

# ARTICLE VI OF THE NON-PROLIFERATION TREATY IS A *PACTUM DE CONTRAHENDO* AND HAS SERIOUS LEGAL OBLIGATION BY IMPLICATION

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## INTRODUCTION

Article VI of the Nuclear Non-Proliferation Treaty (“NPT”) states in full: “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>1</sup>

The ultimate issue that I address below is whether or not the International Court of Justice (“ICJ”) would be willing to declare nuclear-proliferating member states of the NPT in violation of their good-faith obligation under Article VI, and, more specifically, whether the statement would be interpreted as a *pactum de negotiando*, a *pactum de contrahendo*, or neither of the two.

In the 1996 ICJ opinion on the Legality of the Threat or Use of Nuclear Weapons, the Court indicated that Article VI of the treaty compels the member-states to more than simply an “action,” but to a final “result” obligation. In Paragraph F of the opinion’s *dispositif*, the fifteen judge panel decided unanimously that, “There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.”<sup>2</sup>

These words, “to pursue in good faith and bring to a conclusion,” mean that the ICJ is asserting that not only do the member states have to undertake good-faith negotiations towards

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<sup>1</sup> Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

<sup>2</sup> *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 3 (July 8).

complete nuclear disarmament, but that the member states have a duty to *complete those negotiations with a result*: the ultimate and completely comprehensive nuclear disarmament treaty. What the other terms of this ultimate treaty might be are anyone's guess, but the ICJ implies that one line must be in the treaty: complete nuclear disarmament by all member states.

If this is so, and if the ICJ is willing to hold that this results-based duty is legally binding, then the ICJ means to say that Article VI is more than just an agreement to future negotiations (*pactum de negotiando*), but actually an agreement to come to an understanding (*pactum de contrahendo*). This second type of agreement, in principle, could be upheld in court *prior* to the actual creation and ratification of the document – prior to the creation of the ultimate treaty. This means that NPT member-state parties could pursue an injunction in the ICJ against nuclear-proliferating member-states (U.K., U.S.A. etc.) under the legal argument that their proliferation actions are in violation of the good-faith duty to negotiate and actually create an ultimate nuclear disarmament under the Article VI NPT auspices.

To make this argument robust, I will discuss three elements. First, I will define and show support for the understanding of what a *pactum de contrahendo* looks like. Second, I will explain what the legal obligations of *pacta de contrahendo* are and explain that those obligations significantly differ from *pacta de negotiando*. Finally, I will apply these definitions, examples and findings to the ICJ case interpretation of Article VI of the NPT and show that the Article is a *pactum de contrahendo*, that it has legally enforceable meaning, and that there are implications for the nuclear non-proliferation regime. Ultimately, this process and analysis cannot take place in a political vacuum. I will also address the political realities of, and possible alternatives to, my findings.

**PART I: SHOWING THE EXISTENCE OF *PACTA DE CONTRAHENDO*, COURTS' USE OF THEM, AND DEFINING SUCH A PACTUM BY THE TERMS OF THE AGREEMENT**

In his 1961 treatment of the subject in *The Law of Treaties*, Lord McNair states that *pactum de contrahendo* “is correctly applied to an agreement by a State to conclude a later and final agreement . . . . When they are expressed with sufficient precision, they create valid obligations . . . .”<sup>3</sup> This definition asks for “sufficient precision,” something that I will address later in regards to Article VI of the NPT. I agree with Lord McNair when he continues,

“Less happily in our opinion, the term *pactum de contrahendo* is applied to an obligation asserted by two or more parties to negotiate in the future with a view to the conclusion of a treaty. This is a valid obligation upon the parties to negotiate in good faith, and a refusal to do so amounts to a breach of the obligation. But the obligation is not the same as an obligation to conclude a treaty or to accede to an existing treaty, and the application to it of the label *pactum de contrahendo* can be misleading and should be avoided.”<sup>4</sup>

The second type of obligation to which Lord McNair is referring would be a *pactum de negotiando*. Here, Lord McNair quite succinctly lays out the main difference between the two pacts and the common misuse of their terms interchangeably.

*Pactum de contrahendo* is a Latin term of art that has been used in international law tribunals as a general principle of law. “Amongst other general principles which arbitral tribunals often have had recourse to are: the autonomy of the will of the parties, the *pactum de contrahendo*,<sup>5</sup> abus de droit<sup>6</sup> . . . and the duty of full disclosure.”<sup>7</sup> The term has been used as distinguished from a *pactum de negotiando* in court cases, law review articles, and legal commentaries. At its core, a *pactum de contrahendo* creates a legal obligation that binds the parties of the original pactum to negotiate in good faith *and* to come to some positive result on an

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<sup>3</sup> Arnold Duncan McNair, *THE LAW OF TREATIES* 27, 29 (2nd ed., 1961).

<sup>4</sup> *Id.* See also *Tacna-Arica Arbitration*, 2 R.I.A.A. 92 (1925).

<sup>5</sup> *Gov't of Kuwait v. Am. Indep. Oil Co.*, 66 I.L.R. 518, 575 (1984).

<sup>6</sup> *Libyan Oil v. Gov't of the Libyan Republic*, 20 I.L.M. 1, 196 (1977).

<sup>7</sup> A. F. M. Maniruzzaman, *International Development Law as Applicable Law to Economic Development Agreements: A Prognostic View*, 20 WIS INT'L L.J. 1 (2001).

issue mentioned in the *pactum de contrahendo*. The Latin term *pactum* comes from “*paciscor*,” meaning to make a bargain or an agreement, to covenant or contract.<sup>8</sup> *Contrahendo* comes from the Latin root “*contraho*,” meaning to draw together, to conclude, or to complete any arrangement.<sup>9</sup> Therefore, quite literally, the phrase *pactum de contrahendo* means to agree to complete an arrangement.

Some scholars, such as Miaha de la Muela, Kron, and Marion, believe that the increased obligation arising out of a *pactum de contrahendo* (as opposed to a *pactum de negotiando*) is, perhaps, an increased duty to submit to arbitration over a nonnegotiable dispute.<sup>10</sup> Other scholars, including Lord McNair, Oppenheim, Lauterpacht, and Hahn, believe that the *pactum de contrahendo* creates an absolute obligation to conclude an agreement.<sup>11</sup>

Ulrich Beyerlin, the author of the *Pactum de Contrahendo, Pactum de Negotiando* entry in the Encyclopedic Dictionary of International Law, argues that “there is no relevant distinction between the two pacts in the legal quality of the obligations resulting from [them].”<sup>12</sup> Beyerlin’s argument aside, once I establish that a *pactum de contrahendo* does create more burdensome legal requirements on the member-states, actually deciding on what a *pactum de contrahendo* looks like creates a new topic to debate.

## **PART II: THE LEGAL OBLIGATIONS OF A *PACTUM DE CONTRAHENDO* AND THE LEGAL REMEDIES**

As previously mentioned, there is a divide in the legal texts as to the extent of legal obligations arising from a *pactum de contrahendo*. The texts do agree that a *pactum de*

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<sup>8</sup> University of Notre Dame Latin Dictionary and Grammar Aid available at <http://www.nd.edu/~archives/latgramm.htm> (last visited Apr. 15, 2005).

<sup>9</sup> *Id.*

<sup>10</sup> Ulrich Beyerlin, *Pactum de Contrahendo, Pactum de Negotiando*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 854, 858 (R. Bernhardt ed., 1997).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

*contrahendo* at the very minimum entails the obligations of a *pactum de negotiando*; namely, to negotiate further on the specified point in good faith. The next level up from the very minimum would be to incur the liability of arbitration or legal action if one of the parties was not negotiating at all, was not negotiating in good faith, or was pursuing endeavors that would be contrary to the intent of the subsequent agreement. At its highest level of legal duty, a *pactum de contrahendo* creates a legal obligation on all parties to the pactum to come to a mutually agreed-upon solution within the parameters of the original pactum. Failure to come to such an agreement (and failure to be actively engaged in finding common ground in order to solve the dilemma) would be actionable in court.

If a tribunal has an action before it in which one party argues that a document is a *pactum de contrahendo*, how will the court decide whether or not the document is indeed a *pactum de contrahendo* (in order to compel some sort of action or injunction against the other party) or simply an agreement to further discuss the issues therein? As McNair stated, the court would look to the specificity of the terms within the pactum, the actions of the parties that agreed to the pactum, and the intent of the parties as understood within the context of the pactum. Even the *contrahendo*-doubting Beyerlin offers an example of what a *pactum de contrahendo* might look like: “The two South Vietnamese parties shall sign an agreement on the internal matters of South Viet-Nam as soon as possible and do their utmost to accomplish this within ninety days after the cease-fire comes into effect . . . .”<sup>13</sup> Beyerlin considers this to contain, “an absolute mutual obligation to conclude a further agreement on a specific problem.”<sup>14</sup> I am inclined to agree with his evaluation and, furthermore, I would say that the parties could have taken each

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<sup>13</sup> Agreement on Ending the War and Restoring Peace in Viet-Nam, Jan. 27, 1973, 935 U.N.T.S. 6, *quoted in* Ulrich Beyerlin, *supra* note 10, at 854, 856.

<sup>14</sup> Ulrich Beyerlin, *supra* note 10, at 854, 856.

other to court if one had been unwilling to pursue the subsequent agreement with all deliberate speed and good faith.

In contrast, Beyerlin cites the following as an example of a *pactum de negotiando*: “In order to achieve peace between them, the parties agree to negotiate in good faith with a goal of concluding within three months from the signing of this Framework a peace treaty between them.”<sup>15</sup> Here, I disagree with Beyerlin’s characterization of this phrase as clearly a *pactum de negotiando*. I argue that the good faith requirement to negotiate with a goal in mind and a stated timeline is specific. If four months pass and there is no peace treaty, and one of the parties is acting belligerently, then perhaps the other party might have an injunctive cause of action in international law to compel the other side to cease its belligerent activities. Just exactly what grounds either one of the parties would assert to have standing to sue is unclear. Therefore, for all intents and purposes, this nebulous goal and inability to specifically enforce a duty upon either party would probably be treated as a *pactum de negotiando*.

Beyond the misuse of the term *pactum de contrahendo*, some authors argue that a *pactum de contrahendo* does not have the full legal effect and force of a ratified treaty, which benefits from the full legal force of *pacta sunt servanda*. In describing the legal force of the provisions of the Article 14 technology transfers of the UN Convention on the Law of the Seas, Myron Nordquist writes that they are, “largely declaratory of policy goals, and [often] couched in the language of *pacta de contrahendo*.”<sup>16</sup> These *pacta* are not legally enforceable as a legal duty, but rather set certain international standards or guidelines.<sup>17</sup> One reason that the technology

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<sup>15</sup> Framework for the Conclusion of a Peace Treaty, Sept. 17, 1978, 17 ILM (1978) at 1466, *quoted in* Ulrich Beyerlin, *supra* note 10, at 854, 856.

<sup>16</sup> Center for Oceans Policy, Univ. of Va., *U.N. Convention on the Law of the Sea 1982: A Commentary* 668 (Myron H. Nordquist et al. eds.), *quoted in* Gaetan Verhoosel, *Beyond the Unsustainable Rhetoric of Sustainable Development: Transferring Environmentally Sound Technologies*, 11 GEO. INT’L ENVTL. L. REV. 49 (1988).

<sup>17</sup> See Colin M. Alberts, *Technology Transfer and Its Role in International Environmental Law; A Structural Dilemma*, 6 HARV. J.L. & TECH, 63, 71 (1992), *cited in* Gaetan Verhoosel, *Beyond the Unsustainable Rhetoric of*

transfer provisions are less controlling and less obligation-inducing is because, “it would be almost impossible to invoke them...”<sup>18</sup> This use of the term, however, dilutes its true meaning: one in which the parties are bound to create a resulting outcome in future negotiations.

The quality of binding the parties to future outcomes, even when political will for the outcome or the means necessary to achieve it has faltered, is the most important quality of a *pactum de contrahendo*. In the following statement, Antonio Cassese succinctly states the important differences in the quality of the *pacta*:

These *pacta [de contrahendo]* do not impose obligations *si voluero* that are subject to the persisting will of all contracting parties to enter into the future agreement. They go much further than that: they make it incumbent upon the parties to agree upon a specific legal regulation of the matter outlined in generic terms in the *pactum*. Since the parties must act in good faith, it follows that if one of them refuses to make the agreement or finds pretexts for delaying its conclusion, it is in breach of international law. Consequently, the other party can use all the legal means made available by the law of international responsibility for the purpose of demanding the implementation of the pactum.<sup>19</sup>

### **PART III: ARTICLE VI OF THE NPT IS A *PACTUM DE CONTRAHENDO***

Now, I come to the issue of whether the obligation assumed by the parties under Article VI of the NPT is a *pactum de contrahendo*. I will revisit the Treaty and determine the parties’ intentions when they agreed to it. I will also determine whether Article VI is specific enough to create the legal obligations of a *pactum de contrahendo* and whether there are actionable areas under which a violation could be prosecuted.

“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

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*Sustainable Development: Transferring Environmentally Sound Technologies*, 11 GEO. INT’L ENVTL. L. REV. 49 (1988).

<sup>18</sup> James K. Sebenius, *The Law of the Sea Conference: Lessons for Negotiations to Control Global Warming*, in INT’L ENVTL. NEGOTIATION 189, 204 (Gunmar Sjostedt ed., 1993).

<sup>19</sup> Antonio Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 EUR. J. INT’L L. 4 at <http://www.ejil.org/journal/Vol4/No4/art7-01.html> (last visited Apr. 15, 2005).

disarmament, and on a Treaty on general and complete disarmament under strict and effective international control.”<sup>20</sup>

The argument that this phrase is a *pactum de contrahendo* must admit that the Article itself uses the term “negotiation.” That does not summarily preclude the possibility, however, that Article VI is a *pactum de contrahendo*. The terms of Article VI, were agreed to (signed and ratified) by almost every country in the world. When the countries signed the Treaty, they were making a global deal. The non-nuclear states signed the NPT because they wanted to increase their regional and national security by immediately limiting the spread of nuclear weapons, encourage economic growth with the development of peaceful nuclear energy, and increase global security with the promise from nuclear-weapons states to undertake good faith negotiations on nuclear disarmament. At the time, the states with nuclear weapons wanted to cease the global spread of nuclear weapons and the unchecked proliferation of unsafe nuclear technology, and they wanted to control the peaceful expansion of peaceful nuclear energy. In a nutshell, in order to get the non-nuclear weapons states to stop their nuclear weapons programs, the nuclear states promised to give them peaceful nuclear technology and promised to give up their own nuclear weapons (in a future treaty, the exact provisions of which were to be determined in subsequent good faith negotiations). To the best of our knowledge, today, none of the current NPT member states are actively pursuing a nuclear weapons program – they have upheld their part of the bargain. The nuclear states, however, still cast a pall over the entire world – threatening humanity with tens of thousands of nuclear weapons.<sup>21</sup>

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<sup>20</sup> Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

<sup>21</sup> *Global Nuclear Stockpiles 1945-2002*, 58 NRDC Nuclear Notebook 6, 103-104 Bulletin of Atomic Scientists available at <http://www.thebulletin.org/issues/nukenotes/nd02nukenote.html> (last visited Apr. 15, 2005).



Article VI mandates that all states must pursue good faith negotiations. Furthermore, it names nuclear disarmament under strict and effective international control as the very specific objective of those negotiations. The obligation to sit down and create a global treaty to complete nuclear disarmament still weighs on the nuclear weapons states. They have a duty to negotiate in good faith and must create a subsequent and ultimate nuclear treaty that prohibits the creation of all new nuclear weapons and mandates the destruction of current stockpiles.

With unanimity, the ICJ found that the obligation within Article VI binds the member states to not only the “actions” of good faith negotiations, but to “results” as well. In considering the NPT obligation to negotiate in good faith towards complete disarmament, the Court wrote, “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, nuclear disarmament in all its aspects, by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.”<sup>22</sup> In paragraph 100 of the decision, the Court continues its discussion of the nature of the Article VI pactum. “This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the Treaty. . . .”<sup>23</sup> In referring to Article VI as a two-fold obligation, the Court seems willing to declare that countries have an obligation to sit down together and make good faith efforts to hammer out an effective nuclear disarmament treaty *and* that if the negotiations reach an impasse where one or more of the parties decide that the negotiations have failed, the other parties will have the right to bring the departing country and the disputed issue to binding legal arbitration. This second obligation is what surprised some

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<sup>22</sup> *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 3 (July 8) para. 99.

<sup>23</sup> *Id.* at para. 100.

authors and what they rail against in their papers that argue that the Court, “arrive[d] unanimously at the wrong answer.”<sup>24</sup>

The fifteen judges of the ICJ did *not* get it wrong. The parties to the NPT mutually agreed to the *ends* that the treaty declares needs to be achieved: nuclear disarmament. Moreover, the state parties agreed that they would pursue those ends through any number of to-be-announced means, the instrument of those means, however, is to be a future treaty. All of the state parties agreed to this and they knew that the negotiations would take time, further discussion and deliberation. The Court recognized all of this, and has accordingly declared Article VI a *pactum de contrahendo*. Although the United Nations General Assembly (“General Assembly”) has, “underlined[d] the unanimous conclusion of the Court that there exists an obligation to pursue in good faith and bring to conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control [and called upon States to engage in such negotiations],”<sup>25</sup> the world has yet to see these negotiations take place. (UN Gen. Assembly Resolution 51/45 was adopted by a vote of 115-22-32). In fact, the General Assembly has thanked the ICJ for this interpretation, approved of the interpretation and even called for world-wide negotiations in numerous GA resolutions (we have never seen any of these negotiations take place, even in a preparatory committee).

In his article, *Nuclear Weapons and the World Court: The ICJ’s Advisory Opinion and Its Significance for U.S. Strategic Doctrine*, Robert Turner states that, “the Court seems clearly to have confused two related concepts (a *pactum de contrahendo* and a *pactum de negotiando*).”<sup>26</sup> Turner argues that, “Article VI of the NPT does not, and *cannot reasonably be*

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<sup>24</sup> Robert F. Turner, *Nuclear weapons and the World Court: The ICJ’s Advisory Opinion and Its Significance for U.S. Strategic Doctrine*, in *THE LAW OF MILITARY OPERATIONS* 349 (Michael N. Schmitt ed., 1998).

<sup>25</sup> G.A. Res. 51 U.N. GAOR Supp. (No. 49) at 79, UN Doc. A/51/49 (Vol.1) (1996).

<sup>26</sup> Turner, *supra* note 24, at 324.

*interpreted to, obligate treaty parties to conclude anything. . . .*<sup>27</sup> Turning to the Vienna Convention on the Law of Treaties, Turner cites Article 31(1), which states that, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>28</sup> He asserts that a reading of the text or of the *travaux* (working drafts, debates, etc.) of the Treaty shows that the nuclear parties never intended to be bound to a commitment to conclude negotiations on complete nuclear disarmament.<sup>29</sup> However, Article 31 does not stop at subsection (1). It continues in subsection (3) (a), stating “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” should also be taken into account.<sup>30</sup> On May 1, 2000, the five nuclear powers expressed strong support for the NPT and for the full realization and implementation of Article VI. In their statement, they reaffirmed the necessity of an effective international, “convention banning the production of fissile material for nuclear weapons or other nuclear explosive devices.”<sup>31</sup> Furthermore, they called upon the UN Conference on Disarmament to, “agree on a program of work as soon as possible, which includes the immediate commencement and early conclusion of negotiations on such a treaty.”<sup>32</sup> This statement from the nuclear powers makes it clear that they do believe Article VI binds them, and the whole international community, to create a convention that bans nuclear proliferation and mandates nuclear disarmament.

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<sup>27</sup> *Id.*

<sup>28</sup> Vienna Convention on the Law of Treaties, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331.

<sup>29</sup> Turner, *supra* note 24, at 330.

<sup>30</sup> Vienna Convention on the Law of Treaties, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331.

<sup>31</sup> Text of the Statement by the delegations of France, China, Russia, the U.K. and the U.S. released at the NPT Review Conference at the U.N. May 1, 2000, *available at* <http://usinfo.state.gov/topical/pol/arms/stories/00050104.htm> (last visited Apr. 15, 2005).

<sup>32</sup> *Id.*

Turner continues with his analysis by looking at the *travaux preparatoire*.<sup>33</sup> In regards to the *travaux*, Turner cites Mohamed Shaker's study on the subject. Originally, the nuclear disarmament clauses were only preambulatory and not operative (legally binding) clauses. India and other states wanted to insert a legal obligation to negotiate cease proliferation and begin reductions. "The obligation was therefore not merely to negotiate a meaningful programme but to *undertake* certain measures."<sup>34</sup> This wording, however, would not be accepted by the United States or the Soviet Union, and so the current phraseology, "to pursue negotiations in good faith," was employed in its stead. Turner argues that in this context, it is clear that Article VI is a *pactum de negotiando* because otherwise the superpowers would not have agreed to it and because the exact terms of such a comprehensive nuclear disarmament treaty are unforeseeable.<sup>35</sup> The argument that the superpowers thought that there was no obligation to create a comprehensive treaty is significantly undermined by the aforementioned Article 8 in the "Five Nuclear Powers Express Strong Support for NPT" statement, and is irrelevant to the issue of whether the statement is objectively a *pactum de contrahendo*. In fact, one could argue that many of the states at the time believed that after ratification of the NPT, the UN Conference on Disarmament would begin immediate and intense on-going negotiations that would culminate in a comprehensive nuclear disarmament treaty. Also, other *travaux* that established the goals of the NPT stated, "The treaty should be void of any loop-holes which might permit nuclear or non-nuclear Powers to proliferate, directly or indirectly, nuclear weapons in any form."<sup>36</sup> (GA Resolution 1965, adopted with a vote of 93-0 and five abstentions) Furthermore, Turner omits

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<sup>33</sup> An important note on *travaux preparatoire*: the International Law Commission decided that the primary interpretation of any treaty should come from the text of the treaty itself and not the *travaux* because, "the text must be presumed to be the authentic expression of the intentions of the parties. . . ."

<sup>34</sup> Mohammed I. Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation 1959-1979*, at 570 (1980).

<sup>35</sup> Turner, *supra* note 24, at 329-30.

<sup>36</sup> GA Res. 1965, *quoted in* RULE OF POWER OR RULE OF LAW 19-20 (Nicole Deller et al. eds., 2003).

statements from Shaker's paper that among member states it "was generally felt that negotiating was not an aim in itself but a means to achieve concrete results at the earliest possible date."<sup>37</sup>

What Turner has the most trouble with is the potential extension, *ad ridiculum*, of the Court's finding that the parties have to come to a conclusion in negotiations. Turner asks questions like, "Does this mean that the first State to get to the World Court can obtain a judgment requiring all of the other treaty parties to 'conclude' the treaty favored by the petitioning State?"<sup>38</sup> He also ponders whether "the Court instead intend(s) to assume the legislative task of drafting perhaps hundreds of pages of highly detailed and intrusive inspection and verification terms, to be imposed upon sovereign States irrespective of their consent."<sup>39</sup> There is absolutely nothing in the ICJ's opinion, however, that suggests the Court intends to, or is prepared to, engage in any of these any of these activities.

If the ICJ were to take a more engaged role in realizing the goals of Article VI, it would make much more sense for the Court to declare the parties of the Treaty out of compliance with Article VI until the parties begin a sustained negotiation on the topic. If there were an impasse in the negotiations, it would make sense for the parties to create an arbitration board to which they could refer the deadlock. The ICJ's role would be to sit in judgment on those states that give up on the negotiation process or act as spoilers to the process. They could also act as a court of appeal for the arbitral tribunal.

If I were to argue in the alternative that the Article VI obligations do not amount to a *pactum de contrahendo*, but only a *pactum de negotiando*, I would still point out that there are affirmative obligations that the latter entails. "The Parties are simply duty bound to enter into

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<sup>37</sup> Mohammed Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation 1959-1979*, Vol II at 564 (1980) quoted in *RULE OF POWER OR RULE OF LAW 22* (Nicole Deller et al. eds., 2003).

<sup>38</sup> Turner, *supra* note 24, at 324.

<sup>39</sup> *Id.* at 325.

negotiations. However, both Parties are not allowed to (1) advance excuses for not engaging into or pursuing negotiations or (2) to accomplish acts which would defeat the object and the purpose of the future treaty.”<sup>40</sup> It is clear that there have not been negotiations of the sort envisioned by the NPT and excuses for this inaction are invalid. The *pactum de negotiando*’s involuntary duty upon the parties mandates that they pursue the negotiations in good faith even when the domestic political will to do so has weakened.

No one would argue that Article VI does not create an obligation for the member states to negotiate in good faith towards nuclear disarmament under strict and effective international control. Some would say that this international control has materialized through the International Atomic Energy Agency (“IAEA”). However, in today’s press and security briefings, we see that the addendum of “strict and effective international control” is a contested item as the world realizes that the NPT regime that created the IAEA is no longer capable *ensuring* nonproliferation even in member-state countries (Iran, Libya, and others come to mind), not to mention nuclear disarmament.

Some might argue that the obligation to end the nuclear arms race has been met and that the arms race has ceased. This is simply untrue: China is building nuclear weapons as fast as it reasonably can, as well as North Korea’s activities, Iran’s recent disclosures, pre-1991 Iraq, and many other member-state countries’ attempts, not to mention the United States’ recent decision to research tactical mini-nukes. Moreover, the nuclear arms race between Pakistan and India has introduced a whole new segment of the world’s population to a constant nuclear threat.

This obligation of good faith, however, is not merely a theoretical ideal that exists solely in the legal penumbra of international law. Its application and duty have real legal meaning.

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<sup>40</sup> Antonio Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 EUR. J. INT’L L. 4 at <http://www.ejil.org/journal/Vol4/No4/art7-01.html> (last visited Apr. 19, 2005).

Article 26 of the Vienna Convention on the law of treaties requires every treaty to be performed in good faith.<sup>41</sup> “Good faith is objective good faith; it imposes a standard of objective reasonableness.”<sup>42</sup> The ICJ’s declarations and subsequent General Assembly resolutions are an attempt by the world’s community to call attention to the diplomatic lip service and short shrift that the nuclear weapons states have given to their good faith obligations. “Moreover, since good faith is an accepted general principle of international law, it is appropriate and even necessary to apply it in its legal sense.”<sup>43</sup>

The development of more nuclear weapons and the development of new types of nuclear weapons is a violation of the duty to abstain from acts which would defeat the object and the purpose a treaty. In Article VI of the NPT, the parties agreed to negotiate a future treaty on complete nuclear disarmament. “A significant practical consequence of the ‘good faith’ principle is that a party which committed itself in good faith to a course of conduct . . . would be estopped from acting inconsistently with its commitment . . . when the circumstances showed that other parties reasonably relied on that undertaking or position.”<sup>44</sup> This legal duty is codified in Article 18(b) of the Vienna Convention on the Law of Treaties. “A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty . . . .”<sup>45</sup>

I submit that Article VI, as a *pactum de contrahendo*, is an express agreement by state parties to be bound by a future treaty, the object and purpose of which is nuclear disarmament and nonproliferation. Therefore, the nuclear weapons states, such as France, the People’s Republic of China, the Russian Federation, the United Kingdom, the United States, and others,

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<sup>41</sup> Vienna Convention on the Law of Treaties, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331.

<sup>42</sup> LORI F. DAMROSCH et al., *INTERNATIONAL LAW: CASES AND MATERIALS* 1195 (4th ed. 2001).

<sup>43</sup> OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 130 (1991).

<sup>44</sup> DAMROSCH, *supra* note 42, at 157.

<sup>45</sup> Vienna Convention on the Law of Treaties, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331.

who have employed their military industrial complex in creating new nuclear weapons, are in contravention to the treaty's good faith obligation to refrain from acts which would defeat the object and purpose of the treaty.

**PART IV: WHAT SHOULD HAPPEN IN THE FUTURE AND POSSIBLE CONSEQUENCES OF THIS ARGUMENT AS WELL AS POSSIBLE ALTERNATIVES**

It is important to recognize that theory is an important tool to explore our possibilities, but that, in practice, theories are not applied in a vacuum. The ICJ has given the world a powerful tool in compelling recalcitrant state parties to come to the negotiating table and deal with the world in a good faith effort to rid the world of nuclear weapons. It has inspired the General Assembly to pass resolutions proclaiming a need for an intensified effort for nonproliferation and disarmament. The Court's finding that Article VI has real legal obligations that are being violated by state parties is an important statement in the dialogue that leads to negotiations on a comprehensive nuclear disarmament treaty.

Some have called for a contentious case against the United Kingdom or other NATO members who have accepted the optional-compulsory jurisdiction of the ICJ. The case, they argue, should conclude with a judgment against nuclear (and NATO) NPT states for promoting and endorsing a nuclear posture, nuclear proliferation and deployment, as well as for a failure to engage in good faith negotiations. If this case were to go forward and actually win an injunction against nuclear proliferation on the *contrahendo* arguments advocated above, the results for the nonproliferation regime could be disastrous. I agree with Robert Turner that in this circumstance, under Article X of the Nuclear Non-Proliferation Treaty, the nuclear states would withdraw from the Treaty, citing the Court's opinion as the extraordinary event that affects the



supreme interests of the country.<sup>46</sup> To press the argument over-zealously could mean a pyrrhic victory at best. Other opponents to such action argue that even if current NPT member states did not opt-out of the Treaty through Article X, there would still be several countries (namely Pakistan, India, Israel, Cuba and North Korea) that are not state parties to the Treaty and so would not be bound by the Court's decision based upon the Treaty's obligation. If the state parties did, however, convene to negotiate a comprehensive disarmament treaty, Pakistan and India would most certainly be at the table. Furthermore, I believe that Israel, Cuba and North Korea would be very susceptible to intense global pressure to negotiate. Also, if the permanent five countries in the Security Council finally decided upon a comprehensive disarmament treaty text and there were a couple of spoilers to the treaty that would prevent universal ratification, the Security Council members could insert into the treaty mandatory protocols to help induce those more obstinate countries into compliance with the treaty.

## CONCLUSION

Today, the world is in a heated debate. We now know that Saddam Hussein did not have nuclear weapons, nor was he close to acquiring them at any time after the first Gulf War. Iran has signed the additional protocol and agreed to increased IAEA inspections. Libya has recently agreed to join the chorus of nations calling for an end to nuclear acquisition and advocating for global disarmament. India and Pakistan have begun high-level diplomatic negotiations again, as the tensions of the late 1990s subside and common ground is sought. The debate is often framed as what to do about North Korea, what to do to beef up the IAEA, and how to prevent terrorists

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<sup>46</sup> Article X of the NPT provides: "Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. . . ." Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

from acquiring unsafe nuclear weapons material. The real question boils down to what do we do next?

Today the world has an opportunity to meet its obligation. Every country in the U.N. can call upon its delegates to convene, and not only call for negotiations, but also to actually begin the pre-negotiation process. The negotiations will not be fast-paced, but they are certainly well worth the effort.

The process that will lead to total nuclear disarmament should have many stages, including but not limited to: rules on negotiation, how deadlocks will be settled, how inspections will be handled, how confidence-building mechanisms can be structured into the various stages of disarmament, how to deal with a breach in performance of the treaty requirements, how fissile material can be accounted for and safeguarded, and how international verification systems can be fool-proofed. Some people argue that as the world's nuclear weapons dwindle logarithmically, the incentive to secretly create a weapon, or maintain weapons increases exponentially. Yet the country that secretly maintains a weapon can no longer threaten its use, nor can it blackmail the world – for in a land of the blind, the man with one eye lives a very precarious and quiet life. Even a country that did maintain a handful of secret nuclear weapons would find itself akin to a man with a revolver in a room full of 200 enemies with knives. In a regime of a beefed-up IAEA with inspection rights that ran superior to claims of national sovereignty, no state could maintain a large nuclear arsenal that would be capable of threatening the world.

I find it most troubling that there *are currently no substantive and comprehensive ongoing negotiations*. The Conference on Disarmament seems to have become quagmired in a successful bad-faith bid by certain countries to ensure that it gets no farther on nuclear disarmament. Therefore, I suggest that the membership of the Conference on Disarmament be

expanded to include all countries, and that an invitation be sent out to the governments of all states to join in the creation of a new body: the Comprehensive Nuclear Disarmament Body. No longer should the non-nuclear countries be pacified with the lip-service that the nuclear states give to eventual disarmament or bilateral treaties between the U.S. and Russia (nine countries now have nuclear weapons).

No matter how Article VI is characterized, its duty to negotiate in good faith is not a hollow obligation. The text of the Nuclear Non-Proliferation Treaty, its *travaux preparatoire*, the intentions of the parties at the time of ratification, and the subsequent actions and statements of the member state parties all confirm that there is a serious legal obligation to sit down and negotiate in good faith. As the international tribunal in the German External Debts Arbitration between Greece and the Federal Republic of Germany explained:

*A pactum de negotiando* is . . . not without legal consequences. It means that both sides would make an effort, in good faith, to bring about a mutually satisfactory solution by way of a compromise, even if that meant the relinquishment of strongly held positions earlier taken. It implies a willingness for the purpose of negotiation to abandon earlier positions and to meet the other side part way. . . . An undertaking to negotiate involves an understanding to deal with the other side with a view to coming to terms.<sup>47</sup>

While researching and writing this paper, many colleagues and friends have scoffed at the idea of a world without nuclear weapons. People declared, “They’ll never give them up!” and asked questions like, “Who will verify that they’ve been destroyed?” To all of those who throw their hands up in futility at the mere thought of attempting such a noble undertaking, I offer this simple challenge: Why not try?

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<sup>47</sup> German External Debts Arbitration (Greece v. Federal Republic of Germany), 47 I.L.R. 418, 453-54 (Jan. 26, 1972).