No. 15-15636

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE REPUBLIC OF THE MARSHALL ISLANDS,

Plaintiff - Appellant,

v.

THE UNITED STATES OF AMERICA; PRESIDENT BARACK OBAMA, THE PRESIDENT OF THE UNITED STATES OF AMERICA; THE DEPARTMENT OF DEFENSE; SECRETARY ASHTON CARTER, THE SECRETARY OF DEFENSE; THE DEPARTMENT OF ENERGY; SECRETARY ERNEST MONIZ, THE SECRETARY OF ENERGY; AND THE NATIONAL NUCLEAR SECURITY ADMINISTRATION,

Defendants - Appellees.

On Appeal from the United States District Court for the
Northern District of California: No. C 14-01885 JSW
The Honorable Jeffrey S. White

BRIEF OF AMICUS CURIAE LAWYERS COMMITTEE ON NUCLEAR POLICY SUPPORTING APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amicus curiae* Lawyers Committee on Nuclear Policy states that it is a non-profit corporation registered in the state of New York and accorded status as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation and no stock.

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IDENTITY, INTEREST, AND AUTHORITY TO FILE

Amicus curiae Lawyers Committee on Nuclear Policy (LCNP) is a non-profit educational association of lawyers and legal scholars established in 1981. LCNP engages in research and advocacy in support of the global elimination of nuclear weapons and a more just and peaceful world through respect for domestic and international law. It serves as the United Nations office of the International Association of Lawyers Against Nuclear Arms. LCNP works both in international settings and at national and local levels in the United States. LCNP officers, members of the Board of Directors, and staff regularly produce articles, papers, statements, and letters, as well as occasional books, on issues of disarmament, non-proliferation, and peace, as can be seen at www.lcnp.org.

The interest of LCNP in this case derives from its longstanding research, analysis, and advocacy regarding international legal obligations relating to nuclear weapons. Of particular relevance is that LCNP played a key role in the worldwide campaign in the early 1990s in support of the United Nations General Assembly's request for an advisory opinion of the International Court of Justice on the legality of the threat or use of nuclear

weapons. LCNP drafted a model brief used by a number of governments in the advisory opinion proceedings and advised governments at the hearings held in 1995. After the opinion was released in 1996, LCNP released a book and articles analyzing it. LCNP also coordinated and was a principal drafter of the 1997 Model Nuclear Weapons Convention, a global treaty for the prohibition and elimination of nuclear weapons, revised in 2007, and circulated on both occasions as an official UN document. In 2008, UN Secretary-General Ban Ki-moon described the model as a "good starting point" for negotiations on nuclear disarmament.

John Burroughs, LCNP Executive Director, Peter Weiss, member of the LCNP Board of Directors and LCNP President Emeritus, and Roger Clark, member of the LCNP Consultative Council, serve on the international legal team for the Republic of Marshall Islands in its cases in the International Court of Justice concerning compliance with nuclear disarmament obligations. No person affiliated with LCNP is counsel for the Republic of the Marshall Islands in its case in the Northern District of California, now the subject of this appeal.

This *amicus curiae* brief of Lawyers Committee on Nuclear Policy is submitted pursuant to Fed. R. App. P. 29(a) with the consent of all parties. A

party's counsel did not author this brief in whole or in part, and no party, party's counsel, or other person contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

A duty to pursue negotiations in good faith on effective measures relating to nuclear disarmament is set forth in Article VI[1] of the Nuclear Non-Proliferation Treaty (NPT),[2] a treaty to which the United States is a party. Moreover, objectively reasonable, discoverable and judicially manageable standards concerning fulfillment of an obligation of good-faith negotiation are well established in international jurisprudence. Such standards as a matter of domestic law are also routinely identified and applied by United States courts, as shown by the Brief of Appellant at 24-26. This *amicus* brief will focus on Article VI and standards of international jurisprudence to demonstrate that the District Court erred in finding "that it lacks any judicially discoverable and manageable standards for resolving the dispute

[1] Article VI provides: "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."

[2] Treaty on the Non-Proliferation of Nuclear Weapons, London, Moscow, and Washington, opened for signature July 1, 1968, entered into force March 5, 1970, 21 U.S.T. 483, 729 U.N.T.S. 161. *Available at* http://www.state.gov/t/isn/trty/16281.htm.

…." Order Granting Motion to Dismiss at 7; ER at 11. The argument is structured as follows.

First, the NPT is readily susceptible to judicial interpretation.

Second, international legal standards govern the performance of an obligation of good-faith negotiation: 1) the fundamental legal principle of good faith; 2) the requirement that a genuine effort be made to commence negotiations; 3) rules governing good-faith conduct of negotiations; and 4) the requirement that a state not frustrate the achievement of the objective of negotiations by its acts and omissions. The requirement that a genuine effort be made to commence negotiations is of central importance in the present case.

Third, legal standards are judicially manageable in the context of determining the applicable legal requirements.

Fourth, legal standards are manageable in the context of affording relief.

A. The NPT Is Readily Susceptible to Judicial Interpretation.

Courts "have the authority to construe treaties and executive agreements." *Japan Whaling Ass'n v. Am. Cetacean Society,* 478 U.S. 221, 230 (1986). A case is not non-justiciable for lack of judicially discoverable

and manageable standards if it involves "normal principles of treaty or executive agreement construction." *Gross v. German Foundation Industrial Initiative*, 456 F.3d 363, 387-388 (3rd Cir. 2006), citing *Japan Whaling*, *supra*.

In *Air France v. Saks*, 470 U.S. 392 (1985), the Supreme Court interpreted the Warsaw Convention, an international air carriage treaty. The Court stated that the "analysis must begin … with the text of the treaty and the context in which the written words are used." *Id*. at 397 (citation omitted). The Court also took into account "the negotiating history of the Convention, the conduct of the parties to the Convention, and the weight of precedent in foreign and American courts." *Id*. at 400. The Court noted that "[r]eference to the conduct of the parties to the Convention and the subsequent interpretations of the signatories helps clarify the meaning of the term [in question]." *Id*. at 403.

In the present case, in addition to the text of the NPT, as discussed *infra* available materials relevant to interpretation of Article VI include: a United Nations General Assembly resolution framing the negotiation of the NPT; negotiating history; and subsequent practice and agreements of states parties,

including in a Geneva body dedicated to disarmament negotiations, and in quinquennial conferences reviewing the treaty.

Also available is the Advisory Opinion of the International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, esp. at ¶¶ 99-103 concerning Article VI (July 8).[3] The ICJ is the judicial branch of the United Nations and the highest court in the world on general questions of international law. In *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353 (2006), the Supreme Court stated that the ICJ's interpretation of a treaty set forth in its judgments "deserves 'respectful consideration,'" citing *Breard v. Greene*, 523 U.S. 371, 375 (1998) (*per curiam*).

The interpretive approach employed by the Supreme Court in *Air France v. Saks* is generally consistent with international standards for the interpretation of treaties set forth in the 1969 Vienna Convention on the Law of Treaties (VCLT).[4] Under Article 31(1) of the VCLT, a treaty must 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

[3] Cases of the International Court of Justice are available at www.icj-cij.org.

[4] Opened for signature May 23, 1969, entered into force January 27, 1980, 1155 U.N.T.S. 331.

and purpose." VCLT Article 31(2) provides that the "context for the purpose of the interpretation of a treaty" includes "its preamble and annexes". VCLT Article 31(3) provides that any subsequent agreement between the parties, or subsequent practice "which establishes the agreement of the parties regarding its interpretation" may be taken into account in interpretation. VCLT Article 32 allows for recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31." VCLT Article 33, not relevant here, concerns the authentic text of a treaty. Articles 31-33 of the VCLT provide the basic principles of treaty interpretation that are widely accepted as constituting customary international law. *See, e.g., Kasikilil Sedudu Island (Botswana v. Namibia), Judgment,* 1999 I.C.J. 1045, at ¶ 18 (Dec. 13).

The United States, though a signatory, has not ratified the VCLT. However, as stated in *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308 (2nd Cir. 2000) (citation omitted): "The United States recognizes the Vienna Convention as a codification of customary international law. The United States Department of State considers the Vienna Convention 'in dealing with day-to-day treaty problems' and recognizes the Vienna

Convention as in large part 'the authoritative guide to current treaty law and practice.'" Further, "United States courts have also cited the Vienna Convention as an authoritative codification of customary international law." *Id*. at 308-309 (citations omitted). The *Chubb* court therefore relied on the VCLT in deciding whether a commercial dispute was governed by a treaty of the United States. *Id.* at 309. While the Supreme Court has not referred to the VCLT in matters of treaty interpretation, as to which canons of U.S. law are well developed, the VCLT at a minimum should be considered a relevant resource regarding the principle that treaties shall be performed in good faith, discussed *infra*.

B. There Are International Legal Standards Governing the Performance of an Obligation of Good-Faith Negotiation.

1. Any Treaty Obligation Must Be Performed in Accordance with the Fundamental Legal Principle of Good Faith.

The Charter of the United Nations, Article 2(2), provides: "All Members shall fulfill in good faith the obligations assumed by them in accordance with the present Charter." The United Nations General Assembly affirmed that States have the duty to fulfill in good faith their obligations under international agreements valid under "generally recognized principles and rules of international law," which is indisputably the case with the NPT.

UNGA Resolution 2625 (XXV), 24 October 1970, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. Good faith is thus a legal requirement underpinning the carrying out of an existing obligation.[5]

Judge Mohammed Bedjaoui, former President of the ICJ, has described good faith as "the essential vector of law" and "the generator of legitimate expectations". M. Bedjaoui, "Good Faith, International Law and Elimination of Nuclear Weapons: Keynote Address," in M. Bedjaoui, K. Bennoune, D. Deiseroth, and E. Shafer, *Legal Obligation to Nuclear Disarmament?* (German Section, International Association of Lawyers Against Nuclear

[5] *Cf. Restatement (2d) of the Law of Contracts*, § 205: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Comment (a) states in part: "Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party …." Comment (d) states in part: "A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance."

Arms, 2009), at 158, 160.[6] Judge Bedjaoui stated: "In international relations, states which are supposed to act in good faith are obliged to take into account, in their behavior, their respective legitimate expectations. Each of them has with the other a right, created by good faith, not to be deceived in those expectations." *Id*. at 160.

Good faith is accordingly integral to the mandatory nature of treaties and relevant to their interpretation. Article 26 of the Vienna Convention on the Law of Treaties sets out the requirement *pacta sunt servanda*: "Every treaty in force is binding upon the parties to it and must be fulfilled by them in good faith." Under VCLT Article 31(1), a treaty "shall be interpreted in good faith." Thus Article VI is subject to the over-riding principle set out in Article 26 applicable to all treaties that it is binding and must be performed by the states parties to the NPT in good faith. The obligation under Article 26 applies to all provisions of the NPT and accordingly to Article VI, and in addition Article VI itself requires negotiations to be pursued "in good faith".

[6] Judge Bedjaoui's address is also available at http://lcnp.org/disarmament/2008May01eventBedjaoui.pdf. He was President of the ICJ when it delivered its opinion in *Legality of the Threat or Use of Nuclear Weapons.*

In *Legality of the Threat or Use of Nuclear Weapons*, *supra* at ¶ 102, the International Court of Justice observed regarding the principle of good faith:

> The obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons includes its fulfilment in accordance with the basic principle of good faith. This basic principle is set forth in Article 2, paragraph 2, of the [United Nations] Charter. It was reflected in the Declaration on Friendly Relations between States (resolution 2625 (XXV) of 24 October 1970) and in the Final Act of the Helsinki Conference of 1 August 1975. It is also embodied in Article 26 of the Vienna Convention on the Law of Treaties ….
>
> Nor has the Court omitted to draw attention to it, as follows:
>
> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential." (*Nuclear Tests (Australia* v. *France), Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 268, para. 46.)

The principle of good faith animated the approach of the International Court of Justice in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment,* 1997 I.C.J. 7 (Sept. 25). The case concerned a dispute regarding a joint dam project pursuant to a treaty between Hungary and Czechoslovakia which Hungary maintained had been terminated. The ICJ held that the treaty remained valid, *id.* at ¶ 155(1)D, and that the parties must negotiate in good

faith in light of the prevailing situation and take all necessary measures to ensure the achievement of the treaty's objectives in accordance with such modalities as they may agree upon, *id.* at ¶ 155(2)B. The general treaty obligations, the ICJ stated (*id.* at ¶ 112),

> have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks.
>
> It is all the more important to do this because as the Court recalled in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn". (*I.C.J. Reports 1996*, p. 241, para. 29; …).

The ICJ also stated (*id*. at ¶¶ 141-142):

> It is for the Parties themselves to find an agreed solution that takes into account the objectives of the Treaty, which must be pursued in a joint and integrated way ....
>
> … What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the VCLT, is that the Parties find an agreed solution within the cooperative context of the Treaty.
>
> Article 26 combines two elements, which are of equal importance. It provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal

> interpretation. *The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized*. [Emphasis supplied.]

2. A Genuine Effort Must Be Made to Commence Negotiations.

It is fundamental – and of central importance in the present case – that a genuine effort must be made to commence negotiations**.** As the International Court of Justice stated in the context of a treaty requirement of dispute resolution, the "concept of 'negotiations' … requires – at the very least – a *genuine attempt by one of the disputing parties to engage in discussions* with the other disputing party, with a view to resolving the dispute." *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections,* 2011 I.C.J. 70, at ¶ 157 (Apr. 1) (emphasis supplied). The ICJ has repeatedly characterized the duty to negotiate in good faith as an "obligation *to enter into negotiations* with a view to arriving at an agreement." *North Sea Continental Shelf (F.R.G./Denmark; F.R.G./Netherlands), Judgment,* 1969 I.C.J. 47, at ¶ 85 (Feb. 2) (emphasis

supplied); *see also, e.g., Railway Traffic between Lithuania and Poland*, *Advisory Opinion*, 1931 P.C.I.J. (ser. A/B) No. 42 (Oct. 15), at 116.[7]

Commencement of negotiations is obviously necessary if they are to be conducted. It is also a particularly important step because it tends to build a commitment to the process and to achieving a result. As Judge de Visscher observed:

> Nor should we overlook the psychological value of the opening of negotiations, particularly when the object of the negotiations, as is the case here, is only to apply in practice principles forming part of a pre-established international regime. The opening of negotiations is often a decisive step toward the conclusion of an agreement.

International Status of South-West Africa, *Advisory Opinion*, 1950 I.C.J. 128 (July 11), Dissenting Opinion of Judge Charles de Visscher at 188.

3. There Are International Legal Standards Governing the Good-Faith Conduct of Negotiations.

Once negotiations are commenced, a number of rules govern and circumscribe their good-faith conduct. The legal requirement of good faith is not satisfied when states "obstruct negotiations, for example, by interrupting communications or causing delays in an unjustified manner or disregarding

[7] *Available at* http://www.icj-cij.org/pcij/serie_AB/AB_42/Trafic_ferroviaire_Avis_consultatif.pdf.

the procedures agreed upon." *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment*, 2011 I.C.J. 644, at ¶ 132 (5 Dec.); *see also Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment*, 1974 I.C.J. 3, at ¶ 78 (July 25). The Arbitral Tribunal in *Lake Lanoux* also ruled that good faith would be violated by "an unjustified breaking off of the discussions, abnormal delay, disregard of the agreed procedures, [and] systematic refusals to take into consideration adverse proposals …." *Lake Lanoux Arbitration (France v. Spain)*, 12 U.N.R.I.A.A. 281 (1957), at 23.[8] It stands to reason, moreover, that the notion of undue or abnormal delay applies both to such delay in commencing negotiations, and in sustaining them.

The International Court of Justice has emphasized a further condition that must be satisfied for negotiations to be meaningful: "Negotiations with a view to reaching an agreement also imply that the parties should pay reasonable regard to the interests of the other." *Application of the Interim Accord of 13 September 1995, supra* at ¶ 132. Thus negotiations are not "meaningful," for example, where either of the parties refuses to compromise

[8] *Available at* http://www.ecolex.org/server2.php/libcat/docs/COU/Full/En/COU-143747E.pdf.

and "insists upon its own position without contemplating any modification of it." *North Sea Continental Shelf, supra* at ¶ 85. A party cannot simply ignore the interests of the other party. Such behavior is against the essence of negotiation. In the *Lake Lanoux Arbitration*, *supra* at 32, the Tribunal noted: "[A]ccording to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, ... and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own."

The *AMINOIL Arbitration* Tribunal captured the essence of standards governing good-faith conduct of negotiations once underway, setting out "the general principles that ought to be observed in carrying out an obligation to negotiate, – that is to say, good faith as properly to be understood; sustained upkeep of the negotiations over a period appropriate to the circumstances; awareness of the interests of the other party; and a persevering quest for an acceptable compromise." *Arbitration between Kuwait and American Independent Oil Company (AMINOIL)*, 21 I.L.M. 976 (1982), at ¶ 70.

4. Conduct That Frustrates Achievement of an Agreed Objective of Negotiation is Proscribed.

States subject to an obligation of negotiation "are not allowed (1) advance excuses for not engaging into or pursuing negotiations or (2) *to accomplish acts which defeat the object and purpose of the future treaty*." A. Cassese, *The Israel-PLO Agreement and Self-Determination*, 4 Eur. J. Int'l L. 564 (1993), at 567 (emphasis supplied).[9] Pursuant to the VCLT Article 26 obligation that a treaty in force must be performed by the parties in good faith, the duty of the parties is "not only to observe the letter of the law but also to abstain from acts which would inevitably affect their ability to perform …." *Yearbook of the International Law Commission* (United Nations, 1964), Vol. 1, at 32, ¶ 70 (remarks of Special Rapporteur concerning article that become Article 26).[10] In general, the principle of "[g]ood faith forbids contracting parties to behave in any way that is intended to frustrate the meaning and purpose of a treaty." R. Kolb, "Article 2 (2)," in B. Simma *et al*, *The Charter of the United Nations: A Commentary* (Oxford University

[9] *Available at* http://www.ejil.org/pdfs/4/1/1219.pdf.

[10] *Available at* http://legal.un.org/docs/?path=../ilc/publications/yearbooks/english/ilc_1964_v1.pdf&lang=EFS.

Press, 3rd ed. 2012), Vol. I, at 178. As previously noted, the International Court of Justice has stated that the "principle of good faith obliges the Parties to apply [a treaty] in a reasonable way and *in such a manner that its purpose can be realized*." *Gabčíkovo-Nagymaros Project, supra* at ¶ 142 (emphasis supplied). A showing of a violation of the obligation of good faith does not require "actual damage. Instead its violation may be demonstrated by acts and failures to act which, taken together, render the fulfilment of specific treaty obligations remote or impossible." G.G. Gill, "State Responsibility and the 'Good Faith' Obligation in International Law," in M. Fitzmaurice and D. Sarooshi, eds., *Issues of State Responsibility before International Judicial Institutions* (Clifford Chance Series, Volume VII, 2004), at 84.

C. Legal Standards Are Judicially Manageable in the Context of Determining the Applicable Legal Requirements.

A central question in this case is whether United States opposition, manifested in various ways, to commencement of multilateral negotiations on complete nuclear disarmament is consistent with Article VI. Notably, the United States refused to participate in the 2013 UN Open-Ended Working Group on taking forward proposals for multilateral negotiations on nuclear disarmament; votes against UN General Assembly resolutions calling for

commencement of negotiations on complete nuclear disarmament; and makes official statements setting forth its opposition to negotiation of complete nuclear disarmament. Complaint at ¶¶ 73, 77, 78, 84; ER at 065-067, 069. In the joint statement at the United Nations High-Level Meeting on Nuclear Disarmament on September 26, 2013 cited in ¶ 84 of the Complaint,[11] France, the United Kingdom, and the United States stated: "And while we are encouraged by the increased energy and enthusiasm around the nuclear disarmament debate, we regret that this energy is being directed toward initiatives such as this High-Level Meeting, the humanitarian consequences campaign, the Open-Ended Working Group and the push for a Nuclear Weapons Convention." In the view of the United States, "nothing in Article VI requires time frames or specific requirements for achieving the final elimination of nuclear weapons." Statement of Robert Wood, United States Special Representative to the Conference on Disarmament, Main Committee

[11] *Available at* http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/HLM/26Sep_UKUSFrance.pdf.

I – Subsidiary Body: Effective Measures, 2015 NPT Review Conference, May 8, 2015.[12]

Deciding the question of whether Article VI requires pursuit within a near-term time frame of negotiations on complete nuclear disarmament is a legal question well within the competence of a United States court to decide, turning on an interpretation of Article VI. As explained earlier, that is a task which a court can perform. Not only is the text of the NPT at hand, but also materials relating to negotiating history and state practice and agreements in the interpretation and application of the NPT, as well as the ICJ Advisory Opinion.

Largely based on NPT Article VI, the ICJ unanimously concluded: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations on nuclear disarmament in all its aspects under strict and effective international control." *Legality of the Threat or Use of Nuclear*

[12] *Available at* http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/revcon2015/statements/8May_US_SBI.pdf.

Weapons, supra at ¶ 105(2)F. That conclusion stands as the authoritative international interpretation of Article VI.[13]

What Article VI requires is a question on the merits. However, we offer below, briefly, an interpretation of Article VI congruent with that of the ICJ to indicate that the position of the Republic of Marshall Islands is plausible (indeed, in our view correct) and that interpretation of the NPT and thus resolution of the question regarding pursuit of negotiations is manageable.

Article VI provides:

> 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.

The NPT Preamble provides in relevant part:

> The States concluding this Treaty, hereinafter referred to as the "Parties to the Treaty",

[13]An advisory opinion of the ICJ is not binding *per se* under international law, unlike an ICJ judgment. Regarding judgments, Article 59 of the Statute of the International Court of Justice provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case." However, interpretations of international legal obligations set forth in an advisory opinion are widely considered to be authoritative, and at a minimum certainly deserve "respectful consideration," as the Supreme Court stated regarding ICJ judgments in *Sanchez-Llamas*, *supra*.

> Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples, …
>
> Declaring their 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,
>
> Urging the co-operation of all States in the attainment of this objective,
>
> Recalling the determination expressed by the Parties to the 1963 Treaty banning nuclear weapons tests in the atmosphere, in outer space and under water in its Preamble to seek to achieve the discontinuance of all test explosions of nuclear weapons for all time and to continue negotiations to this end,
>
> Desiring to further the easing of international tension and the strengthening of trust between States in order to facilitate the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons and the means of their delivery pursuant to a Treaty on general and complete disarmament under strict and effective international control[.]

Reading Article VI and the Preamble together, it is abundantly clear that complete nuclear disarmament is the overriding objective of the required negotiations. Moreover, NPT negotiating history and the practice and agreements of states subsequent to adoption of the NPT demonstrate that negotiations on "effective measures … relating to nuclear disarmament"

encompass negotiations on complete nuclear disarmament, which in turn would contribute to general and complete disarmament.

In 1965, while negotiation of the NPT was underway, a United Nations General Assembly resolution formulated the five principles on which the treaty should be based. UNGA Resolution A/RES/2028 (XX), 19 November 1965, adopted by a vote of 93 to zero, with five abstentions. They include:

> b. The treaty should embody an acceptable balance of mutual responsibilities and obligations of the nuclear and non-nuclear Powers;
>
> c. The treaty should be a step toward the achievement of general and complete disarmament and, more particularly, nuclear disarmament.

The subsequent inclusion of Article VI in the treaty reflected a bargain between states that relinquished the option of acquiring nuclear arms and states that possessed such arms. Mohamed Shaker, author of an authoritative three-volume history of NPT negotiations and early practice under the treaty, explained that the responsibility of nuclear weapon states under Article VI "was looked upon by the non-nuclear-weapon States not only in the context of achieving a more secure world but as a *quid pro quo* for the latter's renunciation of nuclear weapons." M.I. Shaker, *The Nuclear Non-*

Proliferation Treaty: Origin and Implementation, 1959–1979 (London: Oceana Publications, Vol. II, 1980), at 564.

Judge Bedjaoui underscored the *quid pro quo* as follows:

> [I]n the spirit of the NPT negotiators, Article VI, which lays out the obligation to negotiate nuclear disarmament in good faith, was clearly conceived as *the necessary counterpart to the commitment by the non-nuclear states not to manufacture or acquire nuclear weapons; it is without a doubt one of the essential elements of the "acceptable equilibrium of mutual responsibilities and obligations between nuclear powers and non-nuclear powers" which, according to the General Assembly, was to be established by the Nuclear Non-Proliferation Treaty which it called for in 1965. In 1995, at the time of the fifth Conference of Parties, which decided the extension of the NPT for an indefinite duration, the reciprocal nature of the said obligations was vigorously reaffirmed*.

"Good Faith, International Law and Elimination of Nuclear Weapons," *supra* at 154 (emphasis in original; footnote omitted).

The NPT was opened for signature on 1 July 1968. Soon after, on 15 August 1968, the Geneva-based Eighteen Nation Disarmament Committee, the precursor of today's Conference on Disarmament, under United States and Soviet leadership adopted an agenda whose first item was listed under a heading taken from Article VI:

> 1. Further effective measures relating to the cessation of nuclear arms race at an early date and to nuclear disarmament. Under this heading members may wish to discuss measures dealing with the

> cessation of testing, the non-use of nuclear weapons, the cessation of production of fissionable materials for weapons use, the cessation of manufacture of weapons and reduction and subsequent elimination of nuclear stockpiles, nuclear-free zones, etc. …
>
> 4. General and complete disarmament under strict and effective international control.[14]

Item 1 encapsulated multilateral measures contemplated during negotiation of the NPT for the fulfilment of the Article VI obligations as to cessation of the nuclear arms race and nuclear disarmament. It includes reduction and subsequent *elimination* of nuclear stockpiles as an *effective measure*. General and complete disarmament was a separate agenda item.

The 2000 NPT Review Conference adopted "practical steps for the systematic and progressive efforts to implement Article VI." Final Document, NPT/CONF.2000/28 (Parts I and II), at 14-15.[15] They include step six, an

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[14] Final Verbatim Record of the 390th Meeting of the Eighteen-Nation Committee on Disarmament, 15 August 1968, ENDC/PV.390, at 30, *available at* http://quod.lib.umich.edu/e/endc/4918260.0390.001?rgn=main;view=fulltext. The NPT was negotiated in this body and the history is available at the same site.

[15] *Available at* http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/GENERAL-DOCS/2000FD.pdf.

"unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament, to which all States Parties are committed under article VI." A separate step, step 11, reaffirms "that the ultimate objective of the efforts of States in the disarmament process is general and complete disarmament under effective international control." The unequivocal undertaking to accomplish the total elimination of nuclear arsenals was reaffirmed by the 2010 NPT Review Conference.[16] Final Document, NPT/CONF.2010/50 (Vol. I), at 19.[17]

As to the Article VI clause regarding a treaty on general and complete disarmament, when the NPT was negotiated such a treaty was understood, as set out in United Nations General Assembly resolution 808(A) of 4 November 1954, as providing for the prohibition and elimination of nuclear weapons and other weapons of mass destruction, the limitation and reduction of armed forces and conventional armaments, and the establishment of

[16] The 2015 NPT Review Conference was unable to reach agreement on a substantive outcome document. *See* United Nations Meetings Coverage, "Consensus Eludes Nuclear Non-Proliferation Treaty Review Conference as Positions Harden on Ways to Free Middle East of Mass Destruction Weapons," May 22, 2015, http://www.un.org/press/en/2015/dc3561.doc.htm.

[17] *Available at* http://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/revcon2010/FinalDocument.pdf.

effective international control through an organ. Subsequent to entry into force of the NPT, the practice of states has been to negotiate separate conventions on prohibition and elimination of weapons of mass destruction, with the 1972 Biological Weapons Convention[18] and the 1992 Chemical Weapons Convention.[19] The ICJ took note of this practice, stating that the "pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments." *Legality of the Threat or Use of Nuclear Weapons, supra* at ¶ 57. The practice of states has also been to negotiate separate treaties on other types of weapons, such as anti-personnel landmines and cluster munitions. All of these matters are considered by the General Assembly under the rubric of "general and complete disarmament".

In light of this history, a comprehensive convention on nuclear disarmament (or instruments to the same end) would, like the conventions on chemical weapons and biological weapons, partially fulfil the general and

[18] Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, London, Moscow, and Washington, opened for signature April 10, 1972, entered into force March 26, 1975, 26 U.S.T. 583, 1015 U.N.T.S. 163.

[19] Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, Geneva, opened for signature 13 January 1993, entered into force April 29, 1997, S. Treaty Doc. No. 103-21, 1974 U.N.T.S. 317.

complete disarmament prong of Article VI. As explained above, a clear separation between the obligation to negotiate nuclear disarmament and the obligation to negotiate general and complete disarmament was established in the Eighteen Nation Disarmament Committee shortly after the NPT was negotiated, and by the 2000 and 2010 Review Conference adoption and then reaffirmation of an unequivocal undertaking to the total elimination of nuclear arsenals. Also, state practice since the NPT was adopted has been to eliminate biological, chemical, and other weapons by way of weapon-specific agreements. Accordingly, the obligation to negotiate nuclear disarmament is not conditional on progress or negotiations regarding general and complete disarmament. George Bunn, a principal U.S. negotiator of the NPT, co-chair of the Eighteen Nation Committee on Disarmament in 1968, and first general counsel of the U.S. Arms Control and Disarmament Agency, reached the same conclusion in a 1994 paper reviewing NPT negotiating history and subsequent practice: "The ordinary meaning of Article VI, its negotiating history and the parties' practice in implementing it all suggest that the pre-conditions often proposed for general complete disarmament do not need to be satisfied to trigger an obligation to negotiate in good faith toward zero nuclear weapons along the 'nuclear disarmament' route." G. Bunn, *Extending*

the Non-Proliferation Treaty: Legal Questions Faced by the Parties in 1995, American Society of International Law, Issues Papers on World Conferences, (No. 2, 1994), at 29.

This brief review of NPT negotiating history and subsequent practice and agreements of states suffices to indicate that a reasonable interpretation of Article VI is that complete nuclear disarmament is both an "effective measure" and a partial fulfilment of the objective of general and complete disarmament. Accordingly, parties to the NPT are obligated to pursue negotiations in good faith on "effective measures" to accomplish the elimination of nuclear weapons.[20] The ICJ's formulation of the nuclear disarmament obligation, largely based on Article VI, is in harmony with this interpretation of Article VI: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations on nuclear disarmament in all its

[20] *Cf*. the Humanitarian Pledge put forward by Austria, which states in part: "We call on all states parties to the NPT to renew their commitment to the urgent and full implementation of existing obligations under Article VI, and to this end, to identify and pursue *effective measures* to fill the legal gap for the prohibition and elimination of nuclear weapons …." (Emphasis supplied.) As of July 9, 2015, the pledge had been endorsed or supported by 112 countries. The pledge ("Pledge Document") and list of countries ("Pledge Support") can be accessed at http://www.bmeia.gv.at/index.php?id=55297&L=1.

aspects under strict and effective international control." *Legality of the Threat or Use of Nuclear Weapons, supra* at ¶ 105(2)F.

The above interpretation is also consistent with the Marshall Islands' explanation of its 1995 decision to ratify the NPT included in its Written Statement submitted June 22, 1995 in *Legality of the Threat or Use of Nuclear Weapons*.[21] The statement reads in part:

> 2. The threat of nuclear weapons
> The Republic of the Marshall Islands, as one having first hand experience of the devastating impacts of nuclear weapons, believes that the threat of use of nuclear weapons continues….
>
> 5. Marshall Islands interest in nuclear disarmament
> Given its extensive first hand experience with adverse impacts of nuclear weapons, Marshall Islands' decision to ratify the Nuclear Non-Proliferation Treaty this year is understandable. This objective of the treaty of "the cessation of the manufacture of nuclear weapons, the liquidation of all their existing stockpiles,

[21] Letter dated 22 June 1995 from the Permanent Representative of the Marshall Islands to the United Nations, together with Written Statement of the Government of the Marshall Islands, *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=e1&case=95&code=unan&p3=1. The statement includes powerful testimony by Lijon Eknilang of Rongelap Atoll concerning the health effects of the 15 megaton 1954 Castle Bravo nuclear test detonation on her, members of her family, and other people on her island. Generally regarding the health and environment effects of the prolonged nuclear testing carried out in the Marshall Islands, see the report of a UN Human Rights Council Special Rapporteur concerning a 2012 mission to the Marshall Islands and the United States. A/HRC/21/48/Add.1, September 3, 2012, *available at* http://ap.ohchr.org/documents/sdpage_e.aspx?b=10&se=133&t=9.

> and the elimination from national arsenals of nuclear weapons" is wholly consistent with Marshall Islands' foreign policy of peaceful co-existence as well as with the overarching goal of the international community to achieve global peace.

In proceedings on the merits, the United States likely would argue for an interpretation of Article VI that differs in some respects from the one sketched above. Determining the correct interpretation of Article VI is a task well within judicial competence; interpretation of legal instruments is a core judicial function.

D. Legal Standards Would Be Judicially Manageable in the Context of Affording Relief.

A declaratory judgment setting out the requirements of good-faith performance of Article VI would be based upon existing legal standards and would provide meaningful parameters for United States conduct. It would not necessarily dictate any one choice of forum or any particular form of legal instrument or instruments to be pursued, but it would set out the legal requirements for commencing and conducting negotiations and for the outcome to be pursued.

It is relevant to both types of relief requested, declaratory and injunctive, that it is feasible for the United States to call for and if necessary itself convene negotiations on complete nuclear disarmament within a near-

term time frame. This is demonstrated by the initiation by the United States of a series of Nuclear Security Summits aimed at coordinating and stimulating global efforts to reduce the vulnerability of nuclear materials to diversion to nuclear explosives. The first such summit was convened by the United States in 2010.[22] Another will be convened by the United States in 2016.[23]

It is also relevant to both types of relief that it is not necessary that all states possessing nuclear arsenals participate in nuclear disarmament negotiations. A treaty could provide that it would enter into force only when certain states have ratified it, as is the case with the Comprehensive Nuclear-Test-Ban Treaty.[24] Those states could include ones that did not participate in negotiations, or that opposed adoption of the treaty. Or a treaty could make some obligations of initial participants in a treaty in force contingent upon certain non-participants eventually joining. While security considerations

[22] *See* U.S. Department of State, Nuclear Security Summit 2010, at http://www.state.gov/t/isn/nuclearsecuritysummit/2010/.

[23] *See* Nuclear Threat Initiative, Nuclear Security Summits 2014 and 2016, at http://ntiindex.org/the-road-ahead/2014-and-2016-nuclear-security-summits/.

[24] Opened for signature September 24, 1996, not yet entered into force. Text available at http://www.state.gov/t/avc/trty/16411.htm.

vary depending on the weapon and legal instrument involved, it is noteworthy that in the case of the 1972 Biological Weapons Convention, France and China did not become parties until nearly a decade after the treaty had entered into force.[25] Also, though they fell within the definition of "nuclear-weapon State" in Article X(3) of the NPT, France and China joined more than two decades after the treaty had entered force.[26]

[25] *See* United Nations Office for Disarmament Affairs, Status of Biological Weapons Convention, http://disarmament.un.org/treaties/t/bwc.

[26] *See* United Nations Office for Disarmament Affairs, Status of Nuclear Non-Proliferation Treaty, http://disarmament.un.org/treaties/t/npt.

CONCLUSION

For the foregoing reasons, the District Court erred in finding that it lacks any judicially discoverable and manageable standards for resolving the dispute.

RESPECTFULLY SUBMITTED this 20th day of July, 2015.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. Rules App. P. 29(d) and 32(a)(7)(B) because this brief contains 6840 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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