

November 2021

OCCASIONAL  
PAPER

Volume 1, Number 11

# China's Nuclear Build-Up and Article VI NPT: Legal Text and Strategic Challenge

Thomas D. Grant



NATIONAL INSTITUTE FOR PUBLIC POLICY

**China's Nuclear Build-Up and  
Article VI NPT:  
Legal Text and Strategic Challenge**

**Thomas D. Grant**

**National Institute Press®**

Published by  
National Institute Press®  
9302 Lee Highway, Suite 750  
Fairfax, Virginia 22031

Copyright © 2021 by National Institute Press®

All rights reserved. No part of this book may be reprinted or reproduced or utilized in any form or by an electronic, mechanical or other means, now known or hereafter invented, including photocopying, and recording or in any information storage or retrieval system, without permission in writing from the publisher. The views expressed in this book are the authors' alone and do not represent any institution with which he is or has been affiliated.

National Institute for Public Policy would like to thank the Sarah Scaife Foundation for its generous support that makes the *Occasional Paper* series possible.

# Table of Contents

Executive Summary.....	v
Introduction.....	1
International Law and Obligations to Negotiate.....	9
Article VI NPT and China’s Build-Up .....	25
Calling Attention to China’s Build-Up .....	33
China’s Putative Rebuttal .....	35
The United Kingdom’s Stockpile Cap Increase .....	49
Conclusion: Understanding Article VI in Its Strategic Setting ...	56
About the Author.....	61



## Executive Summary

China's nuclear build-up presents one of the most serious challenges to strategic stability since the start of the nuclear age. Indicating an intention to approximate or exceed the largest nuclear arsenals in existence, China is acting to prosecute its build-up on an ambitious timetable and scale. For nuclear strategists in the United States and allied countries, the immediate questions that China's build-up raises are the pragmatic ones of how best to maintain the credibility of our long-standing nuclear deterrent in a potentially changed strategic environment. For the diplomats and other policy-makers who address policy-relevant audiences at home and abroad, China's build-up calls for reasoned arguments grounded in the international legal obligations that China is trespassing. An international legal obligation central to the realities of nuclear deterrence for over fifty years has been that contained in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons—Article VI NPT. At its heart, Article VI NPT is a negotiations clause, a treaty text obliging the States Parties to the NPT to pursue negotiations in regard to arms control and, eventually, disarmament, assuming effective measures for a reliable system to achieve, verify, and maintain disarmament can be agreed.

This *Occasional Paper* will start with an overview of how international law understands obligations to negotiate generally and, in particular, what the negotiation requirement in Article VI NPT means for nuclear-weapon States such as the United States and China. As will be noted, when a State is obliged to negotiate, this does not just mean going through the motions. A State must come to the table, but it must come with a genuine intention to find solutions in agreement with the other parties to the negotiation. Moreover, the obligation to negotiate under international law entails constraints on how the State acts *away* from the

table. A general principle of good faith attaches to a State when it is obliged to pursue negotiations, and the constraints arise under that principle. First, the State must not seek to change the environment surrounding negotiations and their subject matter to such an extent as to pre-determine the outcome: good faith does not accommodate a State creating a *fait accompli* around a negotiation. Second, a State must not engage in conduct that aggravates the challenges about which it is obliged to pursue negotiations.

With these points in view, the paper then will turn to consider how the United States and like-minded countries may invoke Article VI in order to call attention to China's unlawful conduct, including how, precisely, China's pursuit of a vastly enlarged and enhanced nuclear arsenal violates the obligation to negotiate, because China has pre-conditioned negotiations on fundamental changes in the strategic environment which would prejudice the outcome of any eventual negotiation; and because China's build-up aggravates the situation about which China is obliged to negotiate. China, with respect to nuclear weapons, seems to read from a playbook that it has used in other situations, such as the South China Sea, where it seeks to impose outcomes on other States, irrespective of the negative effects that its conduct will have on stability and security at large. It should be of particular concern to strategists and policy-makers that China seems to take the same approach with regard to nuclear weapons.

Because Article VI NPT is not a prohibition against nuclear weapons or their modernization and updating, this *Occasional Paper* also will consider the nuclear posture of the United Kingdom, a close United States ally which recently has indicated an increase in its nuclear stockpile limit. Increasing a stockpile to *maintain* stability among the nuclear powers is consistent with good faith negotiations; a head-long drive to disrupt the balance is not.

In closing, this *Occasional Paper* will suggest that China pursues its build-up of nuclear arms to serve its larger aims of geopolitical revision. The United States and its allies long have relied on our nuclear arsenals to stabilize international relations, calibrating our weapons holdings to deter both nuclear war and conventional armed aggression. China, by contrast, seeks a new state of nuclear affairs, not for safeguarding global stability, but, instead, to give China license to pursue its own increasingly forceful agenda against its immediate neighbors and farther afield. Attempting to overturn the geopolitical status quo, China seeks to transform its nuclear arsenal into a tool to achieve that ambition. Such conduct Article VI NPT does not allow.



## Introduction

The People's Republic of China (PRC) has embarked on a major effort to increase the size and capabilities of its nuclear weapons arsenal. The measures that the PRC is taking in this effort include an expansion of plutonium production not reconcilable with nonproliferation goals and civilian energy best practices,<sup>1</sup> the testing of hypersonic orbital capabilities similar to the Soviet's Fractional Orbital Bombardment (FOBS) System,<sup>2</sup> the construction of some hundreds of new ICBM silos,<sup>3</sup> and the addition of nuclear warheads in such numbers as to at least double the existing

---

<sup>1</sup> See David Von Hippel, "Does China Need to Fuel its Power Reactors with Plutonium?" Chapter 5 in Henry D. Sokolski (ed.), *China's Civil Nuclear Sector: Plowshares to Swords?* Nonproliferation Policy Education Center (NPEC), Occasional Paper 2102 (Arlington, VA: March 2021), pp. 87-132, available at

[http://npolicy.org/article\\_file/2102\\_Chinas\\_Civil\\_Nuclear\\_Sector.pdf](http://npolicy.org/article_file/2102_Chinas_Civil_Nuclear_Sector.pdf)

<sup>2</sup> Demetri Sevastopulo, Kathrin Hille & Sylvia Pfeifer, "What China's hypersonic test launch reveals about the global arms race," *Financial Times* (Oct. 21, 2021), available at

<https://www.ft.com/content/f647d654-e870-4829-8dc2-90c98985c034>

Taking the Soviet FOBS technology a step further, China's hypersonic system allows operators to maneuver the warhead in its flight after re-entry: see Timothy Wright, "Is China gliding toward a FOBS capability?" International Institute for Strategic Studies (IISS) (Oct. 22, 2021), available at <https://www.iiss.org/blogs/analysis/2021/10/Is-China-gliding-toward-a-FOBS-capability>. It also gives China the capability to convey a warhead over the South Pole and thus to approach the continental United States from a direction toward which United States early-warning capabilities are relatively weak: *id.*

<sup>3</sup> See Joby Warrick, "China is building more than 100 new missile silos in its western desert, analysts say," *Washington Post* (June 30, 2021), available at [https://www.washingtonpost.com/national-security/china-nuclear-missile-silos/2021/06/30/0fa8debc-d9c2-11eb-bb9e-70fda8c37057\\_story.html](https://www.washingtonpost.com/national-security/china-nuclear-missile-silos/2021/06/30/0fa8debc-d9c2-11eb-bb9e-70fda8c37057_story.html); Shannon Bugos & Julia Masterson, "New Chinese Missile Silo Fields Discovered," Arms Control Association (Sept. 2021), available at <https://www.armscontrol.org/act/2021-09/news/new-chinese-missile-silo-fields-discovered>

stockpile.<sup>4</sup> China indeed is pursuing the development and deployment of a much larger and more capable array of delivery systems in all the dimensions of the nuclear triad – land-based, air, and sea.<sup>5</sup> These details are now familiar to policy-makers and strategists in the United States.<sup>6</sup> But as

---

<sup>4</sup> 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," Chapter 1 in Sokolski (ed.), op. cit., pp. 6-9. However, the plutonium that China's reactor-building program will allow it to produce is estimated to be in such quantity as to allow China to build an additional *one thousand six hundred* nuclear warheads *per year*. Michael Mazza & Henry Sokolski, "China's Nuclear Arms Are a Riddle Wrapped in a Mystery," *Foreign Policy* (Mar. 13, 2020), available at <https://foreignpolicy.com/2020/03/13/china-nuclear-arms-race-mystery/>

<sup>5</sup> See Department of Defense, Annual Report to Congress, *Military and Security Developments Involving the People's Republic of China 2020*, pp. ix, 50, 85, 87, available at <https://media.defense.gov/2020/Sep/01/2002488689/-1/-1/1/2020-DOD-CHINA-MILITARY-POWER-REPORT-FINAL.PDF> As to which see further Deputy Assistant Secretary of Defense for China Chad L. Sbragia, AEI Web Event (Sept. 1, 2020), available at [https://www.aei.org/events/webinar-assessing-chinas-military-an-inside-look-at-the-department-of-defenses-china-military-power-report/?\\_\\_cf\\_chl\\_captcha\\_tk\\_\\_=pmd\\_oWwH.gQTqB1QRldrSIhCShG9I3pAo61TO35Ws.qs-1633511654-0-gqNtZGzNA3ujcnBszQfR](https://www.aei.org/events/webinar-assessing-chinas-military-an-inside-look-at-the-department-of-defenses-china-military-power-report/?__cf_chl_captcha_tk__=pmd_oWwH.gQTqB1QRldrSIhCShG9I3pAo61TO35Ws.qs-1633511654-0-gqNtZGzNA3ujcnBszQfR) and C. Todd Lopes, *China Pursues Own Nuclear Triad, Doubling of Nuclear Capacity*, DOD News (Sept. 1, 2020), available at <https://www.defense.gov/News/News-Stories/Article/Article/2333018/china-pursues-own-nuclear-triad-doubling-of-nuclear-capability/> As to China's heretofore ICBM-centric focus, see Matthew R. Costlow, *Safety in Diversity: The Strategic Value of ICBMs and the GBSD in the Nuclear Triad*, National Institute for Public Policy, *Occasional Paper*, Vol. 1, No. 3 (March 2021), pp. xii, 38-39, 43, available at <https://nipp.org/wp-content/uploads/2021/04/OP-5-Binder-for-web.pdf>

<sup>6</sup> As noted by the President: "China is surging" (Remarks by President Trump Before Marine One Departure, July 29, 2020: <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-marine-one-departure-072920/>). See also Christopher A. Ford, "Law, Morality, and The Bomb," *Arms Control and International*

we come to grips with China's build-up, less familiar is how a legal obligation to negotiate arms control may afford us a way to respond.

The Treaty on the Non-proliferation of Nuclear Weapons (NPT),<sup>7</sup> often described as the cornerstone of the legal framework for nuclear arms control,<sup>8</sup> under its Article VI obliges all States "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."<sup>9</sup> International law gives specific meaning to an obligation to pursue negotiations. As this *Occasional Paper* will argue, China has violated the obligation under Article VI NPT – and not just by failing to come to the table to negotiate. As also will be argued, China's violation has serious implications for the strategic environment that the NPT serves to sustain and improve.

Various treaties, including the NPT, oblige States to negotiate in regard to particular subject matter. An obligation to negotiate is not onerous, an obligation to "pursue negotiations," if a distinction is to be drawn

---

*Security Papers* (hereinafter "ACIS Papers"), Vol. I, Number 22 (Nov. 13, 2020) at p. 10, citing Office of the Secretary of Defense, *Military and Security Developments Involving the People's Republic of China 2020: Annual Report to Congress*, pp. 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., <https://www.belfercenter.org/sites/default/files/files/publication/ChinaNuclearModernization-hzhang.pdf>

<sup>7</sup> 729 U.N.T.S. 161; concluded July 1, 1968; entered into force March 5, 1970.

<sup>8</sup> See, e.g., Statement by Mr. Jean-Yves Le Drian, Minister for Europe and Foreign Affairs (France), U.N. Security Council (Apr. 1, 2019): *The Treaty on Non-Proliferation remains the cornerstone of global strategic stability*, available at <https://onu.delegfrance.org/The-Treaty-on-the-Non-Proliferation-of-Nuclear-Weapons-remains-the-cornerstone>

<sup>9</sup> 729 U.N.T.S. at 173.

between the two, even less so.<sup>10</sup> The obligation nevertheless places definite constraints on the State that the State must observe if it is to remain in compliance. One of the constraints is that the State is not free to *refuse* to negotiate, as it otherwise would be in the absence of the obligation. In other words, under an obligation such as that contained in Article VI NPT, the State must engage with its negotiating partners in a good faith effort to seek mutually agreeable solutions to the issue about which they have committed to negotiate.

Alongside the act of engaging in that way – i.e., the act of coming to the table to negotiate – the State that is obliged to negotiate must observe certain further constraints on its conduct. It is in particular to the further constraints that the present *Occasional Paper* will turn, and to which the United States and our allies should draw attention in arenas of diplomacy and public affairs as we respond to China and its build-up.

The further constraints contained in an obligation to negotiate are found in the duty of every State in a negotiation to conduct itself in good faith. By definition under international law, good faith is part and parcel of negotiation. Good faith, where negotiating is obligatory, in turn, entails that the negotiating State, in its conduct *outside* the negotiation, neither prejudice the outcome of the negotiation, nor aggravate the challenges that it has committed to seek to resolve through negotiation. These are basic elements of the obligation to negotiate, and courts and tribunals, when applying international law, have treated them as no less binding than the element of the obligation

---

<sup>10</sup> The two variations are sufficiently alike for present purposes to set aside for the moment distinctions that sometimes have been drawn between the two. Arguing that “pursue” introduces a distinction, see Christopher A. Ford, “Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons,” 14(3) *The Nonproliferation Review* 401 (2007).

that requires a State to come to the table and engage with other States. China, like all parties to the NPT, has committed to seek to resolve through negotiation the challenges to peace and security that are entailed by the existence of nuclear arms. In having made this commitment, China at once also has committed to respect those two further basic elements: not to engage in conduct that would prejudice the eventual negotiated outcome and not to engage in conduct that aggravates the challenges.

In spite of the obligation under Article VI NPT, China has refused to come to the table;<sup>11</sup> United States officials have noted that China's behavior is inconsistent with Article VI in this way.<sup>12</sup> However, China's pursuit of the most significant nuclear arms build-up since the end of the

---

<sup>11</sup> Reuters, "China says it won't take part in trilateral nuclear arms talks," available at <https://www.reuters.com/article/us-usa-trump-putin-china-idUSKCN1SC0MJ> (May 6, 2019). See also China's own statements: e.g., "United States... proposal for trilateral talks are just tricks" and "China ... [will not] join such talks." General Assembly, First Committee, Seventy-Fifth Sess., 4<sup>th</sup> & 5<sup>th</sup> mtgs, GA/DIS/3648 (Oct. 12, 2020), available at <https://www.un.org/press/en/2020/gadis3648.doc.htm>

<sup>12</sup> See, e.g.,

<https://twitter.com/USArmsControl/status/1334935330127032321> (Dec. 4, 2020; 1:59 PM): 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"; <https://twitter.com/USArmsControl/status/1340372039740211200> (Dec. 19, 2020; 2:02 PM): Billingslea, "...China's obligation to negotiate in good faith (Article VI), which they have not done"; Michael R. Pompeo & Marshall Billingslea, "China Nuclear Build-Up Should Worry the West," *Newsweek* (Jan. 4, 2021): "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"; and Billingslea, quoted in Bill Gertz, "China building 'greatest expansion of a nuclear arsenal' since Cold War, State Department warns," *Washington Times* (Jan. 14, 2021): "China appears to not be in compliance with its Article VI obligations under the NPT."

Cold War constitutes a violation of Article VI in two additional, distinct ways: China with its build-up both (1) aims to change the global nuclear status quo and thus to prejudice the outcome of negotiations; and (2) aggravates the issue that China and the other NPT parties are obliged to negotiate to address—i.e., the challenges to peace and security that nuclear weapons entail.

In drawing attention to these additional, distinct ways in which China is in non-compliance with Article VI NPT, we must be clear about what Article VI NPT *is not*: it is not a prohibition against nuclear weapons-building or development. China's violation therefore does not arise from the mere fact that China is building and developing nuclear weapons. The violation arises, instead, from China's avowed efforts to change the status quo among the negotiating parties before negotiations even begin. In China's stated policy, negotiation is unacceptable to China, except on the condition that China achieves nuclear parity with the United States.<sup>13</sup> So, while refusing to negotiate, China pursues its nuclear build-up apace.

---

<sup>13</sup> See, e.g., Mr. 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](https://www.fmprc.gov.cn/mfa_eng/wjbxw/t1824545.shtml) In a separate public briefing 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 Issues*, Aug. 7, 2020, available at [https://www.fmprc.gov.cn/mfa\\_eng/wjbxw/t1795979.shtml](https://www.fmprc.gov.cn/mfa_eng/wjbxw/t1795979.shtml) Thus has

On the surface, declarations about parity sound reasonable, but, on inspection, as will be addressed below, China has set a pre-condition for negotiations, and Article VI contains no pre-condition. Article VI, instead, simply requires that States negotiate.

Hand in hand with “parity,” much is said in China today about “stability.” Parity, however, is not a synonym for stability. Nothing would be left of the nonproliferation goals of the NPT – and little of stability – if stability were equated to a race to nuclear parity for all. A recent National Institute *Information Series* paper notes the contradiction that the word “stability” presents when China uses it, and Russia uses it in much the same way:

...a nonaggressive conception of ‘strategic stability’ does not comport with Russia’s or China’s expressed geopolitical goals, doctrine or force deployments. Their public lip service to the phrase appears to be hollow virtue-signaling designed only to soothe Western audiences.<sup>14</sup>

---

China articulated the conditions that it imposes on negotiations. Note in the interview with *Kommersant* the legalistic turn of phrase “fair and equitable basis,” which oddly evokes the standard wording of a bilateral investment treaty’s substantive clauses. Cf. statements by non-governmental but 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>

<sup>14</sup> See Dr. Keith B. Payne & Michaela Dodge, *The Strategic Stability Dialogue: Think Before You Speak*, National Institute for Public Policy Information Series, Issue 495 (July 8, 2021), p. 2, available at [https://nipp.org/information\\_series/keith-b-payne-and-michaela-dodge-the-strategic-stability-dialogue-think-before-you-speak-no-495-july-8-2021/#\\_ednref15](https://nipp.org/information_series/keith-b-payne-and-michaela-dodge-the-strategic-stability-dialogue-think-before-you-speak-no-495-july-8-2021/#_ednref15)

The same may be said of China's plea for "parity." In view of their highly destabilizing acts against settled understandings in international relations and international law,<sup>15</sup> China and Russia evidently use words like "stability" and "parity" for public effect, each chosen for the comforting tone it emits, not for analytic coherence or fidelity to the policies either State in fact pursues.

Further casting doubt on China's compliance with Article VI NPT, China participates in no meaningful mechanism for nuclear transparency. Consequently, China's build-up takes place in a vacuum of confidence-building, verification, and accountability. This aggravates all the more the challenges in regard to which the NPT obliges the States Parties to negotiate.

The duty not to aggravate has special salience in this setting, because the realistic intention of the drafters<sup>16</sup> of the NPT was not that the treaty would result in immediate disarmament but, instead, that it would move the world in a direction of greater stability by preventing the

---

<sup>15</sup> As to China, see Communication dated 7 May 2009 to the Commission on the Limits of the Continental Shelf (CLCS) (containing China's first formal espousal in a diplomatic communication of the so-called "9-dash-line"), available at [https://www.un.org/depts/los/clcs\\_new/submissions\\_files/mysvnm33\\_09/chn\\_2009re\\_mys\\_vnm\\_e.pdf](https://www.un.org/depts/los/clcs_new/submissions_files/mysvnm33_09/chn_2009re_mys_vnm_e.pdf) As to Russia, see Thomas D. Grant, "Annexation of Crimea," 109(1) *American Journal of International Law* 68-95 (2015).

<sup>16</sup> As to the drafting history of Art. VI generally, see Ford, op. cit., 14(3) *The Nonproliferation Review* at 405-407 (2007); and chapters in Roland Popp, Liviu Horovitz & Andreas Wenger (eds.), *Negotiating the Nuclear Non-Proliferation Treaty. Origins of the nuclear order* (Routledge, 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>

proliferation of nuclear weapons to States that do not have them and by reducing uncertainty and risk among those that do. Preventing the aggravation of the issue, a necessary predicate if ever we are to solve the challenges of the nuclear age, is foremost among the purposes of the NPT: it is the strategic purpose of the NPT to foster stability around the realities of nuclear deterrence in a world of competing States. China's build-up undermines that purpose.

China's acts and omissions—China's build-up and China's absence from the negotiating table—justify a reasoned critique. Understanding the international legal obligation involved can help formulate the critique, which, in turn, can help restore arms control's necessary predicate—stability in its widest geopolitical sense.

## **International Law and Obligations to Negotiate**

States that are parties to the NPT are subject to certain obligations indicated in that treaty. One of the obligations is that they pursue negotiations. The NPT expresses the negotiations requirement in its Article VI, which 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.<sup>17</sup>

This provision of the NPT correlates to a significant and on-going effort by the United States and its allies to negotiate arms control treaties and to maintain and improve

---

<sup>17</sup> 729 U.N.T.S. at 173.

practical arrangements for stability among the nuclear-weapon States and nuclear nonproliferation in the world at large.<sup>18</sup> The organization charts of U.S. government departments, as well as the budget appropriations that Congress makes, reflect the active commitment of the United States to carrying out this NPT obligation.<sup>19</sup> There is, moreover, the long record of the United States participating in and leading negotiations in furtherance of Article VI's aims.

---

<sup>18</sup> "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 Art. IX, para. 3: 729 U.N.T.S. at 174.

<sup>19</sup> To give the main examples, the Department of State contains in the Office of the Under Secretary for Arms Control and International Security two major Bureaus that have responsibilities relevant to the NPT – the Bureau of Arms Control, Verification, and Compliance (AVC), and the Bureau of International Security and Nonproliferation (ISN); the Department of Defense, in the Office of the Under Secretary of Defense for Policy, contains an Assistant Secretary for Homeland Defense & Global Security who oversees, among other functions, arms control efforts under the NPT, and the Department is responsible for the Defense Threat Reduction Agency; and the Department of Energy, in the Office of the Under Secretary for Nuclear Security, contains units responsible for Defense Nuclear Nonproliferation and Counter-Terrorism & Counter-Proliferation. Nonproliferation functions are carried out in other parts of the U.S. government as well. The Bureau of Industry and Security in the Department of Commerce, for example, contains an Office of Nonproliferation and Treaty Compliance; the Department of Homeland Security contains a Countering Weapons of Mass Destruction Office (CWMD); and the Nuclear Regulatory Commission, in its Office of International Programs, includes a Senior Level Advisor for Non-Proliferation and International Nuclear Security. Because these functions are shared across the Interagency, Congress makes no single appropriation supporting all NPT-related efforts. For a sense of the scale of the functions, it may be noted that the Defense Nuclear Nonproliferation budget in the National Nuclear Security Administration (Department of Energy) alone was \$2.1 billion in Fiscal Year 2020: see [https://www.energy.gov/sites/default/files/2020/03/f72/doe-fy2021-budget-volume-1\\_2.pdf](https://www.energy.gov/sites/default/files/2020/03/f72/doe-fy2021-budget-volume-1_2.pdf).

To understand the meaning of the legal obligation contained in Article VI, the starting point is, of course, the text of Article VI itself. It helps, however, also to consider how international law understands negotiations in general.

## Negotiation Requirements in General

The negotiation clauses that have received the fullest ventilation by international courts and tribunals are those that stipulate negotiation as a required antecedent to a compulsory and binding dispute settlement procedure. For example, parties may have recourse to compulsory and binding dispute settlement procedures under Part XV of the UN Convention on the Law of the Sea (UNCLOS) but only after they have attempted to negotiate a settlement of their dispute.<sup>20</sup> An important aspect of an obligation to negotiate is visible in that arrangement: to be obliged to negotiate is not to be obliged to solve the issue subject to negotiation.

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 obligation to negotiate means that “there be negotiations conducted in good faith, but not that they should be successful.”<sup>21</sup> A negotiation requirement of this 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 does not necessarily reach a result at all:

---

<sup>20</sup> See *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, 2017 Reports of the International Court of Justice (hereinafter “ICJ Rep.”) at p. 39, ¶ 90 (Feb. 2); *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, 2002 ICJ Rep. at p. 424, ¶ 244 (Oct. 10).

<sup>21</sup> *Maritime Delimitation in the Indian Ocean*, op. cit., ¶ 90.

[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 the States 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.<sup>22</sup>

It is seldom the case that parties who have agreed to negotiate leave “their options open as to the outcome” *entirely* open. At the very least, the parties, to have adopted a meaningful obligation, will have agreed to negotiate about some particular problem. A well-known feature of the ICJ Advisory Opinion in the *Nuclear Weapons* case in 1996 is what the Court said about this aspect of Article VI. By identifying the particular problem about which the NPT parties shall pursue negotiations – the possession by certain States of nuclear weapons – Article VI, as the Court saw it, made the obligation to negotiate one of *result*: “The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result.”<sup>23</sup> The disarmament community might interpret this to mean that, because the parties have not yet achieved disarmament, they are in breach. This is not a supportable interpretation. For one thing, an advisory opinion does not lay down legal obligations upon States; it is advisory only; and, so, the Court’s assertion about an “obligation to achieve a precise result” is not a determination about States Parties’ liability

---

<sup>22</sup> *Maritime Delimitation in the Indian Ocean*, Preliminary Objections, Joint Declaration, Judges Gaja and Crawford, 2017 ICJ Rep. at p. 64, ¶ 4 (emphasis original).

<sup>23</sup> *Nuclear weapons*, Advisory Opinion, p. 254, para. 99.

for the continuing existence of nuclear weapons.<sup>24</sup> For another thing, the Court presents a puzzle about its own advisory jurisdiction: the General Assembly knows full well how to ask the ICJ for interpretations of specific treaty provisions, but it did not ask for an interpretation of Article VI of the NPT.<sup>25</sup> Even putting these points aside, we still must take care when reading the 1996 Advisory Opinion: in saying that Article VI expresses an obligation of result, the Court did *not* say that that supposed obligation comes before the obligation of best efforts, much less that it replaces it. To “go beyond” is to add to, not to efface or substitute. So there is less to the Court’s statement about an “obligation of result” than is sometimes made of it. Parties confronting hard questions don’t settle them without effort. And not all the efforts they undertake will result in settlement.

In any event, that an obligation to negotiate has not led 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 they bring a claim under a judicial or arbitral dispute settlement procedure, a party that does not wish to litigate or arbitrate is likely to argue that negotiation has not taken place.<sup>26</sup> In that setting—litigation or arbitration—

---

<sup>24</sup> As has been rightly pointed out, the NPT does not require immediate disarmament: Alessandra Petrobon, “Nuclear powers’ disarmament obligation under Treaty on the Non-Proliferation of Nuclear Weapons and the Comprehensive Nuclear Test Ban Treaty: interactions between soft law and hard law,” 27 *Leiden J. Int’l L.* 169, 187 (2014).

<sup>25</sup> See, e.g., *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, 1989 ICJ Rep. p. 177 (Dec. 15).

<sup>26</sup> A prominent example is Russia in claims that Georgia and Ukraine instituted against it at the ICJ. See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, 2011 ICJ Rep. p. 70, 120 ff. (Apr. 1); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial*

failure to satisfy the obligation to negotiate has the consequence that the court or arbitral tribunal shall not proceed to decide the merits of the claim. 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*.”<sup>27</sup> To constitute a genuine attempt, parties must have “conducted themselves in such a way that negotiations may be *meaningful*.”<sup>28</sup>

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

---

*Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, 2019 ICJ Rep. 558, 587-589, ¶¶ 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), Award (Dec. 19, 2013), pp. 180-182, ¶¶ 820-827.

<sup>27</sup> *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, 2019 ICJ Rep. at p. 588, ¶ 69 (Nov. 8). See also *Case concerning the continental shelf (Tunisia/Libya)*, Dis. Op. Judge Gros, 1982 ICJ Rep. at p. 145 ¶ 4 (Feb. 24), citing, *inter alia*, *Lake Lanoux*, XII United Nations Reports of International Arbitral Awards (hereinafter “UNRIAA”) 281, 311 (Nov. 16). Cf. Abdulqawi Ahmed Yusuf, “Engaging with international law,” 69 *International & Comparative Law Quarterly* 505, 515 (2020).

<sup>28</sup> *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, 2011 ICJ Rep. at p. 685, ¶ 134 (emphasis added) (Dec. 5).

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.<sup>29</sup>

The negotiation requirement 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<sup>30</sup>-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].”<sup>31</sup> This obligation to negotiate between those two parties, not being part of a procedure for recourse to a court,<sup>32</sup> to that extent may be likened to the obligation under Article VI NPT.

As between North Macedonia and Greece, the ICJ concluded that the parties had indeed fulfilled the

---

<sup>29</sup> *Georgia v. Russian Federation*, *supra* n. 26 at p. 132, ¶ 157.

<sup>30</sup> 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; entered into force Feb. 12, 2019: U.N.T.S. reg. no. 55707.

<sup>31</sup> Interim Accord, Art. 5(1), Oct. 13, 1995: 1891 U.N.T.S. 3, 5.

<sup>32</sup> 2011 ICJ Rep. at p. 692, ¶ 166 (Dec. 5). 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) *Michigan Journal of International Law* 141, 161-171 (1994).

obligation to negotiate, though North Macedonia's 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."<sup>33</sup> The ICJ there considered much 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. Whether obliged to negotiate as a condition for bringing a case to court, or as a means to seek a solution when, as under the NPT, there is no court,<sup>34</sup> parties must endeavor meaningfully when they negotiate.

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,<sup>35</sup> negotiation has not taken place where either party "insists upon its own position without contemplating any modification of it."<sup>36</sup> Then, as now, static and insistent repetition by one State of its preconceived viewpoint will not satisfy an obligation to negotiate.

---

<sup>33</sup> 2011 ICJ Rep. at p. 686, ¶ 135.

<sup>34</sup> The NPT contains no compulsory and binding dispute settlement clause (compromissory clause), 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 in court or arbitration (absent a consent to jurisdiction expressed in some other instrument).

<sup>35</sup> Proceedings in the *North Sea Continental Shelf* cases were instituted on Feb. 20, 1967. See the Special Agreements (Denmark-F.R. Germany; F.R. Germany-Netherlands) submitting the matter to the ICJ: *North Sea Continental Shelf Cases*, Pleadings, Oral Arguments, Documents, 1968 ICJ Rep. 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, p. 2 ¶ 5 (Dec. 7, 1967).

<sup>36</sup> *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, 1969 ICJ Rep. at p. 47, ¶ 85 (Feb. 20).

## The Article VI NPT “pursue negotiations in good faith” Clause

Returning now to the starting point, the text of Article VI, this obliges the NPT 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.”<sup>37</sup> As noted already, this negotiations clause, like negotiations clauses generally, does not stipulate the specifics of an outcome. It instead requires the parties to engage in a process *toward* an outcome. The “pursue negotiations in good faith” clause of Article VI thus relates closely to that in the NPT’s 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 indicates the directional aspect of Article VI.<sup>38</sup>

Important as is the affirmative obligation in Article VI to pursue negotiations, important too is what Article VI does *not* say. 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.

The Parties, in adopting the NPT, have obliged themselves not to delay in the search for a negotiated

---

<sup>37</sup> 729 U.N.T.S. at 173.

<sup>38</sup> As to the relevance of a treaty preamble in interpreting an operative provision of the treaty, see *chapeau* to Art. 31(2) of the 1969 Vienna Convention on the Law of Treaties: 1155 U.N.T.S. at 340; *Rights of Nationals of the United States of America in Morocco*, 1952 ICJ Rep. p. 176, 196 (Aug. 27); *Asylum case (Colombia/Peru)*, 1950 ICJ Rep. p. 266, 282 (Nov. 20). See also *Case concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal)*, Dis. Op. Judge Weeramantry, 1991 ICJ Rep. p. 54, 142 (Nov. 12).

resolution of the challenges created by nuclear weapons, but, as just noted, the requirement under Article VI does not stipulate the precise configuration of an eventual result. Article VI calls for “effective measures”; the treaty furnishes no definition of “effective measures.” It instead obliges the States Parties to pursue negotiations in regard to that object.

Nor does the NPT stipulate sequencing, as between nuclear-weapon States or between nuclear and conventional disarmament. Indeed, the United States’ position has been that “the language [of Article VI] contains no suggestion that nuclear disarmament is to be achieved before general and complete disarmament.”<sup>39</sup> The further point is implicit in the logic of the NPT that no one nuclear-weapon State is obliged to disarm outside an omnibus resolution of the situation as a whole—i.e., general disarmament efforts under Article VI are in the direction of “*strict and effective international control*” over *all* States, not merely a selected group or pair.

In *Marshall Islands v. United Kingdom*, Madam Xue Hanqin, the judge of Chinese nationality on the ICJ, seems to have acknowledged the point that Article VI does not exclude parties from its obligation. Judge Xue 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

---

<sup>39</sup> U.S. Assistant Secretary of State for Arms Control Stephen Rademaker, *U.S. Compliance with Article VI of the NPT*, Carnegie Endowment for International 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 *New Zealand Yearbook of International Law* 135, 139-140 (2007), who posits that “[d]e-linking nuclear disarmament from general and complete disarmament” is necessary to “the nuclear disarmament agenda.”

nuclear disarmament.”<sup>40</sup> This observation is noteworthy in at least three respects.

First, it evinces an understanding that the good faith obligation in regard to the arms race continues; the obligation has not ceased to apply through change of circumstance, desuetude, or other mode of treaty modification.

Second, it comports with the plain implication of Article VI that no State has a right to opt out of negotiations or to condition them on the achievement of nuclear weapons parity with another State or States.

And, third, it suggests that criticizing a nuclear-weapon State’s failure to make joint efforts with other nuclear-weapon States is generally admissible. The present *Occasional Paper* will return to this third point below after considering in more detail the manner in which China’s conduct has failed to accord with China’s obligation under Article VI.

Before turning to China’s conduct, however, a few more words are called for in regard to international law and obligations to negotiate – in particular, in regard to the duty of good faith.

### **Good Faith and Signs of its Absence: *fais accomplis* and Aggravating the Challenges**

In addition to coming to the table ready for a meaningful exchange, a State that has an obligation to pursue negotiations must conduct itself in good faith overall in regard to the subject matter of the negotiation. Jurists agree that a commitment to negotiate is a commitment to do so in good faith whether or not a treaty stipulating the

---

<sup>40</sup> *Obligations concerning negotiations relating to cessation of the nuclear arms race and to nuclear disarmament (Marshall Islands v. United Kingdom)*, Declaration of Judge Xue, 2016 ICJ Rep. at p. 1031, ¶ 6 (Oct. 5).

commitment says so.<sup>41</sup> Article VI of the NPT, as observed above, is one treaty that leaves nothing to doubt in this regard: it expressly stipulates that the States Parties, being obliged to pursue negotiations, do so in good faith.

No highly precise standard for distinguishing between good faith and its absence is visible in international law. Assessing the internal state of mind of a State being an exercise fraught with difficulty, the focus has been on external signs.<sup>42</sup> The successful resolution of a dispute through a freely-agreed outcome between the parties would suggest that the parties negotiated in good faith. The continuance of the dispute, however, in itself does not say whether there was good faith or not. The 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, about 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."<sup>43</sup>

---

<sup>41</sup> "The principle of good faith is... 'one of the basic principles governing the creation and performance of legal obligations.'" *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, 1988 ICJ Rep. p. 105, ¶ 94 (Dec. 20), quoting *Nuclear Tests cases (Australia v. France; New Zealand v. France)*, Judgement, 1974 ICJ Rep. at p. 268, ¶ 46; p. 473, ¶ 49 (Dec. 20). See also *Interim Accord of 13 September 1995*, 2011 ICJ Rep. at p. 684, ¶ 131 (Dec. 5); *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Joint Decl. Judges Gaja and Crawford, 2017 ICJ Rep. at p. 64, ¶ 5 (Feb. 2).

<sup>42</sup> 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 ICJ Rep. p. 57, 60 (May 28).

<sup>43</sup> *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Joint Decl. Judges Gaja and Crawford, 2017 ICJ Rep. at p. 64, ¶ 5 (Feb. 2).

Where a party has acted *demonstrably in bad faith*, this is a clear case that the party has failed to meet its obligations: “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,<sup>44</sup> but its observance being integral and necessary to negotiation.<sup>45</sup>

Where a party, though obliged to pursue negotiations, has refused to, that presents a clear case as well. In that case, the matter is one of complete non-performance, rather than a defect vitiating an attempted negotiation.<sup>46</sup> That, in a sense, is a clear case too. As will be argued below, China very much appears to have refused to negotiate.

But what if China were to argue that its various diplomatic statements and participation, for example, in NPT forums such as the Review Conferences, constitute negotiating? An initial reply to such argument is that negotiation requires more than that. Indeed, China itself insists that *other* States do a great deal more than that, if *they* are to satisfy obligations to negotiate.<sup>47</sup>

Even if, however, for purposes of argument, one were to adopt China’s rather solipsistic position—i.e., that China’s arms-length encounters with arms control amount to the negotiating act—more still would be needed to meet the requirement of good faith. Here, as noted, external signs are the best indicators. What are the external signs that a

---

<sup>44</sup> 1988 ICJ Rep. at p. 105, ¶ 94 (Dec. 20).

<sup>45</sup> *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, 1988 ICJ Rep. p. 105, ¶ 94 (Dec. 20), quoting *Nuclear Tests cases (Australia v. France; New Zealand v. France)*, Judgement, 1974 ICJ Rep. at p. 268, ¶ 46; p. 473, ¶ 49 (Dec. 20).

<sup>46</sup> Cf. *National Labor Relations Board 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”).

<sup>47</sup> See *infra* p. 28.

State, under an obligation to negotiate, has *not* acted in good faith? International law has identified two in particular as indicative of the absence of good faith.

A State does not act in good faith if it attempts to impose new circumstances around a negotiation such as would practically pre-judge the outcome.<sup>48</sup> It is well-accepted in international practice that a State may object to an adversary creating *faits accompli*.<sup>49</sup> Where a State is obliged to negotiate in regard to an international challenge, the State is not acting in good faith when it tries to impose its own chosen outcome. The conduct of the other negotiating party, to be sure, may affect the implementation of the State's obligations, including the obligation not to impose a *fait accompli*. Conduct that jeopardizes the basic welfare of the State, or threatens its very existence, may permit the State to change the environment with which negotiations are concerned.<sup>50</sup> But the United States and its nuclear allies

---

<sup>48</sup> Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Oxford University Press, 2013) vol. 1, p. 22.

<sup>49</sup> Examples of States objecting on grounds of *fait accompli* are noted (without disapproval) here: *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, 2012 ICJ Rep. at p. 655, ¶ 79 (Nov. 19); *Georgia v. Russian Federation*, *supra* n. 26 at p. 79, ¶ 16; *Land and Maritime Boundary (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Judgment, 2002 ICJ Rep. at p. 439, ¶ 283 (Oct. 10). 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 ICJ rejected – but this was at a point in time when no obligation to negotiate applied: a negotiation period set in the relevant treaty had expired. *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 2010 ICJ Rep. at p. 69, ¶ 153; p. 70, ¶¶ 156-157 (Apr. 20).

<sup>50</sup> Thus, the ICJ in its *Wall Advisory Opinion* in 2004 was correct to say that a State under an obligation to negotiate must not impose *faits accomplis* upon its partners; but the proper application of the principle, thus stated, depends upon the existence of a viable negotiating partner, of a continuing obligation to negotiate, and of conduct by the negotiating partner that does not seriously threaten the State. The *Advisory Opinion* rightly was criticized for ignoring Israel's concerns

engage in no conduct that threatens China, much less conduct that would so seriously threaten China as to suspend or modify the negotiating rules. Not only did the United States reduce its arsenal after the Cold War by vast measures, but, notwithstanding China's build-up of nuclear and of conventional forces, the United States so far has refrained from reversing its reductions.<sup>51</sup> To the contrary, the United States, even since 2017, has continued to dismantle nuclear warheads in large numbers.<sup>52</sup> No credible threat has arisen that would justify China's present course of action.

Further inconsistent with good faith is conduct that aggravates the challenges that the parties have agreed to seek to resolve by negotiating.<sup>53</sup> It is an obligation under general international law that parties shall not aggravate or exacerbate a problem that they have committed themselves to solve, whether by negotiation or by binding, compulsory

---

about the conduct of the Palestinian negotiating partner. See *Legal Consequences of the Construction of a Wall*, Declaration of Judge Buergenthal, 2004 ICJ Rep. at pp. 240-241, 244, ¶¶ 3, 7 (July 9). For further cogent criticisms of the *Wall* Advisory Opinion, see Michla Pomerance, "The ICJ's Advisory Jurisdiction and the Crumbling Wall Between the Political and the Judicial," 99 *American Journal of International Law* 26-42 (2005); Ruth Wedgwood, "The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense," *id.* at 52-61; Sean D. Murphy, "Self-Defense and the Israeli *Wall* Advisory Opinion: An *Ipsa Dixit* from the ICJ?" *id.* at 62-76.

<sup>51</sup> See U.S. Department of State, *Fact Sheet: Transparency in the U.S. Nuclear Weapons Stockpile*, Oct. 5, 2021, available at <https://www.state.gov/transparency-in-the-u-s-nuclear-weapons-stockpile/>.

<sup>52</sup> The State Department Fact Sheet cited immediately *supra* indicates that since Sept. 30, 2017 the United States has dismantled 711 nuclear warheads.

<sup>53</sup> See *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 1997 ICJ Rep. at p. 66, ¶ 107 (Sep. 25). See also *South China Sea Arbitration (Republic of the Philippines v. People's Republic of China)*, PCA Case No. 2013-19, Award, ¶¶ 1170-1173 (July 12, 2016).

procedures such as adjudication or arbitration.<sup>54</sup> While a number of international agreements codify the obligation, for example UNCLOS in its Articles 279 and 300 (requiring parties to refrain from “any acts that might aggravate or extend the dispute”),<sup>55</sup> and some international courts and tribunals are conferred the power to enforce it, for example the ICJ under Article 41 of its Statute,<sup>56</sup> it is an obligation of a general character – i.e., it belongs to *general* international law, not just the treaty provisions that stipulate it expressly. It is hard to imagine any State denying its existence and role in international law. Indeed, “such a duty [to refrain from aggravation] is inherent in the central role of good faith in the international legal relations between States.”<sup>57</sup> It is an obligation, therefore, applicable to the conduct of Parties to the NPT.

---

<sup>54</sup> For the classic statement of the principle of non-aggravation, see *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Interim Measures of Protection, Order, 1939 PCIJ Ser. A/B, No. 79, p. 199 (Dec. 5). For analysis of the obligation of non-aggravation with references to treaty practice, see *South China Sea Arbitration*, Award *supra* n. 53 at ¶¶ 1169-1170. From another branch of international practice, see Federico Campolieti, “The Rule of Non-Agravation of the Dispute in ICSID Arbitration Practice,” 30(1) *ICSID Review – Foreign Investment Law Journal* 2017-230 (2015).

<sup>55</sup> As an example of one of the many other multilateral instruments that refer to a duty not to aggravate a situation which parties have agreed to settle through negotiation, see Art. 17 of the Charter of the Commonwealth of Independent States (June 22, 1993): reprinted at 34 *International Legal Materials* at p. 1287.

<sup>56</sup> See, e.g., *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Order, Request for the Indication of Provisional Measures, 2016 ICJ Rep. at p. 1169, ¶ 90 (Dec. 7); *Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia)*, Order, Provisional Measures, 2014 ICJ Rep. at pp. 157-159, ¶¶ 42-48 (Mar. 3); *Delimitation of the Maritime Boundary (Ghana/Côte d’Ivoire)*, Provisional Measures, 2015 ITLOS Case No. 23, p. 163, ¶ 89 (Apr. 25). See generally Cameron A. Miles, *Provisional Measures before International Courts and Tribunals* (Cambridge University Press, 2017).

<sup>57</sup> *South China Sea Arbitration*, Award, *supra* n. 53 at ¶ 1171.

## Article VI NPT and China's Build-up

Article VI NPT obliges NPT States to pursue negotiations in good faith on effective measures relating to cessation of the arms race and to nuclear disarmament. China is carrying out a nuclear build-up under a policy of refusing to negotiate until the build-up transforms the global strategic landscape. In these associated strands of action and refusal, China has placed itself in disharmony with Article VI NPT: the strategic purpose of the NPT, of fostering stability around the realities of nuclear deterrence in a world of competing States, requires States to refrain from such transformative ventures. China's build-up and the geopolitical revision that China hopes to prosecute under cover of nuclear arms are in precisely the opposite direction of the changes that NPT States *are* supposed to seek.<sup>58</sup>

The inconsistency between Article VI and China's conduct may be considered under three rubrics. First, as noted, China is not negotiating. Second, China attempts to impose a *fait accompli* that would change in fundamental ways the negotiating environment to the detriment of the other States concerned and in breach of the good faith required of a negotiating party. Third, and related to the second, China's conduct is rapidly changing the realities of nuclear deterrence for the worse and thus aggravates the challenges that China is legally committed to pursue negotiations to resolve.

### China's Refusal to Negotiate

Indicia that point to the fulfilment of an obligation to negotiate have been considered in this *Occasional Paper*.

---

<sup>58</sup> As to a signature effort by the United States under the Trump Administration to move in the direction that the NPT obliges, see *infra* nn. 128, 129.

China's repeated refusals to negotiate are a matter of public record.<sup>59</sup> No very plausible evidence exists that China is engaged in any other exchange in regard to the nuclear arms race that would display the relevant indicia.<sup>60</sup>

Not much more would need be said for present purposes about China's refusals to negotiate, but, conveniently, China supplies a signpost for measuring its own conduct in regard to the duty to negotiate; and, so, a comparison may be briefly suggested. 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."<sup>61</sup> 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."<sup>62</sup> As far as China understands, such exchanges of view "*are far from constituting negotiations.*"<sup>63</sup> China's conduct to date as relevant to Article VI NPT does not even go that far.

### **China's Build-up in Pursuit of a *fait accompli***

China, by carrying out a rapid nuclear arms build-up on a scale evidently intended to transform the strategic landscape, is creating a *fait accompli* likely to prejudice any

---

<sup>59</sup> See *supra* nn. 11, 13.

<sup>60</sup> See further *infra* pp. 48-49 about multilateral forums.

<sup>61</sup> *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).

<sup>62</sup> *Id.* at ¶ 47.

<sup>63</sup> *Id.* (emphasis added).

future negotiation under Article VI NPT. When under an international law obligation to pursue negotiations, a party violates good faith if it acts in that way.<sup>64</sup> Changing the circumstances surrounding the subject matter of negotiations to such a degree that it can impose the outcome it prefers, a party undermines the purpose of negotiations.

Its nuclear build-up would not be China's first attempt to impose an outcome on others by changing the material circumstances surrounding an international challenge. 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 where the Philippines' rights are well-settled.<sup>65</sup> China's island-building program, which has escalated across the South China Sea and includes 3,000-meter runways on a number of artificial islands, has received considerable attention among policy-makers alarmed by the aggressive intent behind it.<sup>66</sup> A distinct aspect of the program is its tendency to create a *fait accompli* in regard to disputes between China, the Philippines, Vietnam, and other States in the region. China insists on "negotiations" there, but China precedes negotiations with the unilateral creation of a geopolitical environment in the region that would all but dictate the outcome. That China pursues such transformative leverage

---

<sup>64</sup> See *supra* pp. 24-25.

<sup>65</sup> See *South China Sea Arbitration*, Award, *supra* n. 53 at ¶ 1177.

<sup>66</sup> See, e.g., Congressional Research Service, *U.S.-China Strategic Competition in South and East China Seas: Background and Issues for Congress* (updated Sept. 8, 2021) p. 15; Capt. David Geaney, "China's island fortifications are a challenge to international norms," *Defense News* (Apr. 17, 2020), available at <https://www.defensenews.com/opinion/commentary/2020/04/17/chinas-island-fortifications-are-a-challenge-to-international-norms/>

over the South China Sea is noteworthy for what it suggests China pursues over global affairs: the conditions that China imposes for coming to the table on nuclear arms are meant to dictate the outcome.

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.<sup>67</sup> 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.<sup>68</sup> 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

---

<sup>67</sup> As to bad faith delay and negotiation in international law, see *Lake Lanoux Award*, XII UNRIAA 281, 306-307 (Nov. 16), quoting the *Tacna-Arica Award*, II UNRIAA at pp. 921 *et seq.* and *Railway Traffic between Lithuania and Poland*, Advisory Opinion, 1931 *Reports of the Permanent Court of International Justice* (hereinafter "PCIJ Rep.") Ser. A/B No. 42 at pp. 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 (DC Cir., Pillard, J., 2015).

<sup>68</sup> Courts applying municipal law have reached conclusions much to this effect. See, e.g., *A/S Apothekernes Laboratorium v. I.M.C. Chemical Group, Inc.*, 873 F.2d, 155 158 (7<sup>th</sup> Cir., Coffey, J., 1989) ("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"). The "interject[ion] of new terms and conditions that were not part of" the agreed terms was also an issue in *Banneker Ventures*, *op. cit.*: 798 F.3d at 1131.

build-up of nuclear arms,<sup>69</sup> conduct that alters the ground that negotiations are meant to cover.

### **China's Build-up as Aggravating the Challenges**

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 challenges that Article VI NPT obliges the Parties to negotiate to resolve. This *Occasional Paper* has recalled the international law principle of non-aggravation: to aggravate a situation that a party is obliged to negotiate to resolve is to violate the good faith incumbent upon all negotiating parties.<sup>70</sup>

Further context may be given to China's build-up if we consider China's recent practice on other matters 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 *South China Sea* 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...<sup>71</sup>

---

<sup>69</sup> See Christopher A. Ford, "Competitive Strategy vis-à-vis China and Russia: A View from the 'T Suite,'" *ACIS Papers*, Vol. I, No. 6 (May 11, 2020), pp. 3-4, available at <https://www.state.gov/wp-content/uploads/2020/05/T-paper-series-6-Strategic-competition.pdf>

<sup>70</sup> See *supra* pp. 25-26.

<sup>71</sup> *South China Sea*, Award, *supra* n. 53 at ¶ 1177 (emphasis added).

*China has aggravated the Parties' dispute* with respect to the protection and preservation of the marine environment.<sup>72</sup>

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].<sup>73</sup>

The first two findings above expressly identify conduct of China that aggravated the dispute that China was legally bound to address. In the *South China Sea* case, China was legally bound to address the dispute through arbitration.<sup>74</sup> An obligation to address the dispute, instead, through negotiation would have placed the parties under the same duty of non-aggravation. The principle of non-aggravation, which grounds the findings that China failed to comply with international law in 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 NPT.<sup>75</sup>

A separate word is called for in regard to the third of the *South China Sea* findings—destruction of evidence. 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

---

<sup>72</sup> *Id.* at ¶ 1178 (emphasis added).

<sup>73</sup> *Id.* at ¶ 1179 (emphasis added).

<sup>74</sup> See *South China Sea Arbitration*, Award on Jurisdiction and Admissibility, ¶ 413 (Oct. 29, 2015). Non-appearance by the respondent effected no bar to the proceedings (a result following directly from UNCLOS Annex VII, Art. 9): *id.* at ¶ 114.

<sup>75</sup> See *supra* n. 53.

transparency.<sup>76</sup> China in multiple fields in recent years has engaged in such misconduct.<sup>77</sup> 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.<sup>78</sup>

---

<sup>76</sup> 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., *Railroad Development Corporation v. Guatemala*, ICSID Case No. ARB/07/23, Provisional Measures (Oct. 15, 2008), ¶ 17 (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. United Republic of Tanzania*, 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 28, 2010); UNCITRAL Model Law on International Commercial Arbitration (1985, as amended 2006) Art. 17(2)(d) (interim measures for preservation of evidence).

<sup>77</sup> To give a striking example, in January 2021, China took steps upstream that caused the Mekong River in Viet Nam to drop by over one meter in less than 48 hours, "[w]ith zero notification to downstream": see tweet dated January 4th, 2021 by the Mekong Dam Monitor, which "uses remote sensing, satellite imagers & GIS to provide weekly monitoring of previously unreported indicators in the Mekong Basin": <https://twitter.com/MekongMonitor/status/1346206870919376903> (last visited August 17th, 2021).

<sup>78</sup> If the view is accepted that negotiations require transparency and the exchange of information, then it is also relevant here that the Tribunal in

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 address a challenge, States are to refrain from conduct that makes it worse. This is especially so in regard to negotiations that States are legally obliged to pursue.<sup>79</sup> 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 challenges with which Article VI NPT is concerned.

\* \* \*

A final point is in order about these signs that suggest China's non-compliance with Article VI NPT. Each of the three points above relies upon a proper appreciation of the legal issues involved. However, each 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'."<sup>80</sup> In advancing an objection to China's conduct under Article VI NPT, a State would have to verify that the factual record indeed supports the objection as advanced.

---

the *South China Sea Arbitration* found China to have failed to produce and transmit environmental impact assessments: *South China Sea Arbitration*, Award *supra* n. 53 at ¶ 991. Such non-transparent conduct, if it reflects China's general practice, has particularly troubling implications for arms control. Troubling in a similar way are Russia's non-compliance with the Open Skies Treaty, and Russia's and China's exit from the International Partnership for Nuclear Disarmament Verification (IPNDF). See Hon. Christopher A. Ford, Assistant Secretary of State (ISN), *Testimony before the U.S. Senate Foreign Relations Committee* (Dec. 3, 2019), p. 3, available at [https://www.foreign.senate.gov/imo/media/doc/120319\\_Ford\\_Testimony.pdf](https://www.foreign.senate.gov/imo/media/doc/120319_Ford_Testimony.pdf).

<sup>79</sup> See *supra* n. 53.

<sup>80</sup> *Georgia v. Russian Federation*, *supra* n. 26 at p. 133, ¶ 160.

A genuine pursuit of negotiations by China would be welcome—and would be a step toward satisfying China’s duty to negotiate under Article VI. But coming to the table, though a step in the right direction, would not in itself bring China into harmony with its Article VI commitments. Full accordance with its obligation requires China to respect the stability of the strategic landscape in which the pursuit of negotiations takes place. Carrying out the largest nuclear build-up since the end of the Cold War is at fundamental variance with the directional goals that the NPT sets for its Parties and the stability that the NPT envisages as the predicate for effective arms control and disarmament measures. The United States, since the end of the Cold War, has made enormous strides in the direction that the NPT sets, and, as noted above,<sup>81</sup> has only continued in that direction, even in the face of China’s nuclear and conventional build-up. The contrast places China’s conduct in even starker relief: China’s conduct aggravates the challenges that the NPT obliges every State Party to pursue negotiations to resolve.

### **Calling Attention to China’s Build-Up**

If, as appears to be the case, the facts support the conclusion that China is in non-compliance with Article VI NPT, then it is open to other Parties to the NPT to call attention to that state of affairs. In other words, because the obligation to pursue negotiations under Article VI applies to China, other NPT Parties may invoke that obligation and express their judgment that China has violated international law.

As noted above, the NPT contains no compulsory, binding dispute settlement procedure applicable to China: the NPT places China under no obligation to answer for its build-up and its consequences for the future of arms control

---

<sup>81</sup> *Supra* n. 51.

and disarmament in an international court of law or arbitration. However, as China's efforts to shape public sentiment reflect, audiences that influence policy are found in many other places.

Before turning to how China might attempt to reply if the United States and others were to draw attention to its breach, a few words are in order about the *opposability* of the Article VI obligation.

The term "opposability," as used in this setting, is one of legal art denoting the character of a legal rule that lets a party invoke the rule 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.<sup>82</sup> 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."<sup>83</sup> 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: "[A]though Article VI of the NPT requires all the States parties to pursue

---

<sup>82</sup> See *Fisheries Jurisdiction (Spain v. Canada)*, Judgment, 1998 ICJ Rep. p. 432, 446, ¶ 23 (Dec. 4); *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application by Nicaragua for Permission to Intervene, Judgment, 1990 ICJ Rep. p. 82, 121, ¶ 71 (Sept. 13); *Case concerning the Continental Shelf (Tunisia/Libya)*, Judgment, 1982 ICJ Rep. p. 18, 76, ¶ 104 (Feb. 24). See also Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge University Press, 2010) 101. Unlike some situations, here there is no doubt that the relevant obligation applies: Art. VI NPT applies to China.

<sup>83</sup> *Nuclear Weapons Advisory Opinion*, 1996 ICJ Rep. at p. 264, ¶ 100 (July 8), quoting *Maorrommatis Palestine Concessions*, Judgment No. 2, 1924 PCIJ Ser. A, No. 2, p. 13.

negotiations in good faith, in practical terms the steps towards nuclear disarmament must necessarily be undertaken and fulfilled by the nuclear-weapon States.”<sup>84</sup>

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.”<sup>85</sup> Judge Xue’s reference to “joint efforts” underscores the negotiation requirement. It also draws attention to the 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.

Underscoring the opposability of Article VI NPT in this way is helpful, because China, and Russia as well, have at times objected when other States note the opposability to them of other treaties, such as human rights treaties. There is no legal ground to object against a State for drawing a reasoned critique of another State’s compliance with a treaty to which it is party.

## **China’s Putative Rebuttal**

China, however, seeks to create the impression that China is a fundamentally benign actor on the world stage, an effort studied in a recent paper in this *Occasional Paper* series.<sup>86</sup>

---

<sup>84</sup> *Marshall Islands v. United Kingdom*, ICJ proceedings, Preliminary Objections of the United Kingdom of Great Britain and Northern Ireland (June 15, 2015) at p. 40, ¶ 93.

<sup>85</sup> Declaration of Judge Xue, *supra* n. 40 at p. 1031, ¶ 6.

<sup>86</sup> Dr. Bradley A. Thayer, *The PRC’s New Strategic Narrative as Political Warfare: Causes and Implications for the United States*, National Institute

Indeed, the present *Occasional Paper* suggests above that China's misplaced use of the words "parity" and "stability" is in service to China's public diplomacy goals. Diplomats and policy-makers in the United States and other countries therefore should anticipate that, if they were to call attention to a breach by China of Article VI NPT, then China would seek to challenge their reasoning. A number of lines of putative rebuttal in particular may be anticipated.

### **China's Assertion that Article VI Places "Special Responsibility" on the United States**

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.<sup>87</sup> China, in its 2015 Implementation Report, gives one line of putative rebuttal that it might adopt if called to account for its failure to negotiate under Article VI NPT.

In its 2015 Implementation Report, China said 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

---

for Public Policy, *Occasional Paper*, Vol. 1, No. 3 (March 2021), available at <https://nipp.org/wp-content/uploads/2021/03/OP-3-for-web.pdf>.

<sup>87</sup> See NPT/CONF/2010/50 (Vol. I).

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.<sup>88</sup>

This statement merits several observations.

First, China's statement that "[w]hen conditions are ripe, all nuclear-weapon States should join the multilateral nuclear disarmament process" means that, as of that time, not all nuclear-weapon States had joined. If all were not in the process, then at least one was out. This seems tantamount to an admission that China is not in the process.

Second, China's suggestion about a putative "special responsibility" —i.e., that certain States bear "special responsibility" in regard to nuclear arms and thus should be negotiating while China is not—is one that China has repeated over time,<sup>89</sup> but it has no basis in Article VI. China

---

<sup>88</sup> *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, p. 4, ¶ 17 (Apr. 27, 2015).

<sup>89</sup> For example, China postulated the same "special responsibility" on Russia and the United States in its NPT implementation report at the 2005 Review Conference: see [http://chnun.chinamission.org.cn/eng/chinaandun/disarmament\\_armscontrol/npt/t196288.htm](http://chnun.chinamission.org.cn/eng/chinaandun/disarmament_armscontrol/npt/t196288.htm) And in 2019 in response to President Trump's invitation to join tripartite nuclear negotiations, China said, through Geng Shuang, the Foreign Ministry spokesman, "China believes that countries with the largest nuclear arsenals have a special responsibility when it comes to nuclear disarmament and should continue to further reduce nuclear weapons in a verifiable and irreversible manner, creating conditions for other countries to participate [in negotiations]." Reuters, "China says it won't take part in trilateral nuclear arms talks," May 6, 2019, [https://www.reuters.com/article/us-usa-trump-putin-china/](https://www.reuters.com/article/us-usa-trump-putin-china/china-)

acknowledges that the “disarmament” clause of Article VI is universally applicable (e.g., China’s 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 really being addressed at Russia and the United States, these being the “States with the largest nuclear arsenals.” So, on China’s understanding, “disarmament” is a *universal* obligation when China says; but, at other times—when China says—it is a *particular* obligation born by two States alone. It is true that treaties exist in which different parties, depending on criteria set out in the treaty, have different rights and obligations.<sup>90</sup> Indeed, under the NPT itself, the nuclear-weapon States have different rights and obligations from the non-nuclear weapon States. But there is nothing whatsoever in Article VI, or the NPT as a whole, to rank or differentiate *among* the nuclear-weapon States in the way that China insists.<sup>91</sup> There is no status of “honorary non-nuclear-weapon State” in the NPT!

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*.

---

says-it-wont-take-part-in-trilateral-nuclear-arms-talks-  
idUSKCN1SC0MJ

<sup>90</sup> E.g. 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.

<sup>91</sup> Indeed, the consistent position of the United States has been that “Article VI... requir[es] *all* NPT Parties to pursue negotiations in good faith”: Hon. Christopher A. Ford, Assistant Secretary of State (ISN), *Our Vision for a Constructive, Collaborative Disarmament Discourse*, Remarks, Palais des Nations, Geneva, Switzerland (Mar. 26, 2019), available at <https://www.state.gov/our-vision-for-a-constructive-collaborative-disarmament-discourse/> (emphasis original).

The Marshall Islands, the United Kingdom observed, was not for practical purposes opposing the Article VI negotiation requirement against the United Kingdom in order to get arms control negotiations to start between the United Kingdom 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*.<sup>92</sup> The judge of Chinese nationality, in substance, agreed when she referred to “joint efforts” between the “nuclear-weapon States.”<sup>93</sup> 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.

Third, there is a contradiction between the obligation that the disarmament clause entails and the conduct that China pursues. Under the disarmament clause, it is possible—indeed likely—that disarmament will not come about right away. 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 as part of the whole treaty to which it belongs, a directional or progressive element is clear. As noted previously, the Parties in the NPT Preamble “[d]eclar[e] their intention [*inter alia*]... to undertake effective measures *in the direction of nuclear disarmament*” (emphasis added). China, referring to the “gradual” character of the NPT process, acknowledges the incremental approach. However, China’s conduct on the ground<sup>94</sup> fails to follow it. Quite the opposite

---

<sup>92</sup> Preliminary Objections of the United Kingdom, *supra* n. 84 at pp. 37-38, ¶¶ 86-87.

<sup>93</sup> Declaration of Judge Xue, *supra* n. 40 at p. 1031, ¶ 6.

<sup>94</sup> The expression “conduct on the ground” is used here in the sense that international lawyers use it: i.e., to denote the range of actual behavior of states including “law enforcement and seizure of property as well as

of incrementally moving in the prescribed direction, China engages in a rapid arms build-up—and in the absence of negotiations as to effective measures in regard to the challenges that China's conduct aggravates. In China's view, other nuclear-weapon States are obliged to engage in the incremental approach, but China is at liberty to move in the opposite direction by leaps and bounds. Meanwhile, China places conditions on the opening of negotiations not found in Article VI. China's conditions seem calculated to delay the opening of negotiations indefinitely.

Fourth, while contending for an unsupportable reading of the disarmament clause of Article VI, China ignores the arms race clause altogether. China, perhaps, draws comfort from a legal theory that the arms race limb of Article VI has somehow ceased to apply.<sup>95</sup> The better view is that it has continuing effect.<sup>96</sup> The paragraph quoted above from

---

battlefield or other military activity, such as the movement of troops or vessels, or *deployment of certain weapons*." See International Law Commission, *Draft conclusions on identification of customary international law, with commentaries* (2018), Draft conclusion 6, Comment (5): U.N. doc. A/73/10, p. 134 (emphasis added).

<sup>95</sup> See, e.g., Daniel H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (Oxford University Press, 2011) p. 100: "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 University 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," chapter in Jonathan L. Black-Branch & Dieter Fleck (eds.), *Nuclear Non-Proliferation in International Law* (Asser Press/Springer, 2014) p. 64 (positing that "Article VI has largely remained a dead letter").

<sup>96</sup> Among other considerations supporting that view, there is Judge Xue's statement in the *Marshall Islands cases*, cited *supra*, n. 40, from

China's 2015 Implementation Report is the totality in that Report of what China has to say 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.

Whatever one makes of the arms race clause, the disarmament clause without doubt continues to apply. China's acts and omissions are not readily reconciled with either.

### **China's Denial that it Engages in a Race for Arms**

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."<sup>97</sup> People familiar with past arms races and current events will recognize that China's denial of arms racing is a denial of reality.

The salient feature of the Cold War arms race had been, not an action-reaction arms-building dynamic between the United States and the Soviet Union, but the strategic risk arising from geopolitical rivalry between these nuclear-armed States – and, in particular, arising from Soviet efforts to attain predominance for its socio-political system by overturning the prevailing relations within and among States.<sup>98</sup> There is no doubt that geopolitical rivalry exists

---

which it is evident that that Chinese jurist understands disarmament and arms control to be continuing obligations.

<sup>97</sup> NPT/CONF/2015/32, *supra* n. 88 at p. 3, ¶ 13 (emphasis added).

<sup>98</sup> 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 Press, March 2021), *passim*; and regarding the use of the term "arms race" in historical context, *id.* at pp. 11-20, available at <https://nipp.org/papers/the-action-reaction-arms-race-narrative-vs-historical-realities/> See also Keith B. Payne & Michaela Dodge, *Stable Deterrence and Arms Control in a New Era*

between China and other States, including States that hold nuclear arms, and that the rivalry entails risks. 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.<sup>99</sup> China's baseless assertions of special privileges at sea place China at odds with the many States that rely on freedom of navigation, including with the other nuclear-weapon States. And China's evident aim to establish its own socio-political system as the dominant one at the global level entails great power competition with the United States and friction with like-minded States. China's nuclear build-up brings about yet further risk, unsettling as it is to the architecture of deterrence worldwide.

China, perhaps, would assert that it is the United States arsenal that is prejudicial to the outcome of an eventual negotiation, not China's build-up. But the United States and the Soviet Union had maintained nuclear arms on a very

---

(National Institute Press, Sept. 2021), pp. 6-9, 14, available at <https://nipp.org/wp-content/uploads/2021/09/Payne-Dodge-OP-9.pdf>. See esp. Trachtenberg, Dodge & Payne at p. 22 addressing the "dramatic increase in the number and accuracy of Soviet ICBM warheads" in the 1960s and 1970s, even though the United States at the same time was focused on reducing strategic risk through arms control.

<sup>99</sup> 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). Expressing concern that China's hypersonic weapon, noted *supra* in the introduction, will erode India's nuclear deterrent and thus call for a response, see Debajit Sarkar, "China's Fractional Orbital Bombardment System: Impact on India's nuclear deterrence posture," *Financial Express* (India) (Oct. 25, 2021), available at <https://www.financialexpress.com/defence/chinas-fractional-orbital-bombardment-system-impact-on-indias-nuclear-deterrence-posture/2356471/>

large scale before the negotiation requirement was set down in the NPT—and after the NPT entered into force both States achieved reductions—very steep reductions—in the size of their arsenals.<sup>100</sup> The U.S.-Soviet (then U.S.-Russian) reductions exemplified the directional aspect of the NPT: the former Cold War adversaries both had moved by significant degrees in the prescribed direction. Since then, notwithstanding the introduction by Russia of new weapons systems that give rise to serious concern,<sup>101</sup> the United States has not increased the number of nuclear weapons it holds. As the U.S. Department of State recently has noted on the basis of newly-declassified data, from 1994 through 2020 the United States dismantled 11,683 nuclear warheads, and this process continues apace.<sup>102</sup> A cause of instability, uncertainty, and risk to the aims of the NPT is China's build-up, not the steps that the United States has taken since the early 1990s to pursue and implement meaningful arms control.<sup>103</sup>

---

<sup>100</sup> The United States arsenal today is around 13 per cent 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," *ACIS Papers*, Vol. I, No. 14 (July 30, 2020), p. 3, available at <https://www.state.gov/wp-content/uploads/2020/07/T-paper-series-Tango-FINAL-508.pdf> See also, charting the United States' steps between the end of the Cold War and 2008 to reduce weapons and related materials stockpiles, Ford (United States Special Representative for Nuclear Nonproliferation at the time) and William H. Tobey, Deputy Administrator for Nuclear Nonproliferation, NNSA, *The United States and Article VI: A Record of Accomplishment*, pp. 8-15 (May 6, 2008): <https://2001-2009.state.gov/documents/organization/115100.pdf>

<sup>101</sup> E.g. the Tsirkon hypersonic cruise missile: "Russia touts test launch of hypersonic missile on Putin's birthday," *Reuters* (Oct. 7, 2020).

<sup>102</sup> See *supra* n. 51.

<sup>103</sup> See Christopher A. Ford, "U.S. Priorities for 'Next Generation Arms Control,'" *ACIS Papers* Vol. I, No. 1 (Apr. 6, 2020), p. 2: <https://www.state.gov/wp-content/uploads/2020/06/T-paper-series-1-Arms-Control-Final-1-508.pdf>

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.<sup>104</sup> 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 build-up threatens to make that environment less, not more, conducive to arms control and disarmament.

On the better understanding of the historical record, “arms race” has not 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 does not support a formulaic model of how the competing Superpowers actually behaved.<sup>105</sup> The USSR, on the evidence, appears to have carried out arms build-ups largely without regard to the contemporary behavior of the United States. So appears to be the case with China today.

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 connection to any proportionate contemporary increase by the United States or the United

---

<sup>104</sup> The geopolitical competition presented to the United States by Russia and China is a central factor guiding United States strategy, as directed in the 2017 *National Security Strategy of the United States of America* (Dec. 2017), pp. 26-28 and *passim*. See also Ford, *supra* n. 103 at p. 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.”

<sup>105</sup> Trachtenberg, Dodge & Payne, *supra*, n. 98.

States' allies. 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, deprive of credibility China's claim that Article VI entails no obligation for China to pursue negotiations.<sup>106</sup> China, just as was the USSR during the Cold War, is obliged under the NPT in that way.

### **China's Possible Plea of Compliance with Arms Limitations**

In response to accusations of non-compliance, China might well assert that, not only does its arms build-up not run afoul of 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 sequitur* for China when addressing the NPT to assert that China is "compliant" with obligations placing limits on nuclear weapons development and possession, because, first, the NPT does not stipulate particular limits on the numbers or kinds of weapons a nuclear-weapon State holds; and, second, with the possible exception of the Comprehensive Nuclear Test Ban Treaty, which China and the United States have signed but not ratified, and provisions such as Article V of the Antarctic Treaty which stipulate exclusions from certain geographic areas, no internationally binding obligation applicable to China limits China's development and possession of nuclear weapons.

---

<sup>106</sup> 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, *op. cit.*, n. 93 at p. 5. China's build-up threatens to overturn the calculus that has contributed to international peace in that part of the world for decades.

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 legal duty addressing its numeric and qualitative arms build-up or providing for transparency in regard to the build-up. 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 say what an agreement must look like; 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.<sup>107</sup>

### **China's Possible Invocation 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 Review Conference has been noted already here and attention called to its omission of

---

<sup>107</sup>Arms control advocates indeed have suggested that China's arms build-up is hard to reconcile with Art. VI NPT. See Kingston Reif, Director, Disarmament & Threat Reduction Policy, Arms Control Association, Tweet dated 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'.")

any reference to the arms race. It is beyond the limits of the present *Occasional Paper* 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*, as observed above, China itself understands that mere exchanges of view "are far from constituting negotiations."<sup>108</sup> This observation applies *mutatis mutandis* to exchanges involving China in intergovernmental bodies. Assertions that China might make to the effect 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, it is not the usual practice.<sup>109</sup>

*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 ordinarily suffice for the technical issues that the parties must grapple with if they are to make a genuine attempt to reach agreement.

---

<sup>108</sup> People's Republic of China, Position Paper, *supra* n. 61 at ¶ 46 (emphasis added).

<sup>109</sup> Diplomatic conferences, such as that resulting in the text of the 1969 Vienna Convention on the Law of Treaties, are the exception that prove the rule: these are multilateral gatherings not only expressly designated as negotiating sessions but also purposefully organized to conduct negotiations.

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.<sup>110</sup>

As such, conduct in that setting does not generate the legal effects sought.

In *Northern Cameroons*, the particular legal effect sought was a determination by the ICJ 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..."<sup>111</sup> The Court went on to assess statements that the Marshall Islands had made in the UN General Assembly

---

<sup>110</sup> *Northern Cameroons (Cameroon v. United Kingdom)*, Sep. Op. Judge Sir Gerald Fitzmaurice, 1963 ICJ Rep. at p. 123 (Dec. 2). 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 (*Ethiopia v. South Africa; Liberia v. South Africa*), Joint Dis. Op. Sir Percy Spender and Sir Gerald Fitzmaurice, 1962 ICJ Rep. at p. 562 (Dec. 21).

<sup>111</sup> *Marshall Islands v. United Kingdom*, Judgment, 2016 ICJ Rep. at p. 853, ¶ 48 (Oct. 5).

High-Level Meeting on Nuclear Disarmament and the Nayarit conference.<sup>112</sup> The assessment of exchanges in intergovernmental assemblies, then, as with the assessment of 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.<sup>113</sup>

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.

## 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.<sup>114</sup> The document addresses the

---

<sup>112</sup> *Id.* at pp. 853-854, ¶¶ 49, 50.

<sup>113</sup> *Id.* at p. 856, ¶ 58.

<sup>114</sup> Her Majesty's Government, *Global Britain in a competitive age. The Integrated Review of Security, Defence, Development and Foreign Policy* (March 2021).

United Kingdom's "minimum, assured, credible nuclear deterrent," and, under that rubric, indicates an increase in the country's "overall nuclear warhead stockpile."<sup>115</sup> The United Kingdom had said in 2010 that it intended to reduce its stockpile from a ceiling not exceeding 225 warheads to not more than 180 by the mid-2020s. The United Kingdom now "will move to an overall nuclear weapon stockpile of no more than 260 warheads."<sup>116</sup>

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

First, the United Kingdom's increase is modest.<sup>117</sup> Even taking the previous target ceiling of 180 as the starting point (instead of the actual 225), the increase would still be nothing like that which China undertakes. Moving from a stockpile in the low hundreds—as it is estimated China holds—to a stockpile over a thousand is approaching a five-fold increase. Even the most conservative estimates are that China will more than double its stockpile within ten years.<sup>118</sup> The steps that China is taking to increase its supply of fissile material suggest that China soon will have the ability to increase its nuclear weapons stockpile far past low multiples of its current size and to do so quickly;<sup>119</sup> projections suggest that China's anticipated new

---

<sup>115</sup> *Id.* at p. 76.

<sup>116</sup> *Id.*

<sup>117</sup> Compared to the UK's post-Cold War reduction in its nuclear arsenal, the 2021 cap increase is tiny. See the chart in Hans M. Kristensen & Matt Korda, "British Defense Review Ends Nuclear Reductions Era," Federation of American Scientists (Mar. 17, 2021), available at <https://s3.us-east-1.amazonaws.com/uploads.fas.org/2021/03/UK-stockpile2.png>.

<sup>118</sup> For a summary of estimates of China's present stockpiles (July 2021) and feasible growth to 2030, see Cochran & Sokolski *supra* n. 4 at pp. 6-9.

<sup>119</sup> Sokolski (ed.) *supra* n. 1 at p. 1.

plutonium-producing reactors will supply enough material to build 1,600 new warheads *each year*.<sup>120</sup> Even if the United Kingdom were actually to deploy 260 warheads—i.e., the new stockpile's total cap—the United Kingdom's entire arsenal would not match the lowest estimates of *new* warheads that China is adding.

Second, the United Kingdom does not declare that nuclear negotiations will begin if and only if some self-identified change in the strategic environment in its favor occurs: the United Kingdom does not declare that its cap increase is a prerequisite to the pursuit of negotiations. (Nor does France, the other United States nuclear ally, declare that it needs more nuclear leverage before it is willing to negotiate).<sup>121</sup> As noted above, Article VI NPT obliges the parties to pursue negotiations. The obligation is not conditional upon party leverage.

Third, and related to the first two considerations, the increase in its nuclear weapons stockpile that the United Kingdom 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 United Kingdom's cap increase aims to maintain an existing environment by maintaining the United Kingdom's existing deterrent capability. China's build-up, by contrast, surpasses deterrent objectives and aims to place China in an altogether new position enabling it to impose negotiating outcomes of its choice.

---

<sup>120</sup> See Mazza & Sokolski *supra* n. 4.

<sup>121</sup> See *Dossier* of the Ministère de l'Europe and des Affaires Étrangères (updated Apr. 2019), available at [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#sommaire\\_6](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#sommaire_6).

The United Kingdom indeed notes that emerging challenges jeopardize strategic stability: “Proliferation of CBRN weapons, advanced conventional weapons and novel military technologies will increase the risk and intensity of conflict and pose *significant challenges to strategic stability*.”<sup>122</sup> China’s nuclear build-up, and the associated deployment of new systems such as China’s hypersonic orbital system and the construction of supporting infrastructure such as new missile silos (which appear to be in a number approaching the total number of warheads that the United Kingdom currently deploys),<sup>123</sup> are a chief source of those challenges. The United Kingdom’s stockpile cap increase is a measured response – so measured that, given the scale and speed of China’s build-up, the United Kingdom’s new ceiling likely will not even keep the United Kingdom in the present ratio of arms with China: China will surpass the United Kingdom’s new ceiling. The qualitative enhancements in its nuclear capabilities that China pursues further undermine strategic stability. Modest cap increases, such as that which the United Kingdom has adopted, barely even begin to offset the strategic transformation that China now pursues.

Fourth, the United Kingdom’s cap increase, whether viewed as part of the United Kingdom’s foreign and defense policy overall or in isolation, does not aggravate the challenges that concern Article VI NPT. The Article VI 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 take steps that aggravate the challenges that negotiation is intended to resolve. The United Kingdom has declared an increase in its

---

<sup>122</sup> *Global Britain*, *supra* n. 114 at p. 29 (emphasis added). See also *id.* at p. 77, affirming strategic stability as the goal of UK nuclear weapons policy.

<sup>123</sup> See *supra* nn. 2, 3.

nuclear weapons stockpile ceiling, but the increase is marginal at most. Such an increase causes no fundamental change in the negotiating environment. Geopolitical transformation is not the aim of the United Kingdom's cap increase, and aggravation of strategic instability is not its result.

Finally, the United Kingdom, like the United States and France and for that matter the Russian Federation, deficiencies in its negotiating conduct aside, in fact negotiates. The United Kingdom's work on the Fissile Material Cut-Off Treaty negotiations is a salient example.<sup>124</sup> China, by contrast, has frustrated negotiation efforts on that project,<sup>125</sup> and refuses proposals to negotiate on others.<sup>126</sup>

While Article VI NPT establishes a legal obligation on the States parties, it is not a general restraint against the development and possession of nuclear weapons. Five States Parties of the NPT possess nuclear weapons, a state of affairs which the treaty acknowledges.<sup>127</sup> The present *Occasional Paper* has suggested that the NPT also assumes the need for stability as States pursue the goals of arms

---

<sup>124</sup> See *Global Britain*, *supra* n. 114 at p. 78. As to France's work on the Fissile Material Cut-Off Treaty, see *Dossier*, *supra* n. 121.

<sup>125</sup> Sokolski (ed.) *supra* n. 1 at p. 2. See also [http://fissilematerials.org/blog/2020/05/no\\_clear\\_path\\_forward\\_for.html](http://fissilematerials.org/blog/2020/05/no_clear_path_forward_for.html).

<sup>126</sup> Remarks by President Trump *supra* n. 6: "[W]e would want to talk to China eventually." See also Press Statement, On Arms Control Negotiations with China (noting invitation to China by Special Presidential Envoy for Arms Control, Ambassador Marshall Billingslea, to join in good faith negotiations) (July 9, 2020): available at <https://www.state.gov/on-arms-control-negotiations-with-china/>. See also Opening General Debate, First Committee, General Assembly: GA/DIS/3647 (Oct. 9, 2020).

<sup>127</sup> As to the DPRK's fraught relationship with the NPT, see International Atomic Energy Agency, Fact Sheet on DPRK Nuclear Safeguards, available at <https://www.iaea.org/newscenter/focus/dprk/fact-sheet-on-dprk-nuclear-safeguards>.

control and, eventually, “under strict and effective international control,” complete disarmament. The negotiation requirement of Article VI NPT aims to set States on a path in the direction of those goals. Their attainment would be difficult or impossible, in an environment of strategic uncertainty and new risks.

Seeking agreed changes in international relations in the direction of greater certainty and less risk is not only accommodated by the NPT; the treaty implicitly requires it. The realization that uncertainty and risk conduce against arms control led the United States under the Trump Administration in 2018 to inaugurate, as a further effective measure in pursuit of the NPT's goals, the CEND initiative—Creating An Environment for Nuclear Disarmament.<sup>128</sup> The United Kingdom and some forty other countries participated in CEND.<sup>129</sup> Article VI NPT very much envisages the kind of change in the geopolitical environment that CEND was seeking and in the way CEND was seeking it: change toward a more stable geopolitical

---

<sup>128</sup> For an overview, see Dr. Heather Williams, “CEND and a changing global nuclear order,” *King's College London: Spotlight on Research* (Apr. 3, 2020), available at <https://www.kcl.ac.uk/news/cend-and-a-changing-global-nuclear-order>. CEND aims to bring about a general improvement in trust and security in order to facilitate and further negotiations. Thus, in a sense, CEND has transformative aims, but in at least two ways it differs from China's drive to impose a new order on international relations: (1) the change CEND seeks is not to multiply one country's nuclear leverage against others for that country's gain; and (2) CEND entails pursuing negotiations even while the efforts it promotes are still underway.

<sup>129</sup> See Remarks, Assistant Secretary of State Christopher A. Ford, Leadership Group for the Creating an Environment for Nuclear Disarmament (CEND) Initiative (Sept. 3, 2020), available at <https://www.newparadigmsforum.com/p2755>. At the time the present *Occasional Paper* went to press, the U.S. Department of State website referencing CEND was not entirely clear whether the Biden Administration would be continuing the initiative.

environment achieved through a consent-based effort among States.

But as noted, the necessary predicate to the NPT's overall purpose is that the existing realities of nuclear deterrence not grow *less* stable. That is to say, nuclear-weapon States have a duty not to aggravate the situation that they, along with all NPT States, have agreed to pursue negotiations to resolve. In the logic of Article VI, a State must retain the liberty to respond when one or more States fail to fulfil that duty. Article VI accommodates both agreed steps to improve the environment for negotiation and arms control; and proportionate steps to preserve or restore stability in the environment, including steps by a nuclear-weapon State to maintain a stable deterrent. Indeed, in deciding to raise its stockpile cap, the United Kingdom 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.<sup>130</sup> It is no longer tenable, because that reduction, far from improving the security environment, would have made it worse.

The obligation under Article VI NPT to pursue negotiations entails that each State Party seek a negotiated path toward the NPT's goals. Moreover, it entails that, in seeking that path, each State Party conduct itself in good faith. Good faith imposes further constraints, but it is by no means a straightjacket. The NPT accommodates States that endeavor to maintain stability in the strategic environment. The accommodation here is all the more important at a time when one State seeks to overturn stability in pursuit of its own geopolitical aims.

---

<sup>130</sup> *Global Britain*, *supra* n. 114.

## **Conclusion: Understanding Article VI NPT in Its Strategic Setting**

This *Occasional Paper* has suggested that Article VI NPT is properly understood in the strategic setting in which the nuclear-weapon States exist.

Diplomats and lawyers might read Article VI NPT as a relatively formalistic provision, expressing an obligation to pursue negotiations but largely detached from the strategic setting. The directional aspect of the NPT's aspirations for arms control and an eventual, strictly-regulated disarmament is explicit in the treaty however, and States, in practice, pursue policies that move international relations one direction or the other—toward an environment congenial to the NPT's goals or the other way. Thus, even on a formal reading, the strategic setting is not to be ignored.

China's nuclear build-up is, arguably, the most salient feature of the NPT's strategic setting today. In recent years, China has ignored the directional aspect of the NPT and, instead, is moving toward a radical increase in the quality and quantity of its nuclear weapons. China's build-up has no plausible tie to an "action-reaction" calculus, for the country that China identifies as its main geopolitical competitor and that country's allies, unlike China, are not racing past their existing deterrent postures to transform the strategic setting for the attainment of geopolitical ends. China's conduct in this regard—not just its refusal to come to the table for an earnest attempt to negotiate arms control—justifies a response. An appropriate response would include the United States and others drawing attention to the tension between China's conduct and China's obligations under Article VI NPT.

The following summarizes the main points, as argued above:

- (i) International jurisprudence supplies indicia as to what conduct by a country satisfies a legal obligation to pursue negotiations. To be obliged to pursue negotiations is to be obliged to do so *in good faith*. Categorical refusal to negotiate, where the country is obliged to pursue negotiations, is *per se* non-compliance.
- (ii) The factual record reflects that China has not engaged in more than general exchanges of view in regard to the objects that Article VI NPT requires the Parties to pursue negotiations to address. Mere general exchanges of view do not constitute the pursuit of negotiations.
- (iii) 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; it also ignores the historical reality that nuclear build-ups, in particular that which the USSR carried out during the Cold War, were not active-reactive efforts to maintain parity with a competitor but, instead, independent tools of geopolitical strategy.
- (iv) China's qualitative and quantitative build-up of nuclear weapons entails China's non-compliance with Article VI, because it 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. China's

practice in other situations, including the South China Sea, demonstrates an alarming consistency in this regard: China seeks to impose *faits accomplis*, and it ignores the international law obligation not to aggravate disputes.

- (v) 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. However, the speed and scale of China's surge toward nuclear weapons is relevant in context for the reasons set out in point (iv) above. An NPT State Party that seeks fundamentally to change the relationships among nuclear-weapon States to favor its own geopolitical ambitions ignores the obligation under Article VI to pursue negotiations.

Article VI NPT does not allow one nuclear power to wait while it pursues arms. The obligation to pursue negotiations has no pause button for a State to prosecute a claim to global dominance even when the State alleges the claim to be an historic right. Noteworthy here, China appears to have moderated its public rhetoric about history, perhaps in response to the widespread opprobrium directed toward it for the Covid-19 pandemic.<sup>131</sup> Yet the narrative of grievance arising out of past wrongs is deeply-rooted in China's

---

<sup>131</sup> Thayer, *supra* n. 86 at pp. 2-3, 14-21.

politics<sup>132</sup>— and in its international legal policy.<sup>133</sup> The quest for a new nuclear status quo serves to advance China's long-stated aim of redressing the harm that China suffered in the 19<sup>th</sup> century under European imperialism. Seeking an arsenal that far exceeds the needs of deterrence in China's strategic setting, China seeks from its nuclear expansion the freedom of action it desires against countries in East Asia as well as in other parts of the world. The nuclear build-up, understood in this strategic dimension, is cause for alarm. The NPT has functioned for over a half century to impart stability to a system puzzling over the risks that nuclear weapons entail. China's build-up threatens to throw the system into disarray.

The NPT does not set particular limits on how many or what kind of nuclear weapons the nuclear-weapon States hold. It is not an arms limitation treaty in that sense. However, it places real, if modest, constraints on its States Parties, including the nuclear-weapon States, in regard to the pursuit of negotiations. Negotiating in a framework of international law that recognizes the realities of nuclear deterrence requires good faith in the negotiations and in the policies that each party implements at large. Building nuclear arms in order to impose a geopolitical transformation of the builder's choosing is antithetical to the NPT. Refusing to negotiate until one party's nuclear build-up creates a new state of affairs is to violate Article VI

---

<sup>132</sup> Dr. Christopher A. Ford, *Ideological "Grievance States" and Nonproliferation: China, Russia, and Iran*, Remarks at Arms Control Conference and Experts Forum, Institute for National Security Studies, Tel Aviv, Israel (Nov. 11, 2019), available at

<https://2017-2021.state.gov/ideological-grievance-states-and-nonproliferation-china-russia-and-iran/index.html>.

<sup>133</sup> The attachment of China in its international legal policy to arguments about historic rights is vivid in the South China Sea and was a contributing factor to the disputes there that the Philippines brought to arbitration in 2013. For the Award in the *South China Sea Arbitration*, see *supra* n. 53. And see discussion, *supra*, p. 29.

of the NPT. The United States and others concerned with promoting the goals expressed in that treaty, the cornerstone of global efforts to address nuclear arms, should draw attention to China's build-up as the strategic challenge it is.

## *About the Author*

Dr. Thomas D. Grant served during the Trump Administration as Senior Advisor for Strategic Planning in the Bureau of International Security and Nonproliferation at the Department of State, 2019-2021, and in the Office of the Under Secretary of State for Arms Control and International Security. He is a former United States designee to the Permanent Court of Arbitration. Author of six sole-author and two co-author books and over fifty articles in academic and policy journals, Dr. Grant's previous work also includes a National Institute *Information Series* paper, *The NATO Brussels Communiqué and the Treaty on the Prohibition of Nuclear Weapons (TNPW): Stability of Custom and Legality of Deterrence* (September 7, 2021).

Recently published by the National Institute Press:

Books

Michaela Dodge, *U.S.-Czech Missile Defense Cooperation: Alliance Politics in Action*, 2020

Keith B. Payne, *Shadows on the Wall: Deterrence and Disarmament*, 2020

David J. Trachtenberg, *The Lawgivers' Struggle: How Congress Wields Power in National Security Decision Making*, 2020

Occasional Papers

Susan Koch, *Securing Compliance with Arms Control Agreements*, Vol. 1, No. 10, October 2021

Keith B. Payne and Michaela Dodge, *Stable Deterrence and Arms Control in a New Era*, Vol. 1, No. 9, September 2021

Steve Lambakis, *Space as a Warfighting Domain: Reshaping Policy to Execute 21<sup>st</sup> Century Spacepower*, Vol. 1, No. 8, August 2021

Matthew Costlow, *A Net Assessment of "No First Use" and "Sole Purpose" Nuclear Policies*, Vol. 1, No. 7, July 2021

David J. Trachtenberg, Michaela Dodge and Keith B. Payne, *The "Action-Reaction" Arms Race Narrative vs. Historical Realities*, Vol. 1, No. 6, June 2021

Matthew Costlow, *Safety in Diversity: The Strategic Value of ICBMs and the GBSD in the Nuclear Triad*, Vol. 1, No. 5, May 2021

David J. Trachtenberg, *Congress' Role in National Security Decision Making and the Executive-Legislative Dynamic*, Vol. 1, No. 4, April 2021

Bradley A. Thayer, *The PRC's New Strategic Narrative as Political Warfare: Causes and Implications for the United States*, Vol. 1, No. 3, March 2021

Michaela Dodge, *Russia's Influence Operations in the Czech Republic During the Radar Debate and Beyond*, Vol. 1, No. 2, February 2021

Keith B. Payne, *Redefining Stability for the New Post-Cold War Era*, Vol. 1, No. 1, January 2021

Information Series

Keith B. Payne, "The Taiwan Question: How to Think About Deterrence Now," No. 509, November 2021

Heino Klinck, "Taiwan's Turn - Deterring and Derailing an Existential Threat," No. 508, November 2021

David J. Trachtenberg, "Back to the Future: A Misguided Understanding of China's Nuclear Intent," No. 507, November 2021

Keith B. Payne, "Cultivating Intellectual Capital - Linking Deterrence Practitioner to Academician," No. 506, October 2021