“Star Wars” has become the popular designation for the Space-based ballistic missile defense envisioned by President Reagan in his speech to the Nation on March 23, 1983.1 The formal name is the Strategic Defense Initiative (“SDI”). “Star Wars,” by the way, is a misnomer because it conveys the impression of a fully deployed, offensive, Space-based missile system, which SDI is not. SDI - as currently defined - is merely a research program designed to determine the feasibility of a Space-based ballistic missile defense (that is, an anti-ballistic missile system). As such, SDI is legal international law. An extension of SDI beyond the research phase to include also development and testing (as is being considered by the Administration) probably is illegal, although the Administration’s position is that it is not. Deployment of the proposed missile defense would be illegal based on current international law - also under the Administration’s interpretation.

The legality of a space based missile defense turns on the interpretation of the Outer Space Treaty of 19672 and the Anti-Ballistic Missile (ABM) Treaty of 1972.3 While the Outer Space Treaty is a multilateral Treaty to which most nations in the world are parties, the ABM Treaty is a bilateral agreement between the U.S. and the Soviet Union. Attention has focused primarily on the ABM Treaty since it deals specifically with missile defense systems. The Outer Space Treaty, on the other hand, deals with the use, testing and deployment of weapons in Space in general, and has never been regarded as an obstacle to a Space-based missile defense, as has the ABM Treaty.

The Outer Space Treaty
The Outer Space Treaty requires that Space be used only for “peaceful purposes.”4 Peaceful has been interpreted to mean non-aggressive rather than non-military, thus permitting military uses of Space.5 And indeed, Space is already being used extensively for military surveillance, reconnaisance and communications via satellite. Certain military, non-aggressive uses of Space are outlawed by the Treaty, however. For example, States may not “place in orbit around the Earth objects carrying nuclear weapons or any other kinds of weapons of mass destruction ...”6 Furthermore, testing of weapons on the moon and other celestial bodies is prohibited.7

SDI as a research and development program is not affected by the Outer Space Treaty, because these activities do not involve the use of Space, which is what the Treaty regulates. Testing of a Space-based missile defense in Earth orbit would be permitted under the Treaty, while testing on celestial bodies would be outlawed. Deployment is not banned by the Treaty because the Space-based missile defense envisaged by the President “to intercept and destroy strategic ballistic missiles before they reach our soil or that of our allies”,8 is intended as a defensive shield, i.e., it is non-aggressive, and thus serving a “peace-
ful” purpose within the meaning of the Treaty. Deployment of a Space-based missile defense in Earth orbit is also not the kind of (non-aggressive) military use of Space which the Treaty specifically prohibits because a Space-based missile defense, as currently conceived, would intercept missiles targeted at the U.S. with lasers or particle beams and these are neither nuclear weapons nor weapons of mass destruction.\(^9\)

**The ABM Treaty**

The ABM Treaty prohibits the deployment of comprehensive anti-ballistic missile (ABM) systems\(^\text{10}\) — its rationale being that peace between the U.S. and the USSR is best preserved through the threat of mutual assured destruction (MAD). The idea is that without a comprehensive missile defense deployed on either side, the U.S. and the Soviet Union are capable of inflicting sufficient damage on the other by a retaliatory strike to deter a first strike.

An ABM system is defined in Article II of the Treaty as

> “an ABM system to counter strategic missiles or their elements in flight trajectory, currently consisting of:

(a) ABM interceptor missiles, which are interceptor missiles constructed and deployed for an ABM role, or of a type tested in an ABM mode;

(b) ABM launchers, which are launchers constructed and deployed for launching ABM interceptor missiles; and

(c) ABM radars, which are radars constructed and deployed for an ABM role, or of a type tested in an ABM mode.”\(^11\)

It is controversial whether the President’s proposed missile defense — based on a technology not contemplated at the time the Treaty was signed — falls within the above definition of “ABM system.” The question is whether the phrase “currently consisting of”\(^12\) limits the scope of the definition so that it includes only missiles, launchers and radars listed in the definition — thus excluding systems based on other technologies, such as the President’s missile defense.\(^13\) Such an interpretation has been embraced by the Reagan Administration as the correct interpretation of the Treaty. In other words, the Administration holds that the President’s missile defense is not covered by the definition of ABM system and therefore not prohibited under Article V of the Treaty (see below).\(^14\) Classified negotiating history is cited in support of this view.\(^15\) Referring to the definition in Article II of the Treaty, Mr. Abraham D. Sofaer, legal advisor to the President and Secretary of State on Arms Control Matters, at a Congressional Hearing on October 22, 1985, said:

> “The provision can more reasonably be read to mean that the systems contemplated by the treaty are those that serve the functions described and that currently consist of the listed components.” The treaty's other provisions consistently use the phrases ‘ABM systems’ and ‘components’ in contexts that reflect that the parties were referring to systems and components based on known technology.”\(^16\) (Emphasis added)