation, 21 VA. J. INT’L L. 443 (1981) (pointing out that good faith is an overriding principle of international law; see also U.N. CHARTER art. 2, para. 2 (imposing a duty of good faith on the part of member nations; nations have an obligation to “fulfill in good faith the obligations assumed by them”)).

\(^ {28}\) Grogan, supra note 13, at 867-68. The United States first brought good faith into interpretation of the Treaty in 1983 when the Soviets were suspected of not adhering to the Treaty in good faith; the U.S.S.R. was thought to be preparing to “breakout” of the Treaty by installing Krasnoyarsk radar in Siberia. After the Reagan administration proposed the Star Wars program, the U.S.S.R. objected to the reinterpretation of the Treaty by the administration to “allow for” the continuation of the Star Wars proposal. Id.

\(^ {29}\) Id.

\(^ {30}\) ABM Treaty, supra note 7, art. XV (allowing each nation the option for withdrawing from the Treaty by giving six months notice to the other party if extraordinary events have jeopardized the supreme interests of the withdrawing nation).

\(^ {31}\) Ballistic Missile Defense Organization, The ABM Treaty and the President’s Decision Not to Deploy NMD, Department of Defense Electronic Library, at http://www.defenselink.mil/specials/missiledefense/history4.html (last visited Sept. 9, 2002) (noting that the Russian response to an amendment or withdrawal from the ABM Treaty would be to scrap the entire arms control structure, as the Russians view the ABM Treaty as the cornerstone agreement for the
States can breach the Treaty and attempt to defend its actions by asserting that the Treaty contract was 1) breached by earlier actions or 2) null and void.

1. The ABM Treaty—Breached by an Earlier Action

In response to a United States breach of the ABM Treaty, a possible defense may be that the Treaty was breached by earlier actions. The radar system built by the U.S.S.R. in 1983 (Krasnoyarsk) may have breached the Treaty and thus ended its life. Proving material breach is difficult, however, absent blatant rejection of the terms of the contract. Furthermore, it is unlikely that an act of the now defunct government of the U.S.S.R. some eighteen years earlier would justify a current United States breach of the ABM Treaty. To give legitimacy to a breach by the United States in the international community, there would need to be an in independent action of one of the Soviet successor states providing justification. Because no recent action of the Russian government has breached the ABM Treaty, it is not probable that the United States government could adequately justify a breach of the ABM Treaty by pointing only to an earlier, potential Soviet breach in 1983.

2. The ABM Treaty—Null and Void

A second option available to the United States government in pursuing missile defense in breach of the ABM Treaty is to justify these actions by

---

33 See Restatement (First) of the Law of Contracts §275 (1932) (listing six factors that contribute to a finding of material breach); see also ROBERT A. SUMMERS & ROBERT A. HILLMAN, CONTRACT & RELATED OBLIGATION: THEORY, DOCTRINE & PRACTICE 839 (3d ed. 1997) (noting there is no single touchstone of material breach, that many factors are involved and that material breach is hard to prove).
34 See Gross, supra note 32, at 31 (stating that the Soviet action of building a radar system to track missiles was not enough to justify a potential United States breach of the ABM Treaty in 1987 and so the 1983 Soviet action would not justify a current breach).
35 Id. at 31.
asserting that the ABM Treaty is null and void due to a change in circumstance. Treaties are contracts in international law. Contracts become null and void when the circumstances underlying the contract change completely. Within the idea that a change in circumstance releases the United States government from the ABM Treaty of 1972, there are two possibilities for finding a change in circumstance so drastic that a breach of the Treaty by the United States is allowable: the dissolution of the U.S.S.R. into states, or the end of MAD (the underlying premise of the Treaty) with the end of Soviet nuclear threats.

a. The Dissolution of the U.S.S.R.

On Christmas Day 1991, the Soviet Union ended. Fifteen independent states emerged to take the place of the U.S.S.R. In contract law, performance of a contract is impossible and the contract ends when a party to the contract disappears. The ABM Treaty had been an agreement between the United States and the Soviets—did it end when one of the parties ceased to exist?

International law does not recognize that a change in government alters a state's obligations under treaty commitments, but this was more than a change in government within a state; rather, fifteen completely new states emerged. The previous Bush administration undertook a review of all treaties with the U.S.S.R. to see which should be upheld and the Clinton administration followed with a Memorandum of Understanding (MOU). This review

37 Yoo, supra note 25.
38 See infra note 41.
40 Yoo, supra note 25, at 903.
41 See Taylor v. Caldwell, 122 Eng. Rep. 309 (Q.B. 1863) ("In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.").
42 See Yoo, supra note 25, at 904.
and MOU are direct evidence of earlier recognition of the new states that emerged from the break-up of the U.S.S.R. and therefore render present assertion of the Treaty as null and void more difficult to accept. Nevertheless, within international law, the "clean slate" theory serves to free new states from the agreements made by their predecessors. This theory, if recognized as law, would not bind the new states by the treaties of the former U.S.S.R.—thus making the ABM Treaty void.

The fact that the four new states that have possession of the nuclear arsenal of the former Soviet Republic (Russia, Belarus, Kazakhstan and Ukraine) have expressly assumed the responsibility of the ABM Treaty is likely to prevent a justified United States breach of the Treaty. In the international community, it is accepted that the new states, Russia especially, intend to be bound by the ABM Treaty. Another factor that points toward the continuation of the ABM Treaty is Article 34 of the Vienna Convention, which maintains the obligations of treaties entered into by a prior State unless the other parties agree to release the new states, or if the continued application of the treaty would be incompatible with the objective of the conditions of the treaty. The United States did not release the four states of the former Soviet Republic that now have the nuclear arsenal; in contrast, the MOU of the Clinton administration specifi-

45 See Yoo, supra note 25, at 905-06 (noting that the clean slate theory exists in the Restatement (Third) of Foreign Relations Law of the United States and within Article 16 of the Vienna Convention, but that the United States is not a party to the Vienna Convention and that the Restatement is not an authoritative statement on international law).

46 Vienna Convention, supra note 26 (providing in Article 24 that if the parties agree, expressly or by conduct, to continue a bilateral treaty, than an exception is made to the general rule that prevents continuation of a treaty by a new state); see also Yoo, supra note 25, at 905 (stating that there is an exception to the clean slate rule in the Restatement (Third) of Foreign Relations Law of the United States that allows a treaty to continue to bind a new state if the new state accepts the terms of the treaty. This is also an exception to the Vienna Convention).

47 See John Issacs, Talking Points on the Case Against the ABM Treaty, 4 NEXUS 93 (1999).

Russia explicitly assumed the treaty obligations of the former Soviet Union. On January 29, 1992, shortly after the dissolution of the former Soviet Union, Russian President Boris Yeltsin said, Russia regards itself as the legal successor to the USSR in the field of responsibility for fulfilling international obligations. We confirm all obligations under bilateral and multilateral agreements in the field of arms limitations and disarmament which were signed by the Soviet Union and are in effect at present.

Id.

48 Vienna Convention, supra note 26, art. 34.
cally recognized the continuation of the ABM Treaty. Prior acts of inclusion, combined with no specific act of termination, are likely to keep the ABM Treaty in continued existence. The Treaty is not null and void due to the dissolution of the Soviet Republic since recognition by the United States and new post-Soviet states have substantiated its continued existence since 1991.

b. End of MAD, Soviet Nuclear Threat

It is well established that the purpose of the ABM Treaty was to stabilize nuclear relations between the United States and the U.S.S.R. President Nixon undertook the SALT process to slow the nuclear arms race, and the ABM Treaty was developed for that purpose. Furthermore, the ABM Treaty codified MAD. If treaties are contracts between nations, then when the purpose of the contract is completely frustrated does the treaty cease to exist? It is clear that MAD was the foundation of the ABM Treaty, the purpose of which was to stabilize relations by preventing nuclear missile stockpiling along with a possible nuclear attack; neither party contemplated extinguishing either their own nation or that of the other party. Although MAD is no longer viable and an event—the end of the U.S.S.R.—has prevented specific performance of the Treaty, the purpose of the Treaty remains intact. It is still possible to prevent nuclear attack between the United States and the former Soviet Republics and maintain a stable, secure nuclear situation as a continuing goal of all the nations involved. Stable nuclear relations, as sought by President Nixon at the outset of the ABM Treaty, remains the purpose. Thus, complete frustration of purpose has not occurred due to a change in the circumstance of the status of either nation's nuclear ability.

49 Memorandum of Understanding, supra note 44.
50 See Eland, supra note 16 (quoting Dr. Kissenger's thoughts concerning the ABM Treaty).
51 See Missile Defense Milestones, infra note 87.
52 Grogan, supra note 13, at 806.
53 Krell v. Henry, 2 K.B. 740 (K.B. 1903) (outlining the frustration of purpose doctrine by considering the foundation of the contract, prevention of performance and whether the event that prevented performance was in contemplation of the parties—contemplation would prevent frustration of purpose).
54 See Baucom, supra note 39.
56 See Carla Ann Robbins & Andrew Higgins, Bush Plans How to Exit the ABM Treaty, WALL ST. J., Oct. 19, 2001, at A16 (noting that Russia and United States are considering large cuts in the numbers of offensive weapons kept by both nations in ongoing arms talks).
The missile defense plan proposed by the current Bush administration is touted as protection against rogue nations and terrorist groups. This new threat is a significant change in circumstance—from the communist U.S.S.R. to rogue nations. In a summer 2001 briefing, Deputy Secretary of Defense Wolfowitz outlined how drastically different the world is today as compared with 1972. The Bush administration has repeatedly pointed to North Korea, Iran, and Iraq as examples of nations that pose the greatest threat and, therefore, justification for the deployment of a missile defense shield.

The purpose of the ABM Treaty, stabilizing nuclear relations, does not appear to be consistent with this new outlined threat in that, as opposed to the situation with the U.S.S.R., here the Administration is not seeking arms limitations talks with rogue nations, rather they are simply seeking to protect the American nation. However real and justified this 21st century threat may be in light of the September 11, 2001 terrorist attacks, it is outside the existing relationship with the former Soviet Republics. While this new threat may justify separate action and defense, it does not frustrate the purpose of stabilizing nuclear relations with Russia. This drastic change in circumstance, due to the emergence of new enemies of the United States may justify withdrawal from the Treaty to protect United States safety. However, the purpose of stabilizing nuclear relations with Russia is still a cornerstone of United States policy.

57 Richard Norton-Taylor, The MADness of President George: The Bush administration's decision to abandon the Anti-Ballistic Missile Treaty has put the British government in a difficult position, GUARDIAN (Washington, D.C.), Aug. 1, 2001, available at 2001 WL 25731914 (quoting President Bush's address at the National Defense University by noting that the proliferation of ballistic missile technology is "in the hands of states for whom terror and blackmail are a way of life").

58 See Wolfowitz, supra note 23 (stating specifically that in 1972 the number of biological weapons programs was unknown, whereas today there are thirteen; ten countries had chemical weapons programs, and today there are sixteen; five countries had nuclear weapons programs, while today there are twelve; nine countries had ballistic missiles, and today there are twenty-eight).

59 See id.

60 See Robbins & Higgins, supra note 56 (realizing this is significantly different from the relationship with the U.S.S.R. and now Russia where arms limitations talks continue to be common).

61 Presidents Putin and Bush, News Conference at the Asia Pacific Economic Cooperation Leader's Summit in Shanghai, China (Oct. 21, 2001) (transcript at http://msnbc.com/news/645662.asp) (giving evidence of continued United States-Russian arms negotiations—quoting Putin, "[W]e affirmed our mutual intention to reduce strategic offensive weapons," and quoting Bush, "[B]oth our nations are working to prevent proliferation and to reduce the threat from..."
C. Amendment of the ABM Treaty

As written, the terms of the ABM Treaty make clear that amendment is possible. An amendment that would allow the proposed missile defense program to proceed would drastically alter the Treaty since the aim of the Treaty was to prevent construction of antiballistic missile defense systems in an effort to stabilize the arms race. Nonetheless, while it may seem radical, this type of amendment is an option for the Bush administration to consider for two reasons: 1) precedent shows that the Treaty has been successfully amended to accommodate drastic changes, and 2) the ABM Treaty is just a part of an overlapping arms limitation structure that is subject to continual amendment and revision.

1. Prior Successful Amendment as Precedent

Historically speaking, amending the ABM Treaty is not an impossibility as it has been done twice. These two previous amendments serve as a backdrop for a potential amendment to allow for the construction of a missile defense system. This amendment, however, would be more extreme than the previous amendments.

In 1974, just two years after signatures were affixed, the ABM Treaty was amended. While this amendment did not change the purpose of the Treaty, the amendment decreased the number of defense sites each country was allowed to maintain, thus making a significant change. With this change, the United States protected the missile defense site at Grand Forks, North Dakota, and the U.S.S.R. protected their capital at Moscow.

The second amendment to the ABM Treaty happened more recently. When the Soviet Union disbanded in late 1991, the Treaty was amended to allow for Cold War stockpiles throughout the former Soviet Union.

62 ABM Treaty, supra note 7 art. XIV(1) ("Each Party may propose amendments to this Treaty. Agreed amendments shall enter into force in accordance with the procedures governing the entry into force of this Treaty.").


64 Eland, supra note 16, at 61.

65 Id. (noting that the ABM Treaty was amended in 1974 to allow each nation one installation site containing local defenses; the Treaty originally allowed each nation two installation defense sites).

66 Id.

67 Baucom, supra note 39.
Russia (and other states) to succeed Soviet responsibility. This amendment is more drastic than the first, as the Treaty went from a bilateral agreement between the United States and the Soviet Union to a multilateral agreement that now includes five nations. Bilateral treaties are contracts between nations. Adding four states to replace the former Soviet Union changed the nature of the Treaty dramatically as it is now an agreement between the United States and four nations and among the other four nations themselves. Any possible amendment to allow the Bush missile defense system would be within the existing framework, but would change the Treaty's entire focus, which was the prevention of construction of missile defense systems to protect an entire country.

While there is a history of amending the ABM Treaty, this amendment is unlikely to occur. The Bush administration has stated that it intends to move beyond the Treaty and that simply amending the Treaty does not move beyond, but rather gives validity to the idea of maintaining the Treaty through the amendment process.

The recent summit between President Bush and President Putin suggests that negotiation is more likely than amendment. Speaking with President Putin at a news conference, President Bush announced drastic cuts in the United States nuclear arsenal. Even with this significant milestone in United States/Russian arms relations, no agreement was reached on missile defense due to striking differences as to how to make missile defense work in conjunction with the ABM Treaty. Treaty amendment seems highly unlikely

---

68 Eland, supra note 16, at 61 (pointing out that, “more recently the Treaty was renegotiated to reflect the demise of the Soviet Union”).

69 See George K. Walker, Source of International Law and the Restatement (Third), Foreign Relations Law of the United States 37 NAVAL. REV. 1, 16 (1988) (“A multilateral convention contemplates that more than two nations will be bound by its terms ... Bilateral treaties are, as the name implies, negotiated between only two nations and bind only those two nations.”). Id.

70 Eland, supra note 16, at 61-62 (pointing out that Russia, Ukraine, Belarus and Kazakhstan have now assumed the ABM obligations of the former U.S.S.R.).

71 Id. at 62 (noting that neither recognizing Russia or the four states as the ABM successor would preserve the full original purpose and substance of the Treaty).

72 Wolfowitz, supra note 23 (“[T]his administration does not intend to violate the ABM Treaty; we intend to move beyond it.”).

73 Jeanne Cummings & Carla Anne Robbins, Bush, Putin Pledge to Cut Nuclear Arms, but Divisions Remain Sharp, WALL ST. J., Nov. 14, 2001, at A24, available at 2001 WL-WSJ 29677882. Bush announced that the United States would reduce the United States nuclear stockpile by two-thirds, lowering the total number of long-range missile to between 1,700 and 2,200. Russia had earlier agreed to reduce their arms level to around 1,500 missiles. Id.

74 Laurence McQuillian & Bill Nichols, Bush- Putin talks highlight continuing differences;
as an agreement would be required before an amendment is possible. While both nations appear ready to negotiate, neither nation is ready to compromise and reach consensus.

2. Arms Limitation Structure Permits Amendment

The ABM Treaty was part of the SALT I process, so that on the day the Treaty was signed it was actually one of two agreements made official.\textsuperscript{75} The ABM Treaty is just one piece of the arms limitation puzzle;\textsuperscript{76} perhaps the most persuasive evidence of this is the existence of the SALT II process and subsequent agreements.\textsuperscript{77}

The Bush administration has repeatedly stated that the ABM Treaty is out of date, while maintaining that arms reductions talks between Russia and the United States are ongoing.\textsuperscript{78} Because the ABM Treaty is only one agreement among many that govern arms control, it may be possible to amend one treaty (the ABM Treaty) and not disrupt the entire balance of nuclear stability.

It is, however, unlikely that the United States will be able to amend the ABM Treaty to sufficiently accommodate the missile defense plan proposed by the Bush administration.\textsuperscript{79} Notably, the international community is strongly...
opposed to the idea of amending the Treaty in such a way that the entire purpose of the Treaty is circumvented.\textsuperscript{80} Earlier attempts to amend the ABM Treaty to allow for the Star Wars plan under the Reagan administration were not successful, and the same fate is likely for the current proposal.\textsuperscript{81} Amending the ABM Treaty may theoretically be possible as the Treaty is only a small piece of the arms control agreement process, but the amendment approach is not viewed as practical\textsuperscript{82} and is not well-received by anyone involved in the process, neither in the United States nor Russia.\textsuperscript{83}

\textit{D. Withdrawal from the ABM Treaty}

The ABM Treaty itself holds the most obvious method for moving beyond the terms of the Treaty—withdrawal. Article XV specifically allows for either country to withdraw unilaterally from the Treaty.\textsuperscript{84} All that is required for withdrawal is six months notice and an accompanying “statement that explains the extraordinary events that the notifying Party regards as having jeopardized

\textsuperscript{80} \textit{Id.} (noting that members of the international community including China, France and the United Nations, supported Russian opposition to Treaty amendment); \textit{see also} Pamela L. Meredith, \textit{Comment: The Legality of a High-Technology Missile Defense System: The ABM and Outer Space Treaties}, 78 \textit{Am. J. Int'l L.} 418, 421 (1984) (recalling that amending the ABM Treaty was ruled out with the Star Wars proposal because the entire objective and purpose of the Treaty were being questioned); \textit{see also} Deborah Seward, \textit{Russia Welcomes U.N. General Assembly Vote in Support of Maintaining ABM Treaty}, \textit{ASSOCIATED PRESS NEWSWIRES}, Nov. 30, 2001. The General Assembly voted 84-5 with 62 abstentions in favor of maintaining the Treaty, showing strong international support for the ABM Treaty. \textit{Id.}

\textsuperscript{81} \textit{see} Gross, \textit{supra} note 32, at 65-66 (noting that opponents of the Reagan administration’s SDI plan disliked the idea of amendment because it might allow for the wholesale development and deployment of a space-based missile defense system to proceed. Proponents of the Reagan SDI plan were also opposed to the amendment idea because they saw an amendment as a possible Soviet veto power of United States defense plans—before any initiative could be carried out, Soviet approval through the amendment process would be necessary.).

\textsuperscript{82} \textit{See} Steven Mufson, \textit{Postponement Shows Shift in Priorities}, \textit{WASH. POST}, Oct. 26, 2001, \textit{available at} 2001 WL 29164804 (identifying that one major problem with amending/revising the ABM Treaty would be what to name the new treaty—Bush would want the name to reflect an end of the ABM Treaty, while Putin would want the name to show he salvaged the ABM Treaty); \textit{see also} Meredith, \textit{supra} note 80, at 421 ("[A]mendment is ruled out in this case since . . . amendment would require the consent of both parties." This was a similar situation faced during Star Wars program.).

\textsuperscript{83} Mufson, \textit{supra} note 82. The idea of amending the ABM Treaty is opposed by many in the Bush administration because they do not see the need for such a treaty since the United States and Russia are no longer fierce enemies. \textit{Id.}

\textsuperscript{84} ABM Treaty, \textit{supra} note 7, art. XV.
its supreme interests.” However, withdrawal from the Treaty is not as simple as giving notice. There are “certain justifications for withdrawal that might not be sufficient under international law.” If the United States is to maintain credibility in the international arena, and especially with the new Russian state, any justification for withdrawal must be real and legitimate.

In the past, withdrawal has not been considered a viable option for the fear of destabilizing relations between the United States and the former Soviet Union. The fear of starting another arms race kept the United States as a party to the Treaty. However, withdrawal could have been adequately justified during Reagan’s SDI program, and so, the events of September 11th, 2001 and the new terrorism concerns likely allow withdrawal to be recognized as adequate justification.

Withdrawal is an independent action; the Bush administration need not consult with anyone other than U.S. officials and Congress (even the requirement of this consultation is debatable). The justification for withdrawal is at the discretion of the United States. While United States withdrawal is not likely to meet a warm international reception, it may well be the safest and most honest option for pursuing missile defense since it is not possible to honor the Treaty and simultaneously pursue missile defense. Breaching or amending the Treaty do not appear to be legitimate options.

85 Id.
86 Kinsel, supra note 14, at 772 (noting withdrawal is not “trouble free”).
89 See Kinsel, supra note 14, at 773 (“As such, [the construction of the Krasnoyarsk radar] would meet the United States’ international legal obligations for withdrawal under the specific terms of the ABM Treaty.”).
90 Stephen F. Cohen, Second Chance with Russia, NATION (Washington, D.C.), Nov. 5, 2001, available at 2001 WL 2132977 (noting that the September 11th events have given the United States a second chance at pursuing ABM negotiations with Russia).
92 See Meredith, supra note 80, at 421.
93 See Mufson, supra note 82 (reaffirming the fact that the ABM Treaty and missile defense are mutually exclusive since the United States had to postpone tests of its missile defense system to avoid violating the Treaty; this was done to continue progress that is being made between Presidents Bush and Putin on the subject of missile defense).
Regardless of which option is chosen (breach, amendment or withdrawal from the ABM Treaty), the current U.S. pursuit of missile defense will "move beyond" the ABM Treaty. One should consider possible responses to the United States decision to pursue missile defense in an effort to make the most informed decision on how or if to proceed.

III. POSSIBLE RESPONSES TO UNITED STATES MISSILE DEFENSE

The United States has been a major player in the international arena since World War II and, after the fall of the Soviet Union, has been perhaps the most powerful nation on the globe. Even though it may not be possible for any nation to match the military, economic or political influence of the United States, it is likely that there will be an international reaction to any United States decision to end the ABM Treaty.\(^4\) Having been a part of international efforts to punish other nations for treaty violations in the past, the United States must expect that reaction will come from many sources.\(^5\) Possible reactions to the United States' violation—in whatever form—of the ABM Treaty may include forceful response, action in the International Court of Justice and international backlash.

A. Forceful Response

If the United States is to deploy a missile defense system, nations that were a party to what would then be a defunct ABM Treaty may feel threatened.\(^6\) In response to this new threat, the United States ability to defend against


\(^5\) See, e.g., Dylan A. MacLeod, *International Consequences of Norway's Decision to Allow the Resumption of Limited Commercial Whaling*, 6 INT’L LEGAL PERSP. 131 (1994). In one example, the United States agreed to proposed trade sanctions on Norway for breaching the moratorium on commercial whaling as imposed by the International Whaling Commission even though the Commission’s scientific body had approved limited whaling and Norway had exercised tremendous conservation programs. *Id.*

\(^6\) See Martin Kettle & Amelia Gentleman, *US Defies Global Fury Over Missile Shield*, GUARDIAN (Washington, D.C.), July 13, 2001, available at 2001 WL 24850425 (Vladimir Rushailo, the head of Mr. Putin’s security council, said, “Russia, like many other countries, takes the view that the US’s unilateral withdrawal from the ABM Treaty would lead to the destruction of strategic stability, a new powerful spiral of the arms race . . .”).
incoming missiles, forceful reaction might be considered by those who would then feel threatened (mainly Russia, but also including the three other nations). This forceful response would likely come in the form of anticipatory self-defense or reprisal.

1. Self-Defense

According to Swiss Lawyer E. de Vattel, "One's own defense against unlawful assault is not only rightful, but an obligation of a nation, and one of the most sacred." More than two hundred years after this definition was formulated, self-defense is understood to be a common institution in international law, allowing nations to defend themselves when facing an imminent threat.

Article 2(4) of the United Nations (U.N.) charter governs modern self-defense: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." The preeminent concern of the charter of the U.N. is the promotion of international peace. Any self-defense action taken must be proportional to the action to which it responds. An armed attack is not proportional to the deployment of a purely defensive missile defense system.

The only way to justify self-defense in this modern era is to use force consistent with the purposes of the U.N. so as to eliminate any conflict with the strict prohibition of the use of force found in Article 2(4). The type of

99 Id. at 749.
100 U.N. CHARTER art. 2 para. 4; see also BASIC DOCUMENTS OF THE UNITED NATIONS 2 (Louis B. Sohn, ed., 1956) (outlining Article 2(4) of the United Nations' Charter).
103 See Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226 (July 8) (noting that self defense is governed inter alia by the principle of proportionality).
104 See Zedalis, supra note 101, at 85 (noting that the prevailing view of Article 2(4) is that only the force that is expressly permitted elsewhere in the U.N. Charter is allowed under Article
self-defense that is permitted under the auspices of the U.N. in response to the deployment of a missile defense system would be anticipatory self-defense. This is an action that is taken in expectancy of a direct armed attack.

Article 51 of the U.N. Charter speaks directly to the use of force in self-defense, allowing the use of force only when 'an armed attack occurs.' This is not, however, the circumstance that would occur with the deployment of a United States missile defense system, since there would be no armed attack. In fact, the only time the United States missile defense would ever be activated is if the United States itself were first attacked which would constitute justifiable self-defense in its own right. The latest push to implement U.N. resolutions allowing "nations' rights to individual and collective self defense" speak directly to the use of force in response to armed attacks. If the United States violates the ABM Treaty, former Treaty members will have even less of a right to a self-defense claim if they consider Articles 2(4) and 51 read in conjunction with the peaceful settlement requirement of Article 2(3).

While it appears certain that a right to self-defense exists under the U.N Charter, the right does not exist if there is a moment for deliberation. This negates any claim by former Treaty members since they all know of the development and deployment of a missile defense system. The right to self-

2(4)).

105 Id. at 97 ("Thus, to justify the use of force against a perceived imminent threat of attack or an action that threatens to create military instability, reference must be had to the doctrines of anticipatory self-defense and self-help reprisal.").

106 OSMANCY, supra note 98, at 749.

107 Zedalis, supra note 101, at 98.


109 See Zedalis, supra note 101, at 103 ("When Articles 2(4) and 51 are read in conjunction with Article 2(3), Article 2(3)'s requirement that '[a]ll members shall settle their international disputes by peaceful means' suggests that forceful measures of dispute resolution are always prohibited, unless in response to an actual armed attack."); see also U.N. CHARTER art. 2, para. 3.

110 See Zedalis, supra note 101.

111 See id. at 154 ("Advance knowledge of a situation surely gives . . . more than a 'moment of deliberation' and thus seems to require (the targeted state) to develop appropriate responses.").
defense is not a right that is advocated or accepted and is not a viable option for members of the ABM Treaty that wish to remain in good international standing after a probable United States violation of the Treaty.

2. Reprisal

A second option that may be available to members of the ABM Treaty in response to United States violation of the Treaty is reprisal, or the retaliation undertaken by one state in response to the illegal action of another state. However, this option may not exist under international law as it was outlawed after World War II and no longer recognized as legitimate by the international community, especially for treaty violation.

A clear, progressive development has emerged that bans the use of reprisals involving force in international law among all civilized nations. In the case of reprisals, when one nation is dissatisfied with the actions of another, the dissatisfied nation responds with military action to force the other nation to act as the forceful nation wishes; this is contrary to international law, however.

An act of reprisal is not within the purposes of the U.N. and is not allowed under any Article. While the International Court of Justice has not banned reprisals, there has not been an action before the I.C.J. that has sanctioned or approved of a reprisal action. A reprisal for a violation of the ABM Treaty is not therefore acceptable.

---

112 See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27), at 100 (noting that statements made by State representatives confirm the prohibition on force expressed in Article 2(4); these statements recognize that the prohibition on force is a fundamental principle of international law).
113 See OSMANCZYK, supra note 98.
116 Id. at 151.
117 See Zedalis, supra note 101, at 121 ("[T]he only use of force by an individual state left indisputably untouched . . . is the traditional right of self-defense.").
118 See Legality of the Threat or Use of Nuclear Weapons, supra note 103 (noting that belligerent reprisals have not altogether been banned, but the dissenting opinion of Judge Weeranantry laments not making an outright ban on reprisals as they are not accepted as lawful under customary international law).
119 See Zedalis, supra note 101, at 123 (noting that resolutions condemning reprisals were issued thirteen times in the first twenty five years of UN existence).
Reprisals, whether recognized or legal, are only permitted when a nation acts in a prohibited manner. If handled according to the terms of the Treaty, a withdrawal from the ABM Treaty is not an illegal act. Justified breaches of the Treaty or an amendment to the Treaty are also legal actions. Reprisal should not therefore be considered by members of the ABM Treaty as a legitimate response to a United States violation of the Treaty that is within the bounds of customary international law.

B. Potential International Court of Justice Action

Opening in 1946, the International Court of Justice (I.C.J.) reflects the "main forms of civilization and the principal legal systems of the world." Only a state that is a U.N. member (and Switzerland) may apply to be heard by the I.C.J., and jurisdiction is limited to three situations. The ABM Treaty contains no provision for submitting a dispute to the I.C.J.; therefore, the only way that the I.C.J. could hear a case arising from an ABM Treaty dispute is if the United States and the four former Soviet Republics agreed to submit the dispute to the Court's jurisdiction.

The Court has traditionally refrained from hearing cases of a legal and political nature, and thus the court's reception of this emotional and political dispute is highly unlikely. The Court could possibly issue a non-binding advisory opinion used to facilitate discussion. Yet another possible option for states seeking jurisdiction before the Court is for a party to submit the issue to the Chambers procedure. This procedure gives the party control over the size, expertise and composition of the Court.

Regardless of how the issue of a violation of the ABM Treaty would be submitted to the Court, it is unlikely the Court would render a decision. The ABM Treaty specifically provides for a Standing Consultative Commission.

120 OSMANCZYK, supra note 98.
122 Id. (stating that jurisdiction is possible (1) when states choose to submit the dispute to the court; (2) when there is a jurisdictional clause, i.e. a treaty or convention submits all disputes to the I.C.J.; or (3) where there is a reciprocal declaration).
123 See MacLeod, supra note 95, at 133.
124 Id.
125 Id. at 133.
126 Id.
(SCC), which is to govern and implement the provisions of the Treaty.  

Having the SCC revise and interpret the Treaty will likely preclude the need for a Court decision, as the I.C.J. deems that "it is the duty of the court to interpret the treaties, not to revise them." 

In all likelihood, the United States would not choose to submit to the jurisdiction of the I.C.J. as the United States has repeatedly made it clear that it intends to proceed with the proposed missile defense system. Even without United States submission, it would be possible for the Court to render a decision if there is jurisdiction and the case has a strong legal and factual basis. This, however, is not probable since any of the proposed methods for moving beyond the ABM Treaty that are available to the United States have a legal basis for action—especially withdrawal as it is provided for in the Treaty itself. While theoretically a possibility, action by the I.C.J. is not a real option since the jurisdiction is not provided for in the Treaty, the United States is unlikely to submit to jurisdiction, probable United States action is not illegal and the Court typically refrains from political issues.

C. International Backlash

From even a small sampling of the international media, it is easy to perceive that many in the world are unhappy with the United States' decision to deploy a missile defense system. While it is unlikely that any nation will pursue self-defense or reprisal, and action in the I.C.J. is improbable, there are other ways nations can show their disapproval for United States policy.

The United Kingdom and Denmark are especially affected by a decision to deploy missile defense, as these nations are home to two of the three existing Ballistic Missile Early Warning Stations. If terribly unhappy or dissatisfied,
these nations could revoke the agreements with the United States which allow for the existence of these structures.\textsuperscript{133} 

As it enters its third century of foreign policy, the United States’ goal is to maintain and develop good international relations with countries throughout the world. Many have noted that violating international law by testing and deploying missile defense is not the best way to win friends or gain credibility.\textsuperscript{134} In the past, the United States has imposed sanctions or refused to trade with nations that violate international law and treaty commitments.\textsuperscript{135} Logic provides that the United States should expect a similar reaction from others.\textsuperscript{136} The greatest backlash will likely come from the Russians, who here asserted that the United States is renewing the arms race.\textsuperscript{137} This backlash could force the United States to confront its relations with the world’s only other nuclear superpower without a single arms limitation agreement.\textsuperscript{138} While this is frightening to consider, it is unlikely that Russia would want to exist without an arms agreement with the United States since it is Russia who has a decayed arsenal and lacks the funds to repair or replace nuclear weapons.\textsuperscript{139} The United States may face trade restrictions, difficulty in making treaties, and distrust or dislike from some. However, if the United States follows the

\textsuperscript{133} See id. (noting, however, that the U.K. is not likely to take such action since their newly appointed Secretary for the State of Defense is much more amenable to the idea of missile defense than his predecessors have been).

\textsuperscript{134} See A Startling Lack of the Vision Thing, \textit{Canberra Times}, Aug. 7, 2001, \textit{available at} 2001 WL 26510109 (noting that it is acceptable for the United States to violate international law in pursuit of its own national interests, but that it should be done in a way that offends the least number). See also The Physicians for Social Responsibility Briefing, July 12, 2001, \textit{available at} 2001 WL 21895884 (stating that the Bush administration wants to pursue a missile defense system even though it violates international law).

\textsuperscript{135} MacLeod, \textit{supra} note 95. The United States imposed trade sanctions on Norway for not following the whaling moratorium that was created and enforced by the International Whaling Commission.

\textsuperscript{136} See Kettle & Gentleman, \textit{supra} note 96. The head of the Russian Security Council stated that “the international community should consolidate its efforts to prevent such developments” (referring to the breach of the ABM Treaty by construction of United States missile defense). Id.

\textsuperscript{137} See Big Victory for Putin with START II but Problems Remain, \textit{Agence France-Presse}, Apr. 15, 2000, \textit{available at} 2000 WL 2774482 (quoting the Russian daily Kommersant, “Americans violate the ABM agreement... they (United States) will be the cause of the start of a new arms race”).

\textsuperscript{138} See \textit{ABM Treaty & President's Decision Not to Deploy NMD, supra} note 31 ("The Russians now threatened to scrap the entire arms control structure if the United States insisted on changing or withdrawing from the ABM Treaty.").

\textsuperscript{139} Robbins & Higgins, \textit{supra} note 56.
principle of good faith that overrides international law, most nations will respect whatever decision the United States makes in the best interest of its citizens.

IV. CONCLUSION

Prior to September 11, 2001, a missile defense shield was a campaign promise of George W. Bush. After this now infamous date, missile defense seems a necessity to keep Americans safe from the nuclear threat of rogue nations and groups. The president has made clear that a thirty-year old ABM Treaty will not constrain his plans to protect America.140

With the decision made, the challenge now is in how best to end the U.S. commitment to the ABM Treaty. Withdrawing, by giving six months notice and a statement that clearly outlines the threat from rogue nations and groups is honest, straightforward and follows the international law principle of good faith negotiations. Complex arms talks and agreements have proven cumbersome and difficult to deal with, making the case for a clear withdrawal even stronger.

Incentives to mitigate Russian opposition are possible.141 Compromises have been suggested that change the face of international relations.142 The greatest incentive the United States government can give to Russia or any other nation is an honest and clear answer on its policy. Russia has stated, "we are partners" in referring to its new relationship with the United States, and to continue this partnership and other partnerships, the United States should openly and honestly withdraw from the ABM Treaty to pursue missile defense. The events of September 11th have caused everyone to seriously consider the threats from rogue nations and groups—missile defense is imminent. Self-defense and reprisal actions are not likely and the I.C.J. has no direct jurisdiction over the United States decision on missile defense. If the Bush

140 See Wolfowitz, supra note 23 ("President Bush has also made clear that a 30 year-old treaty designed to preserve the nuclear balance of terror during the Cold War must not be allowed to prevent us from taking steps to protect our people, our forces and our allies.").

141 Mary Dejevsky, US to Offer Putin Aid in Return for Deal on Star Wars, INDEPENDENT (London), May 29, 2001, available at 2001 WL 17887082. The United States is prepared to offer joint anti-missile exercises, buy Russian missiles and other trade and aid incentives to compromise the package that is offered to Putin by the Bush administration. Id.

142 Why Not Accept Russia into NATO?, BUS. WK. ONLINE, Sept. 21, 2001, available at 2001 WL 25755027. Proposed post Cold-War plans include offering NATO membership to Russia, the former leader of NATO's greatest adversary, the Warsaw Pact. Id.
administration is truly concerned with protecting America and its allies, an honest withdrawal and acceptance of any international backlash is the best policy.

America’s greatest patriot, George Washington, said, “[T]o be prepared for war is one of the most effectual means of preserving peace.” To prepare for war, the United States seems ready to develop and deploy a missile defense shield, but to preserve the peace, the United States should use good faith and honesty in its international obligations and withdraw from the ABM Treaty rather than attempt to justify a breach or undertake a cumbersome amendment procedure.\textsuperscript{143}

\textsuperscript{143} President George W. Bush, Remarks by the President on National Missile Defense (Dec. 13, 2001), at http://www.whitehouse.gov/new/releases/2001/12/print/20011213-4.html. President George W. Bush announced to the world on Dec. 14, 2001 that the United States was giving the required six months notice of its intention to withdraw from the ABM Treaty. The president cited new threats from terrorists and rogue nations along with the difficulties of amending or breaching the Treaty as the reasons for withdrawing. He also noted that withdrawal from the Treaty was the best legal option and the best option for continuing relations with Russia and the rest of the world. Since this announcement, there has been little international backlash. The six months required for notification have come and gone and it seems as though honesty was the best policy.