ARTICLE VI OF THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS (NPT): THE PURSUIT OF NEGOTIATIONS AND CHINA'S PURSUIT OF ARMS

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I. INTRODUCTION

What, if any, obligation does the negotiations clause of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons[1] (NPT) place on a nuclear-weapon[2] State? More particularly, in view of that obligation, does the People's Republic of China, a nuclear-weapon State that has expressed the intention to increase its nuclear weapons holdings in both qualitative and quantitative terms[3] and conditions its negotiation posture on the future attainment of parity with the United States and the Russian Federation,[4] conduct itself in accordance with Article VI? The

1. Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, entered into force Mar. 5, 1970, 21 U.S.T. 483, 729 U.N.T.S. 161 [hereinafter NPT].

2. "For the purposes of [the NPT], a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January, 1967." NPT, supra note 1, at art. 9, ¶ 3.

3. *See* Arms Control Association, Press Statement (Nov. 3, 2021) (reporting on U.S. Dep't of Defense estimate that China "likely intends to have at least 1,000 warheads by 2030"), *available at* https://www.armscontrol.org/pressroom/2021-11/arms-control-association-says-chinas-nuclear-buildup-deeply-troubling See earlier reports Julia Masterson & Shannon Bugos, Arms Control Association, *Pentagon Warns of Chinese Nuclear Development* (Oct. 2020), *available at*: https://www.armscontrol.org/act/2020-10/news/pentagon-warns-chinese-nuclear-development. *See also* Christopher A. Ford, *Law, Morality, and The Bomb*, 1(22) ARMS CONTROL AND INT'L SEC. PAPERS (2020), at 10, citing OFF. OF THE SEC. OF DEFENSE, MILITARY AND SECURITY DEVELOPMENTS INVOLVING THE PEOPLE'S REPUBLIC OF CHINA 2020: ANNUAL REPORT TO CONGRESS (2020), 38–39, 55–56, 85–88. Even uncritical assessments that take at face value China's own representations (e.g., about the "no first use" policy that China asserts it maintains) acknowledge that China is modernizing its nuclear forces in significant ways. *See, e.g.*, Hui Zhang, *China's Nuclear Weapons Modernization: Intentions, Drivers, and Trends*, BELFER CTR., *available at*: https://www.belfercenter.org/sites/default/files/files/publication/ChinaNuclearModernization-hzhang.pdf.

4. *See* Fu Cong, Director-General of Department of Arms Control, Ministry of Foreign Affairs of the People's Republic of China: "[G]iven the huge disparity between the Chinese nuclear arsenal and that of the US and the Russian Federation, we simply do not believe that there is any fair and equitable basis for China to join the US and the Russian Federation in a nuclear arms control negotiation. But, and then, we continue to say that . . . if the US commits itself to reducing its nuclear arsenal to a level comparable to the Chinese nuclear arsenal, we'll be happy to join." Interview with Kommersant (Oct. 16, 2020), *available at* https://www.fmprc.gov.cn/mfa_eng/wjbxw/t1824545.shtml. Two months before, Mr. Fu associated himself with Russia's insistence that the United States extend the New START Treaty "and on that basis further reduce its huge nuclear arsenal, so as to create conditions for other Nuclear-Weapon States to participate in the nuclear disarmament negotiations." MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA, *Department of Arms Control and Disarmament Holds Briefing for International Arms Control and Disarmament*

present article considers the proper interpretation of Article VI NPT, in particular the obligation "*to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date,*"[5] and whether it is open to another NPT Party, such as the United States, to invoke Article VI when questioning China's conduct.

These issues have current salience, because the United States has called on China to join the United States and Russia in nuclear arms control negotiations;[6] China to date has refused to join;[7] and United States officials have drawn attention to the Article VI obligation when responding to China's refusals.[8] China's nuclear

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Issues (Aug. 7, 2020), *available at* https://www.fmprc.gov.cn/mfa_eng/wjbxw/t1795979.shtml Curiously, in the interview with Kommersant, China's spokesman uses the legalistic phrase "fair and equitable basis," evocative of the standard wording of a bilateral investment treaty's substantive clauses. See also statements by non-governmental CCP-affiliated persons, e.g., Professor Fan Jishe of the Central Party School of the Community Party of China: "They [the United States and Russia] should dramatically reduce their own nuclear arsenals first before extending the invitation to China." Fan Jishe, "Trilateral Negotiations on Arms Control? Not Time Yet," China-US Focus (Sept. 13, 2019), *available at* https://www.chinausfocus.com/peace-security/trilateral-negotiations-on-arms-control-not-time-yet.

5. NPT, *supra* note 1, at 173.

6. Remarks by President Trump, op. cit.: "[W]e would want to talk to China eventually." Michael R. Gordon, *Trump Administration Shifts Course on Russian Arms Talks, Easing Insistence China Join Now*, THE WALLSTREET JOURNAL (Aug. 18, 2020), *available at*: https://www.wsj.com/articles/trump-administration-shifts-course-on-russian-arms-control-talks-easing-insistence-china-join-11597781025. *See also* Press Statement, On Arms Control Negotiations with China, U.S. DEP'T. OF STATE (July 9, 2020) (noting invitation to China by Special Presidential Envoy for Arms Control, Ambassador Marshall Billingslea, to join in good faith negotiations), *available at*: https://2017-2021.state.gov/on-arms-control-negotiations-with-china/index.html. *See also* Meeting Coverage, General Assembly, Opening General Debate, U.N. General Assembly GA/DIS/3647 (Oct. 9, 2020).

7. *See, e.g.*, Chinese statement that the "United States . . . proposal for trilateral talks are just tricks" and that "China . . . [will not] join such talks.", Meeting Coverage, General Assembly, First Committee Delegates Call for Cooperation to Prevent Nuclear Arms Race, Stem Tide of Illegal Weapons, as General Debate Continues, U.N. General Assembly GA/DIS/3648 (Oct. 12, 2020), *available at*: https://www.un.org/press/en/2020/gadis3648.doc.htm. *See also*, from the year before, China says it won't take part in trilateral nuclear arms talks, REUTERS (May 6, 2019), https://www.reuters.com/article/us-usa-trump-putin-china-idUSKCN1SC0MJ.

8. *See, e.g.*, Special Presidential Envoy for Arms Control Marshall S. Billingslea, "If China wants to be treated as a great power, it must behave like one. That means, among other things, honoring its Article VI obligations under the NPT," U.S. Arms Control (@USArmsControl), TWITTER, (Dec. 4, 2020, 1:59 PM), https://twitter.com/USArmsControl/status/1334935330127032321; Billingslea, ". . . China's obligation to negotiate in good faith (Article VI), which they have not done," U.S. Arms Control (@USArmsControl), TWITTER, (Dec. 19, 2020, 2:02 PM), https://twitter.com/USArmsControl/status/1340372039740211200; "All nations must urge China to honor its obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons to pursue negotiations in good faith," Michael R. Pompeo & Marshall Billingslea, *China Nuclear Build-Up Should Worry the West*, NEWSWEEK (Jan. 4, 2021); and Billingslea, "China appears to not be in compliance with its Article VI obligations under the NPT," quoted in Bill Gertz, *China Building 'Greatest Expansion of a Nuclear Arsenal' Since Cold War, State Department Warns*, WASHINGTON TIMES (Jan. 14, 2021).

weapons build-up and the negotiations clause also have drawn remark from arms control experts in the think tank world.[9]

The NPT contains no compulsory and binding dispute settlement clause (compromissory clause)[10], and so a breach of an NPT provision such as Article VI gives rise to no cause of action that a State Party might pursue (absent a consent to jurisdiction elsewhere).[11] So the proper interpretation of Article VI and an assessment of China's conduct under that provision are relevant, not as a matter of litigation strategy, but as a matter of United States diplomacy toward China. Diplomats responsible for carrying out the foreign policy of the United States indeed might ask whether the United States has plausible grounds for calling attention to China's conduct (both acts and omissions) as non-compliant with Article VI, and, if they do, what precisely those grounds are.

This article will proceed in three Parts (II, III, and IV) followed by a Conclusion in Part V. Part II will address the content and scope of the obligation to pursue negotiations contained in Article VI of the NPT, including the continuing applicability of the clause concerning cessation of the nuclear arms race (Article VI arms race limb). Because writers and officials have suggested from time to time that the arms race limb of Article VI has ceased to apply,[12] its continuing applicability merits special attention. Part II also will place the Article VI negotiation requirement in the wider setting of

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9. *See* Kingston Reif (@KingstonAReif), Director of Disarmament & Threat Reduction Policy at the Arms Control Association, TWITTER (July 27, 2021), https://twitter.com/KingstonAReif/status/1419835013143490561: "It is difficult to see how adding nearly 250 nuclear missile silos is consistent with China's obligation to 'pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament'."

10. *See generally* Jonathan I. Charney, *Compromissory Clauses and the Jurisdiction of the International Court of Justice*, 81 AM. J. INT'L L. 855–87 (1987).

11. Thus, for example, if the Marshall Islands were to have succeeded in asserting ICJ jurisdiction against the United Kingdom in respect of allegations of non-compliance with Art. VI NPT, jurisdiction would have been asserted under the Parties' Declarations under the Optional Clause of the Statute of the International Court of Justice, not under the NPT itself. *See* United Kingdom Preliminary Objections (June 15, 2015), 25–27, *available at*: https://icj-cij.org/public/files/case-related/160/20150615_preliminary_objections_en.pdf. *See also* Marsh. Is. v. U.S., 865 F.3d 1187, 1191 (9th Cir. 2017) (observing that "the Treaty includes no mechanism to address alleged breaches").

12. *See, e.g.*, Daniel H. Joyner, INTERPRETING THE NUCLEAR NON-PROLIFERATION TREATY 100 (2011): "By any reasonable calculus, this result [cessation of the nuclear arms race] was accomplished by the ending of the Cold War and the dissolution of the Soviet Union, and the accomplishments in nuclear arms control which have occurred in the past twenty years"; James Crawford, *International Law and the Problem of Change: a Tale of Two Conventions*, 49 VICTORIA U. OF WELLINGTON L. REV. 447, 453, 464, 470 (2018) (referring to "effective measures to achieve nuclear disarmament" but not referring to the "arms race" obligation). *Cf.* Daniel Rietiker, *The Meaning of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons: Analysis Under the Rules of Treaty Interpretation*, *in* NUCLEAR NON-PROLIFERATION IN INT'L L. 64 (Jonathan L. Black-Branch & Dieter Fleck eds. 2014) (positing that "Article VI has largely remained a dead letter").

negotiations in treaty law. This is not the only negotiation requirement that States have puzzled over in international law.

Part III will consider the basis for calling attention to China's non-compliance with Article VI, first by considering, as a matter of law, the opposability[13] of the Article VI negotiation requirement by one nuclear-weapon State against another; and second, by considering conduct that justifies criticizing China for non-compliance, that conduct including for purposes of international law acts and omissions alike, and those acts including for purposes of international law China's statements refusing to negotiate until the ratio in nuclear arms among the United States, Russia, and China changes in China's favor. China's statements saying that China will negotiate only when it approaches parity in its nuclear arsenal with the United States and Russia perhaps has a surface appearance of reasonableness. However, under Article VI obligating that China negotiate, those statements are tantamount to breach. Perhaps surprising at first, the conclusion that China has breached Article VI follows naturally, once it is recalled that the NPT nuclear-weapon States are not parties at arm's-length: they are parties obliged under the specific terms of Article VI to negotiate, and those terms do not condition or qualify that obligation on parity among nuclear-weapon holders. Moreover, on the received understanding of negotiations under international law, where a State has accepted an obligation to negotiate, but the State tries to bring about fundamental changes in the factual circumstances before negotiations have concluded, that State has violated international law. Keeping a State's arsenal up to date, making improvements in it, and even increasing the number of weapons in it, are not in themselves fundamental changes in the factual circumstances, but past a point a nuclear build-up aims at strategic

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13. The term "opposability," as used in this setting, denotes the character of a legal rule that lets a party invoke it against another. For an obligation to be opposable, it must as a matter of law arise from a rule that applies to the party against which a party invokes it. Thus, for example, Spain argued that a Canadian national Coastal Fisheries Protection law was not opposable against Spain: Fisheries Jurisdiction (Spain v. Canada), Judgment, 1998 I.C.J. p. 432, 446, ¶ 23 (Dec. 4); El Salvador argued that a Judgment of the Central American Court holding a special maritime regime in the Gulf of Fonseca to be opposable to Nicaragua was also opposable to Honduras: Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Application by Nicaragua for Permission to Intervene, Judgment, 1990 I.C.J. 82, 121, ¶ 71 (Sept. 13); and the ICJ clarified that it was not "making any ruling as to the . . . opposability to Libya of the straight baselines" that Tunisia had declared to mark the starting point for measurement of the latter's territorial sea: Continental Shelf (Tunis./Libya), Judgment, 1982 I.C.J. 18, 76, ¶ 104 (Feb. 24). *See generally* Eirik Bjorge, *Opposability and Non-Opposability in International Law*, BRITISH Y.B. INT'L L. (Oct. 14, 2021), *available at* https://academic.oup.com/bybil/advance-article/doi/10.1093/bybil/brab006/6397000?login=true; J.G. Starke, *The Concept of Opposability in International Law*, 4 AUSTL. Y.B. INT'L L. 1 (1971); *See also* CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW (2010) 101.

change, not mere maintenance of functionality within existing doctrine. China's buildup plainly aims at strategic change: it aims at transforming the environment before negotiations begin and, thus, at prejudicing the outcome of negotiations, if ever they do begin. In that, as will be seen below, there is a breach of China's legal obligations

Part III also will consider possible defenses that China might invoke, if the United States were to take it to task for its conduct in regard to Article VI.

Part IV considers what Article VI does *not* oblige. Article VI is not a prohibition against possessing, modernizing, or augmenting nuclear arsenals *per se*. The limits of Article VI, and a proper understanding of where they lie, are important, especially in view of the interest of all nuclear-weapon States in maintaining reliable deterrent capabilities, an interest that the NPT does not deny.

This article concludes with some general observations about Article VI and the obligation to pursue negotiations in the setting of nuclear arms control.

II. INTERPRETING ARTICLE VI AND ITS ARMS RACE LIMB

The place to start when interpreting a legal instrument is the text.[14] This axiom applies no less in treaty interpretation than in any branch of law.[15] Article 31 of the 1969 Vienna Convention on the Law of Treaties (VCLT) expresses the general rule as follows: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[16]

Article 31 reflects customary international law.[17] The customary character of this rule—known as the General Rule of Interpretation—is inferable from evidence at large of what States

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14. "Thus," where a statute is what the interpreter is called upon to interpret, "our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." Bedroc Ltd. et al v. U.S., 541 U.S. 176, 183 (2004).

15. To this point, see Justice Scalia's observations about the 1929 Warsaw Convention (Convention for the Unification of Certain Rules Relating to International Transportation by Air): Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 n. 5 (1989). *Cf.* THE AMERICAN LAW INSTITUTE, RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW (TENTATIVE DRAFT NO. 2) (2017), § 106, Reporter's Note 3 and cases there cited.

16. Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 340 [hereinafter VLCT].

17. Legality of Use of Force (Serb. and Montenegro v. Neth.), Preliminary Objections, 2004 I.C.J. 1011, ¶ 99 (Dec. 15); Territorial Dispute (Libya/Chad), 1994 I.C.J. 6, ¶ 41 (Feb. 3). *See also* AMERICAN LAW INSTITUTE, *supra* note 15.

do and believe:[18] where evidence shows that a practice of States is widespread, consistent, and representative (i.e., not necessarily *many* States but the States *particularly concerned* with an area of activity engage in the practice);[19] and evidence shows that States adhere to the practice out of a conviction that they are legally obliged to (as distinct from following the practice only by habit or policy choice), then it may be concluded that a customary international law rule exists.[20] The customary character of the General Rule of Interpretation did *not* result from its inclusion in a treaty. Indeed, inclusion of a rule in a treaty establishes the legal force of the rule between the parties to the treaty *only*—a principle codified in VCLT Article 34 (*pacta tertiis*)[21] and itself a universal principle.[22] If a treaty happens to express a rule that *also* belongs to customary international law, then the existence of the rule as part of customary international law is inferred, not from the treaty, which supplies no conclusive indication in that regard, but by the usual evidence of customary international law just noted.[23] We will return below to this point—that rule-making by treaty extends to the treaty parties only and that customary international law does not come to be simply because a treaty expresses a rule. It is a point salient to the NPT in light of claims that another treaty—the Treaty on the Prohibition of Nuclear Weapons (TPNW)—might in some way have brought about a *general* prohibition on States.[24] Article VI NPT is not a nuclear weapons prohibition, and no such prohibition of general applicability has come into being since.

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18. *See* International Law Commission (ILC) Draft conclusions on identification of customary international law, with commentaries (2018) (hereinafter "ILC Draft conclusions"), Conclusion 2, Comment (5): A/73/10 p. 126, as to the *inductive* character of the process by which customary international law is identified.

19. *Id.* at Conclusion 8, Comment (4): A/73/10, p. 136.

20. *Id.* at Conclusion 2: A/73/10, p. 124.

21. VCLT, *supra* note 16, at 341: "Article 34 (General Rule Regarding Third States). A treaty does not create either obligations or rights for a third State without its consent."

22. *See, e.g.*, the reference by the United States in Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), long before the VCLT (to which the United States, in any event, is still today not a party) acknowledging the *pacta tertiis* principle: U.S. Counter-Memorial, 1951 I.C.J. Pleadings 335 (Dec. 20).

23. *See* ILC Draft conclusions, Conclusion 11: A/73/10, p. 143; and especially, ILC Draft conclusions, Conclusion 11: A/73/10, Comment (2): "in and of themselves, treaties cannot create a rule of customary international law or conclusively attest to its existence or content."

24. As to the TPNW, *see infra* n. 133–136 and accompanying text. *See also* Thomas D. Grant, *The NATO Brussels Communiqué and the Treaty on the Prohibition of Nuclear Weapons (TPNW): Stability of Custom and Legality of Deterrence*, NAT'L INST. FOR PUB. POL'Y INFO. SERIES, Paper No. 501 (Sept. 7, 2021), *available at* https://nipp.org/information_series/thomas-d-grant-the-nato-brussels-communique-and-the-treaty-on-the-prohibition-of-nuclear-weapons-tpnw-stability-of-custom-and-legality-of-deterrence-no-501-september-7-2021/.

At first appearance, Article VI NPT presents no special problem of interpretation. Article VI is a negotiations provision. International law, as will be shown below,[25] is familiar with obligations to negotiate. A large number of treaties contain negotiation provisions in obligatory terms. However, after setting out the text of Article VI, we will see that a question was raised at the end of the Cold War about the continued scope of application of Article VI. It was the United States that raised the question—one of the five nuclear-weapon States Parties and one of the two Superpowers whose part in the drafting and adoption of the NPT was of central importance.[26] Moreover, that question, raised by the United States some thirty years ago, is pertinent to the present-day conduct of one of the other nuclear-weapon Parties—China. An old question about how much of Article VI continues to apply—in particular, whether the arms control limb of Article VI continues to apply—thus, returns in the form of some new questions about China, and an answer to these requires, first, an answer to that which was raised before.

A. The Text and a Post-Cold War Question

Article VI NPT reads as follows: "*Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.*"[27]

Immediately clear is that the text addresses the Parties to the NPT, not a subgroup of them, and it addresses them individually ("each"), not as a collective body. Article VI obliges each of the Parties to "pursue negotiations in good faith." As with any negotiation clause, this is an obligation to negotiate in respect of a particular subject matter; the particularity of subject matter is a point to which we will return below (*page 16*). The subject matter specified in Article VI is denoted under two heads—first, "effective

25. *See* discussion, *infra* Section II.B.

26. As to the drafting history of Art. VI, *see* Christopher A. Ford, *Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons*, 14(3) THE NONPROLIFERATION REV. 401, 403 (2007); and chapters in NEGOTIATING THE NUCLEAR NON-PROLIFERATION TREATY: ORIGINS OF THE NUCLEAR ORDER (Roland Popp, Liviu Horovitz & Andreas Wenger eds., 2018), *passim*. For a summary timeline, see the Arms Control Association's fact sheet: https://www.armscontrol.org/factsheets/Timeline-of-the-Treaty-on-the-Non-Proliferation-of-Nuclear-Weapons-NPT. For the procedural history, with adjacent links to documents including First Committee summary records and relevant General Assembly resolutions, see UN Audiovisual Library of International Law, Treaty on the Non-Proliferation of Nuclear Weapons: https://legal.un.org/avl/ha/tnpt/tnpt.html.

27. NPT, *supra* note 1, at art. 6.

measures" and, second, "a treaty." Both these heads are further particularized in subordinate clauses. The "effective measures" that are to be the subject matter on which the Parties each are to pursue negotiations are to relate to "*cessation of the nuclear arms race at an early date*" and "*nuclear disarmament*." The treaty is to be "on general and complete disarmament under strict and effective international control." The ambitious scope of the treaty head of Article VI is evident. That head covers not just nuclear arms, but all arms ("*complete* disarmament"). The United States' position has been that "the language contains no suggestion that nuclear disarmament is to be achieved before general and complete disarmament."[28]

The "effective measures" head,[29] by contrast, is concerned with just nuclear arms. There are two limbs under the "effective measures" head. There is a nuclear disarmament limb and an arms race limb. The main concern here is with the arms race limb.

In some sense, though as we will see, not necessarily in the legal sense, the United States since shortly after the end of the Cold War has suggested that the nuclear arms race referred to in Article VI was exclusively that between the United States and the Soviet Union—and that that race ended when the Cold War ended.[30] Conclusions about the Cold War rivalry, as well as the current state of affairs, however, require a cautious approach toward the facts and toward how Article VI NPT applies to the facts. The term "arms race," though given *juridical* meaning by its inclusion in Article VI, needs in particular to be approached with caution. Exponents of an "action-reaction" model of arms racing between the United States and USSR attributed a particular practical meaning to the term "arms race." It was their thesis that maintenance and development of the nuclear deterrent by the United States provoked the Soviet nuclear buildup and, so, the "arms race," in their view, would have stopped, if the United States, for its part, had stopped building

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28. Remarks by U.S. Assistant Secretary of State for Arms Control Stephen Rademaker, U.S. Compliance with Article VI of the NPT, CARNEGIE ENDOWMENT FOR INT'L PEACE (Feb. 3, 2005). Some arms control academics and non-nuclear-weapon states' officials question this position. *See, e.g.*, Hine-Wai Loose, 2005—Year of the Nuclear Non-Proliferation Treaty—But What Happened to Nuclear Disarmament? 4 N.Z. Y.B. INT'L L. 135, 139–140 (2007), who posits that "[d]e-linking nuclear disarmament from general and complete disarmament" is necessary to "the nuclear disarmament agenda."

29. *See* Treasa Dunworth, *Pursuing 'Effective Measures' Relating to Nuclear Disarmament: Ways of Making a Legal Obligation a Reality*, 97 INT'L REV. RED CROSS 601 (2016), for comment on the "effective measures" head of Art. VI; Monique Cormier & Anna Hood, *Australia's Reliance on US Extended Nuclear Deterrence and International Law*, 13 J. INT'L L. & INT'L REL. 3, 27–46 (2017).

30. *See* further pp. 10–11 below.

nuclear arms.[31] Empirical evidence now casts doubt on that thesis. Soviet arms-building, in light of the evidence, seems to have been largely *independent* of U.S. action or restraint.[32] To have spoken, then, of an "arms race" in progress, or of an "arms race" ending, would have partaken of legal fiction, if the phrase were interpreted to apply *only* to a factual pattern of action and reaction between two nuclear powers. The term "race" does imply competitors who act in response to one another, but evidence of a responsive relationship between the main Cold War nuclear powers, when social scientists and nuclear policy leaders have studied the historical record, has proved, at best, equivocal.[33]

The assumption on the part of the NPT drafters that there nevertheless was an "arms race" is embedded in the treaty text. A somewhat different sense of the term therefore is necessary, if the term is to be given effect. This is because it is a basic principle that all terms of a legal instrument have effect; it is only in unusual circumstances that an interpreter might declare that an instrument or a phrase in an instrument is "pathological"—i.e., defective from the outset in such a way that it simply cannot be made to work. It is for that reason of basic principle that some account of the term "arms race" must be given.

An observation relevant to arriving at an account of the term "arms race" as used in Article VI is that, in the Cold War, as noted, build-ups by one power seem to have been largely disconnected from the actions or reactions of the other. And, yet, there is no evidence that anybody thought that the facts of the situation deprived the arms race limb of effect at the time, and nobody since then has claimed that the parties were mistaken about the facts that they were adopting Article VI to address.[34] It follows that no more would

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31. *See* HON. DAVID J. TRACHTENBERG (Study Director), DR. MICHAELA DODGE & DR. KEITH B. PAYNE, THE "ACTION-REACTION" ARMS RACE NARRATIVE VS. HISTORICAL REALITIES (National Institute for Public Policy, 2021), *passim* and 11–20, regarding the use of the term "arms race" in historical context.

32. Former U.S. Secretary of Defense Harold Brown put it succinctly: "Soviet spending [on nuclear arms] has shown no response to U.S. restraint—when we build, they build; when we cut, they build." Testimony of Secretary of Defense Harold Brown before the U.S. Congress, House of Representatives, Committee on the Budge, Outlook and Budget Levels for Fiscal Years 1979 and 1980: Hearings Before the United States House of Representatives Committee on the Budget, 96th Congress, 1st Session, Part 1 (Washington, DC: U.S. Government Printing Office, 1979), p. 500, quoted at Trachtenberg, *supra* note 31, at 3, ¶. 7.

33. TRACHTENBERG ET AL., *supra* note 31, at 3:

"The corollary to this thinking, as expressed in the public debate, is that if only the United States had refrained from taking actions in the nuclear and missile defense spheres its restraint would have been reciprocated by others. The study uncovered no empirical evidence to suggest that this 'inaction-inaction' corollary to the action-reaction thesis is valid."

34. There is a doctrine of mistake in treaty law, embodied in Art. 48 of VCLT, but that doctrine is applied very conservatively; after only the most exacting analysis would a court or

the facts of the situation deprive the arms race limb of effect today—because the facts today, in a salient way, are similar to the facts at the start: China engages in a nuclear arms build-up largely disconnected from the nuclear posture of the United States or of the allies of the United States. Numerical increases and modernization by the United States, United Kingdom, and France have been marginal only; their purpose has been confined to maintaining stable deterrence. They have not approached the scope of China's build-up or of China's evident aim, which is to transform the strategic landscape. Indeed, the measures that the United States and its allies took at the end of the Cold War, though certainly of a transformative nature, went precisely the *opposite* direction that China is going today: all three western nuclear-weapon States *reduced* their nuclear arsenals by significant amounts—the United States, by eighty percent.

Considering the empirical evidence from the Cold War, if the present state of affairs is not an "arms race" for purposes of Article VI, then that is not because an action-reaction relationship is missing. Such a relationship was not present then either. If there is no "arms race" today for Article VI purposes, then that would have to find its explanation in some other circumstance than the unilateral nature of China's drive to arm.

The explanation that would remain would be that some process of treaty modification has been at work. If it were the considered legal position of the United States that, by such process, the "arms race" limb has ceased to apply, and if that position were shared among the parties to the NPT, then this would have considerable consequences for the future of the NPT: if there is no longer a nuclear arms race for purposes of Article VI, then the obligation "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race" now would have no practical effect. It would be a provision that has faded from legal relevance. Under an interpretation holding that no arms race now exists for purposes of Article VI, an avenue for raising concerns over a nuclear-weapon Party's compliance with Article VI would be unavailable. It is therefore relevant to policy-makers to arrive at a confident legal view as to whether the arms race limb of Article VI continues to apply. This is the question that certain statements by

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tribunal find that a treaty is invalid due to error. VCLT, *supra* note 16, at 344. Moreover, one of the conditions for invoking error in the Art. 48 sense is that "the circumstances were [not] such as to put [the State invoking error] on notice of a possible error." *Id.* at Art. 48(2). It is not tenable to assert that the United States or the Soviet Union, at the time they adopted the NPT, were not "on notice" of the nature of their own nuclear armaments strategy. Neither of those States, therefore, could be said to have been in "error" when they accepted the "arms race" clause of Art. VI.

U.S. officials after the end of the Cold War have raised. The present article will consider those statements below.[35]

Before turning to the question of the continued applicability of the arms race limb of Article VI, this Part will consider negotiation requirements in international law generally (subpart B) and the negotiation requirement in Article VI (subpart C). The continued applicability of the arms race limb of Article VI then will be considered (Part D), with special attention to the United States' position in regard to Article VI (subpart D(1)), to the positions expressed by other countries in regard to that provision (subpart D(2)), and to legal policy ramifications that would arise if Article VI were applied differently among the five nuclear-weapon Parties (subpart D(3)).

B. Negotiation Requirements Generally

The negotiation clauses that have received the fullest ventilation by international courts and tribunals are those that stipulate negotiation as a required antecedent to some (usually compulsory and binding) dispute settlement mechanism but do not necessarily, in themselves, lead to a settlement. For example, parties may have recourse to the dispute settlement mechanisms under Part XV of the UN Convention on the Law of the Sea (UNCLOS) after they have attempted to negotiate a settlement of their dispute.[36] Considering UNCLOS Article 83, paragraph 1 (which addresses delimitation of the continental shelf), the International Court of Justice (ICJ) in *Maritime Delimitation in the Indian Ocean* observed that the provision contained a requirement that "there be negotiations conducted in good faith, but not that they should be successful."[37] A negotiation requirement of that kind is an obligation of "best efforts" (sometimes referred to as an obligation of conduct); it is not an obligation to reach a specified result.

Indeed, jurists have underscored that a negotiation prescribed in such terms does not necessarily reach a result at all:

> [E]ven where there is an obligation to negotiate, negotiations do not constitute, as such, a method of dispute settlement because they may or may not lead to a settlement, depending wholly or partly on the position of one of the States

35. *See infra* Section II.D.2.

36. *See* Maritime Delimitation in the Indian Ocean (Som. v. Kenya), Preliminary Objections, Judgment, 2017 I.C.J. 3, ¶ 90 (Feb. 2); Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment, 2002 I.C.J. 303, ¶ 244 (Oct. 10).

37. Som. v. Kenya, 2017 I.C.J., at ¶90.

> concerned. If States agree to negotiate but leave all their options open as to the outcome of those negotiations, they have not necessarily agreed to a method of *settlement*: it is equally possible that the dispute will not be settled.[38]

That an obligation to negotiate might not lead to a settlement does not mean that the obligation is without legal consequence. Because obligations of this type often stipulate negotiation as a requirement that parties must fulfil before invoking a judicial or arbitral dispute settlement clause,[39] a party that does not wish to litigate or arbitrate is likely to argue that the obligation has not been satisfied.[40] Dispute settlement clauses thus have given courts and tribunals occasion to consider what conduct would satisfy an obligation to negotiate.

When courts and tribunals have considered what conduct would satisfy an obligation to negotiate, they have concurred that paying mere lip service to the obligation does not suffice. The obligation entails "mak[ing] a *genuine attempt*."[41] To constitute a genuine

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38. Maritime Delimitation in the Indian Ocean (Som. v. Kenya) Joint Declaration, Judges Gaja and Crawford, 2017 I.C.J. 3, 63, ¶ 4 (emphasis original).

39. A characterization commonly seen in investment awards is that such a requirement is "preliminary" or "procedural." It is no doubt preliminary, for the requirement in treaties that contain it is to be satisfied before a claimant invokes the arbitral or judicial dispute settlement clause. Whether it is best described as "procedural" may be less clear. Some disputation has arisen as to whether such a requirement is "merely" one of procedure; or one that must be met in order to satisfy the conditions under which the parties have agreed to the exercise of arbitral or judicial power. *See, e.g.*, Ethyl Corp. v. Can., Award on Jurisdiction, ¶ 85 (June 24, 1998); Salini Costruttori S.p.A. v. Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, ¶¶ 74–88 (July 23, 2001); SGS Société Générale de Surveillance S.A. v. Pak., ICSID Case No. ARB/01/13, Decision on Objections to Jurisdiction, ¶ 184 (Aug. 6, 2003); Kaz. v. Ascom Grp. S.A., Stati, et al., Case no. T 2675-14, Svea C.t. of Appeal, Div. 02, Bench 020106 (Dec. 9, 2016), 50 ("In the literature, support is found for both positions"). In regard to the U.S.-Ecuador BIT, *see* Murphy Exploration and Prod. Co. Int'l v. Ecuador, ICSID Case No. ARB/08/4, (Oreamuno Blano, President; Grigera Naón and Vinuesa, Arb.), Award on Jurisdiction, 15 Dec. 2010, ¶ 149. *See also* ¶¶ 140–57. In regard to Art. 26(2) of the Energy Charter Treaty, *see* discussion in THOMAS ROE & MATTHEW HAPPOLD, SETTLEMENT OF INVESTMENT DISPUTES UNDER THE ENERGY CHARTER TREATY (James Dingemans ed. 2011) 137. Note: The present author served as party-appointed expert for Kazakhstan in the Stati proceedings.

40. A prominent example is Russia in claims that Georgia and Ukraine instituted against it at the ICJ. *See* Application of the Int'l Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Preliminary Objections, Judgment, 2011 I.C.J. 70, 120, ¶ 116 (Apr. 1) [hereinafter CERD case]; Application of the Int'l Convention for the Suppression of the Fin. of Terrorism and of the Int'l Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Preliminary Objections, Judgment, 2019 I.C.J. 558, ¶¶ 66–70 (Nov. 8). Cf. pre-arbitration waiting periods stipulated in some treaties, such as that in Art. 26(2) of the Energy Charter Treaty, and invoked from time to time against treaty claimants: *see, e.g.*, Stati et al v. Kazakhstan, SCC Arb V (116/2010) (Böckstiegel, Chairman; Haigh & Lebedev, Co-Arbitrators), Award (Dec. 19, 2013), 180–82, ¶¶ 820–27.

41. Application of the Int'l Convention for the Suppression of the Fin. of Terrorism and of the Int'l Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 40, at 588, ¶ 69. *See also* Continental Shelf (Tunis./Libya)1982 I.C.J., at 145, ¶ 4 (dissenting

attempt, parties must have "conducted themselves in such a way that negotiations may be *meaningful*."[42]

There exist many ways to conduct a meaningful negotiation. However, not every diplomatic contact or exchange constitutes a negotiation. The ICJ in *Georgia v. Russia* observed as follows: "[N]egotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims."[43]

The negotiation requirement under consideration in *Georgia v. Russia* was a pre-condition for recourse to the ICJ. Though, as noted, this is the kind of negotiation requirement that courts most often have had occasion to apply, not all obligations to negotiate are a pre-condition for recourse to a court. The obligation in Article 5, paragraph 1, of the North Macedonia[44]-Greece Interim Accord was not a pre-condition of that kind. It was, instead, an obligation to negotiate "with a view to reaching agreement on the difference [over the name of North Macedonia]."[45] This obligation to negotiate, not being part of a procedure for recourse by a party to a court or arbitral tribunal, was a free-standing obligation.[46] The ICJ concluded that the parties had indeed fulfilled that obligation, though the name remained at that time still in question. Crucial to the Court's conclusion, North Macedonia "showed a degree of openness to proposals that differed" from its own preferred outcome; and Greece, too, "changed its initial position."[47] The ICJ there considered much

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opinion by Gros, J.), citing, inter alia, Lake Lanoux Award, XII REP. INT'L ARB. AWARDS 281, 311 (Nov. 16). *Cf.* Abdulqawi Ahmed Yusuf, *Engaging with International Law*, 69 INT'L & COMP. L. Q'LY 505, 515 (2020).

42. Application of the Interim Accord of 13 Sept. 1995 (the former Yugoslav Rep. of Macedonia v. Greece), 2011 I.C.J. 644, 685, ¶ 134 (emphasis added) (Dec. 5).

43. CERD, supra note 40, at 132, ¶ 157.

44. The Macedonian party at the time was titled for purposes of the Interim Accord, and for transactions in the United Nations, as "the Former Yugoslav Republic of Macedonia" (the FYROM) in accordance with Security Council resolutions 817 (1993) and 845 (1993). The name "Republic of North Macedonia," short form "North Macedonia," was agreed between the two States under Article 1(3)(a) of the Final Agreement for the settlement of the difference described in the United Nations Security Council Resolutions 817 (1993) and 845 (1993), the termination of the Interim Accord of 1995, and the establishment of a strategic partnership between the Parties, signed at Prespa, June 17, 2018, and entered into force Feb. 12, 2019. U.N.T.S. reg. no. 55707.

45. Interim Accord, Art. 5(1), Oct. 13, 1995, 1891 U.N.T.S. 3, 5.

46. The former Yugoslav Rep. of Macedonia v. Greece, 2011 I.C.J. at 692, ¶ 166. For some earlier examples of such negotiation clauses—i.e., clauses requiring negotiation but not as a pre-condition for recourse to a court or arbitral tribunal—*see* Martin A. Rogoff, The Obligation to Negotiate in International Law: Rules and Realities, 16(1) MICH. J. INT'L L. 141, 161–71 (1994).

47. The former Yugoslav Rep. of Macedonia v. Greece, 2011 I.C.J. at 686, ¶ 135.

the same factors as judges and arbitrators do in determining whether parties satisfy requirements to negotiate contained in clauses that provide for recourse to judicial or arbitral dispute settlement.

As observed some fifty years ago in the *North Sea Continental Shelf Cases,* which were argued at the time when the NPT was in its final drafting stages,[48] negotiation has not taken place where either party "insists upon its own position without contemplating any modification of it."[49] Then, as now, static and insistent repetition by one State of its preconceived viewpoint will not satisfy an obligation to negotiate.

Jurists agree that a commitment to negotiate is a commitment to do so in good faith whether or not a treaty stipulating the commitment says so.[50] "The principle of good faith is . . . one of the basic principles governing the creation and performance of legal obligations."[51]

No highly precise standard for distinguishing between good faith and its absence is visible in international law. Because assessing the internal state of mind of a State is an exercise fraught with difficulty,[52] the focus has been on external signs.[53] The successful resolution of a dispute through negotiation would suggest that the parties negotiated in good faith. The continuance of the dispute, however, says nothing in itself conclusive as to good faith. The

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48. Proceedings in the North Sea Continental Shelf cases were instituted on Feb. 20, 1967. *See* the Special Agreements (Denmark-Ger.; Ger.-Neth.) submitting the matter to the I.C.J.: North Sea Continental Shelf, Pleadings, Oral Arguments, Documents, 1968 I.C.J. 5, 6–9. As of Dec. 7, 1967, "substantial progress" had been made on the draft NPT text, but "a final draft [had] not as yet been achieved": Interim Report of the Conference of the Eighteen-Nation Committee on Disarmament, U.N. Doc. A/6951, 2 ¶ 5 (Dec. 7, 1967).

49. North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 85 (Feb. 20).

50. *See, e.g.*, The former Yugoslav Republic of Macedonia v. Greece, *supra* note 42, at 684, ¶ 131. *See also* Maritime Delimitation in the Indian Ocean supra note 36, at 63–64, ¶ 5. For an example of a national statute that does stipulate good faith in the negotiation setting, see the Native Title Act 1993 (Cth) as applied in Charles v. Sheffield Resources Ltd [2017] FCAFC 218 ¶ 3 (Federal Ct. Austral.) (noting the "correlative obligation on other persons to negotiate in good faith").

51. Border and Transborder Armed Actions (Nicar. v. Hond.), Jurisdiction and Admissibility, 1988 I.C.J. 69, ¶ 94 (Dec. 20) (internal quotations omitted), quoting Nuclear Tests cases (Austl. v. Fr.; N.Z. v. Fr.), Judgment, 1974 I.C.J. 253, ¶ 46; 457, ¶ 49 (Dec. 20).

52. It is in light of the difficulty that "the General Assembly can hardly be supposed . . . to ask the [ICJ's] opinion as to the reasons which, in the mind of a Member, may prompt its vote." Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948 I.C.J. 57, 60 (May 28).

53. *See* for example factors relevant to determining whether a State has the intention to recognize another entity as a State: Thomas D. Grant, *How To Recognise A State (And Not): Some Practical Considerations*, *in* SOVEREIGNTY, STATEHOOD AND STATE RESPONSIBILITY: ESSAYS IN HONOUR OF JAMES CRAWFORD 192, 207–08 (Christine Chinkin & Freya Baetens eds., 2015).

outcome of a negotiation, given the openness of negotiation to a range of solutions as well as to the possibility of inconclusive outcomes, does not say much, if anything, as to how the parties conducted themselves in the course of negotiation. "Two parties, each acting in good faith, or not demonstrably in bad faith, can fail to reach agreement."[54]

Where a party has acted *demonstrably in bad faith*, this is a clear case that the party has failed to meet its obligation. "Negotiation in bad faith" is a contradiction in terms. The obligation breached, in that case, would be the obligation to negotiate, the principle of good faith not being a separate source of obligation in that setting,[55] but its observance being integral and necessary to negotiation.

Where a party, though obliged to pursue negotiations, has refused to, that too presents a clear case. In that case, the matter is one of complete non-performance, rather than a defect vitiating an attempted negotiation.[56]

Finally, negotiation requirements are requirements to negotiate about a particular thing. A party does not satisfy a negotiation requirement by negotiating about *X* when the requirement is to negotiate about *Y*. In other words, "the subject-matter of the negotiations must relate to the subject-matter of the dispute . . . ."[57] It was Georgia's failure to have negotiated with Russia about alleged violations of the Convention on the Elimination of Racial Discrimination (CERD) that frustrated Georgia's attempt to litigate the matter before the ICJ.[58] It is true that the subject matter that parties are obliged to negotiate about may be expressed at a high level of abstraction, and the subject matter need not be part of a classic bilateral dispute such as those litigated from time to time in court. But it would serve no purpose to require negotiation purely for negotiation's sake: even negotiation requirements that are readily satisfied are not a hollow vessel. This point, and the others set out above, are relevant to the proper interpretation and application of the negotiation requirement in Article VI NPT, to which we now turn.

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54. Som. v. Kenya, 2017 I.C.J.,at 64, ¶ 5.

55. Nicar. v. Hond., 1988 I.C.J.at 105, ¶ 94.

56. *Cf.* NLRB v. Katz, 369 U.S. 736, 743 (Brennan, J., 1962) ("Clearly, the duty [to negotiate] may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact—'to meet . . . and confer'—about any of the mandatory subjects").

57. Geor. v. Russ., 2011 I.C.J. at 133, ¶ 161.

58. *Id.* at 139, ¶ 180: "[R]egardless of the Russian Federation's ambiguous and perhaps conflicting statements on the subject of negotiations with Georgia as a whole, and President Saakashvili personally, these negotiations did not pertain to CERD-related matters."

C. Negotiation Requirement in Article VI NPT

To recall, Article VI reads as follows: "*Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.*"[59]

Of chief concern for present purposes is the part of Article VI obliging the Parties "to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament."[60] This clause relates to that in the Preamble "[d]eclaring [the Parties'] intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament." The preambular language underscores the directional aspect of Article VI. Article VI is not a prohibition against nuclear weapons. If it were, then it would require nuclear disarmament immediately, which it does not. It is, instead, a negotiation clause, envisaging the Parties *moving in a direction* promoted by negotiations.[61]

In considering the negotiation requirement in Article VI, two clauses of that provision merit special remark, the "to pursue negotiations" clause and the "effective measures" clause. Subpart C(1) and subpart C(2) will consider these respectively.

1. The "To Pursue Negotiations" Clause

China, the main State concerned for present purposes, has not, to the present author's knowledge, given a complete exegesis of how it understands Article VI, including the words "to pursue negotiations" therein. One Chinese legal scholar, writing in 2009,

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59. 729 U.N.T.S. at 173.

60. *Id.*

61. As to the relevance of a treaty preamble in interpreting an operative provision of the treaty, this follows from the character of the preamble as part of the context of the treaty, as recognized in the chapeau to Art. 31(2) VCLT: "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes," VCLT art. 31(2), *supra* note 16, at 340. As to the general applicability of that rule, *see* Rights of Nationals of the U.S. in Morocco (Fr. v. U.S.), Judgment, 1952 I.C.J. 176, 196 (Aug. 27); Asylum Case (Colom./Peru), Judgment, 1950 I.C.J. 266, 282 (Nov. 20). *See also* Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sen.), Judgment, 1991 I.C.J. 54, 142 (Nov. 12) (dissenting opinion by Weeramantry, J). Under the NPT, there is the further consideration that, in its operative provisions, the treaty expressly calls on the States Parties to "assur[e] that the purposes of the Preamble... are being realised." NPT, *supra* note 1, at art. VIII(3).

said that the Article VI obligation is merely "hortatory or inspirational in nature."[62] That view is difficult to accept, for the terms of Article VI are mandatory ("[e]ach of the Parties . . . undertakes . . ."). [63] However, at least one other writer, with high-level experience in arms control negotiations, once suggested that the words "to pursue" have a limitive effect on the negotiations clause.[64] The effect, in that writer's view at the time, is not to render the mandatory terms of Article VI merely "hortatory or inspirational," but it *is* to limit the obligation to one of exploration or overture and thus to distinguish it from an obligation to negotiate as such. In that view, an obligation to *pursue* negotiations is not the same thing as an obligation to *negotiate*; Article VI is not a negotiation provision but, rather, a sort of pre-negotiation procedural clause, a stipulation that the parties will explore the *possibility* of negotiation. Is this interpretation sound—i.e.,

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62. Zhang Xinjun, *Intentional Ambiguity and the Rule of Interpretation in Auto-Interpretation – The Case of "Inalienable Right" in NPT Article IV*, 52 JAPANESE Y.B. OF INT'L L. 35, 36 (2009). The author was an associate professor at the School of Law of Tsinghua University, Beijing, at the time and as of December 2020, inter alia, an editor of the CHINESE J. OF INT'L L.

63. It is true that the Ninth Circuit seems to say otherwise. *See* Marsh. Is. v. U.S., 865 F.3d at 1190, 1195–96: "In context, the state parties' meek agreement that they 'undertake . . . to pursue' good-faith negotiations is at most a hortatory directive." But the question that the Court of Appeals was addressing was whether the NPT gave the plaintiff a federal cause of action, not what the effects of Art. VI might be in the international law sphere. The statement there about "a hortatory directive" was relevant, perhaps, to the Court of Appeals' reasoning that the NPT is a non-self-executing treaty, but that statement would be better characterized as dicta only, it not having been essential to the court's judgment affirming that the plaintiff had presented no justiciable claim. The plaintiff most certainly had not, and so to take the court to task over the legal effects of the negotiations clause would be to cavil Judge McKeown's conclusion as to the issue that the appeal presented is sound.

In international settings, a treaty by which parties "undertake" to do or refrain from something normally identifies an international legal obligation. For example, the ICJ in the Pulp Mills case considered Art. 41 of the 1975 Statute of the River Uruguay by which those parties "undertake" to prescribe certain national rules; not to reduce certain environmental standards in their national law; and to inform one another of prospective new national law rules. Neither party raised any question as to the obligatory effect of the "undertake" provision; and the Court understood the specified conduct to be obligatory. *See* Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, 45 ¶ 61 (Apr. 20). Similarly, Djibouti and France understood "undertake" in Article 1 of their 1986 Convention on Mutual Assistance in Criminal Matters to denote a legal obligation: Certain questions of mutual assistance in Criminal matters (Djib. v. Fr.), Judgment, 2008 I.C.J.177, 220, ¶ 116 (June 4); Nicaragua and Colombia shared the same understanding in regard to use of the verb "to undertake" in connection with the Pact of Bogotá: Territorial and Maritime Dispute (Nicar. v. Colom.), Preliminary Objections, 2007 I.C.J.832, 870, ¶ 123 (Dec. 13); a declaration that a State deposits in accordance with SC res. 9 (1946) of Oct. 15, 1946, by which the State "undertakes to accept the jurisdiction of the Court" legally binds the State to do so: Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Croat. v. Serb.), Preliminary Objections, 2008 I.C.J. 412, 430 ¶ 58 (Nov. 18). As to NPT Art. VI itself, the ICJ confirmed its obligatory character: *see infra* text accompanying notes 66–68.

64. *See* Ford, *supra* note 26, at 403.

does the phrase "to pursue" in the negotiations clause of Article VI limit the obligation set down therein?

On at least three grounds, the better interpretation of the "to pursue negotiations" clause is that it does not differ very much from a clause requiring negotiations, *simpliciter*.

First, viewing the clause in Article VI as something less than a negotiation requirement would not accord with the interpretation placed on it repeatedly by other States and the ICJ. Second, a negotiation requirement, whether expressed with the verb "to pursue" or otherwise, encompasses the pursuit and, thus, any difference, to this extent, is one more of form than function. And third, a reading of the French-language version of the NPT, as well as examples of usage from courts that employ both French and English as authentic languages, illustrates that "to pursue negotiation" is synonymous with "to negotiate" when used in settings like Article VI.[65]

Turning first to the ICJ practice, the Court in the *Nuclear Weapons* Advisory Opinion referred to "the full importance of the recognition by Article VI of the [NPT] of an *obligation to negotiate* in good faith a nuclear disarmament."[66] The ICJ in the three cases on *Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament*[67] recalled that statement from the Advisory Opinion with approval. The ICJ thus has read Article VI as requiring that the Parties negotiate. An "obligation to negotiate" is not a procedural construction under which the parties exist two steps removed, as it were, from negotiation. It is a commitment to do what it says, and the ICJ has consistently understood it that way. The ICJ's understanding, to this extent, comports with the plain reading of the text, as noted above.[68]

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65. Academic critics of the limitive interpretation of the "to pursue negotiations" clause also have referred to a supposed prevalence of academic opinion on the matter. See, e.g., Monique Cormier & Anna Hood, *Australia's Reliance on US Extended Nuclear Deterrence and International Law*, 13 J. INT'L L. & INT'L REL. 3, 35 (2017) and other works cited on that page at n. 138.

66. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 66, 263, ¶ 99 (July 8) (emphasis added). As to the ICJ's suggestion that this is an obligation recognized, and thus pre-existing the NPT, evidence, in the view of the present author, is lacking that general international law had contained, or does contain, a disarmament rule.

67. Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K), Judgment, 2016 I.C.J. 844, ¶ 20 (Oct. 5); Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. India), 2016 I.C.J. 255 at 264, ¶ 19 (Oct. 5); Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.), 2016 I.C.J. 552 at 561, ¶ 19 (Oct. 5).

68. Ford, *supra* note 26, at 403.

No doubt there is much in the ICJ's nuclear weapons advisory opinions to question; the strong dissent of Vice-President Schwebel identified the main difficulties.[69] However, the understanding that the ICJ reached of the "to pursue negotiations" clause is supported by other considerations as well. Countries, international organizations, and jurists referring to a pursuit of negotiations also have done so, not to denote some preliminary phase distinct and severable from a negotiation, but, rather, the action itself of conducting negotiations. Thus, for example, Australia, in its Declaration made upon signature of the NPT, "welcome[d] the call in Article VI . . . for negotiations . . . ."[70] Germany in its understandings expressed upon signature said that "the Parties to the Treaty will commence without delay the negotiations on disarmament envisaged under the Treaty, especially with regard to nuclear weapons,"[71] a statement that the present author is not aware drew objection from China, the United States, or any other party. Australia and Germany understood Article VI to concern negotiations, not a prior phase of engagement or discussion of exploratory purpose disconnected from negotiations.

Turning to international usage more widely, a number of examples may be given from legal settings in which pursuing negotiations similarly has been understood to mean the act of negotiating. In the United Nations International Law Commission (ILC),[72] it was natural to refer to the Committee of Ministers of the Council of Europe (COE) "*pursuing negotiations* with the European Union" about the Union's accession to the COE[73]; or in discussions on the topic of State responsibility and countermeasures to note that "a wrongdoing State could *pursue negotiations* indefinitely" and thus frustrate the State that was wronged.[74] It

69. *See id.* at 409–11. *See also* Tim Wright, *Negotiations for a Nuclear Weapons Convention: Distant Dream or Present Possibility?*, 10(1) MELBOURNE J. INT'L L. 217, 228–29 (2009) (acknowledging the critics but begging to differ).

70. NPT, *supra* note 1 at 264.

71. *Id.* at 273.

72. The International Law Commission (ILC) is the U.N. body that the U.N. General Assembly established under G.A. Res. 174(III) (Nov. 21, 1947) to give effect to U.N. Charter Art. 13(1), which requires the Assembly to "initiate studies and make recommendations," inter alia, for the purpose of "promoting international co-operation in the political field and encouraging the progressive development of international law and its codification." The U.S. Supreme Court from time to time has acknowledged the relevance of the ILC's drafting work and commentaries, though, absent adoption as a treaty, these are not binding as a matter of international law. *See, e.g.*, U.S. v. La., 389 U.S. 155, 176 (1967); U.S. v. Cal., 447 U.S. 1, 7–8 (1980) and *id.* at 7 n.7 (1980); U.S. v. Me., 469 U.S. 504, 523–24 (1985).

73. Int'l Law Comm'n, Summary, Recording of the meetings of the Sixty-Fourth Session, U.N. Doc. A/CN.4/SER.A/2012 at 77 ¶ 18 (2012) (emphasis added).

74. Int'l Law Comm'n, Rep. of the Comm'n to the General Assembly on the work of the Forty-Fourth session, U.N. Doc. A/CN.4/SER.A/1991/Add.1 at 28 ¶ 190 (1992) (emphasis added).

appears from the context that in both these examples the concern was with the act of negotiating. The EU and COE were already in agreement about accession; the task was to negotiate the final details of the accession instruments, and nobody doubted that the two sides were going to do so. As for the example concerning responsibility and countermeasures, the discussion in the ILC addressed "negotiations—which were likely to be *the first procedure to be applied*" among the required "amicable procedures," the apprehension thus having been that the wrongdoer would drag out that likely procedure, not that the wrongdoer would fail to use it.

Treaties and international instruments on other topics similarly have used the verb "to pursue" to mean active engagement in a process or task, not to denote an antecedent or preparatory exploration that might, or might not, lead to such engagement. For example, the 1892 Treaty between Switzerland and Austria-Hungary for the regulation of the Rhine required the parties to "make every effort" to construct dams and other flow controls and required that those tasks "shall be . . . pursued . . . ."[75] The treaty exhorted the parties to pursue those efforts, not to engage in a preliminary process to exchange views at arm's length about flood control. Likewise, an OECD Council recommendation on transboundary pollution in 1974 called on countries to "enter into consultation" and *then* "diligently pursue such consultations,"[76] a form and sequence of words that would make no sense if the pursuit were a predicate step to the consultations themselves.

A similar relation is visible in the Permanent Court's 1931 advisory opinion on *Railway Traffic between Lithuania and Poland,* where that court interpreted a Resolution of the Council of the League of Nations that placed a legal duty on the two litigants to negotiate: "The Court is indeed justified in considering that the engagement incumbent on the two Governments in conformity with the Council's Resolution is not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements."[77]

Again, to pursue is to conduct negotiations, which entails the parties having entered into them. In light of the shared understanding of what it means to pursue negotiations evinced here and in the other materials noted, the better reading of the

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75. Treaty for the regulation of the Rhine art. XVII, Switz–Austria, Dec. 30, 1892, https://www.admin.ch/opc/de/classified-compilation/18920017/index.html.

76. Org. for Economic Co-Operation and Development [OECD], *Recommendation of the Council on Principles Concerning Transfrontier Pollution,* OECD/LEGAL/0133 (Nov. 14, 1974).

77. Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931 P.C.I.J. REP. (ser. A/B) No. 42, at 116 (Oct. 15).

"to pursue negotiations" clause in Article VI NPT is that the Parties thereby have engaged to enter into and conduct negotiations, not just to deliberate about negotiating.

A draftsman certainly has words at his disposal to denote a procedural antecedent or other step prior to negotiation. Turning again to the UN Convention on the Law of the Sea, an example of such words is found in that treaty's Article 283. Under Article 283, which is titled "Obligation to exchange views," parties to a dispute "shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means."[78] There, the parties are obliged, as distinct from negotiating, to exchange views. Exchanging views, they might agree to negotiation; they might agree to "other peaceful means." In either case, UNCLOS Article 283 plainly indicates a diplomatic step separate and distinct from negotiation, something that NPT Article VI does not.[79]

Finally, it is to be observed that, in at least one of the other authentic languages of the NPT, the received understanding of "to pursue" leads to the same interpretation as supported by the considerations above. In the French text, the clause reads, "*[c]hacune des Parties au Traité s'engage à poursuivre de bonne foi des négociations . . . .*"[80] The phrase "to pursue" in English may mean to carry on or proceed with (as in an action or procedure); this is one of some eleven variants and sub-variants indicated in the Oxford English Dictionary.[81] However, it is the chief variant concerning legal procedure. A perusal of case law discloses many instances in which courts in English-speaking countries have used the expression "pursue negotiation" in accordance with the dictionary.[82] As for *poursuivre*, this, in a legal setting, also

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78. United Nations Convention on the Law of the Sea art. 283, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397, 508 (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

79. UNCLOS was not the first treaty to distinguish between "exchange of views" and other forms of engagement. For example, air transport agreements of the Federal Republic of Germany concluded before UNCLOS (and before the NPT) have distinguished between "exchange of views" and a consultation process. *See* Air Transport Agreement art.12–13, July 22, 1959, 464 U.N.T.S. 189, 201–03; Air Transport Agreement art. 8–9, Ger./Sen., Oct. 29, 1964, 728 U.N.T.S. 121, 125.

80. NPT, *supra* note 1, at 181.

81. Oxford English Dictionary, 3rd edition, 2007.

82. *See, e.g.*, E.E.O.C. v. Asplundh Tree Expert Co., 340 F.3d 1256, 1261 (11th Cir., 2003); Big Red, LLC v. Davines S.P.A., 31 Fed. Appx. 216, 220–21 (4th Cir., Wilkins, J., 2002); Blue Grass Provision Co., Inc. v. N.L.R.B., 636 F.2d 1127, 1129 (6th Cir. 1980); Morley v. Royal Bank of Scotland plc [2020] EWHC 88 (Ch) (High Court of England and Wales, Kerr J.) (Jan. 27, 2020) ¶ 55; In the matter of Edwardian Group Ltd. [2017] WEHC 2805 (Ch) (Morgan J.) ¶ 25; Scheuer v. Bell [2004] VSC 71 (June 3, 2003) (Supreme Court of Victoria, Kaye J.) ¶¶ 83, 87; Synchronics Incorporated v. Synchronics Ltd., 2001 FCT 1031 (Fed. Ct. of Can.; Taubman, Assessment Officer) ¶ 8; Sadowski v. City of Hamilton: CUPE and its Local 5167

particularly connotes the continuance of a procedure under way. Thus, for example, in a judgement of the European Court of Human Rights (where the English and French texts are equally authentic),[83] "*le refus par un requérant d'entamer ou de poursuivre des négociations avec les authorités d'un Etat défendeur*" is equivalent to "an applicant's refusal either to enter into or continue negotiations with the authorities of a respondent State."[84] Both the contrast between "*entamer*" and "*poursuivre*," and the equivalency between "*poursuivre*" and "continue," accord with the meaning of "to pursue" that the present author reasons is to be given to those words in Article VI. The European Court of Justice, which, like the Court of Human Rights, publishes texts of its judgments in English and in French,[85] deals with "to pursue" much the same way. Thus, "*la Commission souhaitait poursuivre à son compte les négociations*" is in its English form "the Commission wished to continue the negotiations on its own behalf."[86] No other variant of "*poursuivre*" is disclosed by searches of the jurisprudence of either of these treaty-based courts.

Of course, to negotiate, one needs more than one party; and the parties need to take steps to set negotiations in train. Thus, an obligation to pursue negotiations necessarily entails preliminaries before it will be satisfied. This practical reality is reflected in the interpretation and application of negotiation clauses: parties, rightly, do not operate on the view that their obligations to negotiate come with a pre-fixed schedule or demand a constant state of engagement without preamble or pause.[87] That an engagement,

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intervening, 2019 HRTO 1078 (Human Rights Tribunal of Ontario; Cook, Adjudicator) ¶¶ 94, 95; Cilliers N.O. v. Duin & See (Pty) Ltd., Case No. 12442/2011, 2012 (4) SA 203 (WCC) (Feb. 28, 2012) (Western Cape High Court, Binns-Ward J.) ¶ 12; Comm'r of Inland Revenue v. Aer'Aqua Med. Services Ltd, [2006] NZHC 744 (June 29, 2006) (High Court of New Zealand, Abbott AJ) ¶ 2.

83. In accordance with Rule 34 of the Rules of Court of the European Court of Human Rights, as amended Dec. 13, 2004, and Sept. 19, 2016, the official languages of the European Court of Human Rights are English and French. This is in line with the European Convention on Human Rights, art. 59.

84. Andronicou and Constantinou v. Cyprus, Case 86/1996/705/897, Judgment of 9 Oct. 1996, at ¶ 165.

85. However, "the only authentic version of the judgment . . . is that which appears in the language of the case": Language Arrangements, COURT OF JUSTICE OF THE EUROPEAN UNION, https://curia.europa.eu/jcms/jcms/Jo2_10739/en/. As to translation functions in the Court of Justice, *see* Legal Translation at the Court of Justice of the European Communities, EULITA, https://eulita.eu/legal-translation-court-justice-european-communities/.

86. Case T-271/04, Citymo SA v. Comm'n, Judgment of the Court of First Instance (Second Chamber), [2007] ECR II-01375 (8 May 2008).

87. The U.S. Court of Appeals for the Ninth Circuit thus cogently observed that "the essential details of the negotiations [stipulated under Art. VI]—their time, their place, their nature—was unspecified upon ratification." Marsh. Is. v. U.S., 865 F.3d at 1195. *See also*

to be a negotiation, must be *meaningful* (see above, *pages 13–14*) itself suggests that satisfying a negotiation requirement involves outreach, exploration, and a rhythm adaptable to an evolving substantive colloquy. Negotiation allows, indeed necessitates, that the parties are not constantly at the table.[88] Moreover, that it is indispensable to have more than one party in order to have a negotiation entails a process of invitation, agenda-setting, and, quite likely, trial-and-error.[89] A party does not fall into breach of a negotiations clause simply because another party is intransigent. If it did, then the negotiations clauses of the kind contained in many dispute settlement provisions would present a moral hazard: the party that wishes to avoid the arbitration tribunal or court merely would have to drag its feet, and, refusing to negotiate, deprive the other party of the chance to fulfil the negotiation requirement—and, thus, of recourse to dispute settlement. That is not how courts or tribunals understand negotiation clauses. In the obligation to negotiate inheres the pursuit. Making that explicit (as NPT Article VI does) is, arguably, better drafting; but leaving it to be inferred has not led courts and tribunals to any different interpretation.[90]

2. The "Effective Measures" Clause

Turning to the "effective measures" clause, a question arises as to its function within the article to which it belongs. No doubt, each

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Michael J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, 91 AM. J. INT'L L. 417, 434: "the [ICJ's advisory opinion] does not dictate any timetable or negotiating forum."

88. By contrast to where an adopted text tells parties simply to pursue negotiations, treaty drafters elsewhere have had a specific timeline or procedure in mind. NPT Art. III, para. 4, for example, requires that negotiation of safeguard agreements for non-nuclear-weapon States Parties commence "within 180 days from the original entry into force" of the NPT; and, if a State ratifies or accedes to the NPT later than the expiry of the 180 days, then negotiations "shall commence not later than the date of [their] deposit" of ratification or accession instrument. NPT, *supra* note 1, at 172. As to negotiations on the subject of peaceful nuclear explosions (Art. V), the point of commencement was on more permissive terms—i.e., "as soon as possible after the [NPT] enters into force." *Id.* at 173.

89. Salient in this regard, President Trump observed in reply to a reporter's question regarding possible future trilateral negotiation, "We thought that we would do it first. I don't know if it's going to work out. But we would do it first and then we go to China together . . . . Which, I think, works out probably better." (Remarks by President Trump, July 29, 2020, op. cit. p. 2 n. 2). Cf. DONALD J. TRUMP, THE ART OF THE DEAL (1987) 233: "There are times when you have to be aggressive, but there are also times when your best strategy is to lie back."

90. Ford, op cit., therefore, was right when he observed that "the language about negotiations needing to be 'pursue[d] . . . in good faith' clearly leaves open the possibility that such negotiations might not take place, let alone succeed": Ford, *supra* note 26, at 403. That possibility—i.e., the possibility that negotiations might fail or never begin—is implicit in treaties that follow the more streamlined form and require, simply, that parties negotiate. Courts and tribunals that have been called upon to apply those treaties agree: see judgments and awards cited, Part II(B) above, especially Som. v. Kenya, Joint Declaration, Judges Gaja and Crawford, 2017 I.C.J. at 64, ¶ 4.

NPT Party has wide discretion to determine what, in its view, constitutes an effective measure. Past a certain point, however, discretion such as that would reduce the obligation to a very modest one indeed.[91] For reasons that may be set out briefly, the "effective measures" clause does entail a wide discretion, but not so much as to relieve an NPT Party of a meaningful legal duty.

A proper understanding of the "effective measures" clause requires reading it together with the other words in Article VI. For ease of reference, here again is Article VI: "[e]ach of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

As an initial matter of textual analysis, it merits observation that the subjects to whom the sentence is addressed—"[e]ach of the Parties to the Treaty"—have accepted an obligation (they have "undertake[n]") to do something. The thing that they have undertaken to do is "to pursue negotiations in good faith." To negotiate without an object would be an exercise with no point, and, so, the predicate of the sentence is comprised of that active part ("to pursue negotiations . . ."), plus a pair of subordinate clauses. The subordinate clauses give the negotiations their object. The first subordinate clause is "*on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament*." The second is "*on a treaty on general and complete disarmament under strict and effective international control*." These are the objects toward which the Parties are to direct themselves when they negotiate.

The starting point of the Article VI obligation is the obligation to negotiate. From that starting point, it follows that the objects of negotiation are matters not yet subject to agreement, for, if they were already agreed, then it would be to no purpose to oblige negotiating about them. Taking the second object of negotiation—a treaty—Parties negotiating on a treaty will have differences of view as to what the treaty should say. Parties negotiating on a treaty addressing a matter of the complexity and gravity of "complete disarmament . . ." will have particularly diverse, even contentious,

91. Academic writers concerned with disarmament have lamented the discretion that the "effective measures" clause leaves in each Party. *See, e.g.*, Paul Meyer, *"Permanence with Accountability": An Elusive Goal of the NPT*, 3(2) J. FOR PEACE AND NUCLEAR DISARMAMENT, 215, 216 (2020).

views as to what *that* treaty should say.[92] The same will be the case for Parties negotiating "on effective measures relating to cessation of the nuclear arms race" etc. The object of a negotiation in any situation is, by definition, an object of difference.

To read an unbounded discretion into the "effective measures" clause, however, would furnish a Party a justification for refraining from negotiation. For two related reasons, the lineaments of which have been suggested already above, this is not the better reading of Article VI:

First, there is the structure of the provision. The obligation in Article VI is not expressed as an obligation that the Parties be in accord as to the definition of "effective measures." The treaty might well have defined effective measures, in which case it would have achieved just such accord. Instead, the treaty requires the Parties to negotiate on effective measures, which leads to the second point.

Second, if a negotiation provision, including this one, were aimed at reaching agreement on something already agreed, then the provision would have no effect. As noted above in connection with negotiation provisions generally,[93] for a negotiation provision to have effect, it must oblige negotiation *about something*. Article VI obliges negotiation about, *inter alia*, "effective measures."

It would not avail a State, seeking to justify its failure to negotiate, to say merely that it differs from another State as to what measures might be effective. A natural reading of the text of Article VI, instead, is that one of the purposes in pursuing negotiations is to work through the many permutations of "effective measures" that States are likely to conceive in furtherance of arms control. Differences between China and other States as to what measures might be "effective measures" do not efface the obligatory direction in Article VI to negotiate. To the contrary, such differences are the reason negotiation is required.

Even a negotiation concerning a seemingly straightforward object, such as Greece and North Macedonia's negotiation concerning the latter's name,[94] entails back-and-forth. The technical complexity of arms control being so much greater than many other objects of negotiation, it is natural to assume that the design of, and

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92. Indeed, the drafters of the NPT in the 1960s were deliberate in leaving the complexity of arms control and disarmament to future negotiations. John Carlson, *Is the NPT Still Relevant? How to Progress the NPT's Disarmament Provisions*, 2(1) J. FOR PEACE AND NUCLEAR DISARMAMENT 97, 101 (2019). *See also* the observation by U.S. NPT negotiator Gerard Smith that it is "obviously impossible to predict the exact nature and results of such negotiations." *Military Implications of the Treaty on the Non-Proliferation of Nuclear Weapons*, Hearing Before the S. Comm. on Armed Services, 91st Cong. 121 (1969), (answer to question submitted by Sen. Thurmond).

93. See p. 16 above.

94. See p. 14 above.

agreement to, "effective measures" will be negotiated at length, even if political differences (such as those that made the Greece-North Macedonia negotiations difficult) were to be set aside.[95] The NPT Parties still, however, are obliged to pursue negotiations. To the extent that each NPT Party has discretion to interpret the "effective measures" clause, variations of interpretation have only so much impact on the provision as a whole. It is unsupportable to read a subordinate clause of a negotiation provision so as to eliminate the obligation to negotiate.[96]

D. The Continuing Applicability of the Negotiation Requirement

Treaties, which is to say instruments expressing legally-binding commitments under international law,[97] are durable, but no treaty is forever; very few treaties are even claimed to be.[98] Parties

95. For case studies of six arms control negotiations up to 1989, *see* APRIL CARTER, SUCCESS AND FAILURE IN ARMS CONTROL NEGOTIATIONS (1989).

96. This conclusion follows from a general consideration of legal construction: an allocation or reservation of discretion is not to deprive of effect a binding term that it is subordinate to. Practically every legal system applies that consideration. Thus, for example, under the U.S. Federal Rules of Civil Procedure Rule 54(d) on award of costs, "the discretion . . . [to grant costs] is not a power to evade the specific categories of costs set forth by Congress." Taniguchi v. Kan Pacific Saipan, Ltd., 566 U.S. 560, 572 (2012). In a different posture, there was France's purported acceptance of ICJ jurisdiction in the Norwegian Loans case. The French Declaration purporting to accept jurisdiction contained a reservation on the following terms: "This declaration does not apply to differences relating to matters which are essentially within the national jurisdiction as understood by the Government of the French Republic." Judge Sir Hersch Lauterpacht reasoned that the Declaration was "an instrument incapable of producing legal effects before this Court," because, though it purported to accept jurisdiction, the reservation in it swallowed the acceptance. Certain Norwegian Loans (Fr. v. Nor.), 1957 I.C.J. 9, 44, 66 (July 6) (separate opinion by Lauterpacht, J.). The Court rejected France's claim on other grounds, but the case is best remembered for Judge Lauterpacht's separate opinion.

97. *See* VCLT Art. 2(1)(a), *supra* note 16, at 333: "'Treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." *See also* VCLT Art. 26, *supra* note 16, at 339: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." For purposes of this article, distinctions under United States law between treaties (which, in accordance with Article II, Section 2, of the Constitution, require advice and consent of the Senate, with two thirds concurring) and executive agreements (which enter into force by executive act alone) will be left aside, because (1) the concern here is with treaty interpretation under international, not national, law; and (2) the treaty concerned, the NPT, is one that required Senate advice and consent and thus is a "treaty" in both the international and the United States sense of the term.

98. Thus, for example, "it is a principle of international law that a territorial régime established by treaty 'achieves a permanence which the treaty itself does not necessarily enjoy.'" Territorial and Maritime Dispute (Nicar./Colom.), Judgment, 2007 I.C.J. 832, 861, ¶ 89 (Dec. 13), quoting Territorial Dispute (Libya/Chad), at 37, ¶¶ 72–73. When parties adopt language suggesting immutability, it is typically in treaties of peace and territorial settlement that they do so. *See, e.g.*, Treaty of Perpetual Peace, Eng.-Scot., Jan. 24, 1502, Thomas Rhymer, Foedera, Vol. 12, at 793–97 (1740).

that enter treaties understand that possibilities exist, or may arise, for modification or even termination. Durability, which jurists sometimes denote with the expression "stability of treaty relations,"[99] however, is a characteristic of treaties fundamental to their role in international relations. Reflecting the need for durable treaties, States and the courts to which they sometimes subject themselves are careful about the modes and processes by which a treaty might cease to apply. The present subpart (D) will start with a brief overview of ways a treaty, or part of a treaty, might cease to apply. It then will turn to the United States' position regarding the continuing applicability of Article VI of the NPT (D(2)); positions that other States have taken regarding that matter (D(3)); and grounds of legal policy that caution against interpreting Article VI as imposing a negotiation requirement on some nuclear-weapon Parties but not on others (D(4)).

1. Desuetude and Other Ways Treaties Cease to Apply

The identification of modes and processes by which a treaty might cease to apply being one of the most important matters in international law, an enormous literature has arisen around the matter, as well as an extensive judicial and governmental practice. It is beyond the scope of the present Article to canvass the literature and practice.[100] Instead, some brief observations may be made as relevant to the arms race limb of Article VI.

To begin, there is no doubt that the NPT remains in force. No question arises as to the NPT having been subject to any process of termination or withdrawal that would have affected the obligations of China or the United States.[101] Therefore, the mechanisms concerning termination or withdrawal from a treaty are not relevant

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99. Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, 65, ¶ 104 (Sept. 25). *See also* Temple of Preah Vihear (Cambodia/Thai.), Judgement, 1962 I.C.J. 6, 57 (June 15) (separate opinion by Fitzmaurice, J.).

100. *See generally*, *e.g.*, ATHANASSIOS VAMVOUKOS, TERMINATION OF TREATIES IN INTERNATIONAL LAW: THE DOCTRINES OF REBUS SIC STANTIBUS AND DESUETUDE (1985); PAUL REUTER, INTRODUCTION AU DROIT DES TRAITÉS 116–31 (PUF, Paris, 3d ed. 1995); MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 543–44 (2009).

101. Or of any other Party, with the possible exception of the Democratic People's Republic of Korea (DPRK). The declaration of withdrawal from the NPT by the DPRK on Jan. 10, 2003, whatever its effects on the DPRK, left the obligations of the other NPT Parties undisturbed. For the DPRK's statement on that action, *see* Korean Central News Agency, *KCNA 'Detailed Report' Explains NPT Withdrawal* (Jan. 22, 2003), https://fas.org/nuke/guide/dprk/nuke/dprk012203.html. As to the earlier crisis arising over the DPRK's refusal to permit the IAEA to carry out safeguards inspections, see Antonio F. Perez, *Survival of Rights under the Nuclear Non-Proliferation Treaty: Withdrawal and the Continuing Right of International Atomic Energy Agency Safeguards*, 34 VA. J. INT'L L. 749 (1994).

here (Articles 54 and 56 VCLT).[102] Fundamental change of circumstances, where it was not foreseen by the parties to a treaty, may be invoked by them as a ground for terminating or withdrawing from the treaty (Article 62 VCLT).[103] It is self-evident in Article VI that the conclusion of the arms race is foreseen in the NPT; bringing the arms race to conclusion is one of the main objects and purposes of the NPT.[104] Therefore, the arms race limb of Article VI would not have ceased to apply by operation of the rule of fundamental change.

The suspension of the operation of a treaty also may occur, where a party invokes supervening impossibility of performance and where the impossibility resulted from the *permanent* disappearance or destruction of an object indispensable for executing the treaty (Article 61 VCLT).[105] Even if the view is taken that the arms race, for purposes of Article VI NPT, disappeared at the end of the Cold War, it is evident that the resulting state of affairs was not permanent. An old arms race might resume; a new one might begin. Supervening impossibility does not address a claim that the arms race limb of Article VI has ceased to apply. Moreover, there is the empirical evidence, noted above, that the Cold War rivalry did not involve an action-reaction "race" in the sense that some writers had assumed. The reduction in nuclear armaments by the United States and Russia after the Cold War certainly changed the strategic environment, but, in view of the evidence, it did not result in the disappearance of the one and only state of affairs that could be called an "arms race" for purposes of Article VI.

There are various voluntary mechanisms, under which parties to a treaty may agree to modify its terms, or to terminate or suspend them. These are visible in Articles 57,[106] 58,[107] 59[108] VCLT. No nuclear-weapon State has agreed to any change in the NPT that would have set aside the arms race limb of Article VI.

A final mechanism meriting consideration for present purposes is desuetude. While the 1969 Vienna Convention did not codify any provision expressly concerned with desuetude, the concept exists in

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102. As to termination, *see generally* Laurence R. Helfer, *Terminating Treaties, in* THE OXFORD GUIDE TO TREATIES 634–49 (Duncan Hollis ed., Oxford University Press 2nd ed. 2020).

103. As to which, *see* Malgosia Fitzmaurice, *Exceptional Circumstances and Treaty Commitments*, *in* THE OXFORD GUIDE TO TREATIES, *supra* note 102, at 602–13.

104. *See* NPT, *supra* note 1, at 171, preambular ¶8.

105. Supervening impossibility of performance: VCLT art. 61, *supra* note 16, at 346.

106. Suspension of the operation of a treaty under its provisions or by consent of the parties: VCLT art. 57, *supra* note 16, at 345.

107. Suspension of the operation of a multilateral treaty by agreement between certain of the parties only: VCLT art. 58, *supra* note 16, at 345.

108. Termination or suspension of the operation of a treaty implied by conclusion of a later treaty: VCLT art. 59, *supra* note 16, at 345–46.

international law and is sometimes advanced as one that may lead to a treaty provision ceasing to apply.[109] The ILC, in its work on the law of treaties,[110] considered obsolescence or desuetude as possible ground for termination of a treaty. The ILC's understanding was that certain circumstances in which a provision (or an entire treaty) went unused might provide "a factual cause of the termination," but the legal basis would be found—if it existed at all—in "the consent of the parties."[111] According to the ILC, necessary for desuetude is "the consent of the parties to abandon the treaty, which is to be implied from their conduct in relation to the treaty."[112] Irina Buga, in a recent monograph on modification of treaties, like most authorities on the topic, largely accepts the ILC's exposition. Buga describes desuetude as a process of tacit consent by the parties to the treaty's termination, "a situation in which the operation of a treaty or an individual provision is tacitly varied by means of subsequent practice or subsequent customary law."[113] Substantial evidence is needed if one is to establish that tacit consent of the parties has resulted in a treaty lapsing.[114] The evidence that the

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109. States, for example, invoke desuetude in legal proceedings. *See, e.g.*, Belgium's contention that the Convention of Conciliation, Judicial Settlement and Arbitration between the Kingdom of Yugoslavia and Belgium of March 25, 1930, through desuetude had ceased to apply. Legality of Use of Force (Serb. and Montenegro v. Belg.), Judgement, 2004 I.C.J. 279, ¶ 119 (Dec. 15). *See also* Villiger, *supra* note 100, at 548–49 (citing Sir Humphrey Waldock, Special Rapporteur on the Law of Treaties); *Summary Records of the 690th Meeting,* [1963] 1 Y.B. Int'l L. Comm'n 107, ¶ 7, U.N. Doc. A/CN.4/SER.A/1963); SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 163–65 (2nd ed. 1984); Robert Kolb, *La Désuétude En Droit International Public*, 111 REV. GEN. DE DROIT INT'L PUBLIC 577, 604–05 (2007).

110. The ILC began work on the topic in 1950 and adopted a set of Draft Articles on the Law of Treaties with commentaries in 1966. *Report of the International Law Commission to the General* Assembly, U.N. Doc. A/6309/Rev.1 (1966), *reprinted* in [1966] 2 Y.B. INT'L L. COMM'N 177, U.N. Doc. A/CN.4/SER.A/1966/Add.1. The UN General Assembly, by G.A. Res. 2166 (XXI) (Dec. 5, 1966), decided to convene an international conference of plenipotentiaries to consider the law of treaties, with a view to an international convention; the conference was held from Mar. 26 to May 24, 1968; and Apr. 9 to May 22, 1969; the ILC's Draft Articles supplied the basis for the conference's work, and, with amendments, the eventual VCLT emerged. For the analytic guide to the ILC's work on the law of treaties, *see* INT'L L. COMM'N, *Analytical Guide to the Work of the International Law Commission* (Dec. 4, 2020), https://legal.un.org/ilc/guide/1_1.shtml. For the documents of the UN Conference on the Law of Treaties, *see* U.N. Codification Division Publications, UNITED NATIONS CONFERENCE ON THE LAW OF TREATIES (Mar. 26, 1968–May 22, 1969) https://legal.un.org/diplomaticconferences/1968_lot/.

111. *Report of the International Law Commission to the General* Assembly, Draft art. 39 Comment 5, U.N. Doc. A/6309/Rev.1 (1966), *reprinted* in [1966] 2 Y.B. INT'L L. COMM'N 237, U.N. Doc. A/CN.4/SER.A/1966/Add.1.

112. *Id.*

113. IRINA BUGA, MODIFICATION OF TREATIES BY SUBSEQUENT PRACTICE 12–13 (2018).

114. Belgium, in Legality of Use of Force (Serb. and Montenegro v. Belg.), 2004 I.C.J. 279 (Dec. 15), presented six pages of written argument and 12 annexes in support of its contention that the 1930 Convention had lapsed through desuetude. Legality of Use of Force (Serb. and Montenegro v. Belg.), Verbatim Record, ¶16 (Apr. 22, 2004) https://www.icj-cij.org/public/files/case-related/105/105-20040422-ORA-01-00-BI.pdf.

parties to the NPT have changed Article VI or set it aside, if any exists at all, is sparse.[115] The better view is that Article VI has not lapsed.

2. The United States' Position in Regard to Continuing Applicability

Geopolitical competition between the United States and the Soviet Union was one of the most salient features of world politics and military affairs in the years between the acquisition of atomic weapons by the Soviet Union in 1949 and that State's transformation in 1989–91. The competition had not begun with the USSR's acquisition of the atomic bomb, but it did acquire a new dimension. The end of the Cold War, which the end of the Soviet system of rule enabled, in retrospect, did not permanently resolve the geopolitical competition, but it did bring about massive reductions in nuclear armament. Nuclear weapons development and deployment had absorbed vast energies, and the existence of large nuclear arsenals in the hands of geopolitical competitors had aroused anxiety. It is not surprising that American diplomats drew attention at the close of the Cold War to the fact that the United States and Soviet Union had greatly reduced their nuclear weapon holdings. On at least one occasion, a State Department lawyer addressed that welcome turn of events with reference to the terminology of Article VI of the NPT:

> The obligations in article VI apply to all states, not only to nuclear-weapon states. Article VI does not establish any specific timelines for the fulfillment of the obligations it states. The only reference to timing in the text is very general—that is, that negotiations relating to 'cessation of the nuclear arms race' are to achieve that goal 'at an early date.' And indeed, the nuclear arms race between the United States and Russia has in fact ended.
>
> So we are left with the remainder of the obligations under article VI, namely to pursue negotiations in good faith on effective measures relating to nuclear disarmament

115. Nor is the view well-supported that subsequent practice has otherwise changed the meaning of Art. VI. For some of the difficulties in establishing that it has, see Mika Hayashi, *Non-Proliferation Treaty and Nuclear Disarmament. Article VI of the NPT in Light of the ILC Draft Conclusions on Subsequent Agreements and Practice*, 22 INT'L CMTY. L. REV. 84–106 (2020).

> and on a Treaty on general and complete disarmament under strict and effective international control.[116]

These observations, which Deputy Legal Adviser Ronald Bettauer made in a public address to the Association of the Bar of the City of New York in 2006, drew a distinction between the obligation in Article VI to pursue negotiations relating to cessation of the nuclear arms race, on the one hand, and the obligation to pursue negotiations relating to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control, on the other hand. Though Mr. Bettauer did not precisely state as a legal conclusion that the obligation regarding the arms race no longer applied, he might have seemed, to those listening at the time, to have been suggesting that indeed it did not.

The previous year, the Special Representative of the President for Nonproliferation of Nuclear Weapons, Jackie W. Sanders, had spoken straight to the point. Addressing the Main Committee of the 2005 NPT Review Conference, Ambassador Sanders said,

> Mr. Chairman, the nuclear arms race referred to in Article VI is over. The United States and Russia have altered their fundamental relationship, and the drawdown of the nuclear weapons built up during the Cold War has been under way for almost two decades. The prospect of a global nuclear war that rightfully preoccupied the international community thirty-five years ago is at its lowest ebb in the history of the nuclear age.[117]

This is a statement by a senior United States representative evidently asserting two things: first, that the U.S.-Soviet arms race was over; and, second, that the conclusion of that arms race was the conclusion of *the* arms race to which Article VI refers.

The first is an assertion of fact: the United States and Russia no longer faced one another in an overt geopolitical contest and with the massive nuclear arsenals that each country had built during the Cold War. The fact asserted would have been obvious to any observer of international relations in the late 20th and early 21st centuries; one could hardly have missed it. At least in the sense that

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116. Ronald Bettauer, Deputy Legal Adviser of the Dep't of State, Address Before Lawyer's Committee on Nuclear Policy re U.S. Compliance with Nuclear Policy (Oct. 10, 2006) (transcript available online at https://2009-2017.state.gov/s/l/2006/98879.htm).

117. Jackie Sanders, U.S. Special Rep. of the President for the Nonproliferation of Nuclear Weapons, Statement to the 2005 NPT Review Conference Of the Treaty on the Nonproliferation of Nuclear Weapons: U.S. Implementation of Article VI and the Future of Nuclear Disarmament (May 20, 2005) (transcript), *available at*: https://2001-2009.state.gov/t/isn/rls/rm/46603.htm.

these two powers had vastly reduced their nuclear arsenals and considerably relaxed their nuclear readiness (as reflected in targeting, modes of deployment, etc.), they had brought *something* to a close, even though the term "arms race" is rightly approached with caution. As noted earlier in this article,[118] the empirical record from the Cold War casts doubt on the proposition that the behavior of the USSR had been a series of predictable reactions to nuclear weapons development and deployment by the United States. And, so, the term "arms race," if used to denote an action-reaction cycle of arming and more arming, is dubious. There nevertheless can be little doubt that, at the end of the Cold War, the facts on the ground in the United States and in the USSR changed very significantly in regard to the size and readiness of the former Cold War protagonists' nuclear arsenals. This was the "drawdown" that Ambassador Sanders noted, as a matter of fact.

The Ambassador's second assertion, by contrast, was not one exclusively of fact. It was suggestive of a legal interpretation. To say that the change in political-military affairs between the United States and Russia ended "*the* nuclear arms race referred to in Article VI" is to suggest that Article VI, where it addresses the arms race, addresses only two NPT Parties. Not only does this suggest an interpretation of a legal provision of a treaty; it suggests an interpretation, that, if accepted, would have a significant effect on that provision. It would limit the provision's legal force to a single bilateral relationship.

The two parts of Ambassador Sanders' 2005 statement about the arms race and Article VI combine the obvious and the not-so-obvious. The obvious is the observation that the United States and the Soviet Union had radically reduced their nuclear arsenals. So obvious is that observation that a certain air of obviousness pervades the statement as a whole. The U.S.-Soviet arms race "rightfully preoccupied" the NPT Parties when they drafted the NPT; Article VI refers to "the arms race"; and the Parties were no longer so "preoccupied" after the Cold War. A surface plausibility, then, accrues to the conclusion that the arms race limb of Article VI no longer applies. However, on closer inspection, that conclusion, which is of legal character, not purely factual, is not so obvious.

For one, it is not at all clear that the United States, in statements such as those considered above, evinced an intention to adhere to a particular legal view about the meaning of Article VI. The statement by the lawyer was to a public gathering of lawyers, not to a treaty body, much less to a court or tribunal or to a fellow

118. See *supra*, pp. 9–12, with reference to TRACHTENBERG, *supra* note 31.

NPT Party in a *démarche* or other formal declaration. The statement by the diplomat, though to the NPT Review Conference, was just that: a diplomat's statement to diplomats, not a statement of legal policy. Even where officials considerably senior to these, for example a Minister of Justice, speak to formal intergovernmental assemblies, such as the United Nations Commission on Human Rights, the burden is high on the party who argues that legal effects result from the statement.[119]

It is not at all surprising that United States diplomats and lawyers made reference to the end of the state of affairs that had prevailed for some forty years between the United States and the Soviet Union, marking as it did the end of a major epoch in international relations. The congratulatory tone audible on the occasion of this achievement is much as one would have expected.[120] The occasion called for congratulations. It is true that a government official, speaking chiefly for symbolic or political reasons, might at the same time include a statement intended to produce legal effects. However, legal effects in such a setting are not to be presumed. Even where the official who speaks is one of those whose statements presumptively bind the State on behalf of which he is speaking,[121] it is to the specific words employed and their context that one must turn in order to discern what, if any, legal effects a statement produces. For example, President Reagan, on the fifteenth anniversary of the NPT, referred to the obligation "to pursue negotiations in good faith on effective measures relating to nuclear

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119. The situation alluded to was that of Ms. Mukabagwiza, Minister of Justice of Rwanda, whose statement did not suffice to constitute a withdrawal of Rwanda's reservation to Article IX of the Genocide Convention. Among other factors, including the circumstances in which the statement was made, the ICJ considered the function of the declarant as an official of her State. As to official function, the Court recalled the long-standing disposition that Heads of State and Heads of Government, as well as Foreign Ministers, presumptively bind the State in matters of international relations, but others do not. Armed activities on the territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. 6, 27–29, ¶¶ 46–55. In any event, the concern in that case was with a jurisdictional reservation, an act which may be withdrawn (or made or modified) by unilateral act. Art. VI NPT is not a unilateral act. *See also*, *Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations*, Int'l L. Comm'n, Rep. on the Work of its Fifty-Eighth Session, [2006] 2 Y.B. INT'L L. COMM'N 161, at 163 Guiding Principle 4 Comment 1, U.N. Doc. A/CN.4/SER.a/2006/Add.1 (Part 2).

120. U.S. diplomats and State Department lawyers were not alone in drawing attention to it, though others were relatively muted in their response. *See*, for example, former Soviet international lawyer Rein Müllerson, writing in 2001: "The Soviet-American arms race which was the most significant global factor of world politics for almost half a century has all but disappeared." Rein Müllerson, *The ABM Treaty: Changed Circumstances, Extraordinary Events, Supreme Interests and International Law*, 50(3) INT'L & COMP. L.Q. 509, 519 (2001).

121. *See* VCLT Art. 7(2)(a), *supra* note 16, at 334. *See also* Dem. Rep. Congo v. Rwanda, 2006 I.C.J. 6.

disarmament"—i.e., the President left out the arms race limb.[122] This was July 1, 1983, a time when an arms race was, without a doubt, under way in the Article VI NPT sense. It would not be plausible to say that President Reagan was declaring a change in the United States' interpretation of Article VI, or that he was saying that strategic competition between the United States and Soviet Union did not exist. "Arms race," in this setting, meant that two nuclear-weapon States were in a state of high readiness and were making considerable expenditures to maintain or increase their nuclear capabilities, even though their behavior did not follow a predictable action-reaction pattern.[123] The omission of a reference to the arms race limb, which occasionally is seen in U.S. statements concerning the NPT, does not mean, without more, that the United States was or is arguing for the desuetude of that part of Article VI.

Turning again to the Deputy Legal Adviser's statement in 2006, it is telling that that statement confined itself to observing that the arms race *between the United States and Russia* was over.[124] It did not refer to the "arms race" generally or qualify the "obligations in article VI" [plural in original] except to make the obvious point that these "apply to all states."[125] To acknowledge that Article VI sets down not just one obligation but plural obligations, and to observe that these apply not just to one bilateral relationship but to all the Parties, does not greatly attach the speaker to the idea that Article VI contained a time-limited arms-race *lex specialis*[126] for the two Cold War rivals. Indeed, that acknowledgement and that observation are hard to reconcile with the view that the Article VI régime is somehow a bilateral and limited one.

Nor did the Deputy Legal Adviser's statement contain the analysis one would expect, if a considered legal view were being

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122. Ronald Reagan, Statement on the 15th Anniversary of the Signing of the Treaty on the Non-Proliferation of Nuclear Weapons, 1983 PUB. PAPER 960 (1983).

123. In relation to the weakness of the action-reaction thesis as explanatory model for 1980s Soviet behavior, *see* TRACHTENBERG, *supra* at note 31, at 47–54.

124. *See* Bettauer, *supra* note 116.

125. *Id.*

126. A "special law," or "self-contained regime." As to the meaning and origins of the concept of lex specialis, *see* Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR J. INT'L L. 483 (2006). Writers often associate the concept with regimes established by treaties in distinction to general international law. Joost Paulwelyn, for example, refers to the law of the WTO as *lex specialis*. Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EUR'N J. INT'L L. 907, 947, *passim* (2003). Judge Simma and Counsellor Pulkowski, however, trace its origins to the S.S. Wimbledon case, where the Permanent Court of International Justice held that the provisions of the Treaty of Versailles addressing the Kiel Canal were "self-contained," and, therefore, "[t]he idea which underlies [the specific provisions regarding the Kiel Canal] is not to be sought by drawing an analogy from [the other provisions of the Treaty addressing inland navigable waterways]." *See* Simma *supra* note 126, at 491, *quoting* S.S. Wimbledon, 1923 P.C.I.J. Ser. A No. 1 at 23.

offered to support the conclusion that some process of extinction, obsolescence, or desuetude had excised an operative clause from the NPT.[127] To recall, when the ILC had considered obsolescence or desuetude as possible ground for termination of a treaty, its understanding was that those circumstances may provide "a *factual* cause of the termination," but the legal basis would be found—if it existed at all—in "the consent of the parties."[128] As one of the main States that had moved for the conclusion of the NPT, the United States almost certainly would have said more than it did, if it were espousing a view that Article VI had undergone such a diminution in legal relevance. While a State, to consent to such a change need not adhere to any very strict form of words, mere suggestion does not suffice.[129]

More telling still, when an opportunity has arisen for the United States to address Article VI NPT in a legal setting, the United States has not said that the arms race limb has lapsed. To give one of the main examples, the United States, in 1994, presented its observations to the ICJ in the advisory proceedings on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion)*. The United States had serious misgivings about those proceedings,[130] because the Request for the advisory opinion had come from the World Health Organization (WHO), a body whose competence did not extend to the question posed.[131] It is to be assumed that the United States took at least the usual amount of care in presenting its legal position as one would expect of a State before an international judicial or arbitral body.[132]

According to the United States' Written Statement to the ICJ, "[T]he Non-Proliferation Treaty accepts the lawfulness of the

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127. Even rather formal-sounding claims, upon scrutiny, may better be understood as having "a purely political, economic or strategic nature," as States have discovered when judges deny such claims legal effects: Territorial and Maritime Dispute (Nicar. v. Colom.), Application by Honduras for Permission to Intervene, Judgment, 2011 I.C.J. 420, at 434, ¶ 437 (May 4).

128. Draft Art. 39 Comment (5), [1966] 2 Y.B. INT'L L. COMM'N, at 237 (emphasis added).

129. In case of doubt as to the legal effect of statements such as this, a cautionary approach has been advanced and widely accepted. *See* ILC Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, Guiding Principle 7, Comment (2), [2006] 2 Y.B. INT'L L. COMM'N, at 165. Cf. the weakness of ambiguous indications of consent to ICJ jurisdiction: Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), 1984 I.C.J. 595 ¶ 54 (Nov. 26) (dissenting opinion by Schwebel, J.).

130. As did others. *see* Matheson, *supra* note 87, at 419.

131. And so, the ICJ declined to adopt an advisory opinion responding to the substance of the WHO's request. Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, 1996 I.C.J. 66, 76–84, ¶¶ 22–31 (July 8).

132. Noting the relevance of "oral pleadings before courts and tribunals" as evidence of acceptance of an assertion as law (opinio juris) in connection with the identification of customary international law, *see* ILC Draft conclusions, Conclusion 10, Comment (4): A/73/10, at 141 (2018).

development and possession of nuclear weapons by the nuclear-weapon States designated in the Treaty . . . ."[133] Indeed, the NPT does not prohibit a nuclear-weapon State from possessing, modernizing, or augmenting its nuclear arsenal. Instead, it acknowledges the nuclear-weapon States and constitutes a regulatory architecture for nuclear technology and a framework for arms control and eventual disarmament. It is true that some States, by treaty, have excluded the deployment of nuclear weapons from their regions.[134] And, recently, a group of States have entered into a treaty, the Treaty on the Prohibition of Nuclear Weapons (TPNW), that declares that each of its parties "undertakes [*inter alia*] never . . . to develop, test, produce, manufacture, or otherwise acquire, possess or stockpile nuclear weapons or other nuclear explosive devices."[135] The North Atlantic Council, representing the Member States of NATO, in a Communiqué of June 14, 2021, noted that "[t]he TPNW does not change the legal obligations of [NATO] countries with respect to nuclear weapons."[136] Indeed, no NATO country is a party to the TPNW. The Communiqué further stated the North Atlantic Council's understanding that "the TPNW [does not] reflect[] or in any way contribute[] to the development of customary international law."[137]

The North Atlantic Council's understanding in this regard accords with that of the UN International Law Commission (ILC) in its *Draft conclusions on identification of customary international law*. The ILC there explains that "in and of themselves, treaties cannot create a rule of customary international law or conclusively attest to its existence or content."[138] The ILC leaves open the possibility, depending on circumstances, that a treaty may be *evidence* relevant to assessing whether a rule of customary international law exists, but a treaty is never self-sufficient as a

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133. Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion), Written Statement of the United States of America, June 10, 1994, at 20, *available at* https://icj-cij.org/public/files/case-related/93/8770.pdf.

134. As under, *e.g.*, Treaty for the Prohibition of Nuclear Weapons in Latin America and the Caribbean (Treaty of Tlatelolco), *opened for signature* Feb. 14, 1967, A/6663 (entered into force Apr. 22, 1968); South Pacific Nuclear Free Zone Treaty (Treaty of Rarotonga), *opened for signature* Aug. 6, 1985, 1445 U.N.T.S. 177 (entered into force Dec. 11, 1986); Treaty on the Southeast Asia Nuclear Weapon-Free Zone (Treaty of Bangkok), *opened for signature* Dec. 15, 1995, 1981 U.N.T.S 129 (entered into force Mar. 27, 1997); African Nuclear-Weapon-Free Zone Treaty (Treaty of Pelindaba), *opened for signature* Apr. 11, 1996, A/50/426 (entered into force July 15, 2009); Treaty on a Nuclear-Weapon-Free Zone in Central Asia, *opened for signature* Sept. 8, 2006, 2970 U.N.T.S.91 (entered into force Mar. 21, 2009).

135. Treaty on the Prohibition of Nuclear Weapons Art. 1(1), *opened for signature* Aug. 9, 2017; entered into force Jan. 22, 2021.

136. North Atlantic Council, Brussels Summit Communiqué, June 14, 2021, ¶ 47.

137. *Id.*

138. ILC Draft conclusions, Conclusion 11, Comment (2): A/73/10, 143 (emphasis added).

generative force in creating new customary international law. A treaty, as evidence, is likely to be particularly deficient as evidence of *practice*: the treaty text might declare a point of view about legal obligation, and it might, as a source of *conventional* law for its particular parties, make a certain rule legally obligatory, but the treaty will not evince much, or anything, about what States in fact *do*. State practice—what States in fact do—is one of the necessary elements of customary international law. The ILC further observed that "establishing whether a conventional rule [i.e., a rule in a treaty] does in fact correspond to an alleged rule of customary international law cannot be done just by looking at the text of the treaty: in each case the existence of the rule must be confirmed by practice (together with acceptance as law)."[139] The continued possession of nuclear weapons, and the continued declaratory policies of nuclear-weapon States in the maintenance of strategies of deterrence, are examples of State practice. Moreover, this conduct is State practice of the most salient kind, because the States engaged in it are "States . . . particularly involved in the relevant activity."[140] No State that possesses nuclear weapons subscribes to the proposition that possessing nuclear weapons is unlawful; few, if any, States with the technical capacities and resources that might support the future development of nuclear weapons subscribe to the proposition either. Customary international law does not contain a rule contradicting the NPT in this regard.[141]

In noting that the NPT accepts for the nuclear-weapon States the lawfulness of the *development* of nuclear weapons, not only their possession, the United States demonstrated its understanding that the NPT takes account the dynamic nature of its subject matter. It accords with that understanding to interpret the "arms race" clause in Article VI as having continuing application. It would be incongruent with that understanding to interpret the "arms race" clause in Article VI to go no further than a particular bilateral relationship that existed at the time of the treaty's drafting. The United States, when a legal position was called for, indeed did not say that the "arms race" clause had lapsed but, instead, cast doubt on a static interpretation of "arms race." The United States made the same point in its Written Statement in the other nuclear

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139. *Id.*, Conclusion 11, Comment (4): A/73/10, 144.

140. *Id.*, Conclusion 8, Comment (4): A/73/10, 136.

141. *See further* Thomas D. Grant, *The ILC's Draft Conclusions on Customary International Law and the Treaty on the Prohibition of Nuclear Weapons (TPNW): Lawmaking and Its Limits in a Nuclear Age*, 13 GEORGE MASON INT'L L. J. (forthcoming, 2022).

weapons advisory proceedings at the ICJ that year.[142] Thus, far from taking the opportunity to articulate an interpretation that the arms race limb had waned with the Cold War's end, the United States in the most conspicuous legal setting in which it might have done so instead affirmed that the NPT is intended to address a changing technological and political landscape.[143] The United States did not foreclose the possibility of a future arms race—and of the continuing applicability of the NPT obligation to pursue negotiations relating to it.

Presented an opportunity to object to express statements by other States that the arms race limb continues to apply, the United States remained silent. A number of States in 2010 at the NPT Review Conference ("Rev.Con."), for example, referred to the Article VI obligation in regard to the arms race as an applicable provision of the NPT. References at the 2010 Rev.Con. to this effect are found in reports and/or working papers of Algeria, Brazil, Chile, Mexico, New Zealand, Uruguay,[144] and China.[145] The European Union as recently as 2021 in the Council Conclusions on the 2020 Rev.Con. suggested its own understanding that the NPT would apply if a "new nuclear arms race" is not avoided.[146] Earlier post-Cold War statements referring to the arms race limb by U.S. allies similarly drew no rebuke.[147] If the United States had intended a shift after (circa) 1990 in its interpretation of Article VI, then one would have expected a response from the United States to protect its position as against the contrary view.[148] The present author is unaware of any indication in the record of the 2010 Rev.Con. or after that the United

142. Legality of the Threat or Use of Nuclear Weapons (Request for Advisory Opinion), Written Statement of the United States of America (June 20, 1994), at 13.

143. As to the "evolutionary" character of the NPT, *see* D.W. Greig, *The Interpretation of Treaties and Article IV.2 of the Nuclear Non-Proliferation Treaty*, 8 AUSTL. Y.B. OF INT'L L. 77, 106–14.

144. NPT/CONF.2010/50 (Vol. II), 181 (Algeria); *id.* at 251 (Brazil); *id.* at 55 (Chile); *id.* at 341 (Mexico); *id.* at 229 (New Zealand); *id.* at 330 (Uruguay).

145. NPT/CONF.2010/50 (Vol. III), 194.

146. Council of the European Union, *Conclusions on the Tenth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons,* 13243/21 (Nov. 15, 2021), 3, ¶ 5, *available at* https://data.consilium.europa.eu/doc/document/ST-13243-2021-INIT/en/pdf.

147. *See, e.g.*, the National Interest Analysis placed before the Houses of Parliament in Australia on May 13, 1998, in which the Government noted the Article VI provision for negotiations on effective measures relating to the cessation of the nuclear arms race. Peter Scott & Rachel Lord (eds), *Australian Practice in International Law* 1998, 19 AUSTL. Y.B. OF INT'L L. 287, 408 (1998).

148. For the classic exposition of the legal effects of a failure to raise objection when the situation called for one, see Temple of Preah Vihear (Cambodia v. Thai.), Judgment, 1962 I.C.J. 6, 23 (June 15) (regarding the later-contested map line); and see also *id.* at 30–31 (regarding Prince Damrong's visit).

States responded to deny the continued applicability of the arms race limb of Article VI as a matter of international law.

3. Positions Expressed by Other Countries in Legal and Diplomatic Fora in Regard to Continuing Applicability

As recalled immediately above, a number of States at the 2010 Rev.Con. indicated that the obligation to pursue negotiations relating to cessation of the arms race continues to apply. In addition to the inference to be drawn from U.S. non-response to those States on that point, their statements are relevant as indications of their own understanding of the arms race limb. In other settings, too, States, including other nuclear-weapon Parties to the NPT, take positions that similarly leave the continued application of the "arms race" limb of Article VI undisturbed.

Salient in this regard are the proceedings before the ICJ concerning nuclear weapons, including the advisory proceedings, which were addressed above. In the advisory proceedings on *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, States gave no indication that the arms race clause has ceased to apply. The United States' observation in those proceedings (repeated in the related *Nuclear Weapons* proceedings) about the development of nuclear weapons has been noted already.[149] For its part, the United Kingdom said this: "After the conclusion of the PTBT [Partial Nuclear Test Ban Treaty] and NPT the *main focus* of nuclear arms control efforts switched toward limiting the size of American and Soviet nuclear forces."[150] Given the historical reality, it was apposite for the UK to refer to the U.S.-U.S.S.R. arms race as the "main focus" of nuclear arms control efforts at that point in time. However, to refer to a matter as the "main focus" is a natural form of words to denote first in rank, not to exclude that there existed or might arise other matters of concern. There is no indication in its pleadings in the mid-1990s advisory proceedings on nuclear weapons that the UK thought that the U.S.- U.S.S.R. arms race was the only nuclear arms race with which the NPT was, or might be, concerned.

Indeed, the UK went on in its Written Statement in the advisory proceedings to draw attention to the continuing nature of arms control. Bringing its historical overview up to the 1990s, the UK observed that "[l]ike all its predecessors, . . . the Conference on Disarmament has also continued to discuss nuclear arms control

149. *See* Written Statement of the United States of America, *supra* note 133.

150. Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion), Written Statement of the U.K., Sept. 20, 1994, 22, ¶ 5 (emphasis added).

and disarmament issues."[151] Thus, in the UK's view, the U.S.-Soviet arms race had not been the sole focus of concern earlier, and disarmament did not become the sole focus after the U.S.-Soviet arms race had subsided. The disarmament arm of Article VI NPT was not the sole applicable nuclear provision of Article VI. Arms control, as distinct from disarmament, continued to be discussed.[152]

The submissions of the Federal Republic of Germany are relevant in this regard as well. Germany gave no indication that the arms race had become a dead letter. To the contrary, Germany drew attention to the continuing character of the Article VI obligation, including in regard to the arms race:

> Only by consistently continuing efforts towards the contractual limitation and reduction of nuclear weapons can the States Parties fulfil the obligation contained in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, "to pursue negotiations in good faith on effective measures relating to *cessation of the nuclear arms race* at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."[153]

To quote the arms race limb as part of the obligation under Article VI, and to say that the States Parties must "consistently continu[e] efforts" to fulfil that obligation, are difficult to square with a view that the arms race limb has ceased to apply. The logical conclusion is that Germany, too, viewed that provision to denote a continuing obligation.[154]

In contentious proceedings, too, States have addressed the arms race. The Marshall Islands in 2014 instituted cases at the ICJ against several States possessing nuclear weapons.[155] In a case in which an Applicant State invoked the arms race clause against a Respondent State, one would have expected the latter to have drawn to the Court's attention the inapplicability of the clause, if in

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151. *Id*. at. 25, ¶¶ 8, 9 (emphasis added).

152. As to the distinction between arms control and disarmament, *see* Joyner, *supra* note 12, at 36, 102.

153. Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Request for Advisory Opinion), Written Statement of Germany (Sept. 20, 1994), 5 (emphasis added).

154. In the aftermath of the nuclear weapons advisory proceedings at the ICJ, the United States and its officials, writing in official or individual capacity, commented on the Court's Advisory Opinions. The commentary is critical and deliberate in its attention to detail. *See, e.g.*, Ford (2007), *supra* note 27. *Cf.* Matheson, *supra* note 88, at 420–21. The present author is aware of no instance in such writings where exception was taken to the indications by other States that the arms race limb continues to apply.

155. *See, e.g.*, Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Application Instituting Proceedings Against the U.K. (Apr. 24, 2014).

truth the clause did not apply. The United Kingdom, when the Marshall Islands invoked the arms race clause in its 2014 suit, did not. To the contrary, the United Kingdom referred to the arms race clause with no indication that it does not apply.[156]

In *Marshall Islands v. United Kingdom*, the judge of Chinese nationality on the ICJ, Madam Xue Hanqin, writing separately, said that the Applicant State had "every reason to criticize the nuclear-weapon States for failing to make joint efforts in pursuing negotiations on the cessation of nuclear arms race and nuclear disarmament."[157] Given the source, this observation is noteworthy in at least two respects. First, it evinces an understanding that the obligation in regard to the arms race continues. Second, it suggests that criticizing a nuclear-weapon State's failure to make joint efforts with other nuclear-weapon States is generally admissible. The present Article will return to the second of these points below.[158]

One more element of the practice of the ICJ merits remark in this regard. When captioning the several Marshall Islands cases, the Court elected to refer to them as *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. [Respondent State]*) (underscore added). The ICJ has not hesitated to fashion the caption of a case to reflect its own understanding of the legal issues involved. To give perhaps the most significant recent example, in the *Kosovo* advisory proceedings the Court subtly, but significantly, altered the wording of the General Assembly's Request. The General Assembly's Request was for an advisory opinion on the question, "Is the unilateral declaration of independence *by the Provisional Institutions of Self-Government of Kosovo* in accordance with

156. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U. K.), Preliminary Objections of the U.K. (June 15, 2015), ¶¶ 13, 66, 90, 92; Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U. K.), Verbatim Record CR 2016/3 (Mar. 9, 2016), ¶ 30. The Marshall Islands also instituted proceedings against India, though India is not an NPT Party. India had no objection to use of the expression "arms race" in the generic sense and affirmed its position that it will "not engage in any arms race," a form of words suggesting the possibility of others besides that between the United States and Soviet Union. Obligations concerning negotiations relating to cessation of the nuclear arms race and to nuclear disarmament (Mars. Is. v. India), Counter-Memorial of the Republic of India (Sept. 16, 2015), ¶ 91. Pakistan, too, in its pleadings in response to a further Marshall Islands suit, acknowledged the possibility (and danger) of arms races between other countries: Exhibit Number 1 (Prime Minister's Statement dated Sept. 26, 2013), appended to Counter-Memorial of Pakistan (Dec. 1, 2015), in Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. Pak.).

157. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Declaration of Judge Xue, 2016 I.C.J. 441, 443, ¶ 6.

158. *Supra* Part III(A).

international law?" (emphasis added).[159] The ICJ captioned the proceedings as "Accordance with international law of the unilateral declaration of independence in respect of Kosovo."[160] The ICJ assessed that the declaration in question, though undoubtedly adopted, had not been adopted by the Provisional Institutions.[161] Accordingly, the ICJ left "Provisional Institutions" out of the caption. By contrast, the ICJ, in the caption to the Marshall Islands cases, kept "arms race" in. While an example from the practice of one international body, and though neither its judges nor the Court as a whole speak on behalf of any particular country or countries, the ICJ here accords with the practice of a number of NPT States Parties, including nuclear-weapon States before the ICJ and in diplomatic settings as well.

In a treaty having the policy objectives of the NPT, it would have been odd to have adopted an obligation to negotiate in respect of one nuclear arms race and to have excluded or discontinued that obligation in respect of others. The parties were free, of course, to adopt such a limited obligation. They no doubt knew how to draft a text that would have done so unambiguously. The treaty that they did in fact draft says nothing to differentiate the obligations of parties in that way.

Noteworthy in this connection, the NPT does differentiate between States that had manufactured or exploded a nuclear weapon or other nuclear explosive device prior to January 1, 1967 (a time-limit not attached to the arms race) and those that had not.[162] This is the NPT's differentiation between nuclear-weapon Parties and non-nuclear-weapon Parties. There is no category in the NPT of an "arms-race Party" or a "non-arms-race Party." Among the nuclear-weapon Parties, the treaty makes no distinction.

The results of an *a contrario* interpretation—i.e., one that holds the arms race limb of Article VI to have lapsed upon the cessation of the U.S.-Soviet arms race because there are no more "arms-race Parties"—are curious. For example, if that interpretation were correct, then the United States and the Soviet Union, who would have been the lone Parties subject to the clause, might have escaped its application by means of a simple formality. They might have declared a moratorium on their race one day, resumed the race the

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159. GA res. 63/3 (A/63/L.2) (Oct. 8, 2008).

160. *See Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo,* Advisory Opinion, 2010 I.C.J. 404 (July 22); and compare to the earlier iteration of the case caption on the Court's scheduling order: 2008 I.C.J. 409 (Oct. 17).

161. Accordance with international law of the unilateral declaration of independence in respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403, 424–25, 444–48, ¶¶ 52–53, 102–09.

162. NPT, *supra* note 1, art. 9, ¶ 3, at 174.

next, and proceeded confident that they now, having once ceased, could lawfully resume and, in resuming, ignore the obligation to negotiate cessation. On that interpretation, once the two particular Parties had ceased the arms race one time, the curtains would have fallen on the cessation clause, never to rise again. As to any other Parties that commenced an arms race, the clause would have been *ab initio* void and of no effect. Considering the text of Article VI, and the object and purpose that motivate it, such an interpretation is not convincing.

4. Legal Policy Cautions Against an Interpretation of Article VI That Differentiates Among the Obligations of the Five Nuclear-Weapon Parties of the NPT.

Finally, in considering the arms race limb of Article VI, a cautionary note is in order, as regards possible legal policy consequences of an interpretation that applies that provision differently among the five nuclear-weapon Parties.

Nobody would say that the five nuclear-weapon Parties act on the international stage in political solidarity. However, it is a well-known position of legal policy, shared by the nuclear-weapon Parties, that the possession of nuclear weapons does not in itself constitute a breach of international law, for there is applicable to them no prohibition of the possession of nuclear weapons.[163] Nor, necessarily, is the use of nuclear weapons a breach of international law.[164] On this understanding, too, the nuclear-weapon States converge. The consistent conduct of the nuclear-weapon States, as a group, is critical to the most convincing exposition of their convergent understanding that neither the possession of nuclear weapons nor necessarily their use is unlawful.

Judge Schwebel, the U.S. Judge and Vice-President of the ICJ at the time of the *Nuclear Weapons* advisory proceedings, in his dissent from the Court's conclusion as to the legality of nuclear weapons, expressed the understanding like this:

> This nuclear practice [of holding and developing nuclear weapons for purposes of deterrence] is not a practice of a lone and secondary persistent objector. This is not a practice of a

163. As the ILC expressed it, "There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State." Articles on Responsibility of States for Internationally Wrongful Acts, *Report of the Commission to the General Assembly on the Work of Its Fifty-Third Session*, [2001] 2 Y.B. INT'L L. COMM'N 26, A/CN.4/SER.A/2001/Add.1. Thus, it makes sense to talk of legal breach only after it is established that there exists an obligation.

164. Legality of the Threat or Use of Nuclear Weapons, *supra* note 66, at 266 (July 8).

> pariah Government crying out in the wilderness of otherwise adverse international opinion. This is the practice of five of the world's major Powers, of the permanent members of the Security Council, significantly supported for almost 50 years [as of 1996] by their allies and other States sheltering under their nuclear umbrellas.[165]

It had been the possession of nuclear weapons by this "large and weighty number of other States" that imparted legal gravity to the conclusion that international law had not prohibited them.[166] If the conclusion is still to hold, then it holds for the same reason. Given their involvement in shaping general international law in this way, it makes sense to have placed the five nuclear-weapon States under the same, not divergent, legal obligations in regard to arms control. The multilateral regime to which these States have agreed for regulating nuclear weapons regulates them each the same.

To posit, instead, that that regime entails divergent obligations lacks express support in the NPT, a point illustrated above.[167] Also, placing two States in isolation would weaken the jural groundwork for the continued possession of nuclear weapons laid down as it is by the shared practice of these "five of the world's major Powers." A degree of symmetry in the relations of the nuclear-weapon States, across their conventional legal commitments and the customary international law that they shape, would be lost. To speak of their practice as a *consistent* practice affecting customary law would be less convincing than it so far has been.

There would be a further possible unintended consequence of adopting, as a formal matter of the practice of the United States in international law, the proposition that the "arms race" clause has somehow become dead letter. That proposition would make the "disarmament" limb both the gravamen of any complaint pertaining to the United States' efforts under Article VI and the sole defense. In writings of the disarmament community, including of academics critical of the United States' NPT practice, deprecation is commonplace of the United States' efforts that are short of disarmament.[168] For the United States to argue that *only* disarmament remains of the Article VI nuclear-related obligations

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165. *Id.* at 312 (dissenting opinion by Schwebel, Vice-President).

166. *Id.* Not to mention the existence, and endorsement, of the NPT, which, as one writer noted, "is difficult to square . . . with the *opinio* that nuclear weapons are unlawful under all circumstances . . . ." NIKOLAS STÜRCHLER, THE THREAT OF FORCE IN INTERNATIONAL LAW 82 (2007) (italicization added).

167. See page 43 above.

168. *See, e.g.*, DANIEL H. JOYNER, THE NUCLEAR NON-PROLIFERATION REGIME 64 (2009); Rietiker, *supra* note 12, at 47, 58–59. *See, e.g.,* Joyner, *supra* note 12, at 36, 102 (summarizes the distinction between arms control and disarmament).

might well concentrate the critics all the more upon the continued existence of nuclear arsenals among the nuclear-weapon States, rather than invite them to consider, in good faith, the on-going efforts that the United States leads toward arms control.

Setting aside parts of Article VI in this way has been advanced by some non-nuclear-weapon States and their officials. It has been advanced in particular that the clause addressing "a treaty on general and complete disarmament"—which this article has referred to as the "treaty head" of Article VI[169]—has "no relevance today."[170] That is not the United States' position.[171] In other words, the treaty head has not been subject to desuetude. By no means does the desuetude of one part of a treaty necessarily entail that other parts, too, have ceased to apply. However, it opens the door to that operation of treaty law, if a State invokes it. If a State says that one part of a given article has ceased to apply, and on rather easy terms, then other parts may no less easily cease to apply. As a matter of legal policy, it is a risky proposition to say that the "arms control" limb of Article VI has ceased to apply.

A final observation in regard to the evidence adduced above serves to place it in its proper context as an aid to treaty interpretation. It would be open to say that the evidence of State practice concerning the "arms race" limb of Article VI NPT would be too equivocal to support the emergence of a rule through customary processes of law formation.[172] Indeed, a great deal more would be needed to reach that end. However, the question here is not whether a new customary rule has emerged. The question, instead, is whether evidence exists that an unequivocal act of treaty-making has been rescinded or in some way qualified. The presumption in favor of the stability of treaty relations, key to international relations, correlates to a heavy burden on a State that argues that a particular treaty provision no longer applies.[173] The evidence

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169. See pages 8–9 above.

170. Hine-Wai Loose, *supra* note 28, at 139 (citing Jozef Goldblat, *Arms Control: The New Guide To Negotiations And Agreements*, INTERNATIONAL PEACE RESEARCH INSTITUTE and STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE, 107 (2d ed. 2002)).

171. *See, e.g.*, Rademaker, *supra* note 28. Further to the "general and complete disarmament" treaty head of Art. VI, *see* David S. Jonas, *General and Complete Disarmament: Not Just for Nuclear Weapons States Anymore*, 43 GEO. J. INT'L L. 587, 621–31 (2012).

172. *See* Draft Conclusions on Identification of Customary International Law, with Commentaries, at 125–26, 128, U.N. Doc. A/73/10 (2018).

173. Thus, the United Kingdom noted the "rigorous standards which tribunals have applied" to claims that a fundamental change of circumstance has led to the lapsing of a treaty: Fisheries Jurisdictions (U.K./Iceland), Memorial on Jurisdiction Submitted by the Government of the United Kingdom of Great Britain and Northern Ireland ¶ 62 (Oct. 13, 1972). At least as rigorous are the standards applied to other claims of treaty modification, including claims of desuetude. *See* the multi-factor test suggested at Vamvoukos, *supra* note 100, at 303.

adduced above, far from satisfying that burden in regard to the "arms race" limb, supports the opposite conclusion.

For the reasons set out above, the better view is that the arms race limb of Article VI NPT continues to apply among the Parties to the NPT, including as between the United States and China.

III. INVOKING ARTICLE VI

The present Part, consisting of three subparts, considers whether it is open to the United States to invoke Article VI NPT in connection with China's recent conduct, and if so on what grounds.

This Part begins, in subpart A, by setting out briefly the reasons that it would be open, in principle, to the United States under Article VI to call attention to non-compliance by China—i.e., the reasons that Article VI is "opposable" by the United States against a non-compliant Party.[174] Subpart B considers, in light of the proper legal interpretation of Article VI, specific grounds supporting the conclusion that China is not compliant with the obligation to negotiate in good faith. Subpart C addresses contentions that China might venture as putative rebuttal.

A. It is Open to the United States to Call Attention to China's Non-Compliance

If it were concluded that China is in non-compliance with Article VI, then it would be open to other Parties to the NPT to call attention to that state of affairs. That is to say, because the obligation to pursue negotiations under Article VI applies to China, other Parties may oppose that obligation against China and call attention to a breach.

The opposability of the Article VI obligation to pursue negotiations is evident in international practice. For example, the ICJ observed in the 1996 *Nuclear Weapons* Advisory Opinion that the obligation under Article VI "formally concerns the 182 States parties to the Treaty."[175] Though the expression "formally concerns" is not a model of clarity, the Court nevertheless there suggested that any Party to the NPT may oppose the obligation under Article VI against any other party. As the United Kingdom clarified in the *Marshall Islands* proceedings, this means, practically speaking, against nuclear-weapon States:

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174. As to the use of the term "opposability" in international law, *see supra* note 13.

175. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 63, ¶ 100 (July 8) (quoting Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 13 (Aug. 30)).

"[A]lthough Article VI of the NPT requires all the States parties to pursue negotiations in good faith, in practical terms the steps towards nuclear disarmament must necessarily be undertaken and fulfilled by the nuclear-weapon States."[176]

Judge Xue's observation, recalled earlier above, is consistent with this understanding. According to Judge Xue, the Marshall Islands had had "every reason to criticize the nuclear-weapon States for failing to make joint efforts in pursuing negotiations on the cessation of nuclear arms race and nuclear disarmament."[177] Judge Xue's reference to "joint efforts" underscores the negotiation requirement. It also draws attention to the special status of the nuclear-weapon States under the NPT. Thus, where Article VI addresses "[e]ach of the Parties to the Treaty," it is the view of the Chinese judge on the principal judicial organ of the United Nations that a particular duty is incumbent upon those Parties who are designated nuclear-weapon States. It follows that any NPT Party may call attention, at the very least, to a nuclear-weapon State's failure to fulfil the duty to pursue negotiations on effective measures relating to cessation of the nuclear arms race.

B. China's Non-Compliance

A number of examples of China's conduct (acts and omissions) are indicative of non-compliance with the negotiation clause of Article VI NPT. The examples may be placed under three rubrics. First, China is not negotiating. Second, China pursues a *fait accompli* that would change in fundamental ways the negotiating environment to the detriment of the other Parties concerned. Third, and related to the second, China's conduct exacerbates the situation that China is legally committed to seek to resolve through negotiation. Each example may be addressed in turn.

1. China is Not Negotiating

The indicia that point to the fulfilment of an obligation to negotiate have been considered already in this Article.[178] China's repeated refusals to negotiate are a matter of public record. No very plausible evidence exists that China is engaged in any other

176. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Preliminary Objections and Annexes, ¶ 93 (June 15, 2015).

177. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Judgment, 2016 I.C.J. 833, ¶ 6 (Oct. 5) (declaration by Xue, J.)

178. *Id*. at 37–43.

exchange in regard to the nuclear arms race that would display the relevant indicia. As will be seen below (III(C)(1)), China neglects to address the arms race limb of Article VI.

Conveniently, China supplies a signpost for measuring its own conduct in regard to the duty to negotiate. In its Position Paper on South China Sea matters, China said that "general exchanges of view, without having the purpose of settling a given dispute, do not constitute negotiations."[179] The Position Paper gives examples. China acknowledges in the Position Paper that it had carried out exchanges of view with the Philippines on "responding to incidents at sea in the disputed areas and promoting measures to prevent conflicts, reduce frictions, maintain stability in the region, and promote measures of cooperation."[180] As far as China understands, such exchanges of view on these matters "*are far from constituting negotiations*."[181] China's conduct to date regarding the arms race does not even go that far. It would ring false for China to assert that China has fulfilled its duty under Article VI NPT to negotiate, unless China identifies exchanges of view that go further than the exchanges went with the Philippines.

2. China is Pursuing a *Fait Accompli*

China, by carrying out a rapid nuclear arms build-up[182] in the absence of any arms control or transparency mechanism and in the absence of negotiations toward the same, is creating a *fait accompli* that inevitably prejudices a future negotiation. It is well-accepted in international practice that a State may object to an adversary creating *faits accompli*.[183]

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179. EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE REPUBLIC OF FIJI, POSITION PAPER OF THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA ON THE MATTERS OF JURISDICTION IN THE SOUTH CHINA SEA ARBITRATION INITIATED BY THE REPUBLIC OF THE PHILIPPINES ¶ 46 (Dec. 7, 2014), https://www.mfa.gov.cn/ce/cefj/eng/topic/nhwt/t1372318.htm.

180. *Id.* at ¶ 47.

181. *Id.* (emphasis added). *See further* on this point below at pages 53–62.

182. As noted by former President Trump, "China is surging." *Remarks by President Trump Before Marine One Departure,* THE WHITE HOUSE (July 29, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-marine-one-departure-072920/.

183. Examples of States objecting on grounds of fait accompli are noted (without disapproval) here: Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 624, 655, ¶ 79 (Nov. 19); CERD case, 2011 I.C.J. at 70, 79, ¶ 16; Land and Maritime Boundary Between Cameroon and Nigeria, 2002 I.C.J. at 439, ¶ 283. In the Pulp Mills case, Argentina objected that Uruguay's plans to carry out works on the River Uruguay would have constituted a fait accompli, a contention that the I.C.J. rejected—but this was after a negotiation period set in the relevant treaty had expired, a circumstance to which the Court drew attention: Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, 69–70, ¶ 153, 156–57 (Apr. 20).

This would not be the first time that attention has been called to China's practice of imposing *faits accompli*. As the UNCLOS Annex VII Tribunal in the *South China Sea Arbitration* determined, "China has effectively created a *fait accompli* at Mischief Reef by constructing a large artificial island on a low-tide elevation," and thus intruding upon the Philippines' exclusive economic zone, an area that China evidently seeks to compel negotiations about, notwithstanding the settled character of the Philippines' rights there.[184]

A party is not acting in good faith, when, in order substantially to alter the factual circumstances to its own advantage, it delays a negotiation that it agreed in legally binding terms to pursue.[185] Nor is it acting in good faith when it demands, as a pre-condition to the negotiation, a different negotiation on a subject matter as to which negotiation is *not* obligatory.[186] This general observation is all the more salient where the obligation to negotiate concerns effective measures in regard to nuclear weapons, and where the States concerned are admonished in binding treaty language, as the NPT Parties are, to achieve a result sooner rather than later. China refuses to engage in a meaningful manner, and, in the time elapsing, China continues to accelerate its qualitative and quantitative build-up of nuclear arms,[187] conduct that alters the ground that negotiations are meant to cover.

3. China's Conduct Aggravates the Situation

It is an obligation under general international law that parties shall not aggravate or exacerbate a problem that they are seeking

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184. *See* South China Sea Arb. (Phil. v. China), PCA Case No. 2013-19, Award, ¶ 1177 (July 12, 2016).

185. As to bad faith delay and negotiation in international law, *see* Lake Lanoux Award, 12 R.I.A.A. 281, 306–07 (Nov. 16) (quoting the Tacna-Arica Award, 2 R.I.A.A. at 921 *et seq*. and Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931 P.C.I.J. Rep. (Ser. A/B), No. 42, at p. 108 *et seq*. (Oct. 15). Bad faith delay has been considered in municipal law as well. For example, a public agency was found in breach of a duty to negotiate with a prospective contractor, where it delayed obligatory negotiations in order to "[explore] the possibility of soliciting more bids," which is to say, it delayed in the hopes of the negotiating environment changing to its advantage over that lapse of time. Banneker Ventures, LLC v. Graham, 798 F.3d 1119, 1131 (D.C. Cir. 2015).

186. Courts applying municipal law have reached conclusions much to this effect. *See, e.g.*, "a party might breach its obligation to bargain in good faith by unreasonably insisting on a condition outside the scope of the parties' preliminary agreement." A/S Apothekernes Lab'y. v. I.M.C. Chem. Grp., Inc., 873 F.2d 155, 158 (7th Cir. 1989). The "interject[ion] of new terms and conditions that were not part of" the agreed terms was also an issue in Banneker Ventures, 798 F.3d at 1131.

187. *See* Christopher A. Ford, Competitive Strategy vis-à-vis China and Russia: A View from the "T Suite," 1(6) ACIS PAPERS 2, at 3–4 (2020). https://www.state.gov/wp-content/uploads/2020/05/T-paper-series-6-Strategic-competition.pdf.

to resolve.[188] While a number of international agreements codify the obligation, for example Articles 279 and 300 of UNCLOS (requiring parties to refrain from "any acts that might aggravate or extend the dispute"), it is an obligation of a general character. Indeed, "such a duty [to refrain from aggravation] is inherent in the central role of good faith in the international legal relations between States."[189] It is an obligation, therefore, applicable to the conduct of Parties to the NPT.

It is hard to see how the most rapid and sophisticated nuclear arms build-up since the Cold War, carried out with no measures of control or transparency, could fail to aggravate the situation that Article VI obliges the Parties to negotiate to resolve. Some context may be provided by considering China's recent practice more widely on other topics relevant to international peace and security. Salient again in this connection are the findings of the UNCLOS Annex VII Tribunal in the *South China Sea Arbitration* in regard to China's artificial islands. The Tribunal found as follows:

> China's intensified construction of artificial islands on seven features in the Spratly Islands during the course of these proceedings has *unequivocally aggravated the disputes* between the Parties . . .[190]
>
> . . . .
>
> *China has aggravated the Parties' dispute* with respect to the protection and preservation of the marine environment.[191]
>
> . . . .
>
> China has *undermined the integrity* of [the Annex VII arbitral proceedings] . . . [by having] *permanently destroyed evidence* of the natural status of [certain features in the Spratly Islands the status of which had been in dispute].[192]

The first two findings above expressly identify conduct of China that aggravated the dispute that China was legally bound to address. In the *Philippines* case, China was legally bound to address

188. Electricity Company of Sofia and Bulgaria (Belg. v. Bulg.), Interim Measures of Protection, Order, 1939 P.C.I.J. (SER. A/B) NO. 79, at 199 (Dec. 5); South China Sea Arb., PCA Case No. 2013-19 at ¶¶ 1169–70. From another branch of international practice, *see* Federico Campolieti, *The Rule of Non-Aggravation of the Dispute in ICSID Arbitration Practice*, 30(1) ICSID REV.–FOREIGN INVESTMENT L. J. 217, 217–30 (2015).

189. South China Sea Arbitration, PCA Case No. 2013-19 at ¶ 1171.

190. *Id.* at ¶ 1177 (emphasis added).

191. *Id.* at ¶ 1178 (emphasis added).

192. *Id.* at ¶ 1179 (emphasis added).

the dispute through arbitration.[193] An obligation to address the dispute, instead, through negotiation would have placed the parties under the same duty to avoid aggravating it. The principle of non-aggravation, which grounds the findings that China aggravated its dispute with the Philippines, thus is relevant, *mutatis mutandis,* to settings in which China is legally obliged to negotiate, and thus the principle is relevant to Article VI.[194]

The third of these findings—destruction of evidence—is relevant as well. Obfuscation and lack of transparency concerning the subject matter of a dispute are not in accord with an obligation to negotiate the dispute. Destruction of evidence is an extreme form of obfuscation and lack of transparency.[195] China in multiple fields in recent years has engaged in such misconduct. China's continued refusal to negotiate toward mechanisms of transparency and confidence-building in regard to China's nuclear arms build-up has troubled China's interlocutors when attempting to address Article VI in particular. China's refusal in that regard, if not "undermin[ing] the integrity" of Article VI altogether, renders fulfilment of the negotiation requirement more difficult.[196]

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193. *See* South China Sea Arbitration (Phil. v. China), PCA Case No. 2013-19, Award on Jurisdiction and Admissibility, ¶ 413 (Oct. 29, 2015). Non-appearance by the respondent effected no bar to the proceedings (as clearly stated in UNCLOS Annex VII, Art. 9). Award on Jurisdiction and Admissibility at ¶ 114.

194. *See* Gabčíkovo-Nagymaros Project, 1997 I.C.J. at 66, ¶ 107.

195. International law contains no rules of general application that specify the manner or scope of preservation and production of evidence in negotiations or in judicial or arbitral procedures. However, dispute settlement practice reflects the importance of maintaining a reliable evidentiary record, and particular procedural rules address the matter. *See, e.g.*, R.R. Dev. Corp. v. Guatemala, ICSID Case No. ARB/07/23, Provisional Measures, ¶ 17 (Oct. 15, 2008), (declining request for provisional measures against Guatemala under Central American Free Trade Agreement (CAFTA) Art. 10.20.8 on preservation of evidence); Biwater Guaff (Tanzania) Ltd. v. Tanz., ICSID Case No. ARB/05/22, Procedural Order No. 1, ¶ 84–88 (ordering, under Art. 47 ICSID Convention and Rule 39(1) ICSID Arbitration Rules, Tanzania to preserve, and "take no adverse step in relation to," certain evidence relevant to the proceedings); Rawat v. Mauritius, PCA Case No. 2016-20, Jurisdiction, ¶ 33 (keeping open possibility of a request by claimant for measures of protection to preserve evidence). As to procedural rules, *see, e.g.*, the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (May 29, 2010); UNCITRAL Model Law on International Commercial Arbitration (1985, as amended 2006) Art. 17(2)(d*)* (interim measures for preservation of evidence).

196. If the view is accepted that negotiations require transparency and the exchange of information, then it is also relevant here that the Tribunal in the South China Sea Arbitration found China to have failed to produce and transmit environmental impact assessments: South China Sea Arbitration, PCA Case No. 2013-19 at ¶ 991. Such conduct, if it reflects China's general practice, has particularly troubling implications for arms control. (See above pages 15–16 and below n. 205 regarding good faith as an element of negotiation). This is a further light in which non-compliance of Russia with the Open Skies Treaty, and the exiting of Russia and China from the International Partnership for Nuclear Disarmament Verification (IPNDF), are concerning. *See* Hon. Christopher A. Ford, Assistant Secretary of State (ISN), Testimony before the U.S. Senate Foreign Relations Committee (Dec. 3, 2019), 3, *available at* https://www.foreign.senate.gov/imo/media/doc/120319_Ford_Testimony.pdf.

China is a nuclear-weapon State with an alarming record of aggravating the problems that it ought to be working to solve. It is axiomatic that, when seeking to ameliorate or resolve a situation, States are to refrain from conduct that makes the situation worse.[197] This is especially so in regard to negotiations that States are legally obligated to pursue.[198] China's conduct in carrying out its nuclear arms build-up threatens to do irreparable harm to international peace and security and, in so doing, aggravates the situation that China is legally obligated to pursue negotiations to ameliorate and resolve.

A final point is in order as regards indicia of China's non-compliance. Each of the points above, B(1), B(2), and B(3), relies upon a proper appreciation of the legal issues involved. However, each point depends upon the facts as well. "[A]scertainment of whether negotiations . . . have taken place . . . [is] essentially a question . . . of fact 'for consideration in each case.'"[199] In advancing an objection to China's conduct under Article VI, a State would have to verify that the factual record indeed supports the objection as advanced. A genuine pursuit of negotiations by China would be welcome—and would satisfy China's duty to negotiate under Article VI. To date, the facts do not support a conclusion that China has engaged in such pursuit.

C. China's Putative Rebuttal

China, in response to criticism, might seem likely to seek safe harbor in a discretionary reading of the "effective measures" clause of Article VI. The present Article has argued[200] that such a reading, whether or not plausible in itself, does not relieve China of the obligation to negotiate.

China's public statements about Article VI suggest, however, that China's main line of rebuttal might be in a different direction.

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197. The main international courts and tribunals, indeed, have the power to indicate measures of protection to prohibit such conduct in certain circumstances. *See, e.g.*, Immunities and Criminal Proceedings (Eq. Guinea v. Fr.), Order, Request for the Indication of Provisional Measures, 2016 I.C.J. at 1169, ¶ 90 (Dec. 7); Seizure and Detention of Certain Documents and Data (Timor-Leste v. Austl), Order, Provisional Measures, 2014 I.C.J. at 157–59, ¶¶ 42–48 (Mar. 3); Delimitation of the Maritime Boundary (Ghana/Côte d'Ivoire), Provisional Measures, 2015 I.T.L.O.S. Case No. 23, at 163, ¶ 89 (Apr. 25). *See generally* CAMERON A. MILES, PROVISIONAL MEASURES BEFORE INTERNATIONAL COURTS AND TRIBUNALS (2017).

198. *See* n.194 above, regarding Gabčíkovo-Nagymaros.

199. CERD case, *supra* note 40, at 133, ¶ 160.

200. *See* pages 24–26 above.

Relevant in particular is China's 2015 Implementation Report,[201] wherein China addresses Article VI. After considering the Report (subpart C(1)), this subpart will touch briefly on the factual elements of China's putative rebuttal (subpart C(2)); and then on the assertion that China might make that its conduct in multilateral fora has addressed China's Article VI obligation (subpart C(3)).

1. China's Legal Characterization of Article VI

In its 2015 Implementation Report, China says as follows:

> China maintains that all nuclear-weapon States should fulfil in good faith their obligations under article VI of the Treaty and publicly undertake not to seek to permanently possess nuclear weapons. Nuclear disarmament should be a just and reasonable process of gradual and balanced reduction. States with the largest nuclear arsenals bear a special responsibility for nuclear disarmament and should take the lead in reducing their nuclear arsenals drastically. When conditions are ripe, all nuclear-weapon States should join the multilateral nuclear disarmament negotiation process. To attain the ultimate goal of complete and thorough nuclear disarmament, the international community should develop, at an appropriate time, a viable and long-term plan of phased actions, including the conclusion of a convention on the complete prohibition of nuclear weapons.[202]

This statement merits several observations.

First, China here acknowledges that the "disarmament" clause of Article VI is universally applicable (e.g., the reference to the "international community"), but in the same breath denies that it applies to China in quite the way it does to other nuclear-weapon States: China characterizes the "disarmament" clause as imposing "a special responsibility" on two States—Russia and the United States, these being the "States with the largest nuclear arsenals." In other words, "disarmament" is a *universal* obligation when China says; but, at other times—i.e., when China says!—it is a *particular* obligation born by two States alone.[203] It is true that treaties exist

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201. The 2010 Review Conference of the Parties to the NPT adopted an Action Plan that, inter alia, called for the five nuclear-weapon States Parties to transmit individual country reports on NPT implementation. *See* NPT/CONF/2010/50 (Vol. I).

202. Implementation of the Treaty on the Non-Proliferation of Nuclear Weapons in the People's Republic of China, Report submitted by China, NPT/CONF/2015/32, 4, ¶ 17 (Apr. 27, 2015).

203. One is reminded of Lewis Carroll's oft-quoted passage: "'When I use a word', Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—

in which different parties, depending on criteria set out in the treaty, have different rights and obligations.[204] There is nothing whatsoever in Article VI, or the NPT as a whole, however, to support a ranking or differentiation among the nuclear-weapon States such as that which China proclaims.[205]

It is also true that States have drawn attention to the special role that the nuclear-weapon States play under Article VI—but they have done so without acknowledging any special carve-out for China. As noted above, the United Kingdom drew attention to the special role of the nuclear-weapon States in its pleadings in the *Marshall Islands case*. The Marshall Islands, the U.K. observed, was not for practical purposes seeking to impose the Article VI negotiation requirement on the U.K. in order to commence arms control negotiations between the U.K. and the Marshall Islands. For a meaningful result to have followed from a judicial act directing compliance with Article VI (assuming that such a judicial act could have such result), the complainant would have had to address *nuclear-weapon States*.[206] The judge of Chinese nationality agreed in substance when she referred to "joint efforts" between the "nuclear-weapon States."[207] The Marshall Islands, she said, had "every reason to criticize" those who fail to undertake them. No nuclear-weapon State is excused in this regard.

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neither more nor less.'" LEWIS CARROLL, THROUGH THE LOOKING GLASS 49, 1896 (1965 ed.) (emphasis added), and quoted, *e.g.*, by Mr. Highet (for Italy), Elettronica Sicula S.p.A. (ELSI) (U.S. v. It.), 1989 I.C.J. PLEADINGS at 271 (Feb. 23); Sir Ian Sinclair (for Cameroon), Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria:), Verbatim Record, ¶ 14 (Mar. 11, 1998, 10:00 a.m.), https://icj-cij.org/public/files/case-related/94/094-19980311-ORA-01-00-BI.pdf.

204. *E.g.*, the allocation of voting power in the International Monetary Fund (IMF) based on "quotas"—i.e., the amount of financial resources a member is obliged to supply to the IMF—under Art. III and Schedule A of the Articles of Agreement (as amended Dec. 15, 2010); election to membership on the Council of the International Maritime Organization (IMO) based, inter alia, on size of state's "interest in providing international shipping services" and size of "interest in international seaborne trade" under IMO Convention Art. 17 (as amended, Nov. 7, 2002: 2199 U.N.T.S. 122); restriction on total capital ship replacement tonnage as designated for each of the five parties under Art. IV of the Treaty for the limitation of Naval Armament (Washington Naval Treaty), Feb. 6, 1922, 25 L.N.T.S. 201, 205.

205. Indeed, the consistent position of the United States has been that "Article VI . . . requir[es] all NPT Parties to pursue negotiations in good faith." Remarks by Assistant Secretary of State (ISN) Christopher A. Ford, Our Vision for a Constructive, Collaborative Disarmament Discourse at the Palais des Nations, Geneva, Switzerland, (Mar. 26, 2019), available at: https://2017-2021.state.gov/our-vision-for-a-constructive-collaborative-disarmament-discourse/index.html (emphasis original).

206. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Preliminary Objections of the U.K., (June 15, 2015), at 37–38, ¶¶ 86–87.

207. Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marsh. Is. v. U.K.), Declaration of Judge Xue, 2014 I.C.J. 1029, ¶ 6 (Oct. 5).

Second, there is a contradiction between the obligation that the disarmament clause imposes and the conduct that China pursues. The disarmament clause acknowledges the possibility—indeed the likelihood—that disarmament, while preferably soon, will not come about immediately. An incremental approach inheres in Article VI—not least of all in the discretion that States retain when interpreting the expression "effective measures." Moreover, reading Article VI as one must in its context, which includes the treaty's preamble,[208] a directional or progressive element is clearly visible. In the Preamble, the Parties "[d]eclar[e] their intention [*inter alia*] . . . to undertake effective measures *in the direction of nuclear disarmament*" (emphasis added).[209] China does not deny the directional approach. However, China's conduct on the ground is in precisely the opposite direction of that which such an approach requires. China engages in a rapid arms build-up and refuses to participate in negotiations on effective measures in regard to the situation that China's build-up aggravates.[210] In China's view, other nuclear-weapon States are obliged to move toward disarmament, but China is at liberty to increase its arsenal by leaps and bounds. Meanwhile, China places conditions on the opening of negotiations not found in Article VI.[211] China's conditions seem calculated to delay the opening of negotiations indefinitely.

Third, while contending for an unsupportable reading of the disarmament clause of Article VI, China ignores the arms race clause altogether. The paragraph quoted above from China's 2015 Implementation Report is the sum total of what China has to say in that Report about Article VI. The paragraph does not mention the Article VI arms race clause. Nor does the arms race clause make appearance anywhere else in the Report. As argued above (*page 55*), it is not plausible to assert that the arms race clause has ceased to apply.

2. Factual Assertions

China seeks to buttress its legal contentions about the NPT with assertions about the factual record. According to China, "China has never taken part in *any nuclear arms race in any form with any country* in the past, nor will it do so in the future."[212] It takes only a

208. VCLT Art. 31(2), chapeau, 1155 U.N.T.S. at 340.

209. 729 U.N.T.S. at 171.

210. See above pages 48 to 52.

211. See *supra* note 4.

212. Implementation of the Treaty on the Non-Proliferation of Nuclear Weapons in the People's Republic of China, *supra* note 202, at 3, ¶ 13 (emphasis added).

passing familiarity with current events to recognize that this statement of China's is detached from reality. To recall, the salient feature of the Cold War arms race had been, not necessarily an action-reaction dynamic between the United States and the Soviet Union, but the strategic risk arising from geopolitical rivalry between these nuclear-armed States.[213] The hostilities between China and India, one of China's three nuclear-armed neighbors, belie any suggestion that China's build-up does not give rise to strategic risk.[214] The absence of transparency on China's part, and even of negotiations toward effective measures toward transparency, further heightens the risk.[215] Moreover, China's goal—i.e., vastly to augment its nuclear arsenal—gives rise to yet further risk, given the unsettling effect this build-up will have on the architecture of deterrence worldwide if it continues.[216]

China predictably would assert that it is the United States arsenal that is prejudicial to the outcome of an eventual negotiation, not China's build-up.[217] This would not be to the point, however. The United States and Russia maintained armaments on a very large scale before the negotiation requirement was set down in the NPT; and, since that time, both have achieved reductions—very steep reductions—in the size of their arsenals.[218] Since then,

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213. See *supra* n. 32.

214. Academic writers have set out arguments concerning the NPT and U.S. relations with non-party India; less commentary, so far, has been published concerning the NPT and PRC relations with non-party India. As to the former, *see, e.g.*, Eftihia Popovich, *Exploring the Capacity of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) to Achieve Universal Disarmament through a Case Study of India's Engagement with Nuclear Non-Proliferation*, 15(2) FLINDERS L. J. 284 (2013).

215. Writers had noted the transparency deficit in China's nuclear weapons program even before much was said about the scope of China's arms race aims. See, e.g., Susan Turner Haynes, *China's Nuclear Threat Perceptions,* 10(2) STRATEGIC STUD. Q'LY 25, 53 (2016).

216. See Jacob Stokes, *China's Nuclear Buildup is About More Than Nukes,* JUST SECURITY (Jan. 4, 2022), *available at* https://www.justsecurity.org/79622/chinas-nuclear-buildup-is-about-more-than-nukes/ (observing that "U.S.-China nuclear and strategic stability will be tested . . . after . . . revelations . . . about Beijing's nuclear program").

217. For a recent example of China's reactive diplomacy in relation to nuclear weapons, see Catherine Wong, *China hits back at US, Japan over nuclear transparency call,* SOUTH CHINA MORNING POST (Jan 21, 2022), *available at* https://www.scmp.com/news/china/diplomacy/article/3164302/china-hits-back-us-japan-over-nuclear-transparency-call.

218. The United States arsenal today is around only 13 percent of its Cold War peak. *See* Christopher A. Ford, *To Tango Alone: Problems of Theory and Practice in the Sociology of Arms Control, Nonproliferation, Disarmament, and Great Power Competition*, ARMS CONTROL AND INT'L SEC.(ACIS) PAPERS, Vol. I, No. 14 (July 30, 2020) at 3, https://www.state.gov/wp-content/uploads/2020/07/T-paper-series-Tango-FINAL-508.pdf. To visualize the United States' steps between the end of the Cold War and 2008 to reduce weapons and related materials stockpiles*, see also*, Christopher A. Ford, U.S. Special Rep. for Nuclear Nonproliferation at the time and William H. Tobey, Deputy Adm'r for Nuclear Nonproliferation, NNSA, Presentation of "The United States and Article VI: A Record of Accomplishment," at 8–15 (May 6, 2008), https://2001-2009.state.gov/documents/organization/115100.pdf.

notwithstanding the development by Russia of new weapons systems that give rise to serious concern,[219] the United States has continued to retire nuclear weapons and has not increased the stockpile it holds.[220] A cause of instability, uncertainty, and risk to the aims of the NPT is China's build-up, not the relatively stable levels of armament that the United States has maintained since the early 1990s.[221]

Nor is China credible when it asserts that it is not engaged in an arms race with the United States or Russia. The United States and Russia, seen in the geopolitical setting at large, are competitors with one another; and both are competitors with China.[222] A competitive environment of international politics of the kind that Article VI addresses under the rubric "arms race" thus clearly exists in regard to China, and China's nuclear weapons holdings and expansion are to be considered as part of that competitive environment. Moreover, on the better understanding of the historical record, "arms race" has never necessarily entailed a reactive series of escalatory steps between two or more countries. Rhetoric about "action-reaction" arms racing was prevalent during the Cold War, especially in the disarmament community, but the historical record belies a formulaic model of how the competing Superpowers actually behaved.[223] These facts—both historical and present day—have legal consequences. They deprive China of a plausible claim to be on the sidelines when it comes to the nuclear arms race. Indeed, China's buildup, which is on a significant scale both in numbers and in qualitative terms, stands out all the more for its lack of

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219. E.g., the Tsirkon hypersonic cruise missile. *See Russia Touts Test Launch of Hypersonic Missile On Putin's Birthday*, REUTERS (Oct. 7, 2020, 3:37 AM), https://www.reuters.com/article/uk-russia-putin-missiles-idUKKBN26S0ZN.

220. For a recent detailed account, see Hans M. Kristensen & Matt Korda, *Nuclear Notebook: United States Nuclear Weapons,* BULLETIN OF THE ATOMIC SCIENTISTS (Jan. 12, 2021), available at https://thebulletin.org/premium/2021-01/nuclear-notebook-united-states-nuclear-weapons-2021/. For a graph representing the decline in the U.S. stockpile from 1983 to 2013, see David Wright, *Then vs Now: Progress on Nuclear Weapons since the End of the Cold War,* UNION OF CONCERNED SCIENTISTS (Dec. 17, 2014), Fig. 2, available at https://blog.ucsusa.org/david-wright/nuclear-weapons-end-of-the-cold-war-769/.

221. *See* Christopher A. Ford, *U.S. Priorities for "Next Generation Arms Control"*, ACIS PAPERS Vol. I, No. 1 at 2 (Apr. 6, 2020), https://www.state.gov/wp-content/uploads/2020/06/T-paper-series-1-Arms-Control-Final-1-508.pdf. *See also* Frank A. Rose, *Bringing China into the Fold on Arms Control and Strategic Stability Issues,* BROOKINGS (Sept. 25, 2019), *available at* https://www.brookings.edu/blog/order-from-chaos/2019/09/25/bringing-china-into-the-fold-on-arms-control-and-strategic-stability-issues/.

222. The geopolitical competition presented to the United States by Russia and China is a central factor guiding United States strategy, as directed in the NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA at 26–28, *passim* (Dec. 2017). *See also* Ford, *supra* note 205, at 1. "The primary challenge facing the arms control community today is the pressing need to rein in the Russian and Chinese nuclear build-ups that are currently underway."

223. See TRACHTENBERG ET AL., *supra,* n. 31.

connection to any proportionate contemporary increase by the United States or the United States' allies.[224] China's buildup, seen in light of Article VI and the Cold War historical record, is no less indicative of an "arms race." The facts, in context, make clear that China is engaged in an arms race for purposes of Article VI and enjoys no credible safe harbor from the obligation to pursue negotiations.[225]

3. Possible Invocation by China of Remarks in Multilateral Fora

Conceivably, China also might assert that its occasional remarks in multilateral fora about disarmament somehow satisfy China's Article VI obligation. China's Report on the occasion of the 2015 NPT Rev.Con. has been noted already here and attention called to its omission of any reference to the arms race. It is beyond the limits of the present article to give a complete account of China's practice in such settings. As a general matter, it is not convincing for a State in China's position to argue that its declarations and remarks in multilateral fora presumptively generate legal effects sufficient to satisfy a negotiating requirement such as that in Article VI. This conclusion is supported by the following considerations.

First, the observation made under heading (1) on page 48 above—i.e., that China itself understands mere exchanges of view "*are far from constituting negotiations*"[226]–applies *mutatis mutandis* to exchanges involving China in intergovernmental bodies. Any assertion that China might make that such exchanges *do* somehow fulfil the obligation to negotiate are at variance with China's own stated understanding. That they happen to take place in this or that body does not transform the exchanges into a negotiation. To be sure, it is not impossible for States to negotiate in an assembly such as the Security Council, General Assembly, etc. However, when they do, they are clear that that is what they are doing;[227]

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224. See, *supra*, note 220.

225. It is further relevant to the arms race that the United States nuclear umbrella long has been understood to extend not only to Europe as against the threat of Soviet/Russian aggrandizement but also to East Asia as against the PRC, which historically presented a conventional, more than a nuclear, threat to regional security: *See* Ford, *supra* note 205, at 5.

226. *See* Position Paper, *supra* note 179, ¶ 47 (emphasis added).

227. Diplomatic conferences, such as that resulting in the text of the Vienna Convention on the Law of Treaties, illustrate the point: these are multilateral gatherings not only expressly designated as negotiating sessions but also purposefully organized to conduct negotiations. See UN Codification Division, *Diplomatic Conferences*, *available at* https://legal.un.org/diplomaticconferences/.

and when they are not clear, jurists have been skeptical about any later assertion that they were negotiating, a point to which we will return immediately below.[228]

Second, negotiation on a matter as complex and controversial as the arms race, in order to be meaningful (and thus to meet the threshold required to constitute a negotiation), is unlikely to take place in a parliamentary setting. The limited opportunities for discussion afforded in such a setting do not suffice for the technical issues that the parties must grapple with if they are to make a genuine attempt to reach agreement.

Finally, the trend in jurisprudence for over half a century has been to set a higher, not lower, bar for determining whether exchanges in an intergovernmental parliamentary setting carry legal effects. The classic statement about the legal effects of exchanges in intergovernmental assemblies and their limits is that of Sir Gerald Fitzmaurice in the *Northern Cameroons* case: "[Negotiation] does not . . . mean a couple of States arguing with each other across the floor of an international assembly, or circulating statements of their complaints or contentions to its member States. That is disputation, not negotiation."[229] As such, conduct in parliamentary settings does not generate the legal effects sought.

In *Northern Cameroons*, the particular legal effects sought were that a negotiation requirement had been satisfied. Other legal effects, too, that a State might seek in international assemblies have proved likewise elusive. A salient example from recent practice is the Marshall Island's failure to establish that a dispute existed with the United Kingdom in regard to compliance with Article VI NPT. The ICJ in that connection said as follows: "In such a setting [a multilateral forum] . . . the Court must give particular attention, *inter alia,* to the content of a party's statement and to the identity of the intended addressees . . . ."[230] The Court went on to assess statements that the Marshall Islands had made in the UN General Assembly High-Level Meeting on Nuclear Disarmament and the Nayarit conference.[231] The assessment of exchanges in intergovernmental assemblies, then, as with the assessment of

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228. *See* page 59.

229. Northern Cameroons (Cameroon v. U.K.), 1963 I.C.J. 15, 123 (Dec. 2) (separate opinion by Fitzmaurice, J.). This was to amplify, and now with the Court in alignment, the earlier observations about parliamentary transactions, made in dissent in the South-West Africa cases (Eth. v. S. Afr.; Liber. v. S. Afr.), 1962 I.C.J. 319 at 562 (Dec. 21) (joint dissenting opinions by Spender, J., and Fitzmaurice, J.), *available at* https://www.icj-cij.org/public/files/case-related/46/046-19621221-JUD-01-07-EN.pdf.

230. Marsh. Is. v. U.K., 2016 I.C.J. at 853, ¶ 48 (Oct. 5).

231. *Id.* at ¶¶ 49, 50.

whether a negotiation requirement has been filled generally, is centered on the facts. In the *Marshall Islands case,* the facts did not support the conclusion that the legal effects that the Marshall Islands sought had arisen.[232]

It would go too far to say that the practice in regard to intergovernmental assemblies and the generation of legal effects (such as satisfying a negotiation requirement) evinces a very clear standard. However, two points that emerge from the practice are that *(a)* assessments of whether a negotiation has taken place are fact-based and particular to each situation; and *(b)* exchanges typical of those in intergovernmental assemblies or similar gatherings are *not presumed* to generate the requisite legal effects; a specific demonstration is needed, taking account the situation overall.

A claim to have satisfied the negotiation requirement of Article VI through transactions in an intergovernmental body would be open to question. This is so in view of a long-developing practice including the recent failure by a State attempting to demonstrate that such transactions give rise to legal effects in regard to Article VI NPT.[233]

IV. DEVELOPMENT AND POSSESSION OF NUCLEAR WEAPONS UNDER THE NPT

Five States Parties of the NPT possess nuclear weapons, a state of affairs acknowledged in the treaty. While Article VI of the NPT establishes a legal obligation on the States parties, it is not a general restraint against the development and possession of nuclear weapons. Some brief observations are in order on this point, before turning to some general conclusions.

A. The United Kingdom's Stockpile Cap Increase

In March 2021, the United Kingdom, an NPT nuclear-weapon State, published an omnibus document reviewing, *inter alia,* its security policy.[234] The document addresses the United Kingdom's "minimum, assured, credible nuclear deterrent," and, under that rubric, indicates an increase in the country's "overall nuclear weapon stockpile."[235] The United Kingdom had indicated in 2010

232. *Id.* at ¶ 58.

233. *Id.* at ¶ 55–56, 58.

234. *See generally* HM Gov't, *Glob. Britain in a Competitive Age*, THE INTEGRATED REV. OF SEC., DEF., DEV. AND FOREIGN POL. (Mar. 2021).

235. *Id.* at 76.

that it intended to reduce its stockpile from a "ceiling" not exceeding 225 warheads to not more than 180 by the mid-2020s.[236] The March 2021 document, however, draws attention to "the evolving security environment, including the developing range of technological and doctrinal threats," and indicates that the earlier intended reduction is no longer tenable. The United Kingdom now "will move to an overall nuclear weapon stockpile of no more than 260 warheads."[237]

At least three considerations distinguish the United Kingdom's conduct from China's, as relevant to Article VI NPT.

First, the scale of the increase in its nuclear weapons stockpile that the UK now envisages is well within the bounds of the obligation to negotiate: the increase (if carried out even to the maximal stated extent) would cause no fundamental change in the negotiating environment. The increase announced in March 2021 from a declared ceiling of 225 to 260 is modest. Even taking the previous target ceiling of 180 as the starting point, the increase would still be nothing like that which China undertakes.[238] Moving from a stockpile in the low hundreds—as it is estimated China holds—to a stockpile over *a thousand* is approaching an order of magnitude increase.[239] Even the most conservative estimates are that China will more than double its stockpile within ten years.[240] And make no mistake: China is taking steps to furnish its arms program with fissile material in quantities that would make no sense, except in service to a massive numerical increase in its nuclear weapons stockpile.[241] The aim of China's increase is nothing short of strategic transformation. The aim of the UK's is to adjust the UK's deterrent to provocations elsewhere—in order, not to change, but to bring stability to the strategic environment.

Second, no major shift in the strength of its arsenal relative to the arsenals of the other nuclear-weapon States is a declared prerequisite of the United Kingdom. The United Kingdom does not declare that nuclear negotiations are conditional upon a change in the strategic environment. Nor does France declare that such a shift is a prerequisite for negotiations either. As the present article

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236. HM Gov't, *Securing Britain in an Age of Uncertainty: The Strategic Defence and Security Review* (Oct. 2010) 38.

237. HM Gov't, *Glob. Britain in a Competitive Age*, THE INTEGRATED REV. OF SEC., DEF., DEV. AND FOREIGN POL. (March 2021).

238. *See infra* n. 3.

239. *Id.*

240. For a summary of estimates of China's present stockpiles (July 2021) and feasible growth to 2030, *see* Thomas B. Cochran & Henry D. Sokolski, *How Many Nuclear Warheads China Might Acquire by 2030*, *in* NONPROLIFERATION POL'Y EDUC. CENTER OCCASIONAL PAPER 2102, CHINA'S CIV. NUCLEAR SECTOR: PLOWSHARES TO SWORDS? 6, 6–9 (Henry D. Sokolski ed. 2021).

241. *See id.* at 1.

addressed above, Article VI NPT obliges the parties to pursue negotiations. The obligation is not conditional. Moreover, the obligation, like any international legal obligation to negotiate, entails the principle of good faith. Under the principle of good faith, a negotiating party who is subject to a legal obligation to negotiate is not permitted to cause changes in the negotiating environment that are so fundamental that they pre-determine the outcome of negotiations.[242] The United Kingdom has declared an increase in its nuclear weapons stockpile ceiling, but the increase is marginal at most. Such an increase, even if implemented, would cause no fundamental change in the negotiating environment. It is evident, given the scale and speed of China's increase, that the United Kingdom's new ceiling likely will not even keep the United Kingdom in the present ratio of arms with China. Most directly to the present point, the United Kingdom has not conditioned negotiations on an increase in its relative strength against negotiating partners.

Third, the United Kingdom, like the United States and France, and for that matter the Russian Federation, in fact negotiates. The UK's work on the Fissile Material Cut-Off Treaty negotiations is a salient example.[243] China, by contrast, has frustrated negotiation efforts on that project,[244] and refuses proposals to negotiate on others.[245]

B. The Retained Liberty to Increase and Modernize—and a Caveat

It has been the well-articulated understanding of the United States that the NPT *does not* prohibit a nuclear-weapon State from developing and possessing nuclear weapons.[246] To apply this understanding consistently cuts both ways. It entails that the United States retains the freedom to develop and possess nuclear weapons; and it entails that the other four nuclear-weapon States

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242. *See* pages 50 to 52 above.

243. *See* HM Gov't, *Glob. Britain in a Competitive Age*, THE INTEGRATED REV. OF SEC., DEF., DEV. AND FOREIGN POL., *supra* note 235, at 78. As to France's work on the Fissile Material Cut-Off Treaty, *see Nuclear Non-Proliferation Treaty (NPT): Our Dossier*, FRANCE DIPLOMACY (2019), https://www.diplomatie.gouv.fr/en/french-foreign-policy/security-disarmament-and-non-proliferation/disarmament-and-non-proliferation/responsible-development-of-peaceful-uses-of-nuclear-energy/article/nuclear-non-proliferation-treaty-npt-our-dossier.

244. *See* Cochran & Sokolski, *supra* note 241, at 2. *See also*, *No Clear Path Forward for Fissile Material Cut-off Treaty*, INTERNATIONAL PANEL ON FISSILE MATERIALS (May 24, 2020), http://fissilematerials.org/blog/2020/05/no_clear_path_forward_for.html.

245. *See infra* n. 89 (on tripartite negotiation initiatives of the Trump Administration).

246. *See* Legality of the Use by a State of Nuclear Weapons in Armed Conflict, *supra* n. 129, at 20.

retain that freedom too. It follows that, if China were to assert that China's arms build-up does not constitute an Article VI breach *per se*, then, at least in a limited sense, this assertion, too, would be defensible. It would draw support from the United States' own stated understanding. From these observations, a caveat emerges.

If the United States is to hold China to account for its non-compliance with Article VI, then it would risk inconsistency to suggest that development and possession of nuclear weapons, without more, is conduct constituting a breach.

This caveat by no means precludes calling attention to China's nuclear arms build-up and invoking Article VI in that connection. The *magnitude* and *circumstances* of China's build-up are relevant here. China undertakes to increase the quality and the size of its nuclear arsenal, not by increments, but on a transformative scale. The numeric increase that the evidence suggests China pursues might well be close to an order of magnitude.[247] The qualitative improvements to China's arsenal would be revolutionary. As set out above (*pages 48–50*), the intended effect of the build-up is evidently to impose a *fait accompli* before negotiations begin, and the build-up aggravates the situation that China has a duty to address in negotiations (*page 48*). Thus, China's build-up entails a breach of Article VI. There is a breach, not because China is engaged in a build-up, but because China's build-up is difficult or impossible to reconcile with the obligation to negotiate. This conclusion is reinforced by China's insistence that it will not negotiate until it attains parity with the United States.[248] Nothing in the NPT sets parity as a pre-condition for negotiations. *China's non-compliance with Article VI is to be understood as a matrix of factual evidence regarding China's massive arms buildup and the requirements of good faith and non-aggravation of international differences that an international law commitment to negotiate entails.*

China's response to accusations of non-compliance might well include renewed assertions that China has every right to build and develop nuclear weapons. China might assert that, not only does its arms build-up not run afoul Article VI NPT; its arms build-up does not violate *any* international obligation binding on China. Here, however, China would, at best, be stating a *non sequitur*—and an unfortunate one for China's own reputation and standing. It is a *non*

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247. See *supra* note 4. Interestingly, China expressly acknowledges the *qualitative* part of its build-up, though it explains its modernization efforts as serving the interests of "reliability and safety": see statement of Fu Cong, director general of arms control, Foreign Ministry of China, as quoted in Ralph Jennings, *One Reason China Intends to Bulk Up its Nuclear Arsenal,* VOICE OF AMERICA (Jan. 7, 2022), *available at* https://www.voanews.com/a/one-reason-china-intends-to-bulk-up-its-nuclear-arsenal/6387496.html.

248. *See supra* note 4.

sequitur for China to assert that China is compliant with obligations limiting nuclear weapons development and possession, because, with the very limited possible exception of the Test Ban Treaty, which China has signed but not ratified, and provisions such as Article V of the Antarctic Treaty which stipulate exclusions from certain parts of the world, no treaty directly limits China's development and possession of nuclear weapons.

The exercise of declaring itself innocent of violating obligations to which it is not subject—rather casuistic in any event—lies particularly ill in China's mouth, because it is by ignoring an obligation to which China most certainly *is* subject—the Article VI NPT obligation to pursue negotiations—that China practically guarantees it will continue to avoid any obligations that do not accord with its expansionist strategic aims. Article VI does not oblige States to adopt a particular arms control agreement; but it is hard to see how *any* arms control agreement will come into force for China, if China persists in its posture of non-participation. The internal logic of Article VI indeed is directed to avoiding just such an impasse. Article VI does not mandate an agreement; but—if faithfully observed—it precludes the situation in which it is impossible for the Parties to reach an agreement. China's conduct, which risks giving rise to precisely that situation, undoes the logic of Article VI.

These considerations do not change the conclusion (set out above on *page 63*) that it is open to the United States to invoke Article VI in regard to China's recent acts and omissions. However, they identify an area of caution. It would not be plausible to assert that the development and possession by China of nuclear weapons per se constitutes non-compliance. China's quantitative and qualitative build-up of its nuclear arsenal, carried out rapidly, on a massive scale, and in the absence of any meaningful transparency measures, is relevant in regard to the obligation to negotiate under Article VI. In view of the build-up, China is engaged in an arms race in the sense with which Article VI is concerned.[249] Through the build-up, China seeks to impose a *fait accompli* before negotiations begin and aggravates the situation that negotiations are intended to resolve.

249. As to the non-iterative characteristics of nuclear arms buildups, see above, pages 9 to 10.

V. CONCLUSION

Two related indicators of non-compliance by China with that State's obligations under Article VI NPT exist:

(1) failing to negotiate, which is an omission constituting a breach of the Article VI obligation to pursue negotiations (page 48);

and

(2) engaging in an arms build-up that prejudices the outcome of an eventual negotiation (pages 48–50) and aggravates the situation that negotiation is intended to resolve (pages 50–52), which is conduct in violation of good faith250 and thus inconsistent with the obligation to pursue negotiations.

The conclusion that these indicators exist and that it is open to the United States to call attention to them follows from considerations that have been set out in this article. To summarize:

(i) Article VI NPT continues to apply to all NPT Parties, including its "arms race" limb (pages 27–30). This conclusion is supported by State practice, including that of the United States and its allies. State practice contains little or no indication that the "arms race" limb has ceased to apply (pages 30–46).

(ii) The obligation "*to pursue negotiations*" is an obligation to conduct negotiations (*pages 17–24*). The International Court of Justice, and the Permanent Court of International Justice before it, have understood obligations to negotiate in this way (*pages 12–16, 21*). So have allies of the United States (*pages 19–20),* jurists in discussions in the ILC (*page 20*), parties to other treaties (*pages 20–21),* and other courts in one of the other authentic languages of the NPT (*pages 22–23*). The proper interpretation of the "to pursue negotiations" clause is also illuminated by treaty provisions that *do* oblige steps that are not in themselves negotiations (*pages 21–22).*

(iii) International jurisprudence supplies indicia as to what conduct by a country satisfies a legal obligation to negotiate (*pages 12–15).* To be obliged to negotiate is to be obliged to negotiate *in good faith* (*pages 15–16).* Categorical refusal to negotiate, where the country is obliged to negotiate, is *per se*

250. *See also* notes 189 to 108 and the accompanying text in regard to non-transparency and China's withholding of information, which may constitute a further indicator of bad faith.

non-compliance (*page 16).* Negotiation requirements are requirements to negotiate *about a particular object or objects* (*page 16).*

(iv) Where treaty clauses require negotiations, it is assumed, in the absence of specific indication otherwise, that the parties enjoy a considerable discretion in how and on what timetable they commence and conduct negotiations. The Article VI negotiation requirement, like any negotiation requirement, does not demand that States be constantly present at the negotiating table (*page 23).*

(v) The NPT States Parties, while they have discretion as to what measures constitute "*effective measures"* for purposes of Article VI, do not have discretion to fail to negotiate. Differences of view as to what measures constitute "effective measures" are one of the reasons that the Parties agreed to negotiate. Article VI obliges them to negotiate in order to attempt to identify a shared resolution of those differences (*pages 24–26*).

(vi) The factual record, to the extent available at the time that this article was completed, reflects that China has not engaged in more than general exchanges of view in regard to the objects that Article VI requires the Parties to address through negotiations (*page 48).* Mere general exchanges of view do not constitute negotiations.

(vii) China's contention that China is not engaged in an "arms race" for purposes of Article VI is not credible as a matter of fact or law (*pages 55–58).*

(viii) China's qualitative and quantitative build-up of nuclear weapons entails China's non-compliance with Article VI, because the build-up both prejudices the outcome of the eventual negotiations that China is obliged to pursue; and it aggravates the situation that the States Parties are committed to resolving (*pages 50–52*). China's practice in other situations, not least of all the South China Sea, demonstrates an alarming consistency in this regard (*pages 50–51*): China seeks to impose *faits accomplis*, and it ignores the international law obligation not to aggravate disputes.

(ix) The fact that a nuclear-weapon State Party, such as China, develops and possesses nuclear weapons is not in itself evidence of a breach of Article VI (*pages 6–64*). However, the speed and scale of China's surge toward nuclear weapons is relevant in context for the reasons set out in point (viii) above.

In conclusion, the negotiation requirement in Article VI NPT leaves significant discretion in the hands of the Parties as to how

they fulfill it. However, that discretion is not without limit. Even at its extreme, discretion must still accommodate the principle of effective construction: no treaty clause is to be interpreted so as to deprive it of effect. Whatever the precise interpretation a State places on Article VI, that interpretation must give effect to the negotiation requirement that forms its heart.

Article VI requires the Parties to "pursue negotiations," and the negotiations must relate to the "cessation of the nuclear arms race at an early date," as well as to nuclear disarmament. While the negotiation requirement is particular to the NPT, it exists within a jurisprudence of long standing on the matter of the fulfilment (or breach) of obligations to negotiate. The jurisprudence, which the present Article has noted, helps in reaching an appraisal of China's conduct in regard to Article VI.

Nothing in Article VI NPT precludes, as a matter of law, a determination that China is non-compliant with the obligation to pursue negotiations in respect of the arms race. Whether a State invokes Article VI, and if it does, in what terms, depends, however, on a judgment of law and fact, not of law alone. Accordingly, any step, properly taken in regard to China's pursuit of arms, involves both the appreciations of policy that inhere when assessing a potentially complex evidentiary record;[251] and the operation, classically of legal character and familiar to jurists in many settings, of applying the law to the facts.[252]

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251. Reaching legal decisions involves applying law to facts, and a very clear separation between legal analysis and fact-finding is not always visible in practice. This is no less the case in international law than in national law. For example, when the outer limit of the continental shelf was in dispute between Libya and Malta, the ICJ wrestled with differing conclusions that the parties' scientific experts had reached, all of them being "scientists of distinction"; the Court did not carry out its legal function in isolation of fact-finding. *See* Continental Shelf (Libya/Malta), 1985 I.C.J. 13, at 36–37, ¶¶ 41–42 (June 3). Reaching judgments also may involve questions as to who finds the law and who, the facts. Oliver Wendell Holmes, Jr., famously, was skeptical about the standard view that juries are never more than fact-finders. *See* HOLMES, THE COMMON LAW (1881) 122–29, 151. For the standard view, *see* Sparf v. U.S., 156 U.S. 51, 79–80 (1895). Holmes suggested that the fact-finding function might shift from jury to judge where "a state of facts [is] often repeated in practice," as, for example, it is in tort law. *See* THE COMMON LAW at 111. Encounters among States in regard to Art. VI are nowhere near as frequent as the commonplace cases that Holmes had in mind. And, yet, one may imagine circumstances in which the proper division of labor between fact-finder and law-interpreter is controversial even in this more esoteric frame.

252. *See, e.g.*, De Villanueva v. Villanueva, 239 U.S. 293, 298 (1915). *Cf.* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Declaration of Judge ad hoc Verhoeven, 2005 I.C.J. at 368 ¶ 26 (Dec. 19) (calling "apply[ing] insufficient law to insufficient facts" a "failure . . . to discharge . . . [the] judicial function").