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the Non-proliferation of Nuclear Weapons**

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2 ON CERTAIN LEGAL ISSUES ARISING FROM ARTICLE VI OF THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS

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2.1 INTRODUCTION

Article VI is perhaps the most ambiguous provision of the 1968 Treaty on the Non-proliferation of Nuclear Weapons (NPT or hereinafter ‘the Treaty’). The provision requires all states 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, and on a treaty on general and complete disarmament under strict and effective international control.

In spite of the resistance on the part of the nuclear weapon states (NWS) to the inclusion of a disarmament element in the NPT,¹ Article VI was eventually incorporated in the final text of the Treaty as a compromise between the NWS and the opposing positions of non-nuclear weapon states (NNWS). Together with non-proliferation and the right to the peaceful uses of nuclear energy, Article VI constitutes one of the three pillars of the NPT and is an essential element of the ‘grand bargain’ on which the Treaty is founded.²

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1 G. Nystuen & T. Graff Hugo, ‘The Nuclear Non-Proliferation Treaty’, in G. Nystuen, S. Casey-Maslen & A. Golden Bersagel (Eds.), *Nuclear Weapons under International Law*, Cambridge, Cambridge University Press, 2014, p. 383; D.H. Joyner, ‘The Legal Meaning and Implications of Article VI of the Non-Proliferation Treaty’, in *Ibid.*, p. 399.

2 D.H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty*, Oxford University Press, Oxford, 2011, p. 32. A commentator has suggested that, while the text seems to give more importance to the non-proliferation and peaceful uses of nuclear energy pillars, a constitutional approach to the interpretation that takes into account the subsequent practice of the parties and the purposes of the treaty implies that equal weight should be given also to the disarmament pillar (N. White, ‘Interpretation of Non-Proliferation Treaties’, in D.H. Joyner & M. Roscini (Eds.), *Non-Proliferation Law as a Special Regime*, Cambridge, Cambridge University Press, 2012, p. 113).

The present chapter discusses certain problems related to Article VI in the light of the 2014 applications brought by the Marshall Islands before the International Court of Justice (ICJ) against the NWS for an alleged violation of this provision.³

2.2 WHAT 'EFFECTIVE MEASURES' DOES ARTICLE VI REQUIRE?

Article VI requires all states parties to the NPT to pursue negotiations in good faith (1) on effective measures relating to cessation of the nuclear arms race at an early date, (2) on effective measures relating to nuclear disarmament and (3) on a treaty on general and complete disarmament under strict and effective international control. Contrary to what has been argued by certain commentators⁴ and in spite of a sentence contained in the preamble,⁵ the three obligations provided in Article VI are in no chronological or hierarchical order, apart from the fact that the negotiations on effective measures to cease the nuclear arms race appear to be more urgent than the others, as they have to be undertaken “at an early date.”

The normative character of the third obligation has been doubted by some,⁶ while others have interpreted it narrowly as referring to general and complete *nuclear* disarmament only.⁷ As to the first and second obligations, Article VI does not indicate what “effective measures” need to be negotiated by the states parties. Not only bilateral and multilateral treaties but also unilateral measures may be “effective measures” for the purposes of the provision under consideration.⁸ On the other hand, it is doubtful that arms control measures, *i.e.*, measures merely aimed at reducing nuclear arsenals or limiting their increase, are consistent with Article VI as the NWS have argued (with the possible exception of China).⁹ Joyner, for instance, has maintained that, as the reference in the provision is to “disarmament” and not to the narrower concept of arms control, partial measures aimed at tackling vertical nuclear proliferation but not at completely eliminating

3 The Marshall Islands also filed a complaint on the same grounds against the United States and various US organs before a US Federal District Court. So far, the ICJ has registered and listed on its website only the cases against the states that have accepted the compulsory jurisdiction of the ICJ through declarations under Art. 36(2) of the ICJ Statute (United Kingdom, India and Pakistan) but not those against the states which are reliant on *forum prorogatum* for jurisdiction. The applications against the United Kingdom, India and Pakistan can be read at <www.icj-cij.org>.

4 See C. Ford, ‘Debating Disarmament. Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons’, *The Nonproliferation Review*, Vol. 14, No. 3, November 2007, p. 404.

5 The Preamble refers to “the elimination from national arsenals of nuclear weapons and the means of their delivery *pursuant to* a Treaty on general and complete disarmament” (emphasis added).

6 Nystuen & Graff Hugo 2014, p. 393.

7 Joyner 2014, p. 416.

8 *Id.*, p. 411.

9 *Id.*, pp. 400-401.

the nuclear arsenals are incompatible with Article VI.¹⁰ Others, however, have taken the opposite view.¹¹ It appears, in my personal opinion, that arms control measures are consistent with Article VI provided that they are the first step of a good faith process towards the ultimate goal of nuclear disarmament. They would not be consistent with Article VI if they were used by the NWS as a means to avoid or procrastinate indefinitely the final achievement of that objective.

It should be recalled that, at the 2000 NPT Review Conference, the NPT states parties agreed on a series of 13 Practical Steps for the Implementation of Article VI.¹² It has been suggested that the NPT Review Conferences' Final Documents may constitute "subsequent agreement[s] between the parties" for interpretation purposes under Article 31(3) of the 1969 Vienna Convention on the Law of Treaties.¹³ If this view is correct, whether or not the NPT states parties have complied with Article VI could be tested against these steps, which would identify the "effective measures" referred to in the provision. If so, the NWS have not done much, if anything at all, to implement them. The United States, however, has withdrawn its support for the 13 Steps.¹⁴

2.3 IS ARTICLE VI OF THE NPT A PACTUM DE NEGOTIANDO OR A PACTUM DE CONTRAHENDO?

According to the ICJ's 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, Article VI entails not only an obligation to negotiate but also

an obligation to achieve a precise result – nuclear disarmament in all its aspects – by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.¹⁵

This conclusion, however, is difficult to reconcile with the ordinary meaning of the text, which does not suggest an obligation to bring the negotiations to a successful conclusion,

10 D.H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, Oxford University Press, Oxford, 2009, p. 64.

11 See P.M. Kiernan, "Disarmament" under the NPT: Article VI in the 21st Century', *Michigan State International Law Review*, Vol. 20, 2012, p. 385.

12 2000 NPT Review Conference, Final Document, pp. 14-15, <www.un.org/disarmament/WMD/Nuclear/pdf/finaldocs/2000%20-%20NY%20-%20NPT%20Review%20Conference%20-%20Final%20Document%20Parts%20I%20and%20II.pdf>.

13 Joyner 2011, pp. 59-61.

14 Statement by J. Sherwood McGinniss, Deputy US Representative to the Conference on Disarmament, to the Second Session of the Preparatory Committee for the 2005 NPT Review Conference, 1 May 2003, <www.usmission.ch/press2003/0501NPTMcGinniss.htm>.

15 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, 1996 ICJ Rep. 226, pp. 263-264, para. 99.

for instance, by adopting a treaty on nuclear disarmament – a result that is beyond the power of any individual state – but only “to pursue negotiations” in good faith. This is confirmed by an interpretation that takes account of the context, in particular, of the aspirational language of the preambular paragraph declaring the intention of the parties “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.”¹⁶ Furthermore, although “the distinction between [*pactum de contrahendo* and *pactum de negotiando*] may be as narrow as to be nearly imperceptible,”¹⁷ a *pactum de contrahendo* needs to be formulated “with sufficient precision” to create valid obligations and goes beyond an “obligation assumed by two or more parties to *negotiate* in the future with a view to the conclusion of a treaty.”¹⁸ Compare, for instance, the vague language of Article VI with the far more specific text of Article III of the NPT, which provides for the obligation of the NNWS to negotiate *and* conclude a safeguard agreement, having the characteristics specified therein, with the International Atomic Energy Agency (IAEA). Finally, the *travaux préparatoires*, used as supplementary means of interpretation, confirm that Article VI was included in the final text of the Treaty exactly because it did not entail a commitment to successfully conclude negotiations by adopting a treaty on nuclear disarmament.¹⁹ According to Mohamed Shaker, “[t]he obligation to pursue negotiations in good faith was lukewarmly admitted by a number of States, as the only solution acceptable to the two super-powers.”²⁰

The fact that Article VI does not entail an obligation to achieve nuclear disarmament does not mean that it has no normative value. Indeed, the provision contains, at the very least, an obligation “to proactively, diligently, sincerely, and consistently pursue good faith negotiations.”²¹ This goes further than an obligation to merely *enter* negotiations.²² In the *North Sea Continental Shelf* cases, the ICJ held that the parties were

16 Emphasis added. See, however, Step No. 6 of the 13 Practical Steps to implement Art. VI agreed in the Final Document of the 2000 NPT Review Conference, p. 14.

17 H. Owada, ‘*Pactum de Contrahendo, Pactum de Negotiando*’, in R. Wolfrum (Ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. VIII, Oxford, Oxford University Press, 2012, p. 19.

18 Lord McNair, *The Law of Treaties*, 2nd ed., Clarendon Press, Oxford, 1961, pp. 27, 29 (emphasis in the original).

19 Joyner 2014, p. 399.

20 M. Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation 1959-1979*, Vol. II, Oceana Publications, London-New York, 1980, p. 572.

21 Joyner 2011, p. 99.

22 See *Railway Traffic between Lithuania and Poland*, Advisory Opinion of 15 October 1931, PCIJ (Ser. A/B) No. 42, para. 29: “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. [...] But an obligation to negotiate does not imply an obligation to reach an agreement.”

under an obligation to enter into negotiations with a view to arriving at an agreement, *and* [...] so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.²³

In the case concerning Claims Arising out of Decisions of the Mixed Graeco/German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles, the Arbitral Tribunal had already found that “an agreement to negotiate does not necessarily imply an obligation to reach an agreement, [but] it does imply that serious efforts towards that end will be made.”²⁴ The Tribunal further specified that

[a] *pactum de negotiando* is [...] not without legal consequences. It means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken. [...] An undertaking to negotiate involves an understanding to deal with the other side with a view to coming to terms.²⁵

The Lac Lanoux Arbitration confirms that a state will be in breach of an obligation to negotiate when it is responsible for

an unjustified breaking off of the discussions, abnormal delays, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests, and, more generally, in cases of violation of the rules of good faith.²⁶

It should be emphasized again that the fact that no agreement on general and complete nuclear disarmament has so far been reached does not in itself demonstrate that the NPT states parties have breached their obligation to negotiate in good faith. As the ICJ observed in the *Macedonia v. Greece* case,

23 *North Sea Continental Shelf (Germany v. Denmark/The Netherlands)*, Merits, Judgment of 20 February 1969, 1969 ICJ Rep. 3, p. 48, para. 85 (emphasis added).

24 Case Concerning Claims Arising out of Decisions of the Mixed Graeco/German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles (*Greece v. Federal Republic of Germany*), Decision of 26 January 1972, *Reports of International Arbitral Awards*, Vol. XIX, p. 57.

25 *Id.*, p. 56.

26 Lac Lanoux Arbitration of 16 November 1957 (*France v. Spain*), 24 ILR 128 (1957).

[w]hether the obligation has been undertaken in good faith cannot be measured by the result obtained. Rather, the Court must consider whether the Parties conducted themselves in such a way that negotiations may be meaningful.²⁷

Finally, as Judge Owada recalled in his Dissenting Opinion in the *Whaling in the Antarctic* case, good faith on the part of a contracting state in performing its obligations under a treaty “has necessarily to be presumed,”²⁸ although the presumption is subject to rebuttal.

2.4 DOES ARTICLE VI REFLECT CUSTOMARY INTERNATIONAL LAW?

Customary international law is created by the convergence of two elements: practice by a sufficiently representative number of states and other subjects of international law (for instance, international organizations) and “evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it”²⁹ (*opinio iuris ac necessitatis*). Customary international law plays an important role in the Marshall Islands’ applications before the ICJ, particularly in the cases against the NWS not parties to the NPT. Has Article VI become binding on all states even beyond the NPT? In his Declaration attached to the ICJ *Nuclear Weapons* Advisory Opinion, President Bedjaoui stated that

it is not unreasonable to think that, considering the at least formal unanimity in this field, this twofold obligation to negotiate in good faith and achieve the desired result has now, 50 years on, acquired a *customary character*.³⁰

With all due respect, it is difficult to agree with this view. The fact that a treaty has been almost universally ratified or that the states parties act in conformity with the terms of the treaty is not, on its own, sufficient evidence of its customary status. As stated in the Special Rapporteur’s Second Report on the Identification of Customary International Law, one has rather to look at the practice and *opinio iuris* of the states that are *not* parties to the treaty and their attitude towards the treaty.³¹ The practice of states that have not ratified the NPT (India, Pakistan and Israel) and of the state that has withdrawn from it (North Korea) appears unsupportive of the customary nature of Article VI.

27 *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, Merits, Judgment of 5 December 2011, 2011 ICJ Rep. 644, p. 685, para. 134.

28 *Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Merits, Judgment of 31 March 2014, Dissenting Opinion of Judge Owada, p. 7, para. 21, <www.icj-cij.org/docket/files/148/18136.pdf>.

29 *North Sea Continental Shelf* cases, p. 45, para. 77.

30 *Nuclear Weapons* advisory opinion, Declaration of President Bedjaoui, p. 274, para. 23 (emphasis in the original).

31 *Second Report on Identification of Customary International Law*, by Michael Wood, Special Rapporteur, UN Doc. A/CN.4/672, May 2014, pp. 43-44.

From a methodological perspective, one cannot see how such custom could be considered as formed without taking into account the (rather inconsistent) practice and *opinio iuris* of those states that possess nuclear weapons. The Special Rapporteur's Second Report on the Identification of Customary International Law explains that the practice of "States whose interests are specially affected" "should weigh heavily (to the extent that, in appropriate circumstances, it may prevent a rule from emerging)."³² The specially affected states for the purposes of custom formation are *in primis* those that have the opportunity to engage in the relevant conduct.³³ While it is true that Article VI formally addresses *all* NPT states parties, this provision 'specially' affects only the NWS (at least with regard to the part of Article VI that refers to the cessation of the nuclear arms race and to nuclear disarmament). Indeed, the NWS possess the weapons the elimination of which must be negotiated, and it would make little sense for the NNWS to negotiate nuclear disarmament without the participation of the NWS. The fact that Article VI consisted in what the NNWS asked of the NWS – together with the reaffirmation of the inalienable right to the peaceful uses of nuclear energy and the right to receive assistance in the exercise of that right, in return for the NNWS' renunciation to acquire nuclear weapons – demonstrates that this provision was specifically aimed at the NWS.

To be truly 'representative', therefore, participation in the practice must necessarily also include that of the NWS. In any case, the "formal unanimity" referred to by President Bedjaoui is not as solid as it may seem at first sight. Indeed, the position of the several NNWS that accept nuclear weapons on their territory and of those that benefit from the nuclear deterrence umbrella cannot be reconciled with the alleged customary nature of Article VI, as it is based on the acceptance that certain states may possess nuclear weapons. The fact that Article VI does not reflect customary international law has been confirmed in the ICJ's *Nuclear Weapons* advisory opinion, where the Court states that the obligation "formally concerns the 182 states parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community": the vast majority, but not the entire international community.

2.5 CONCLUSIONS

This chapter has argued that Article VI of the NPT only requires the states parties to pursue good faith negotiations in order to adopt effective measures on the cessation of the nuclear

³² *Second Report*, p. 36.

³³ The mechanical transplantation of concepts derived from the law of state responsibility, like 'injured state', to custom formation should be avoided. It is also incorrect to argue that, because of the global effects of nuclear explosions, the interests of all states are specially affected: indeed, Art. VI does not deal with the use of nuclear weapons but with negotiations related to their possession.

arms race and nuclear disarmament as well as a treaty on general and complete disarmament. It does not obligate the parties to successfully conclude such negotiations by achieving an agreement. In order to be meaningful, however, the negotiations must be conducted in good faith with the aim of reaching this result. In this context, the upcoming 2015 NPT Review Conference will offer an important opportunity for the NWS to show that they are committed to going in the right direction.

This chapter has also maintained that Article VI has not yet acquired customary status, as there is no sufficiently widespread, consistent and representative practice and *opinio iuris* in that sense. This of course does not exclude that the provision may become a customary international law in the future, should the two elements of custom sediment.

There are of course many other problematic aspects of Article VI that, due to limited space, were not examined here. If any of the abovementioned cases brought by the Marshall Islands against the NWS for breach of Article VI reach the merits stage, however, the ICJ will have an unprecedented opportunity to clarify all the issues arising from what is one of the most controversial provisions of non-proliferation law.