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Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?

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PARSING GOOD FAITH:
HAS THE UNITED STATES VIOLATED ARTICLE VI
OF THE NUCLEAR NON-PROLIFERATION TREATY?

DAVID A. KOPLOW

The Nuclear Non-Proliferation Treaty (NPT) has long been the cornerstone of the international effort to retard the spread of nuclear weaponry to additional countries, now appreciated as the greatest post-cold war threat to international peace and security. Under this treaty, the parties also undertook to pursue in good faith additional negotiations leading to further reductions in nuclear weapons—and, in fact, such subsequent bargaining has recently yielded dramatic, far-reaching successes. Professor Koplow, however, argues that in one crucial respect, the United States has been derelict in implementing the obligations of the NPT: Recent American presidents have rigidly refused to participate in negotiations that could lead to a comprehensive nuclear test ban treaty, abolishing all nuclear explosions everywhere. Although the NPT’s requirement of test ban negotiations is ambiguously stated, a close reading of the legal materials establishes that it was a key ingredient in the basic bargain of the NPT, and that numerous countries consider it a major, unresolved treaty controversy. Professor Koplow contends that this United States refusal to pursue a test ban treaty is not merely unwise strategy, it is a violation of the country’s international law commitments, exposing the United States to legal remedies and undermining both the global non-proliferation regime and the more general campaign to build support for a new world order based upon greater fidelity to the rule of law.

I. INTRODUCTION

These are heady days for disarmament. Progress is being registered with unprecedented speed and depth across a wide range of longstanding security concerns, and American negotiators and their counterparts from other countries are racing past obstacles that seemed impenetrable only a few years ago. The bargaining range has engulfed strategic nuclear forces, conventional arms, chemical weapons, and all manner of other

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1. Substantial cuts in nuclear offensive systems have been negotiated in the Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Reduction and Limitation of Strategic Offensive Arms, July 31, 1991, U.S.-
military questions. Even the debate about strategic defense, for a decade


4. Arms control efforts have embraced a variety of “confidence-building measures” which do not directly require reductions in military strength, but do ease the fears about any possible surprise attack, through implementation of devices to enhance the “transparency” of national military structures, such as prior notification of military maneuvers, invitations for observers, permission for short-notice inspections, etc. See Treaty on Open Skies, S. TREATY DOC. No. 37, 102d Cong., 2d Sess. (1991) (not in force); Document of the Stockholm Conference on Confidence- and Security-Building Measures and Conventional Disarmament in Europe, Sept. 19, 1986, in UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS: TEXTS AND HISTORIES OF THE NEGOTIATIONS 323 (1990); ARMS CONTROL AND CONFIDENCE BUILDING IN THE MIDDLE EAST (Alan Platt ed., 1992).
the most resilient sticking point, has become more civil, if not yet fully convergent.\(^5\) Everywhere, it seems, arms control is advancing.

In one salient area, however, there has been little or no progress in the modern era, and it is, unfortunately, the one area that has stood for decades in the eyes of many other countries as the primary litmus test of superpower sincerity and achievement in disarmament. This conspicuous exception to the record of recent advances in arms control concerns the American policy toward nuclear test ban proposals—arrangements which would culminate the generation-old effort to halt forever all nuclear explosions around the globe. The United States’ torpid refusal to budge on this crucial issue, and its insistence upon continuing nuclear weapons testing and development, have reflected an attitude still mired in the outmoded cold war context and now threaten to disrupt pursuit of some of the most important national and global security goals in the coming decades, in particular undermining the urgent efforts at nuclear non-proliferation.

This Article explores the United States’ unwillingness to pursue test ban agreements more vigorously and measures that performance against existing legal obligations. The question of nuclear testing policy has long been at the top of the international agenda for arms control, and it has been ensconced in numerous U.S. treaty obligations, most notably the Limited Test Ban Treaty (LTBT) of 1963\(^6\) and the Nuclear Non-Proliferation Treaty (NPT) of 1968.\(^7\) In particular, article VI of the NPT imposes a clear legal commitment upon the United States to pursue “in good faith” negotiations toward further measures of arms control such as a comprehensive nuclear test ban treaty (CTBT)—yet the Reagan and Bush administrations overtly turned in other directions. The contention of this Article, based upon a legal analysis of the object and purpose of the NPT and other instruments, is that this American behavior now constitutes a material breach of the treaty, exposing the United States to specific, damaging legal remedies and to continued political opprobrium and undermining our ability to gain international consensus upon a strengthened non-proliferation regime.

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The Article begins by providing the necessary background on the relevant international arms control treaties and the accompanying security concerns. Part II thus presents both the NPT, and its focus on avoiding the spread of nuclear weapons capability, and the LTBT, and its preliminary regulation of nuclear weapons testing. Part II studies the intersection between these two sets of commitments (and their respective progeny) and considers the international community’s linkage of them in political and legal terms. It also updates the global security picture, discussing the contributions of American presidents Ronald Reagan and George Bush and their Soviet and Russian counterparts, Mikhail Gorbachev and Boris Yeltsin.

Part III then scrutinizes the language of article VI of the NPT, asking three urgent questions. First, to what extent did the parties actually contemplate that a nuclear test ban would become the centerpiece of the superpowers’ NPT obligation—why have other disarmament achievements not adequately discharged the responsibility? Second, what, precisely, is the commitment assumed under article VI—in particular, what should we understand the term “good faith” to require in these international treaty negotiations? Third, what are the consequences of a violation of this provision of the treaty—what potential international liability has the United States now incurred, and how might this ongoing controversy jeopardize United States non-proliferation policy?

Part IV presents the “bottom line” of the Article, marshalling the case that the United States has committed a material breach of its obligations under the NPT. The Article is unable to be precise about exactly what behaviors are now required of the United States or about what specific timetable is mandated for negotiation or conclusion of the next step in the sequential evolution of test bans. But it is incumbent upon the United States to do something—a vague and aspirational obligation is not necessarily a void and meaningless one—and recent American policies, refusing even to talk about a comprehensive test ban agreement, fall short of our international responsibilities.

Finally, the Conclusion offers some ruminations about the larger political and legal context of the test ban controversy, arguing that in the long term, it is profoundly in the American interest to promote greater global adherence to the rule of law and augmented respect for good faith compliance with even imprecise treaty terms. More than any other nation, the United States has a major stake in enhancing the world’s reliance upon the legal trappings of full treaty compliance, and our recent posture toward nuclear test ban policy has thus been short sighted and ultimately self-defeating. The United States should therefore return to the negotiating table and pursue a comprehensive test ban treaty, seeking to register significant achievements no later than the opening of the 1995
Review Conference for the NPT, before our ongoing noncompliance does further violence to the fabric of international law and security.

II. NON-PROLIFERATION AND NUCLEAR TESTING

Efforts to retard the spread of nuclear weapons have long gone hand-in-hand with efforts to restrict the testing of nuclear explosive devices, and this Part charts that convoluted history. The overlaps between these two areas of disarmament policy continue unabated into the current milieu, affecting relationships among the United States, the Commonwealth of Independent States, and all other participants in the global security regime.

A. Nuclear Non-Proliferation

Since the dawn of the nuclear age, the United States has been committed to endeavoring to halt the spread of nuclear weapons. As the "nuclear club" began inexorably to expand, American efforts intensified, amidst apprehensions that indiscriminate proliferation of nuclear technology could generate intractable security problems for the United States and others. President Kennedy's famous 1963 prediction, that the world might contain up to twenty-five nuclear-capable countries by 1975, reflected a profound concern about the complexity of that type

8. Among the earliest proposals aimed at safely moving beyond the American post-World War II monopoly on nuclear weaponry were the Baruch Plan (for international control over nuclear research and development), Eisenhower's Atoms for Peace proposal (sharing the technology for civilian applications of nuclear power), and a raft of multilateral arms control suggestions. See INTERNATIONAL ARMS CONTROL: ISSUES AND AGREEMENTS 94-116 (Coit D. Blacker & Gloria Duffy eds., 2d ed. 1984) [hereinafter Blacker & Duffy]; COMMITTEE ON INT'L SECURITY AND ARMS CONTROL, NAT'L ACADEMY OF SCIENCES, NUCLEAR ARMS CONTROL: BACKGROUND AND ISSUES 233-37 (1985) [hereinafter NAS]; LLOYD JENSEN, NEGOTIATING NUCLEAR ARMS CONTROL 54-58 (1988).


10. GLENN T. SEABORG, KENNEDY, KHURSHCHEV AND THE TEST BAN 198-99 (1981) (In response to a question at a press conference, Kennedy said, "I see the possibility in the 1970s of the President of the United States having to face a world in which fifteen or twenty or twenty-five nations may have these weapons. I regard that as the greatest possible danger . . . ."). See also Blacker & Duffy, supra note 8, at 131; JENSEN, supra note 8, at 52; Memorandum from the Secretary of Defense to the President, The Diffusion of Nuclear Weapons With and Without a Test Ban Agreement (1963) (secret memorandum, declassified and available through National Security Archive,
of global structure, as well as an American resolution to spearhead efforts to forestall it.\footnote{11} Nuclear non-proliferation provided one of the earliest topics for superpower attempts at collaboration, and resistance to further dissemination of nuclear weapons was one of the few security-related issues that the United States and the Soviet Union were occasionally able to agree upon, even during the depths of the cold war.\footnote{12} Today, as the world shifts attention away from exclusive preoccupation with the problems of the traditional East/West axis, toward increasing concern for the North/South dichotomy,\footnote{13} nuclear proliferation has once again been

U.S. Nuclear Non-Proliferation Policy 1945-1991 File, document 892) (predicting that "about 16 countries, excluding the four present nuclear countries, will be able to acquire at least a few nuclear weapons and a crude delivery capability during the next ten years").

11. American leaders have consistently spoken out against the spread of nuclear weapons and have sometimes made it a key national priority. President Jimmy Carter, for example, initiated a major International Nuclear Fuel Cycle Evaluation (INFCE), attempting to educate other countries about the dangers of reliance upon weapons-grade materials in civilian power production. Blacker & Duffy, \textit{supra} note 8, at 165-66; JENSEN, \textit{supra} note 8, at 71-73. The United States Congress, too, has been active, contributing major legislation designed to tighten controls over nuclear development and exports. Blacker & Duffy, \textit{supra} note 8, at 166-67 (citing 1978 Nuclear Non-Proliferation Act).

12. The United States and the Soviet Union peppered each other with arms control proposals, including various non-proliferation schemes, during the 1950s and 1960s, but mutual distrust (and the desire to retain some ability to collaborate on nuclear matters with alliance partners) prevented them from reaching major areas of agreement. JENSEN, \textit{supra} note 8, at 54-59; Blacker & Duffy, \textit{supra} note 8, at 153-54. Overall, the Soviet Union has accumulated a good record of support for non-proliferation objectives (except, importantly, for its early assistance to the Chinese nuclear program), probably at least as good as that of the United States. William C. Potter, \textit{Exports and Experts: Proliferation Risks From the New Commonwealth}, \textit{ARMS CONTROL TODAY}, Jan.-Feb. 1992, at 32; JENSEN, \textit{supra} note 8, at 70, 76-77; William C. Potter, \textit{Soviet Nuclear Export Policy, in LIMITING NUCLEAR PROLIFERATION} 213-52 (Jed C. Snyder & Samuel F. Wells, Jr. eds., 1985).

13. Export international panels have long stressed the growing potential instability and conflict resulting from the extreme disparities in wealth between the developed and the developing world. \textit{INDEPENDENT COMMISSION ON INTERNATIONAL DEVELOPMENT ISSUES (BRANDT COMMISSION), NORTH-SOUTH: A PROGRAMME FOR SURVIVAL} (1980) and \textit{COMMON CRISIS NORTH-SOUTH: COOPERATION FOR WORLD RECOVERY} (1983); \textit{INDEPENDENT COMMISSION ON DISARMAMENT AND SECURITY ISSUES (PALME COMMISSION), COMMON SECURITY: A PROGRAMME FOR DISARMAMENT} (1982). In contrast, Robert M. Gates, Director of the Central Intelligence Agency, recently testified to the Senate Armed Services Committee that due to the end of the cold war and the reductions in Soviet military spending and capability, the threat to the United States of deliberate nuclear or conventional attack by the states of the new Commonwealth of Independent States "has all but disappeared for the foreseeable future." George Lardner, Jr., \textit{Republics' Procurement of Arms Said to Plunge}, \textit{WASH. POST}, Jan. 23, 1992, at A20.
thrust into a high profile. Few scenarios can be as horrific as the possibility that Saddam Hussein, Moammar Gadhafi, or others of their ilk would soon possess weapons of mass destruction, and the rest of the world has recoiled against that eventuality. Even the Bush administration, criticized for allowing the search for commercial advantage to prolong imprudent weapons-related sales to Iraq, responded with an “Enhanced Proliferation Control Initiative,” designed to tighten access to critical materials and technology. Today, nuclear


15. Some experts have argued that, at least in some situations, a degree of nuclear proliferation might not be such a bad thing: It could contribute to deterrence of regional hostilities and perhaps promote a modicum of restraint in local conflicts. Moreover, the eventual spread of nuclear knowledge and materials may be inevitable and irreversible, so the United States and others should seek merely to contain, and to adapt to, this propensity, rather than to defeat it. William Pfaff, The Mushroom Spreads, BALT. SUN, Jan. 30, 1992, at 26; JENSEN, supra note 8, at 53-54. Most people, however, have adopted the opposite viewpoint, seeing the diffusion of nuclear weapons as a dangerous and hostile possibility, one that public policy can and should attempt to defeat. Thomas W. Graham, Winning the Nonproliferation Battle, ARMS CONTROL TODAY, Sept. 1991, at 8; Joseph S. Nye, New Approaches to Nuclear Proliferation Policy, 256 SCIENCE 1293 (1992); NAS, supra note 8, at 226-28.

16. The contemporary inspections inside Iraq conducted by the United Nations and other international organizations have highlighted the ability of international renegades to acquire advanced weaponry, the dangers that they pose, and the difficulty of rooting them out, even with extraordinary on-site access. Trevor Rowe, U.N. Still “Concerned” About Iraq, WASH. POST, Apr. 4, 1992, at A19; Bill Gertz, Biological Arms Elude Inspectors, WASH. TIMES, Apr. 21, 1992, at A1; Joseph F. Pilat, Iraq and the Future of Nuclear Nonproliferation: The Roles of Inspections and Treaties, 255 SCIENCE 1224 (1992).


18. Hearings, supra note 17, at 76 (statement of Richard Clarke); id. at 113 (statement of James LeMunyon). See also ACTIVITIES TO PREVENT NUCLEAR PROLIFERATION, ANNUAL REPORT OF THE PRESIDENT, H. DOC. NO. 135, 102d Cong., 1st Sess. (1991) (reviewing all federal activities related to the effort to halt the spread of nuclear weaponry).
non-proliferation has finally attained its deserved degree of public salience: Arresting the spread of advanced weaponry is now recognized as one of the most crucial policy objectives for national security into the next century.19

The Nuclear Non-Proliferation Treaty has stood for two decades as the centerpiece of the global effort to deal with this threat of proliferation.20 The NPT now has 150 parties (more than any other arms control accord),21 it is widely regarded as one of the most

19. President Bush has said,
[It is essential in these times of great change and great promise, and of major progress in arms control, that the community of nations work together even more diligently to prevent nuclear proliferation, which poses one of the greatest risks to the survival of mankind. I urge all states that are not party to the NPT to join and thereby demonstrate their support for the goal of preventing nuclear proliferation, and I call upon all states party to the Treaty to join our efforts to secure the integrity of the NPT, which benefits all countries.

[Nonconventional weapons] proliferation is a major problem, maybe one of the two most pressing problems in the world. I would couple it with regional conflicts. It was that [combination of problems] that led to the Gulf war. It's that combination that we're also dealing with in North Korea, in India-Pakistan.

20. Leading international experts have underscored the importance of the NPT: the Secretary-General of the United Nations has called the NPT "essential" and "most constructive." Message from the Secretary-General of the United Nations, reprinted in NUCLEAR WAR NUCLEAR PROLIFERATION AND THEIR CONSEQUENCES 9 (Sadruddin Aga Kahn ed., 1986) [hereinafter Khan]. Olaf Palme called the NPT "the most important political and legal instrument we have for preventing the spread of nuclear weapons. And I do not hesitate to characterize the NPT as one of the most important international treaties signed since World War II." Keynote Address, reprinted in Khan, supra, at 20, 24. President Johnson considered the NPT "the most important international agreement limiting nuclear arms since the nuclear age began." WILLIAM EPSTEIN, THE LAST CHANCE: NUCLEAR PROLIFERATION AND ARMS CONTROL 103 (1976) [hereinafter LAST CHANCE]. See also Joseph Rotblat, The Foundations for a Strengthened Non-Proliferation Regime, in Khan, supra, at 63, 68 (NPT's "continuation is most important for world security"); Lewis Dunn, An American Perspective, in Khan, supra, at 382, 388 (NPT "is a cornerstone of international efforts to erect and sustain effective barriers to the further spread of nuclear weapons.")

successful weapons regulation regimes in history, and it has spawned a series of related and implementing accords, which wrap potential proliferators inside a dense web of legal constraints.

The NPT itself embodies an intricate series of compromises and tradeoffs. On one side, the non-nuclear-weapon states (NNWS) committed themselves (a) not to receive, manufacture, or otherwise acquire nuclear explosive devices, either directly or indirectly, and (b) to accept international safeguards, under the auspices of the International Atomic Energy Agency (IAEA), permitting on-site inspection and other intrusions to verify compliance with those underlying obligations. On

22. Numerous authorities credit the NPT, and the non-proliferation regime it centers, with the unexpected success in averting the spread of nuclear weapons. See Sam Thompson, The NPT Regime, Present and Future Global Security: An American View, in NUCLEAR NON-Proliferation and GLOBAL SECURITY 151, 164 (David DeWitt ed., 1987); Lewis A. Dunn, The NPT and Future Global Security, in NUCLEAR NON-Proliferation and GLOBAL SECURITY, supra, at 13, 22.


24. NPT, supra note 7, art. II.

25. The IAEA maintains a world-wide network of “safeguards” measures and equipment to monitor the production and consumption of nuclear materials, to account for materials’ whereabouts, and to provide timely detection of any diversion to weapons purposes. NPT parties negotiate individual safeguards agreements with the IAEA to provide close access into facilities with nuclear activities. Jon Jennekens, IAEA Safeguards—What They Are and What They Do, DISARMAMENT 1990, at 89; NAS, supra note 8, at 251-65; Pilat, supra note 16; Lawrence Scheinman, The International Atomic Energy Agency and World Nuclear Order (1987).

26. NPT, supra note 7, art. III. See generally David Fischer & Paul Szasz, Safeguarding the Atom: A Critical Appraisal (1985) (describing the technology, law, and politics of the IAEA safeguards system); David Fischer, Stopping the Spread of Nuclear Weapons: The Past and the Prospects 120-42 (1992). In 1990, the IAEA had safeguards agreements in effect with 82 NNWS; in 1989, the agency conducted more than 2000 inspections in 42 countries. A.Yu. Meshkov, Nonproliferation and
the other side, the nuclear-weapon states (NWS) undertook (a) not to assist or encourage any NNWS in acquiring nuclear weapons, 27 (b) to share the benefits of peaceful application of nuclear power for civilian purposes, 28 and (c) to attempt to curb the nuclear arms race at an early date. 29

Unlike most other arms control agreements, therefore, the NPT is fundamentally asymmetric. 30 It requires the "have not" states to forswear a weapons capability that their NWS neighbors have apparently found useful, even essential, to their security. 31 It requires the "have" countries to pony up a technology transfer, sacrificing what could otherwise be a significant commercial advantage in the international

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27. NPT, supra note 7, art. I.
28. The NWS pledge to share the myriad possible peaceful benefits of the atom actually had two separate components. Under article IV, the advanced states undertook to disseminate the technology related to nuclear power generation. Under article V, they agreed to provide access to nuclear explosions conducted for peaceful purposes, such as mining or civil engineering. Interest in nuclear power has fluctuated during the past two decades, as nuclear anxieties and adverse economics have affected both supply and demand; interest in peaceful nuclear explosions has consistently declined, but may be making a resurgence. Jensen, supra note 8, at 67-69; William J. Broad, A Soviet Company Offers Nuclear Blasts for Sale to Anyone With the Cash, N.Y. Times, Nov. 7, 1991, at A18.
29. NPT, supra note 7, art. VI.
30. Most other multilateral arms control treaties, such as Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological ( Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, in United States Arms Control and Disarmament Agency, Arms Control and Disarmament Agreements: Texts and Histories of the Negotiations 133 (1990) (hereinafter BWC), and the forthcoming CWC, supra note 3, apply identical restrictions upon the arsenals of all parties. Some treaties do require asymmetric reductions to reach common ceilings, but few are as unequal as the NPT. But see CFE Treaty, supra note 2 (establishing starkly different quotas for permissible levels of conventional forces in Europe for the different parties.)
31. Of course, many argue that possession of nuclear weapons would not help the NNWS pursue their legitimate security objectives, and that it would complicate, rather than assist, their search for stability and development. Sometimes, however, these arguments seem to have a bit of hypocrisy when coming from the NWS. See comments of Hans Blix, director general of the IAEA: "There is something paradoxical about nuclear-weapon States desperately urging non-nuclear-weapon States not to do what they, themselves, find it indispensable to do: namely to continue developing nuclear weapons." Hans Blix, The Role of the IAEA and the Existing NPT Regime, in Khan, supra note 20, at 56.
Both sides agree to perpetuate a nuclear oligopoly in favor of the handful of economically and militarily sophisticated states who happened to be the first to invent nuclear weapons, requiring all others to eschew that avenue in pursuit of security and status.\(^3\)

For all of this, the NPT has accumulated a significant, albeit mixed, record of achievement. The number of states known to possess nuclear weapons has grown, but not at the exponential rate feared earlier.\(^3\) Most states are solid in their compliance with their treaty obligations, although some have behaved with a blatantly cynical indifference to the true import of the terms.\(^3\) The inspection apparatus has benefitted from technological and political improvements,\(^3\) yet more substantial strengthening remains to be accomplished.\(^3\)

Most dramatically, several of the key holdout countries—states repeatedly identified as “problems”\(^3\)—have demonstrated their willingness to cooperate with international inspections. The nuclear-weapon states have made “voluntary offers,” allowing the IAEA to implement safeguards on selected civilian power facilities. These safeguards play no direct role in arms control verification (since the military installations are exempt) but they do demonstrate to NNWS and others that the safeguards are inoffensive, inexpensive, and feasible. ElBaradei, supra note 23, at 104; U.S. ARMS CONTROL AND DISARMAMENT AGENCY, ARMS CONTROL AND DISARMAMENT AGREEMENTS: TEXTS AND HISTORIES OF THE NEGOTIATIONS 223-27 (1990) [hereinafter ACDA TREATY BOOK].

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33. The NPT defines a nuclear weapon state as a country which manufactured and exploded a nuclear device before January 1, 1967. NPT, supra note 7, art. IX.3.

34. Four states (Israel, India, Pakistan, and South Africa) have been widely regarded as “undeclared” nuclear powers, possessing the capacity to deploy nuclear arms at will and to use them in combat. LEONARD S. SPECTOR, THE UNDECLARED BOMB 3 (1988). South Africa, however, has recently reversed course, and appears to have begun the process of abandoning its nuclear prowess. See infra note 39.


36. As new types of nuclear power facilities are developed and brought on line, the International Atomic Energy Agency (IAEA) has crafted additional inspection tools and techniques. ElBaradei, supra note 23, at 109-11.

for the NPT regime—have now signaled their intention to join. South Africa, France, and China have all recently adhered to the treaty, and other key actors, such as Argentina and Brazil, are now assuming comparable obligations outside the scope of the NPT itself.

Nevertheless, several crucial players remain aloof from the NPT, including India, Pakistan, Israel, Cuba, and others. Chief among the complaints of some of these holdout states have been allegations that

38. In addition, several newly-independent republics of the former Soviet Union have joined the NPT (e.g., Lithuania) or have declared their intentions to adhere (e.g., Ukraine). Disarmament Newsbl., Dec. 1991, at 14; Dunbar Lockwood, Ukraine to Join START and NPT; All Tactical Nukes Removed, Arms Control Today, May 1992, at 16.


41. Newsbrief (Programme for Promoting Nuclear Non-Proliferation), Spring 1992, at 2 (China deposited instrument of ratification of NPT on March 9, 1992); David Holley, China Considering Signing Nuclear Pact, Wash. Post, June 19, 1991, at A22. For years, China had remained aloof from the NPT and from international non-proliferation efforts generally, deriding them as superpower attempts to preserve global hegemony. More recently, China has become at least a vocal supporter of efforts to constrain the spread of nuclear weapons, linking non-proliferation to nuclear disarmament, and particularly calling for the United States and Russia to conclude a comprehensive test ban treaty. He Qian Jiadong, China's Position on Nuclear Non-Proliferation, in Khan, supra note 20, at 33, 34. Process of Nuclear Disarmament in the Framework of International Peace and Security, with the Objective of the Elimination of Nuclear Weapons, letter from the head of the Chinese delegation addressed to the Chairman of the Disarmament Commission, United Nations General Assembly (April 24, 1992) A/CN.10/166. The actual Chinese record on non-proliferation, however, remains troublesome. Bill Gertz, China Continues Nuclear Testing; U.S. May Respond, Wash. Times, Oct. 24, 1992, at A3. In addition, there have been reports that China is now preparing to accept a comprehensive nuclear test ban. George Leopold, Experts Suggest China May Accede to Ban on Nuclear Tests, Defense News, June 22-28, 1992, at 12.


43. Some NNWS have also criticized the NWS record of compliance with article IV, which contemplates assistance, or at least meaningful cooperation, in developing the technology for exploitation of the power-generating potential of the atom. Many developing states contend that the level of direct support promised as part of the "basic bargain" of the NPT has not yet been forthcoming, because the supplier states have been too restrictive in the application of their national expert policies regarding access to
the treaty is unacceptably "discriminatory" (in confining NNWS to a permanently inferior position) and that the NWS have not yet adequately honored their article VI obligations to pursue timely disarmament.

Some of these holdouts—as well as many leading states that had long ago joined the NPT—stress that the treaty was originally designed to combat equally two distinct forms of proliferation: the more familiar "horizontal proliferation," meaning the spread of nuclear weapons potential to additional states; but also "vertical proliferation," defined as the intensification—the qualitative improvement and the quantitative

nuclear materials and technology. In some instances, non-parties to the NPT have benefitted from greater assistance than has been provided to treaty parties. NAS, supra note 8, at 245; JENSEN, supra note 8, at 68.

44. See Nabil Elaraby, Practical Problems with Multilateral Arms Control Treaties, in INTERNATIONAL LAW OF ARMS CONTROL AND DISARMAMENT, supra note 23, at 45, 48.

Dissatisfaction with the two-tier nature of the NPT has had reverberations on other areas of arms control, too. For example, regarding the international regulation of chemical weapons (CW), the leading states vacillated: Sometimes they pursued a comprehensive CW agreement, banning all forms of production and use by all countries; at other times, that global effort appeared too ambitious, and activists proposed a more modest non-proliferation treaty, which would at least freeze the status quo, before additional countries could acquire CW capability. As a matter of geo-politics, however, the partial regime, confined to a non-proliferation arrangement perpetuating the existing asymmetry in CW capabilities, was unacceptable to many countries, and prolonged pursuit of the comprehensive treaty was the only plausible solution. William Epstein, The Nuclear Testing Threat, BULL. ATOM. SCIENTISTS, July-Aug. 1990, at 35, 36.

Moreover, the occasional efforts of leading supplier states to coordinate their individual national export control policies regarding potential chemical warfare agents (or, for that matter, regarding other potential military materials, such as missile technology or other weapons-capable equipment) have been largely confined to informal, low-profile operations. A leading rationale for maintaining the relative obscurity of these cartels is the desire to avoid exacerbating the affront to the target countries' sensitivities, which might occur if the control regimes were elevated into formal multilateral treaty arrangements that blatantly excluded the "have not" states. See William J. Broad, 27 Countries Sign New Atom Accord, N.Y. TIMES, May 3, 1992, § 1, at 15; UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY, BIG FIVE INITIATIVE ON ARMS TRANSFER AND PROLIFERATION RESTRAINTS, WORLD MILITARY EXPENDITURES AND ARMS TRANSFERS 1990, at 23 (1990); Ian Anthony, The Missile Technology Control Regime, in ARMS EXPORT REGULATIONS 219, 220 (Ian Anthony ed., 1991).

45. From the outset, the starkly two-tier nature of the NPT has drawn criticism from those who assert that the NNWS are giving up more, in terms of potential avenues for pursuit of security, than are the NWS, who have accepted only the indefinite commitment of article VI. Joseph F. Pilat & Robert E. Pendley, Conclusions, in BEYOND 1995: THE FUTURE OF THE NPT REGIME 165, 166-67 (Joseph F. Pilat & Robert E. Pendley eds., 1990); Blacker & Duffy, supra note 8, at 157, 159; Martin G. Bustillo, Linkages Between Vertical and Horizontal Non-Proliferation, in Leventhal & Tanzer, supra note 42, at 171, 176-81.
growth—of the nuclear arsenals of the NWS. A treaty regime that sought to combat only the first danger, without sufficient attention to the parallel hazards of the second, would be politically unsound and legally incomplete.

A primary vehicle for exposing these differences of perspective has been the NPT review conferences, mandated every five years by article VIII of the treaty. These assemblies, designed to "review the operation" of the treaty, have been well attended, they have generated significant improvements in the execution of the treaty obligations, and they have also been de facto converted into international plebiscites on the popularity and effectiveness of the treaty

46. Bustillo, supra note 45, at 171, 174. Similarly, the disarmament lexicon sometimes differentiates between a "qualitative" arms race (in which countries develop increasingly deadly types of weaponry) and a "quantitative" arms race (in which countries deploy larger numbers of weapons, or in which additional countries come to possess the specialized weaponry).

47. Blacker & Duffy, supra note 8, at 154-55. When the United States and the Soviet Union initially presented their proposed draft of the NPT in 1967, it did not have any provision comparable to the current article VI. The NNWS then insisted that a commitment to arms control negotiations be inserted into the text. Many NNWS might not have signed the treaty if it had failed to incorporate an obligation for the NWS to constrain their nuclear arms race. Blacker & Duffy, supra note 8, at 157; Jensen, supra note 8, at 59; Nonproliferation Treaty Hearings on Executive H Before the Senate Comm. on Foreign Relations, 90th Cong., 2d Sess. 201 (July 1968) [hereinafter 1968 Hearings]. See infra, text accompanying notes 182-215.

48. NPT, supra note 7, art. VIII.3.

49. The review conference provision of the NPT expressly directs attention to the goals articulated in the preamble. ("Five years after the entry into force of this Treaty, a conference of Parties to the Treaty shall be held in Geneva, Switzerland, in order to review the operation of this Treaty with a view to assuring that the purposes of the Preamble and the provisions of the Treaty are being realized.") NPT, supra note 7, art. VIII.3.

50. Eighty-four treaty parties (including virtually all those with any significant nuclear-related activities) and 16 other state observers attended the 1990 review conference.

51. During the 1990 review conference, the parties reached a substantial measure of agreement on a range of critical outstanding issues, including improvements to the IAEA safeguards and inspections regime, and the extension of more satisfactory security assurances from NWS to NNWS. These issues had eluded international diplomats for years, yet the review conference was able to reach agreement on 95% of the necessary provisions. Charles N. Van Doren & George Bunn, Progress and Peril at the Fourth NPT Review Conference, ARMS CONTROL TODAY, Oct. 1990, at 8; Leonard S. Spector & Jacqueline R. Smith, Deadlock Damages Nonproliferation, BULL. ATOM. SCIENTISTS, Dec. 1990, at 39; Fourth NPT Review Conference Ends in Deadlock, DISARMAMENT NEWSL., Oct. 1990, at 2.
arrangements. To date, four such review conferences have been held. Two of them (including the 1990 event) dissolved in anomie, unable even to reach consensus on any type of meaningful final document or report. The chief cause of the discord on each occasion was the unrequited interest in a comprehensive nuclear test ban treaty—the superpowers' inability or unwillingness to discharge their article VI obligations in this area was alleged to be so fundamental that the other, truly productive accomplishments of those review conferences were tossed out in the ensuing debate over CTBT policy.

By the 1995 Review Conference, the stakes will be even higher. Under article X, the parties are to assemble after the treaty has been in force for twenty-five years, "to decide whether the Treaty shall continue in force indefinitely, or shall be extended for an additional fixed period or periods." This provision is interestingly ambiguous, and an unprecedented debate has swirled around the question of what will happen.

52. Success and failure at the review conferences have come to symbolize the global state of the non-proliferation regime, and commentators stress the parties' accomplishments (or lack thereof) as harbingers for the future of the NPT. Spector & Smith, supra note 51; William Epstein, Conference a Qualified Success, BULL. ATOM. SCIENTISTS, Dec. 1990, at 45.

Other treaties have emulated the NPT in incorporating regular review conferences. See BWC, supra note 30, art. XII; Seabeds Arms Control Treaty, supra note 23, art. VII; Burrus M. Carnahan, Treaty Review Conferences, 81 AM. J. INT'L L. 226-30 (1987).

53. Joseph E. Pilat & Robert E. Pendley, Introduction, in BEYOND 1995: THE FUTURE OF THE NPT REGIME, supra note 45, at 3; Van Doren & Bunn, supra note 51; Spector & Smith, supra note 51. When the conference produces no final report, the draft report, embodying the hard-won agreements on outstanding issues (safeguards, security assurances, etc.), is deprived of legal significance. But see Fischer, Stopping the Spread of Nuclear Weapons, supra note 26, at 112 (after the failure of the 1990 review conference, several delegations arranged for most of the tentatively-agreed portions of the draft final report to be circulated to all members of the IAEA; the salvaged document has no legal effect, but it may yet help promote fresh agreements on some points); John Simpson, The Nuclear Non-Proliferation Regime After the 1990 Nuclear Non-Proliferation Treaty Review Conference, in VERIFICATION REPORT 1991: YEARBOOK ON ARMS CONTROL AND ENVIRONMENTAL AGREEMENTS 27, 37 (J. B. Poole ed., 1991) [hereinafter Poole] (consequences of failure to conclude a consensus final document).

54. At the 1990 review conference, the NNWS, led by Mexico, insisted upon including a strong CTBT message in the final declaration; the United States refused. Since the conference operates by consensus, rather than voting, there was no way to resolve the impasse. Van Doren & Bunn, supra note 51; Spector & Smith, supra note 51.

55. NPT, supra note 7, art. X.2. The 1995 meeting may thus be characterized alternatively as the Fifth Review Conference or as the Extension Conference. See Simpson, supra note 53, at 39.
if the parties are unable, by majority vote,\textsuperscript{56} to decide upon a future for the NPT at the 1995 conference: Will the treaty expire, will it automatically be extended indefinitely, or will some other avenue be found?\textsuperscript{57} Parties' dissatisfaction with the NPT to date suggests that the 1995 Review Conference may be controversial and contentious, on arms control issues no less than others.

In any event, the future of the NPT—and with it, the future of the global effort to constrain the spread of nuclear weapons—will be in the hands of its parties in 1995, and the NNWS attitudes toward its obligations will be central in any renewal of the obligations. Important changes may therefore occur in the international non-proliferation regime at the time of the next review conference, and evaluation of the record of American and other compliance with article VI surely will be central.

\textbf{B. Nuclear Test Ban Treaties}

Testing has long been crucial to the development of nuclear weapons.\textsuperscript{58} Although it may be theoretically possible for a country

\textsuperscript{56} The NPT ensures a special position for the United States, the Soviet Union, and the United Kingdom in some, but not all, treaty matters. The assent of these three countries was required before the treaty could enter into force for any state (art. IX.3), and they also retain a right to veto any proposed amendments to the treaty (art. VIII.2). However, the treaty provides that the 1995 decision about extension of the treaty is to be taken by a simple majority vote, with no reserved powers for the three depositaries (art. X.2).


\textsuperscript{58} Any country would be less inclined to build, deploy, and threaten to use a weapon that has not been thoroughly tested. For example, if the superpowers had been prevented from testing new types of nuclear warheads at particular points in history, they might have been compelled to refrain from producing weapons such as MIRVs and cruise missiles. David A. Koplow & Philip G. Schrag, rapporteurs, Phasing Out Nuclear Weapons Tests, Belmont Conference on Nuclear Test Ban Policy, \textit{reprinted in 26 STAN. J. INT'L L.} 216-20 (1989) [hereinafter Belmont Report]; NAS, \textit{supra} note 8, at 231. Today, a new series of “third generation” nuclear weapons, including many considered for possible adaptation in the Strategic Defense Initiative (“Star Wars”) program, has been moving toward the testing phase, and a prompt CTBT would preclude them. Dan Fenstermacher, \textit{Arms Race: The Next Generation}, BULL. ATOM. SCIENTISTS, Mar. 1991,
today to develop a crude atomic device without conducting experimental explosions, the actual practice of countries has generally been to test extensively prior to production or deployment of new nuclear arms. The articulation of a test ban treaty, therefore, has long been appreciated as a key step toward heading off the invention and dissemination of new forms of nuclear warheads. Since the 1950s, therefore, a nuclear test ban treaty has consistently been at the top of the international disarmament agenda, retaining a unique degree of public salience.

The first test ban agreement, the Limited Test Ban Treaty of 1963, confined only the location of nuclear tests, restricting the explosions to deep underground caverns where the radioactivity and other products would be safely contained, not venting into the biosphere.

at 29; Belmont Report, supra, at 219-20.

59. FISCHER, STOPPING THE SPREAD OF NUCLEAR WEAPONS, supra note 26, at 156. Of the four "undeclared" nuclear countries, only India is known for certain to have conducted even a single weapons test; Pakistan, Israel, and South Africa were able to assemble at least an unsophisticated nuclear capability without extensive experience with explosions. SPECTOR, supra note 34, at 3-4.

60. The United States had never tested the atomic bombs that were dropped on Japan at the end of World War II, but the United States and the Soviet Union both undertook testing at a high rate throughout the cold war era, with the United States conducting some 936 explosions and the U.S.S.R. 715. Known Nuclear Tests Worldwide, 1945 to December 31, 1991, BULL. ATOM. SCIENTISTS, Apr. 1992, at 49.

61. Countries conduct nuclear test explosions for many purposes, such as verifying the reliability of weapons already in the stockpile, measuring the effects of the blasts against military targets, etc. The primary motivation, however, has been to develop new types of nuclear weapons or to improve upon existing designs. OLIVER THRÄNERT, SOVIET POLICY ON NUCLEAR TESTING, 1985-1991, at 5-10 (1992).


63. LTBT, supra note 6. The conclusion of the LTBT was preceded by a long exchange of public and private negotiations and by a series of unilateral moratoria, during which the nuclear states voluntarily refrained from all testing. The LTBT was the first truly significant United States-Soviet Union arms control accomplishment, and it broke new ground in addressing a wide range of questions such as internal and alliance politics, nuclear strategy, and East-West rivalry. G. Allen Greb & Warren Heckrotte, The Long History: The Test Ban Debate, BULL. ATOM. SCIENTISTS, Aug.-Sept. 1983, at 36; Blacker & Duffy, supra note 8, at 126-34; JENSEN, supra note 8, at 17-29.

64. The LTBT was perhaps more successful as an environmental protection measure (in keeping radioactive debris out of the atmosphere) than as an arms control accomplishment (since the NWS simply adapted to conducting their weapons development experiments underground, with as much vigor and success as they had previously achieved through their atmospheric explosions). SEABORG, supra note 10, at 286-87; Belmont
The LTBT was explicitly only a partial step, representing incomplete progress toward the ultimate objective of a Comprehensive Test Ban Treaty (CTBT) which had eluded the negotiators due to a lack of consensus concerning the applicable verification structures. In the preamble to the LTBT, the negotiating states declared that they were "[s]eeking to achieve the discontinuance of all test explosions of nuclear weapons for all time, determined to continue negotiations to this end." Moreover, in article I of the treaty, immediately after the passage that proscribed tests in selected environments while permitting them to continue underground, the parties stated,

It is understood in this connection that the provisions of this subparagraph are without prejudice to the conclusion of a treaty resulting in the permanent banning of all nuclear test explosions, including all such explosions underground, the conclusion of which, as the Parties have stated in the Preamble to this Treaty, they seek to achieve.

Continuing pursuit of a CTBT was therefore both an underlying assumption of the LTBT and a continuing commitment imposed by it, and the issue remained intensely active in international disarmament diplomacy.

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65. Most people outside the United States refer to the 1963 agreement as the "Partial Test Ban Treaty," and even the United States Secretary of State, upon signing the accord, referred to the "unfinished business" remaining to be accomplished. Miguel Marin-Bosch, Amendment Conference to the Partial Test-Ban Treaty, 14 DISARMAMENT 83, 86 (1991). See The U.S. Arms Control and Disarmament Agency During the Johnson Administration, Policy and Negotiations, Comprehensive Test Ban (1968) (top secret memorandum, declassified and available through National Security Archive, U.S. Nuclear Non-Proliferation Policy 1945-1991 File, document 1234) (summarizing United States government internal and international efforts in pursuit of further testing restrictions during the 1960s).

66. The United States and the Soviet Union exchanged numerous proposals for on-site inspection of suspicious events and for the installation of automated seismic detectors inside each country. At times, it appeared that the gap between their respective verification positions was quite small, but they were unable to reach complete accord. They therefore settled for an agreement prohibiting testing in the atmosphere, in outer space, and under water (environments for which the existing national verification capabilities were deemed adequate), while permitting—at least as an interim measure—explosions confined underground. SEABORG, supra note 10, at 176-81; SCHRAO, supra note 32, at 15-19; ACDA TREATY BOOK, supra note 32, at 37-44.

67. LTBT, supra note 6, pmbl., para. 3.

68. LTBT, supra note 6, art. I, § 1(b).

69. SCHRAO, supra note 62, at 19-27; JENSEN, supra note 8, at 34-48.
Two additional bilateral United States-Soviet Union treaties contained further incremental progress: The Threshold Test Ban Treaty (TTBT) of 1974\textsuperscript{70} and the Peaceful Nuclear Explosions Treaty (PNET) of 1976\textsuperscript{71} confined the \textit{size} of underground nuclear explosions to 150 kilotons yield.\textsuperscript{72} This level was still large enough to permit the development of all manner of new types of nuclear warheads, and the rest of the world was generally unimpressed by the superpowers' accomplishment.\textsuperscript{73} Nevertheless, these accords perhaps embodied enough stepwise progress to provide the negotiators with a fig leaf of coverage for their claims of fidelity to the ongoing arms control obligations.\textsuperscript{74} Moreover, the TTBT restated, and to some extent amplified, the obligations of the LTBT, in its preamble\textsuperscript{75} and in the direct language of operative article I: "The Parties shall continue their negotiations with a view toward achieving a solution to the problem of the cessation of all underground nuclear weapon tests."\textsuperscript{76}

As discussed below, these two treaties did not enter into force until they were supplemented by additional verification protocols in 1990.\textsuperscript{77} They have remained strictly bilateral; no effort has been made to secure the adherence of nuclear powers other than the United States and the Soviet Union (and Russia, its successor state for these purposes).\textsuperscript{78}

\begin{footnotesize}
\begin{enumerate}
\item The traditional mechanism for measuring the size (or "yield") of a nuclear explosive is in tons of TNT equivalent. A 150 kiloton weapon, for example, has a force comparable to 150,000 tons of TNT, and is roughly ten times as powerful as the bomb dropped on Hiroshima at the end of World War II.
\item SCHRAG, supra note 62, at 23; JENSEN, supra note 8, at 34-39.
\item The TTBT was concluded in 1974 but was not submitted to the United States Senate for its advice and consent to ratification until after the PNET was finished in 1976. Shortly thereafter, President Carter elected to defer ratification of both treaties, opting instead to concentrate on negotiating a CTBT. In 1980, the Reagan administration concluded that the verification provisions of the treaties were inadequate, and entry into force was again delayed, this time until two 1990 protocols (see infra note 92) were drafted. Belmont Report, supra note 58, at 210-11.
\item TTBT, supra note 70, pmbl., para. 3 ("Recalling the determination expressed by the Parties to the [LTBT] 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.").
\item TTBT, supra note 70, art. 1, § 3.
\item \textit{See infra} note 92.
\item China has recently tested a nuclear device having a yield several times greater than the 150 kiloton ceiling of the TTBT. Barbara Crossette, \textit{Chinese Set Off Their Biggest Nuclear Explosion}, N.Y. Times, May 22, 1992, at A1.
\end{enumerate}
\end{footnotesize}
Throughout, there have been episodic efforts to renew the direct pursuit of the principal objective, a CTBT. During the Carter administration, negotiators from the United States, the Soviet Union, and Great Britain labored through several rounds of bargaining over three years, achieving substantial agreement on the content of the fundamental obligations and the accompanying verification provisions. Key elements eluded them, however, and no treaty was reached. As noted below, the Reagan administration then suspended the negotiations, and they have not been resumed.

In sum, the history of nuclear non-proliferation efforts is closely intertwined with the history of nuclear test ban efforts. Both have been appreciated as fundamental devices for arresting the nuclear arms race and the further spread of the weaponry, and both have been the subject of countless resolutions of support—expressed with diminishing patience for the delay—in the United Nations General Assembly and in affiliated disarmament negotiating bodies. At a time when the NPT parties, and especially the NNWS, are contemplating the 1995 opportunity to breathe new life into the non-proliferation regime, the article VI connection to nuclear test ban policy becomes especially problematic.


80. Among the unresolved sticking points were crucial verification issues such as the number and location of seismic monitoring stations to be installed in the territory of the parties, and the rights and functions of the personnel conducting on-site inspections. YORK, supra note 79, at 302-10. These difficulties, in turn, arose largely from the failure of political will among the national leadership of the negotiating countries—with the United States giving a priority to SALT II over CTBT, and with the Soviet Union invading Afghanistan and thus ending all hopes for major arms control accomplishments. Id. at 316-19.

81. The most recent major forum for continuing international deliberations on testing limitations was the 1991 Amendment Conference for the LTBT. At this event, prompted by a request from one-third of the parties to the treaty, representatives debated whether to attempt to achieve a CTBT via use of the amendment provisions of the LTBT. Although many states expressed strong interest in this route, the United States succeeded in squelching the effort. SCHRAAG, supra note 62.

82. Marin-Bosch, supra note 65, at 89 (United Nations General Assembly has adopted over 70 resolutions on nuclear testing; other international bodies have expressed continuing interest, as well); JENSEN, supra note 8, at 43 (the average vote on recent CTBT resolutions in the General Assembly has found 121 states in favor); William Epstein, The Nuclear Testing Threat, BULL. ATOM. SCIENTISTS, July-Aug. 1990, at 35, 36.
C. The Posture of the Reagan and Bush Administrations

The recent American leadership was no friend of CTBT. The Reagan and Bush administrations undertook three separate stratagems designed to fend off the international and domestic pressures favoring further testing limitations. First, most directly, the Reagan administration terminated the ongoing CTBT negotiations that had been underway between 1977 and 1980. The United States declared, in varying terms, that a timely comprehensive test ban treaty was no longer an American negotiating goal; it might remain as a long term ultimate objective, but it was not something to be pursued under current circumstances.
Second, the United States attempted to divert attention from the CTBT question by focusing upon the TTBT and PNET. These relatively modest treaties, observed in practice by the United States and the Soviet Union for over a decade, had never been formally ratified and brought into force. The Reagan and Bush administrations highlighted alleged uncertainties or inadequacies in the verification arrangements for the accords, and devoted years to arguments, to experiments, and then to painstaking bilateral negotiations, over mechanisms and equipment that could redress the shortcomings. Eventually, elaborate


86. In unguarded moments, Reagan administration officials were blunt in stating their objective of shunting attention away from possible progress toward a CTBT and focusing instead on the TTBT and PNET, which were acknowledged to be of marginal importance in any circumstances. Frank I. Gaffney, Test Ban Would Be Real Tremor to U.S. Security, DEFENSE NEWS, Sept. 5, 1988, at 36-37; John Horgan, Test-Ban Countdown, SCI. AM., Oct. 1988, at 16; Schrag, supra note 62, at 42 n.164.

87. Both the United States and the Soviet Union declared in 1976 their intention to abide by the 150 kiloton ceiling pending ratification of the treaties. ACDA TREATY BOOK, supra note 32, at 186.

88. It is technically difficult to evaluate the size of a distant underground nuclear explosion and impossible to be confident about whether a particular test was slightly above or slightly below the 150 kiloton ceiling. The Reagan administration nonetheless alleged that "Soviet nuclear testing activities for a number of tests constitute a likely violation of legal obligations under the [TTBT]." Report from President Reagan to the Congress: Soviet Noncompliance with Arms Control Agreements (Feb. 1, 1986), reprinted in DOCUMENTS ON DISARMAMENT 1986, supra note 84, at 27, 50. More recent expert analysis has reached the opposite conclusion, finding that the earlier estimates of the size of Soviet tests were artificially inflated by consistent mistakes about the seismic transmission properties of the geology of the test site. U.S. CONGRESS, OFF. OF TECH. ASSESSMENT, SEISMIC VERIFICATION OF NUCLEAR TESTING TREATIES 124-26 (1988).

89. At American insistence, the Soviet Union agreed to participate in a series of experiments to assess the effectiveness of various methods of short-range measurement of the size of underground nuclear explosions. Agreement Between the U.S. and the U.S.S.R. on the Conduct of a Joint Verification Experiment (May 31, 1988); SFRC Hearings, supra note 84, at 2-3 (Lehman testimony describing the experiment program); Thrænert, supra note 61, at 64-66.

90. The verification protocols were drafted during six rounds of negotiations, they were signed in June 1990, and they entered into force in December 1990. U.S. Nuclear Testing Policy, 2 DEP'T STATE DISPATCH 626 (1991); R. Jeffrey Smith, Superpowers to Resume A-Test Talks, WASH. POST, May 12, 1989, at A30. Each protocol is substantially longer and more detailed than the original treaty to which it is attached—and those treaties had incorporated, at the time of their signature, the most elaborate and detailed arms control verification mechanisms yet concluded. See S.N. Kiselev, Nuclear Testing, in Stephan & Klimenko, supra note 26, at 76, 79-82 (Soviet perspective on the protocol negotiations).

91. Under the protocols, the United States has the right to employ a variety of on-site instruments to measure the size of Soviet underground nuclear tests. In addition to traditional seismic monitoring equipment, the United States insisted upon the right to use
verification protocols were drafted to supplement the TTBT/PNET inspection powers, and in 1990 the long-delayed accords were effectuated. By elevating these relatively minor perfecting agreements to such primary importance, the United States thus effectively interposed additional time-consuming steps into the already-convoluted, incremental progress toward a CTBT.

Once the TTBT and PNET were in place, however, the Bush administration confronted an unwelcome legacy from its predecessor's test ban policy. In 1986, President Reagan had explicitly promised the Congress and the Soviet Union that further talks on additional testing limitations would commence “immediately” after the TTBT/PNET question was resolved. That bargain had bought the administration four additional years of unconstrained testing, but now the commitment was a burden for testing zealots. The Bush administration eventually decided simply to renege on Reagan's assurances, delaying the initiation


93. In an October 10, 1986 letter sent to the chairs of the Senate and House Armed Services Committees just before departing for a summit meeting, Reagan wrote:

I intend to inform the General Secretary in Reykjavik that, once our verification concerns have been satisfied and the [TTBT and PNET] treaties have been ratified, I will propose that the United States and the Soviet Union immediately engage in negotiations on ways to implement a step-by-step parallel program—in association with a program to reduce and ultimately eliminate all nuclear weapons—of limiting and ultimately ending nuclear testing. These steps we can take in the near future—steps which will show the world that the United States is moving forward.

DOCUMENTS ON DISARMAMENT 1986, supra note 84, at 624, 625.

The commitment to pursue additional test ban negotiations was reaffirmed in a joint communiqué issued on September 15, 1987, after a Shultz-Shevardnadze ministerial meeting. The two parties announced that they had agreed to pursue “full-scale stage-by-stage negotiations on nuclear testing,” to embrace the preparations for a “joint verification experiment” on seismic and other monitoring, and the modification of the TTBT and PNET. Following that, they would “proceed to negotiating further intermediate limitations on nuclear testing leading to the ultimate objective of the complete cessation of nuclear testing as part of an effective disarmament process.” Michael R. Gordon, Issues on Nuclear Testing to Be Resolved in Formal Talks, N.Y. TIMES, Sept. 18, 1987, at A6.
of any follow-on negotiations, and swallowing the domestic and international outrage.94

Even more disingenuously, the Bush executive branch averred that it would need "a period of observation" after the entry into force of the TTBT and PNET, to study their implementation (even though the United States and the Soviet Union had, de facto, been living under the unratified treaties' terms since 1974) before deciding whether additional testing limitations made sense.95 The Director of the U.S. Arms Control and Disarmament Agency then testified in 1990 that this post-TTBT delay in initiating negotiations on further testing restrictions would be a period of "months" rather than "years."96 However, through the end of the Bush administration, no additional treaty talks were underway, there appeared to be little movement or bureaucratic flexibility inside the United States government regarding test ban options,97 and a statutory deadline for the administration to submit a report to the Congress on a proposed schedule for the resumed talks had long since passed unfulfilled.98

As a third dilatory tactic, the United States floated in the international arena a series of plausible-sounding yet ultimately-specious arguments questioning the wisdom and feasibility of a CTBT. As each of these contentions was laboriously rebutted by experts, the administration fell back on other arguments, presenting a "moving target" of glib rationales for continued testing. Eventually, the entire line of


95. U.S. Nuclear Testing Policy, supra note 90, at 627; SFRC Hearings, supra note 84, at 22-23, 40 (Lehman testimony, responding to a question about whether the administration policy might not result in a CTBT even in another 50 years: "[I]t is clear that our long-term objective is not something that will be achieved very quickly.")


98. The Simon Amendment to the fiscal year 1992 defense budget authorization act (section 340) required the president to submit by February 5, 1992 a report to the Congress specifying a tentative calendar for initiating negotiations on further test ban arrangements, together with a statement of the goals that the United States would pursue in the talks. Two months after the deadline had passed, three senators (including Sen. Sam Nunn, Chair of the Senate Armed Services Committee) wrote a letter to the president, complaining about the lack of action. INST. FOR DEFENSE AND DISARMAMENT STUDIES, ARMS CONTROL REPORTER 608.B.227 (1992). See also 136 CONG. REC. S13,760 ((daily ed. Sept. 25, 1990) (exchange of letters between members of Congress and executive branch regarding conformity with earlier promises of "step by step" progress on nuclear testing)).
excuses collapsed—assertions about verification loopholes,\textsuperscript{99} stockpile reliability,\textsuperscript{100} weapon safety,\textsuperscript{101} retention of laboratory expertise,\textsuperscript{102} and the rest were sequentially refuted. The final, honest posture was the Bush administration’s closing line: No CTBT could be effectuated so long as the United States retains a nuclear arsenal and the possibility of refining, improving, or adding new types of warheads to it. Only in some far-off future world where nuclear deterrence is no longer central would the United States begin to discharge its obligations to conclude a halt to nuclear explosions.\textsuperscript{103}

Recently, the quixotic opposition to a CTBT took other odd turns. The Bush administration redoubled its stated commitment to the non-proliferation effort,\textsuperscript{104} and announced that the United States would

\textsuperscript{99} OFF. OF TECH. ASSESSMENT, supra note 88; STEVE FETTER, TOWARD A COMPREHENSIVE TEST BAN 107-58 (1988); Belmont Report, supra note 58, at 236-43 (current or planned verification networks could ensure high confidence in other state’s compliance with a CTBT).

\textsuperscript{100} Belmont Report, supra note 58, at 229-35 (existing or projected procedures can adequately ensure the reliability of the United States arsenal of nuclear weapons into the foreseeable future); FETTER, supra note 99, at 69-106; INTERNATIONAL FOUNDATION, supra note 85, at 20-24.

\textsuperscript{101} SCHRAO, supra note 62, at 190-91 (at most, only a few additional low-yield tests would be necessary to certify that “insensitive high explosive” (a safer, more robust triggering mechanism) could be inserted into existing nuclear devices); Tom A. Zamora, Put a Safety Cap on Testing, BULL. ATOM. SCIENTISTS, Mar. 1992, at 25.

\textsuperscript{102} SCHRAO, supra note 62, at 29 (national weapons laboratories are valuable assets, but they can be sustained, and unfortunate “brain drain” avoided, via the award of other types of contracts). In the same vein, the United States is now subsidizing the Russian military and scientific establishment, in order to help induce weapons experts to retrain for other types of employment, instead of selling their nuclear or other expertise as mercenaries in the global arms market. John J. Fialka, Russian Scientists Change Their Work, Not Always Along Lines the U.S. Likes, WALL ST. J., May 5, 1992, at A16.

\textsuperscript{103} A recent administration policy paper reported that:

A comprehensive test ban remains a long-term US objective. Such a ban must be viewed in the context of a time when the United States no longer needs to depend on nuclear deterrence to ensure international security and stability, and when it has achieved:

- Broad, deep, and verifiable arms reductions;
- Greatly improved verification capabilities;
- Expanded confidence-building measures; and
- Greater balance in conventional forces.


\textsuperscript{104} Statement by the President and Fact Sheet on Nonproliferation Initiative (July 13, 1992) [hereinafter Statement and Fact Sheet]. But see Spurgeon M. Keeny, Jr., The Nonproliferation Noninitiative, ARMS CONTROL TODAY, July-Aug. 1992, at 2; Paul Leventhal & Daniel Horner, Bush’s Voodoo Nonproliferation, CHRISTIAN SCI. MONITOR, July 20, 1992, at 18 (arguing that the newly-announced policies do not incorporate many
unilaterally cease the production of fissile material for additional nuclear weapons and also would halt all existing programs for developing additional types of nuclear warheads and bombs. In July 1992, the government further declared that the future program for explosive testing of nuclear devices—already scaled back due to budgetary constraints—would henceforth be restricted to only six tests per year (roughly one-third the size of the traditional program), with no more than three tests per year greater than thirty-five kilotons yield, and with all the tests being dedicated to assessing the safety and reliability of weapons already in the stockpile, rather than to the development of new types. This testing strategy was immediately criticized as unnecessary—experts asserted that only a handful of tests would be needed, under any plausible assumptions, for stockpile safety and reliability assurances at this point. Still, the administration was unwilling to suspend testing, to

important changes).


107. SCHRAO, supra note 62, at 187 (budgetary constraints drove the annual number of American nuclear weapons tests down from 14 in 1988, to 11 in 1989, and to 8 in 1990); R. Jeffrey Smith, Administration Considers Limiting Nuclear Tests, WASH. POST, May 25, 1992, at A1 (United States would conduct only six tests next year).


open CTBT negotiations, or to consider writing additional testing constraints into law.\textsuperscript{110}

In all of this, the United States government was willing to take the diplomatic and political heat for frustrating the world's desires for more prompt and substantial limitations on testing.\textsuperscript{111} In international assemblies such as the 1990 NPT Review Conference\textsuperscript{112} or the 1991 LTBT Amendment Conference,\textsuperscript{113} the vast majority of participants strongly endorsed the concept of a CTBT, leaving the United States and only a handful of allies—sometimes solely the United Kingdom\textsuperscript{114}—in uneasy isolation.


110. One Bush administration official has said, We have committed to a step-by-step process, and we remain committed to that approach. We do not see a comprehensive test ban (CTB) as very useful in a modern age of arms control when we are sitting down with our former adversaries, cooperating on how we eliminate nuclear weapons, how we control them, and how we maintain stability.

Ronald F. Lehman, Lehman's Lessons: The Arms Control Agenda, ARMS CONTROL TODAY, Dec. 1991, at 8, 12. Another official stated, "[A]s long as we rely upon nuclear weapons for deterrence, we will need to test them." Robert Barker, Assistant to the Secretary of Defense for Atomic Energy, quoted in Dunbar Lockwood, France Announces Testing Halt; Congress Debates Similar Measure, ARMS CONTROL TODAY, Apr. 1992, at 17.

111. There are genuine questions regarding the sincerity of some other states' expressions of interest in a CTBT. Some NNWS may harbor their own nuclear ambitions, and they could be using the superpowers' failure to conclude a CTBT as merely a handy excuse for avoiding constraints upon their own programs. SCHRAG, supra note 62, at 28; Ziba Moshaver, Nuclear Weapons Proliferation in the Indian Subcontinent 108-33 (1991); Belmont Report, supra note 58, at 221-24. Similarly, France and China both elected not to participate in the trilateral test ban negotiations conducted during the Carter Administration. Although France recently suspended its nuclear testing (and pledged a longer moratorium if the other NWS follow suit), see William Drozdiak, France Sets Moratorium on Nuclear Arms Tests, WASH. POST, Apr. 9, 1992, at A18, China has continued its program unabated. Barbara Crossette, Chinese Set Off Their Biggest Nuclear Explosion, N.Y. TIMES, May 22, 1992, at A1; Bill Gertz, China Continues Nuclear Testing; US May Respond, WASH. TIMES, Oct. 24, 1992, at A3.

112. SCHRAG, supra note 62, at 127-31; Van Doren & Bunn, supra note 51; Spector & Smith, supra note 51.

113. SCHRAG, supra note 62; Tom A. Zamora, LTBT Amendment Conference to Continue, But No Test Ban in Sight, ARMS CONTROL TODAY, Mar. 1991, at 14; Marin-Bosch, supra note 65, at 83.

114. See NPT Not Linked to CTB, DISARMAMENT TIMES, May 1990, at 3 (interview with Ian Kenyon, Counsellor on United Kingdom delegation to the CD; recapitulating British view, consistent with that of United States government, that arms control measures other than CTBT will satisfy the article VI obligations).
Recently, the Congress, too, has joined the fray in a significant way. Landmark legislation, passed in the waning moments of the 102nd Congress, has dramatically altered the United States approach to the subject of nuclear test bans. The act required an immediate nine-month moratorium on testing (October 1, 1992 through July 1, 1993); after that, no more than five tests per year are allowed for the next three years, and all of those permitted explosions must be devoted to assessing and improving the safety and reliability of existing weapons, rather than to developing new types of bombs. Beginning on October 1, 1996, there will be a second moratorium, this time of unlimited duration, unless some other state conducts a nuclear test. In addition, the new law requires the president to submit to the Congress, by March 1, 1993, a report containing a schedule for resumption of CTBT negotiations with Russia and a plan for achieving a multilateral test ban treaty by 1996.

D. The Russian Perspective

In recent years, the Soviet Union has emerged as a consistent champion of additional restraints upon nuclear testing. There may be a


116. The Bush administration had opposed additional test ban legislation, and threatened to veto the bill. Paul Nitze & Siegfried Hecker, Weapons Testing We Can't Do Without, WASH. TIMES, July 31, 1992; Paul Wolfowitz, Testing Is Still Needed, USA TODAY, Aug. 3, 1992, at 8A; Nuclear Test Curb May Lead to Veto of Defense Budget, WASH. TIMES, July 29, 1992 (arguing that continued nuclear testing is necessary and noting that executive branch officials would recommend presidential veto of legislation incorporating a test moratorium). However, the testing limitations were ultimately attached to the bill authorizing funding for the "superconducting supercollider" research project in Texas, which the president strongly supported, and administration officials at the last moment reluctantly acceded. Tom Zamora-Collina, Nuclear Weapons Take a Dive, BULL. ATOM. SCIENTISTS, Dec. 1992, at 6; Andrew Rosenthal, White House Fight on Collider Deal, N.Y. TIMES, Sept. 26, 1992, at 1; Helen Dewar, Overturning Bush Policy, Congress Suspends Underground Nuclear Testing, Sept. 26, 1992, at A11; John Isaacs, The Senate That Can Say No, 48 BULL. ATOM. SCIENTISTS, Oct. 1992, at 6.


variety of explanations for this interest: budgetary shortfalls, the political leadership's desire to constrain the military, the public's newfound interest in environmental protection and antinuclearism, as well as the effort to curb the nuclear arms race.

Mikhail Gorbachev was out in front on this issue early in his tenure in office, declaring unilateral moratoria on Soviet nuclear weapons testing from July 26, 1985 to February 26, 1987, and again from October 19, 1989 to October 24, 1990. He made CTBT a priority in his foreign policy, emphasizing his willingness to conclude a far-reaching pact incorporating exceptionally intrusive verification, and tabling a new proposed draft CTB treaty text. Mikhail Gorbachev was out in front on this issue early in his tenure in office, declaring unilateral moratoria on Soviet nuclear weapons testing from July 26, 1985 to February 26, 1987, and again from October 19, 1989 to October 24, 1990. He made CTBT a priority in his foreign policy, emphasizing his willingness to conclude a far-reaching pact incorporating exceptionally intrusive verification, and tabling a new proposed draft CTB treaty text. His successor, Russian President Boris Yeltsin, has continued a third unilateral moratorium, which began October 6, 1991, and has recently extended that test suspension into mid-1993, to match the American initiative. Yeltsin has also declared his own profound interest in a CTBT, a phased reduction in the number of annual tests conducted by each side, or at least a resumption of negotiations on a new test ban agreement—but at the same time, he has undertaken preparations to resume testing if the United States does not reciprocate. Of course, the process of converting unilateral declarations of this sort into a binding international agreement is complex,

119. The "green" movement inside the former Soviet Union, prompted by apprehensions about a repetition of the Chernobyl fiasco and by despair over the state of the environment, has successfully campaigned to reduce, and possibly to prelude, future explosions at the two traditional Soviet nuclear test sites. Schrag, supra note 62, at 63-64, 187; Diane G. Simpson, Nuclear Testing Limits: Problems and Prospects, 33 Survival 500, 507 (1991).


122. Schrag, supra note 62, at 186.

123. Kiselev, supra note 90, at 82-83.


with many opportunities for foundering on issues such as verification, but at least the rhetoric from Moscow has been unambiguously positive.\(^\text{127}\)

In fact, the recent “box score” of nuclear weapons testing reveals that in the past two years, the United States has conducted a total of fifteen tests, the Soviet Union only one, France twelve, China two, and the United Kingdom two.\(^\text{128}\) The ball is thus squarely in the United States’ court on CTBT, with the American political leadership now providing the most important brake on the international community’s desire for a permanent halt to testing.

### III. The Meaning of Article VI

With this background, we now proceed to parse the meaning of article VI of the Non-Proliferation Treaty. Three distinct questions must be addressed: First, how important is a CTBT in particular to the fundamental disarmament obligation; second, what does “good faith” mandate in pursuit of negotiations in this context; and third, how might the international community appropriately respond to a finding of an American breach of this provision of the treaty?

#### A. Why Is CTBT the Key to Article VI?

The relevant passage of the NPT is hardly a model of clarity and precision in drafting:

> 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.\(^\text{129}\)

This paragraph may be read as establishing two similar but distinct negotiating objectives: (a) measures relating to cessation of the arms race

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\(^{127}\) See Falin, *supra* note 121, at 196-285 (reprinting numerous documents from 1985-86 in which Gorbachev called for a halt to nuclear tests).

\(^{128}\) *Known Nuclear Tests Worldwide, 1945 to December 31, 1991*, BULL. ATOM. SCIENTISTS, Apr. 1992, at 49. Over a longer term, since 1980, the total number of tests per country is: United States 167, Soviet Union 188, China 10, France 100, and United Kingdom 14. *Id.* France recently announced a halt to its testing program but has also prepared to resume the explosions in 1993 if the United States fails to reciprocate. Alan Riding, *France Suspends Its Testing of Nuclear Weapons*, N.Y. TIMES, Apr. 9, 1992, at A5; Simon Haydon, *Nuclear Test Site Defended*, WASH. TIMES, Aug. 6, 1992.

\(^{129}\) NPT, *supra* note 7, art. VI.
and to nuclear disarmament, and (b) a treaty on general and complete disarmament. The second goal, general and complete disarmament, has largely been the focus of an independent set of international deliberations and posturing, with its own unique history; it is less relevant in the current context.\(^{130}\)

How, then, is the first goal, cessation of the arms race and nuclear disarmament, converted into a mandate for a CTBT? What did the negotiators in 1968 have in mind for this aspect of article VI? Was this simply noncommittal language designed to provide a general spur for arms control across the board, or was the indirect vocabulary of the article a type of "code language" for a commitment to develop a CTBT? To answer these questions, we need to consider both the perspective of international law and, more broadly, the realities of global politics.\(^{131}\)

There are two distinct approaches to the interpretation of an international legal instrument: the "literalist" or "textual" approach favored by most international authorities, such as the International Court of Justice,\(^ {132}\) and the "contextual" or "intentionalist" approach typically

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131. Burrus Carnahan has noted in connection with the NPT that at the highest level of abstraction, international law is uncertain in its standards for treaty interpretation. Some authorities adopt a "restrictive" style of interpretation, reading a treaty's terms narrowly, on the grounds that each country is sovereign and that constraints upon its autonomy are therefore not lightly presumed; a clear act of consent is required before a term may legitimately be read into a treaty. Other authorities, however, proceed from an "effective" proposition, arguing that a treaty should generally be construed liberally or expansively, to help ensure that it is able to effectuate the goals and objectives that the parties had intended. Burrus Carnahan, Legal Obligations under Article VI of the Nuclear Non-Proliferation Treaty of 1968, with Special Reference to the Issue of a Comprehensive Test Ban 6-7 (Jan. 4, 1991) (unpublished paper prepared for Off. of Arms Control, Dep't of Energy). See also Treaties and Other International Agreements, Interpretation, 14 WHITMAN DIOEST at 380-84. In evaluating the NPT, either maxim of interpretation would lead to the same result.

adopted by American courts and commentators.\textsuperscript{133} At the initial stages, however, the two strategies coincide, and all authorities concur that the task of construing an international agreement should ordinarily begin with close analysis of the text itself, confined essentially to the four corners of the document.

Here, article VI does not explicitly refer to a CTBT, failing to specify what "effective measures" would be appropriate to achieve the articulated goals. The treaty preamble, however, does provide additional insight into the parties' "object and purposes," and sheds light upon the intended referent of the article VI language.\textsuperscript{134} The preamble reports that the negotiators were:

Recalling the determination expressed by the Parties to the 1963 Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water [i.e., the LTBT] 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.\textsuperscript{135}
CTBT is the only future arms control measure specifically mentioned in the preamble (or anywhere else in the treaty), and it is asserted in a context that makes its association with article VI unmistakable.

At this first level of analysis, most observers would conclude that the core meaning of article VI remains ambiguous in this regard and that the role of CTBT, in particular, in fulfilling the obligations requires additional clarification. Where dissection of the text alone fails to resolve such an interpretation question, authorities turn to inspection of a subservient hierarchy of other source materials. The Vienna Convention on the Law of Treaties cites “context” (other instruments executed at the same time as the treaty), “subsequent agreements” (later documents in which the parties reveal their interpretation of the original accord), “subsequent practice” (statements and behaviors manifested after the conclusion of the treaty), and “the preparatory work of the treaty and the circumstances of its conclusion.”

In analyzing the NPT, three types of such legal materials are available. They are, chronologically: (1) social context (in this case, the political and military circumstances prevailing at the time of the negotiation and conclusion of the treaty); (2) drafting history (that is, the sequence of proposals and commentary relevant to what became article VI and associated passages); and (3) subsequent practice (what the parties have said and done about the disarmament obligations, especially within the specialized setting of the review conferences established for this purpose). The following subsections consider each of these types of materials in detail.

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136. The preamble does include a paragraph referring to the goals of “cessation of the nuclear arms race” and “nuclear disarmament,” in addition to the paragraph about test bans. Id. para. 9.

137. LAST CHANCE, supra note 20, at 94. See also Final Declaration of the Third Review Conference of the NPT, reprinted in JOZEF GOLDBLAT, TWENTY YEARS OF THE NON-PROLIFERATION TREATY: IMPLEMENTATION AND PROSPECTS 138, 144 (1990) [hereinafter TWENTY YEARS] (in reviewing the NPT, the conference addresses the treaty article by article, with the relevant preambular paragraphs associated; paragraphs 8-12 are discussed in conjunction with article VI). The United Kingdom (one of the key NWS negotiators) explained in 1968 that “the Preamble is . . . wider than . . . Article VI in the disarmament field and indicates in some detail what needs to be done,” quoted in Mohamed J. Shaker, The Third NPT Review Conference: Issues and Prospects, in NUCLEAR NON-PROLIFERATION AND GLOBAL SECURITY 3, 10 (David DeWitt ed., 1987). But see Carnahan, supra note 131, at 14-16 (preamble does not establish primacy of CTBT).

1. THE SOCIAL CONTEXT OF ARTICLE VI

Article VI was conceived and drafted in a legal and political milieu that strongly associated it with test ban proposals. Since the end of World War II, the question of spreading nuclear capability had been a consistent global concern, addressed in a variety of national proposals and international resolutions, but with little immediate satisfaction. Limitations upon nuclear testing were concurrently seen as a critical device—the single most important tool—for promoting the needed restraint.

A major step forward was achieved in 1961, when the United Nations General Assembly unanimously adopted the “Irish Resolution,” calling upon all states, especially the nuclear powers, to conclude an international agreement to refrain from transferring or acquiring nuclear weapons. The Eighteen Nation Disarmament Committee (ENDC) then took up the issue, receiving and debating various


140. Report to the President by the Committee on Nuclear Proliferation (Jan. 21, 1965) (secret memorandum, declassified and available through National Security Archive, U.S. Nuclear Non-Proliferation Policy 1945-1991 File, document 1104) (stressing the importance of heightened United States attention to the spread of nuclear weapons, and identifying pursuit of a CTBT as the first policy tool to promote a non-proliferation treaty); Dep’t of State, Background Paper on National Attitudes Towards Adherence to a Comprehensive Test Ban Treaty and to a Non-Proliferation Agreement (Dec. 12, 1964), (secret memorandum, declassified and available through National Security Archive, U.S. Nuclear Non-Proliferation Policy 1945-1991 File, document 1078) (linking a CTBT and a non-proliferation accord).


142. The ENDC was the leading multilateral body for negotiating disarmament accords. Members included the United States, the Soviet Union, the United Kingdom, and other major powers, including key NNWS. SHAKER, ORIGIN AND IMPLEMENTATION, supra note 139, at 67-84. In modified form, the ENDC (now reconstituted as the 40-member Conference on Disarmament) has continued to play a major role in elaborating arms limitation measures.
proposals and alternative drafts over the next several years. The most important interim declaration was reflected in General Assembly Resolution 2028 in 1965, which recorded consensus on five principles that should guide the articulation of a non-proliferation treaty, including the notions that the treaty should embody a "balance of responsibilities" and should be a step toward total nuclear disarmament.

In 1966, the United States and the Soviet Union, as co-chairs of the ENDC, initiated a series of private consultations in which they reached tentative agreement on the basic nontransfer and nonacquisition provisions of a possible multilateral non-proliferation accord. After an extended period of arduous consultations with their respective allies, the two co-chairs tabled separate but identical drafts of a nuclear non-proliferation treaty in the ENDC on August 24, 1967. Extensive debate ensued in both the ENDC and the General Assembly, and numerous

143. See Mason Willrich, Non-Proliferation Treaty: Framework for Nuclear Arms Control (1969); Last Chance, supra note 20, at 66-68; Mexico Paper, supra note 134, at 3-6.

144. U.N. GAOR, 20th Sess., Supp. No. 14, at 5, U.N. Doc. A/6014 (1965). Principle (b) is "The treaty should embody an acceptable balance of mutual responsibilities and obligations of the nuclear and non-nuclear Powers . . . ."; principle (c) is "The treaty should be a step towards the achievement of general and complete disarmament and, more particularly, nuclear disarmament . . . ." See ACDA History, supra note 139, at 139.

145. ACDA Treaty Book, supra note 32, at 91. An earlier American draft treaty had been criticized by many NNWS for failing to include sufficiently strong language mandating nuclear arms control in general and CTBT in particular. See ACDA History, supra note 139, at 43 (Nigerian delegate asserts that a non-proliferation treaty would not be durable unless it was accompanied by a CTBT and other initiatives); id. at 44 (Mexican delegate regards CTBT "as an essential condition for a nonproliferation treaty and the minimum goal of the non-nuclear countries"); id. at 44 (Swedish and United Arab Republic delegates speak of the need to link non-proliferation to other arms control measures); id. at 75-76 (many states link CTBT to non-proliferation treaty).

146. NATO and other allies were intensely interested in any treaty or other institutions dealing with nuclear matters, and they did not easily or automatically defer to American preferences. The especially controversial issues at the time concerned the potential inhibitions upon the generation of civilian nuclear power and the possible creation of a nuclear Multilateral Force (MLF) which might allow for some sharing within NATO of the American nuclear weaponry. ACDA Treaty Book, supra note 32, at 90-91; Seaborg, Stemming the Tide, supra note 130, at 83-130, 169-87, 287-306; Spurgeon M. Keeny, Jr., The Non-Proliferation Treaty (Dec. 24, 1968) (top secret memorandum, declassified and available through National Security Archive, U.S. Nuclear Non-Proliferation Policy 1945-1991 File, document 1237); Bunn, supra note 141, at 66-72.

147. Reprinted in United States Arms and Control and Disarmament Agency, Documents on Disarmament 1967, at 338-41 [hereinafter Documents on Disarmament 1967]. See also Last Chance, supra note 20, at 71 (Soviet Union preferred using identical, separate drafts rather than a single joint draft, in order to promote easier modification).
modifications were proposed by the other participating countries (especially the non-nuclear-weapons states, who had attached growing urgency to the proliferation problem\(^{48}\)), leading to a sequence of revised draft texts.\(^{49}\)

The NNWS had several concerns about the original 1967 draft treaty, but perhaps foremost among them was the criticism that the co-chairs had developed a "discriminatory" sinecure for themselves, with the world being irretrievably divided into two castes: those advanced industrialized societies of the first and second worlds, who would be juridically entitled to possess the ultimate weapon, and those poor, developing countries of the third world, who would be shorn of that option.\(^{50}\) The NNWS therefore vociferously demanded that the NWS do something to "balance" the obligations of the treaty, to preserve more fully the equality of autonomous (albeit, very differently situated) sovereigns.\(^{51}\)

The NNWS were not generally clamoring for retention of the right to possess nuclear arms themselves; instead, they insisted that the NWS undertake some sort of parallel disarmament obligations of their own, to mitigate the two-tier system that was being established. This tradeoff was asserted as part of the "basic bargain" of the NPT, a "quid pro quo" for the NNWS abnegation of nuclear arms.\(^{52}\)

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148. The NNWS were not passive or resistant on the question of nuclear non-proliferation. At the 1964 African summit conference and at the Cairo conference of non-aligned states, significant attention was devoted to collective expression of the need to avoid the spread of nuclear weaponry. ACDA TREATY BOOK, supra note 32, at 91; LAST CHANCE, supra note 20, at 64-65.


150. LAST CHANCE, supra note 20, at 75-78; Mexico Paper, supra note 134, at 6-8 (citing statements from Japan, the United Kingdom, Canada, Germany, India, Sweden, and Romania arguing that a non-proliferation treaty must include a commitment to nuclear arms control.)

151. ACDA HISTORY, supra note 139, at 86-88 (reporting comments and proposals from Brazil, India, the United Arab Republic, Burma and Romania generally arguing that the non-proliferation treaty must include a requirement for nuclear disarmament, and frequently citing CTBT as a leading instrument for accomplishing this objective); SEABORG, STEMMING THE TIDE, supra note 130, at 161-62.

152. ACDA HISTORY, supra note 139, at 58, 106 (United States ambassadors declare that the notion of quid pro quo is inappropriate, since the NPT will enhance the security of all states, including NNWS.) President Johnson, however, later acknowledged the NNWS position, saying:

The non-nuclear states have wanted their renunciation of nuclear weapons to be matched with a binding pledge by the nuclear powers to negotiate a halt in the arms race . . . they have asked us to pledge ourselves to move towards
The United States was initially somewhat surprised by this outpouring of NNWS interest in nuclear disarmament, and resisted the characterization of article VI as being the "pricetag" for the rest of the NPT. American officials argued that arresting the spread of nuclear weaponry was as much in the NNWS' interest as it was in the NWS'. No additional compensation should be required to induce countries to do what was manifestly to their own national security advantage: Halting proliferation was good in itself, independent of whatever might also be accomplished in the nuclear disarmament efforts.

The NNWS, however, pressed the argument, asserting that they, too, had a stake in arresting and reversing the nuclear arms race, because the continued possession of weapons of mass destruction by any country imperiled all countries. Therefore, on January 18, 1968, a new provision, which became article VI, was added to the co-chairs' draft text, under which the superpowers accepted the special responsibility to deal with "vertical" proliferation at the same time as "horizontal" proliferation. Through it all, the United States never enthusiastically

that ultimate goal. They feel the restraints they will voluntarily accept give them the right to such a pledge... [The U.S. and the Soviet Union] have jointly pledged our nations to negotiate towards the cessation of the nuclear arms race... The obligations of the non-proliferation treaty will reinforce our will to bring an end to the nuclear arms race. The world will judge us by our performance.


153. SEABORG, STEMMING THE TIDE, supra note 130, at 367.
154. WILLRICH, supra note 143, at 162. The United States also argued the converse point: that nuclear arms control was profoundly in the self-interest of the superpowers, and would be pursued vigorously for that reason, independent of the NPT. United States statement to the ENDC (Feb. 6, 1968), reprinted in UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY, DOCUMENTS ON DISARMAMENT 1968, at 36, 37 [hereinafter DOCUMENTS ON DISARMAMENT 1968].
155. Darryl Howlett & John Simpson, The NPT and the CTBT: An Inextricable Relationship?, ISSUE REVIEW (Programme for Promoting Nuclear Non-Proliferation), Mar. 1992, at 6. The eight non-nuclear members of the ENDC had also played a lead role in developing General Assembly Resolution 2028, supra note 144, in 1965, elaborating the principles that the ENDC should observe in negotiating a non-proliferation treaty, emphasizing a balancing of mutual NWS and NNWS obligations. William Epstein, The Linkage Between a Nuclear Test Ban and Nuclear Non-Proliferation, in NUCLEAR NON-PROLIFERATION AND THE NON-PROLIFERATION TREATY 132, 133-34 (M.P. Fry et al. eds., 1990).
156. ACDA HISTORY, supra note 139, at 98 (description of new proposed text) and 150 (reprinting the proposal); LAST CHANCE, supra note 20, at 77-79; Mexico Paper,
embraced the notion that this was the appropriate "offset" needed to "balance" the NPT, but the NNWS never abandoned that characterization, and the notion of a "quid pro quo" has endured.  

The NNWS negotiators were keenly aware of the less than satisfactory precedent of the LTBT in mandating successor arms limitations, and they determined to do better than solely a preambular reference or a vague statement of intention in the NPT. They insisted that the commitment which eventually became article VI must be legally binding, not entirely aspirational, and they proposed numerous amendments to strengthen and elaborate it—although they were unable to force the inclusion of any direct reference to specific measures of arms control.  

The NNWS negotiators also succeeded in putting some teeth into article VI through linkage to other portions of the NPT: Both article VIII.3 (review conferences) and article X.2 (extension conference) were elaborated as occasions upon which the parties (particularly the NNWS) could assess the treaty, measure compliance with it (particularly NWS progress on disarmament), and determine whether it continued to meet their needs (particularly given the ongoing discrimination inherent in the treaty). These innovations were sold by the

\footnotesize{supra note 134, at 24-26 (statements of the United States and Soviet Union in tabling the new text).}

157. LAST CHANCE, supra note 20, at 181-83; NPT THIRD REVIEW CONFERENCE BRIEFING No. 1 (Greenpeace, Washington, D.C.), at 2 (quoting a United States delegate as acknowledging that "[article VI was added, and subsequently strengthened, to give further effect to the principle that the Treaty should embody an acceptable balance of obligations"). In 1968, United States Ambassador Arthur Goldberg acknowledged that "The permanent viability of this treaty will depend in large measure on our success in further negotiations contemplated in Article VI." At the same time, the British representative was even more explicit, stating that his government was determined to work for a variety of specific arms control measures, including CTBT. FISCHER, STOPPING THE SPREAD OF NUCLEAR WEAPONS, supra note 26, at 109.

158. WILLRICH, supra note 143, at 161 (quoting statement of Indian representative); SEABORG, STEMMING THE TIDE, supra note 130, at 368.

159. ACDA HISTORY, supra note 139, at 106-08 (recapping several amendment proposals offered by Sweden, Spain, Germany, and others, designed to augment article VI by making the disarmament obligation more compelling); Mexico Paper, supra note 134, at 25-30 (reprinting statements and amendment proposals of Romania, Sweden, and Brazil); Statement by the U.A.R. Representative (Khallaf) to the ENDC (Mar. 16, 1967), reprinted in DOCUMENTS ON DISARMAMENT 1967, supra note 147, at 154, 158; SHAKER, ORIGIN AND IMPLEMENTATION, supra note 139, at 569-70.

160. NPT, supra note 7, art. VIII.3 (providing that a conference of parties to the treaty be convened every five years to review its operation). See supra text accompanying notes 48-54.

161. NPT, supra note 7, art. X.2 (a conference of parties will convene in 1995 to decide upon the future of the treaty).
NWS as recurrent opportunities for meaningful "second thoughts," guarantying the parties a chance to return to the question of whether a treaty containing such fundamentally asymmetric obligations should be perpetuated. 162

The NPT was widely seen as a temporary expedient, to deal with the emergency of nuclear proliferation by freezing the status quo, to preclude further deterioration of the global security situation, in anticipation of a later and better resolution. 163 It was never articulated as a "final solution" to the nuclear problem; the metaphor of the day asserted that something that had been going up (like the arms race) had to stop ascending, and pause at least momentarily, before it could start descending toward safety. 164 The NPT was intended to assist in this transition, by arresting the further spread of nuclear capability, halting the adverse momentum, and then initiating the process of weapons dismantling. The ultimate long-term goal was the complete—and equal—eradication of nuclear arms everywhere, by all states.

Through it all, the NNWS continuously asserted the primacy of test ban limitations in throttling the nuclear arms race. Resolutions in the General Assembly, arguments in the ENDC, declarations at non-aligned summit meetings, and other expressions repeatedly pinpointed CTBT as the fundamental issue for arms control and as the most effective tool for impeding vertical proliferation. The NNWS spoke of CTBT not merely

162. Mohamed Shaker, The NPT: The First 15 Years and the Current Crisis (Article VI), in Khan, supra note 20, at 40; Mexico Paper, supra note 134, at 31-32 (highlighting the role of the review conferences, in light of article VIII's reference to the treaty preamble (and especially the CTBT paragraph)); George Bunn & Charles N. Van Doren, Options for Extension of the NPT: The Intention of the Drafters of Article X.2, in OPTIONS AND OPPORTUNITIES: THE NPT EXTENSION CONFERENCE OF 1995, PROGRAMME FOR PROMOTING NUCLEAR NON-PROLIFERATION STUDY No. 2 (George Bunn et al. eds., 1991); Seaborg, Stemming the Tide, supra note 130, at 369; Stockholm Int'l Peace Research Inst., World Armaments and Disarmament Yearbook 1968/69, at 166-71 (1969).

163. Felix Calderon, The Duration of Arms Control and Disarmament Treaties, in INTERNATIONAL LAW OF ARMS CONTROL AND DISARMAMENT, supra note 23, at 145, 152 ("The Non-Proliferation Treaty is considered to be an interim measure against the proliferation of nuclear weapons and other nuclear explosive devices, while the definitive eradication of all nuclear arsenals in the world is being negotiated."); Stockholm Int'l Peace Research Inst., The NPT: The Main Political Barrier to Nuclear Weapon Proliferation 34 (1980) [hereinafter SIPRI, The NPT].

164. Epstein, supra note 155, at 135 (citing a Canadian delegate as likening the process of reversing the arms race to the laborious changing direction of a motor vehicle or ship).
as "desirable" or "useful," but as the key component in the global security regime that the NPT negotiators were seeking to construct.\(^{165}\)

There were, of course, other important negotiating issues in 1968, and some of them have reverberated to the present day: the arrangements for sharing the access to nuclear technology and materials;\(^{166}\) the provision of "security assurances" against nuclear blackmail;\(^{167}\) the arrangements regarding "peaceful nuclear explosions" (PNEs);\(^{168}\) and the "cutoff" of the production of nuclear weapons materials.\(^{169}\) But through it all, the problem of CTBT was highlighted as a special concern

\(^{165}\) Simpson, \textit{supra} note 83, at 509, 514; Seaborg, \textit{Stemming the Tide}, \textit{supra} note 130, at 356-57; Zamora, \textit{supra} note 113, at 14; 1968 \textit{Hearings}, \textit{supra} note 47, part 2, at 342-43 (summarizing the results of 1968 conference of NNWS, where CTBT was highlighted as "a matter of high priority" in the discussion of effective measures for cessation of the nuclear arms race and for nuclear disarmament).

\(^{166}\) The provisions of article IV of the NPT, designed to facilitate cooperation in the exploitation of nuclear power, were controversial at the outset of the treaty and have remained a point of contention. The NNWS have complained that the NWS have been insufficiently forthcoming in providing reliable, affordable access to nuclear power, and have imposed excessively burdensome "safeguards" against diversion. ACDA TREATY BOOK, \textit{supra} note 32, at 92-93; Seaborg, \textit{Stemming the Tide}, \textit{supra} note 130, at 363.

\(^{167}\) The NNWS sought statements from the NWS that they would never use nuclear weapons against states that did not possess them (negative security assurances), and that they would come to the assistance of NNWS who were victimized by aggressive nuclear threats or use (positive security assurances). NNWS considered these assurances vital to avoid a loss of national security that could accompany a decision to abandon nuclear weapons, and the NWS have developed and reasserted various formulations of the assurances over the years. ACDA TREATY BOOK, \textit{supra} note 32, at 93-94; Last Chance, \textit{supra} note 20, at 135-46.

\(^{168}\) In the 1960s, advocates of nuclear energy asserted that nuclear explosions could be adapted for a variety of civil engineering tasks, such as mining or excavation. Article V of the NPT provides that access to such PNEs should be available cheaply and without discrimination, but, in fact, few such projects have been undertaken. Ben Sanders, \textit{Non-Proliferation Treaty: A Broken Record?}, \textit{Bull. Atom. Scientists}, July-Aug. 1990, at 14, 17; Seaborg, \textit{Stemming the Tide}, \textit{supra} note 130, at 341-52.

of the NNWS, as a point they considered central to the entire non-proliferation apparatus. 170

The NNWS participants in the ENDC believed (rightly or wrongly) that a CTBT was then—or would shortly be—politically and technologically attainable. They observed that the superpowers had "almost" accomplished the job only a few years earlier with the 1963 LTBT, 171 and they believed that the lingering verification hurdles should be surmountable. 172 They concluded, more importantly, that the very definition of the items included in article VI—cessation of the arms race and nuclear disarmament—meant a comprehensive test ban. The world could not have a complete and durable halt to the arms race without a CTBT, and, once a prohibition on explosions was in place, disarmament would surely follow in train. CTBT was thus a necessary precondition for the achievement of the objectives of article VI: It was widely appreciated as the most suitable tool for accomplishing the shared task, and it was clearly the leading issue on people's minds at that time. 173 Observers conceded that, while it might, as a theoretical matter, be possible to continue building and deploying new generations of nuclear weaponry, and to resist dismantling obsolete stockpiles, under a test ban regime, it would hardly be politically or militarily logical to do so. 174 A test ban treaty would not by itself usher in the millennium, but it was deemed by most to be the single most effective mechanism for nudging the world in that direction under article VI. 175

170. The non-nuclear members of the ENDC drafted a joint memorandum in which they listed CTBT first among the measures necessary to achieve the disarmament objectives of non-proliferation. Epstein, supra note 155, at 134.

171. Many NNWS joined the LTBT at least in part because they considered it to be a helpful non-proliferation measure, making it more difficult for a would-be newcomer to join the nuclear club. ACDA TREATY BOOK, supra note 32, at 89-90.

172. Statement by Swedish Representative to ENDC (Feb. 13, 1968), reprinted in DOCUMENTS ON DISARMAMENT 1968, supra note 154, at 57, 63 (anticipating great strides forward, and perhaps a new agreement, on CTBT during the summer of 1968).

173. LAST CHANCE, supra note 20, at 181-87; Epstein, supra note 155, at 135: As regards the interpretation of Article VI, it was well understood by all parties that "measures relating to cessation of the nuclear arms race" was clearly intended to cover such measures as a CTB, a ban on the production of fissionable material for weapons, a freeze on the production of additional nuclear weapons, and a ban on flight testing of delivery vehicles. While there was room for differences regarding the entire list, a CTB was at the top of everyone's list of measures, and there can be no doubt that a CTB was considered as the essential and indispensable measure for cessation of the nuclear arms race.

174. Epstein, supra note 155, at 135.

175. See SIPRI, THE NPT, supra note 163, at 39 (listing CTBT first among the steps that the NWS should undertake in order to validate article VI). See also
A final bit of relevant context for the NPT deliberations was the concomitant initiation of the SALT I negotiations. Beginning in 1967, President Lyndon Johnson had attempted to open bilateral talks with the Soviet Union on the subject of imposing agreed limits on both countries' strategic offensive arms (ICBMs and other weapons capable of projecting nuclear warheads to intercontinental distances) and strategic defensive systems (anti-ballistic missile systems for negating the other party's weapons). His early overtures were rebuffed, but on July 1, 1968, at the ceremony signing the NPT, Johnson announced that the Soviets had then agreed to the initiation of the momentous bilateral talks.

The rest of the world was immediately supportive of these efforts and pleased that the pressures and interests reflected in article VI were producing such prompt results. And—jumping ahead in the chronology—the international community has continued to be a keen observer and a grateful supporter whenever the superpowers have been able to lurch toward a strategic arms accord. But there was never any suggestion that the partial success of the SALT and START documents on disarmament 1967, supra note 147 (reprinting statements by several delegations during the NPT negotiations, linking a test ban with a non-proliferation treaty, identifying CTBT as the next urgent step to pursue for nuclear arms control); id. at 104 (Sweden); id. at 136 (Brazil); id. at 463 (U.S.S.R.); id. at 691 (Britain).

176. ACDA TREATY BOOK, supra note 32, at 150-51.


The initiation of SALT negotiations was delayed, however, by the Soviet invasion of Czechoslovakia in August 1968. Thereafter, President Richard Nixon resumed the efforts, and formal negotiations opened in Helsinki in November 1969. ACDA TREATY BOOK, supra note 32, at 151.


180. In 1980, President Reagan abandoned the SALT negotiations and replaced them with START talks, addressing a similar range of weapon systems and issues. The 1991 START Treaty, supra note 1, overtly acknowledges the NPT obligation in preamble
Nuclear Non-Proliferation

2. THE NEGOTIATING HISTORY OF ARTICLE VI

With this contextual background, we can now inspect the evolution of the text of article VI. As noted, the United States and the Soviet Union provided the bulk of the drafting of treaty language. None of their early unilateral proposals—nor their identical August 24, 1967 drafts—contained any provision explicitly committing the NWS to negotiate future measures of nuclear self-control.

The NNWS, however, resolutely demanded inclusion of this element. Several states emphasized the importance of NWS disarmament obligations as essential to ease the discrimination inherent in the treaty and to promote progress toward a safer world. Some implied that they might not sign the treaty, or sustain it beyond its initial phases, in the absence of meaningful progress against vertical proliferation. Many participating delegations spoke ardently about test ban proposals, often highlighting CTBT as the first item on the list of arms control undertakings that should follow the NPT.

para. 5.

181. See Final Declaration of the Review Conference by the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons [hereinafter Final Declaration of the Review Conference], reprinted in NUCLEAR PROLIFERATION FACTBOOK, supra note 152, at 558, 565-66. In reviewing article VI of the NPT, the first Review Conference “welcomed” the SALT I and other arms control accords that had been completed during the first five years of the treaty’s life, but “expressed[d] serious concern that the arms race, in particular the nuclear arms race, is continuing unabated.” Id. at 565.

182. Epstein, supra note 155, at 136; Mexico Paper, supra note 134, at 6-8 (reporting statements by Japan, the United Kingdom, Canada, Germany, India, Sweden and Romania, calling for a halt to vertical proliferation as part of a non-proliferation treaty).


184. The Mexico Paper, supra note 134, contains several revealing expressions, including those by the Nigerian delegate:

The non-nuclear-weapon Powers, therefore, have the right to demand that the nuclear-weapon Powers should begin the process of nuclear disarmament. The first action in that direction would be, in our opinion, an agreement on the cessation of nuclear weapon tests underground and the cessation of the
The United States, it should be stressed, never spoke out against a CTBT and never dissented from the notion that a test ban was a crucial component in the article VI structure.\textsuperscript{185} Senior American spokespersons, in fact, repeatedly endorsed CTBT in the strongest terms, acknowledging that it could play a vital role in nuclear arms control, production of fissionable material for weapon purposes. The Nigerian delegation thinks that these are fields in which agreement is not only necessary but possible at the present time. It also believes that all the arguments advanced for urging the non-proliferation of nuclear weapons among non-nuclear-weapon States are valid for urging the nuclear-weapon States to conclude an agreement on the two measures I have just mentioned.

\textit{Id.} at 11. The representative of Burma stated:

If, therefore, a specific provision for a specific nuclear arms-control measure could not be embodied in the treaty, we feel an article should be formulated, in clear-cut and precise terms, under which the nuclear-weapon Powers would assume a definite obligation to take tangible steps towards nuclear disarmament. Those steps should be explicitly defined. One would envisage them to include the concluding of a comprehensive test-ban treaty, which my delegation considers is valid also as a measure of balance, since the non-proliferation treaty will have additionally a comprehensive test-ban effect on the non-nuclear weapon States; [and several other measures].

\textit{Id.} at 13. The Swedish delegate said:

We have always considered, and continue to maintain, that a non-proliferation treaty, important as it is in itself, cannot stand alone. It has to be—and I use a familiar phrase—coupled with or followed by other international disarmament agreements covering the nuclear weapon field. It has been generally recognized that two such measures are of great imminent urgency, politically speaking, and particularly ripe for decision technically—namely, a comprehensive test ban and an agreement to cut off production of fissile material for weapon purposes.

\textit{Id.} at 21. The representative of the United Kingdom agreed:

I would now like to speak briefly on the urgent need for the suspension of nuclear and thermonuclear tests. We profoundly hope that when the non-proliferation treaty is signed the resulting improvement in the political atmosphere will allow a comprehensive test-ban treaty, and other measures, to be negotiated as soon as possible. We agree with the distinguished and expert representative of Sweden, and other delegations, too, that this is one of the most urgent and important of the disarmament measures which are currently under consideration.

\textit{Id.} at 22.

\textsuperscript{185} There was some internal dissent inside the United States government regarding test ban policy, and many officials would have made the pending SALT negotiations an even higher priority. However, prior to the conclusion of the NPT, the United States and the Soviet Union did not publicly discuss the nascent SALT possibilities, and they certainly never suggested to the NNWS that SALT would shove CTBT into the background. The superpowers' public presentations never diverged from their traditional support for a prompt, verifiable CTBT. \textit{Seaborg, Stemming the Tide, supra} note 130, at 235-45; The U.S. Arms Control and Disarmament Agency During the Johnson Administration, \textit{supra} note 65.
accepting a special responsibility for negotiating a suitable text, and
proclaiming that the United States was committed to it as a desirable,
attainable goal. 186 President Johnson, for example, declared in 1966
that the United States "persists in its belief that the perils of proliferation
would be materially reduced by an extension of the limited test ban treaty
to cover underground nuclear tests." 187

With the United States fully supportive of CTBT, the parties devoted
the bulk of their negotiating energies to other armaments matters. The
contemplated establishment of a NATO "Multilateral Force" (MLF) was
long a nettlesome issue, raising the possibility that the American nuclear
arsenal might be shared in some fashion with currently non-nuclear
allies. 188 The debate also focused on "security assurances," eliciting
promises from the NWS that they would refrain from brandishing nuclear
weapons against NNWS and that they would assist NNWS who were
victimized by nuclear aggression. 189 These were the controversial

186. Secretary of State Dean Rusk, for example, in 1968 listed as possible next
steps in pursuit of article VI a "cutoff" in the production of nuclear materials and a
CTBT. WILLRICH, supra note 143, at 162. See also ACDA HISTORY, supra note 139,
32 (statement of Ambassador Goldberg affirming United States interest in CTBT);
News Conference Remarks by ACDA Director Foster (Aug. 11, 1967), DOCUMENTS ON
DISARMAMENT 1967, supra note 147, at 325, 328:

That is a comprehensive test ban. That would follow on, hopefully. You see,
we have always said that the achievement of a nonproliferation treaty would
form a base on which other measures might take place, one of which certainly
would be the comprehensive test ban which we have been pushing now for
many years.

187. Marin-Bosch, supra note 65, at 85. See also ACDA HISTORY, supra note 139,
at 12, 32 (President Johnson renewing American proposals for a CTBT); SEABORG,
STEMMING THE TIDE, supra note 130, at 160, 227 (Johnson pledging to work for a CTBT

President Kennedy and British Prime Minister Macmillan had jointly stated in 1963,
"A guaranteed end to all nuclear testing in all environments is a fundamental objective of
the free world. We are deeply convinced that the achievement of this objective would
serve our best national interests and the national interests of all the nations of the world."
SEABORG, STEMNING THE TIDE, supra note 130, at 83.

The U.S.S.R. also acknowledged the intimate connection between the NPT and a
CTBT. Soviet Premier Aleksei N. Kosygin wrote in 1968 that following the conclusion
of the NPT, "the Soviet Government proposes that an understanding be reached on the
implementation of the following urgent measures on an end to the arms race and on
disarmament in the near future." He then included on his list the statement, "The Soviet
Government is prepared to reach an immediate understanding on the banning of
underground tests of nuclear weapons on the basis of using national means of detection
to control this ban." 1968 Hearings, supra note 47, pt. 1, at 73, 74-75.

188. See WILLRICH, supra note 143, at 71-87; SHAKER, ORIGIN AND
IMPLEMENTATION, supra note 139, at 131-89.

189. 1968 Hearings, supra note 47, pt. 1 at 263-65, (reprinting United Nations
Security Council Resolution 255 (adopted June 19, 1968) and the relevant United States
weapons-related issues in 1968, and once it became apparent that there was a large measure of consensus upon the importance of a prompt CTBT, the debate concentrated on the still-disputed points. Delegations continued to mention CTBT frequently, but there was by then little occasion to emphasize it as an unresolved point.

The one aspect of the test ban question that did emerge as contentious was the problem of how directly, and where, to assert the obligation for future negotiations. The United States (and to a large extent, the Soviet Union, too) argued that overt reference to CTBT or any other specific arms control measures should be confined to the NPT preamble, not shoehorned into article VI. The NNWS, on the other hand, wanted the commitment to be advertised with more prominence and specificity, and a variety of formulations were proposed. Mexico, in particular, championed the notion that specific measures of arms control should be worked into the operative language of article VI.

The reason for the co-chairs’ reluctance was certainly not any diminished enthusiasm for CTBT or any effort to shuck the lead responsibility for negotiating and drafting the accord—they reaffirmed its centrality to the overall arms control endeavor and their special role in the process.

declaration regarding security assurances); SHAKER, ORIGIN AND IMPLEMENTATION, supra note 139, at 471-552.

190. See Carnahan, supra note 131, at 12, 16-18 (rejection of Romanian and Indian proposals for article VI demonstrates that the negotiators did not agree upon the specification of any particular arms control measures in connection with article VI).

191. Mexico Paper, supra note 134, at 11; DOCUMENTS ON DISARMAMENT 1967, supra note 147, at 394-401 (Mexican draft of treaty provisions specifying an obligation to produce a CTBT, and statement in support of that language); id. at 514-15 (United States reaction to the Mexican proposal); id. at 518-19 (Soviet reaction); SHAKER, ORIGIN AND IMPLEMENTATION, supra note 139, at 557 (summarizing proposals from Mexico, India, Romania, and others regarding article VI).

The March 11, 1968 joint United States-Soviet Union draft treaty was the first to include a direct preambular reference to CTBT and a refined expression of negotiating objectives in article VI. DOCUMENTS ON DISARMAMENT 1968, supra note 154, at 162. See also Statement by Soviet Representative, reprinted in DOCUMENTS ON DISARMAMENT 1968, supra note 154, at 172; and Statement by ACDA Director, reprinted in DOCUMENTS ON DISARMAMENT 1968, supra note 154, at 174, 175.

192. See Mexico Paper, supra note 134, at 11 (United States delegate asserting that “[t]rue security for all Powers, nuclear and non-nuclear alike, lies in progress in the entire range of arms control and disarmament measures, including control of the strategic arms race, a verifiable comprehensive test-ban, and a cut-off of production of fissionable materials for weapons purposes.”).

193. Article VI is an obligation upon “[e]ach of the Parties to the Treaty,” but it was understood at the outset that the nuclear powers, and particularly the superpowers, would logically bear the lead responsibility for fashioning acceptable disarmament proposals, especially regarding nuclear weaponry.
Instead, the United States had two rationales for a "clean" article VI. First, U.S. leaders were wary about their ability to deliver a prompt CTBT (or any other significant arms control measure) on a short timetable. They were apprehensive that the Soviets might—as they had during the LTBT negotiations a few years earlier—publicly endorse a sweeping arms control effort but privately resist the verification arrangements that would be essential to make it work. Therefore, American officials argued that the NPT negotiators should not "complicate" the draft treaty by attempting to resolve in it the tricky and potentially divisive questions about the future direction and timing of subsequent negotiations. They expressed concern that if the already-prolonged NPT negotiations were further delayed by a requirement that the parties concurrently agree upon the outlines of additional disarmament steps, then the entire apparatus of international control might come unraveled.

Second, the United States sought to preserve its diplomatic flexibility: American leaders wanted to retain greater freedom about precisely when to negotiate the various disarmament protocols, how the diverse talks should relate to each other, and what the sequence of arms limitation proceedings should be. They worried that if CTBT (or anything else) were specified in article VI, then the superpowers would lose their control over the timing of the negotiating agenda.

Recall that throughout the 1950s and 1960s, the superpowers had been firmly in the driver's seat in all major multilateral arms control deliberations. They had decided what issues to address, how each draft treaty should be crafted, and when to display and sell their joint product.


195. ACDA HISTORY, supra note 139, at 46, 108, 121; DOCUMENTS ON DISARMAMENT 1968, supra note 154, at 9, 15, 108, 124-25, 230-31, 238 (United States and Soviet statements opposing the effort to make the NPT conditional upon the achievement of other measures of arms control); DOCUMENTS ON DISARMAMENT 1967, supra note 147, at 514-15 (United States statement); id. at 683 (Soviet statement).

196. See 1968 Hearings, supra note 47, pt. 2, at 350-52 (Secretary of State Rogers maintains that article VI does not compel the United States to enter into negotiations regarding the possible limitation of ABM systems on any particular timetable, because the NPT "doesn't set any priorities" among various arms control initiatives).

197. The American and Soviet representatives asserted that the problems of developing a CTBT or other accord were complex and difficult, perhaps requiring a substantial amount of negotiation. The parties should not delay the conclusion of the NPT long enough to produce these other controversial arms control agreements. WILLRICH, supra note 143, at 161-62.
to the other nations. That primacy was valuable, and they did not want to yield to other countries the right to establish the international disarmament agenda.

Perhaps the United States and Soviet Union were overly cautious in this regard. Article VI of the NPT could readily have been drafted in a fashion to underscore the importance of a CTBT, yet still accord the leading states considerable leeway regarding how, where, and when to proceed with the bargaining. Article VI certainly need not have specified a "due date" for a completed accord or spelled out any particular compromises that the parties would have to undertake on verification or other key issues.

But the co-chairs adamantly resisted the NNWS on this point. The United States was concerned that verification of a CTBT might continue to prove a contentious issue, one upon which the United States—despite all good faith in the diplomatic efforts and the creative marshalling of technology—might not be able to obtain adequate Soviet concession. The United States leadership did not want its "hands tied" on CTBT or other diplomatic initiatives through a rigid priority system fixed in article VI.

198. The United States and the Soviet Union had assumed the lead responsibility in the drafting and promotion of the Limited Test Ban Treaty, supra note 6, and the Outer Space Treaty, supra note 23. Subsequent to the NPT, they also controlled the international deliberations leading to the multilateral Seabeds Arms Control Treaty, supra note 23, the Biological Weapons Convention, supra note 30, and others. ACDA TREATY BOOK, supra note 32, at 42, 53, 108, 131.

199. The question of security assurances provides a useful contrast with the treatment of CTBT. Both issues were salient during the NPT negotiations, with NNWS demanding greater concessions and more prominent visibility for their concerns. Regarding both issues, the United States and the Soviet Union expressed sympathy and promised to provide a suitable response. Regarding both issues, the United States blocked efforts to insert overt, binding language into article VI. In the case of security assurances, however, unlike CTBT, the superpowers redeemed their pledges quite promptly, providing at least a partial set of guarantees shortly after the conclusion of the NPT, and keeping the subject alive as a matter for meaningful (albeit incremental) improvement thereafter. See ACDA Treaty Book, supra note 32, at 93-94; WILLRICH, supra note 143, at 167.

200. Mexico Paper, supra note 134, at 16. Domestic United States politics also played a role. The LTBT had been quite controversial inside the United States, with political opponents insisting upon the elaboration of a series of "safeguards" such as the continuation of a vigorous program of underground testing. A CTBT surely would have been even more controversial inside the Senate, as it has been ever since. Belmont Report, supra note 58.

201. In fact, the next major American arms control initiative after the conclusion of the NPT concerned the opening of bilateral SALT negotiations with the Soviet Union, rather than the pursuit of multilateral test ban limitations. Supra text accompanying notes 176-77.
The NNWS yielded only grudgingly. They accepted the deletion from article VI of any overt reference to CTBT, and its placement into the preamble, on the narrow grounds of ceding to the superpowers their requisite flexibility in constructing the international negotiating agenda and avoiding unnecessarily complicating and delaying the conclusion of the NPT. The NNWS did not understand this modification as a ploy to put CTBT "onto the back burner," nor was it ever suggested that the bargaining on the test ban agenda could legitimately stretch out for decades. In acquiescing to the co-chairs' asserted need for a limited acknowledgement of their timetable control, the NNWS were not moderating their ardor for a test ban, nor did they see the NWS as stepping back from the commitment. This was a narrow decision, merely tempering the demand for test ban, not abandoning it.

If the NNWS had thought that the superpowers were sliding away from the obligation to develop a prompt CTBT, many more states might have joined those who abstained from participation in an unacceptably discriminatory NPT. If the NNWS had thought that article VI was becoming an "empty vessel," that they were surrendering to the NWS a "blank check," with no obligation to conclude any particular types of arms control at any particular point in time, the treaty would not have attracted so many adherents. In fact, the NNWS agreed to omit from article VI the explicit reference to CTBT because they thought that it

202. Mexico Paper, supra note 134, at 12 (United Arab Republic proposes compromise formula); LAST CHANCE, supra note 20, at 78-79 (article VI occasioned more discussion and controversy than any other portion of the revised draft treaty).

203. See Statements of Swedish Representative, reprinted in DOCUMENTS ON DISARMAMENT 1968, supra note 154, at 44-45, 305; SHAKER, ORIGIN AND IMPLEMENTATION, supra note 139, at 576-77 (NNWS proposals to strengthen the superpowers' draft of article VI).

204. LAST CHANCE, supra note 20, at 77-79; Carnahan, supra note 131, at 18-19. The Swedish delegate Myrdal observed that under the co-chairs' draft of article VI, "the obligations on the nuclear weapon states are considerably weaker" than in various NNWS drafts. However, she was willing to accept the diluted language in order to retain the flexibility to take timely advantage of any disarmament options that might become available: "[T]o enumerate some specific measures might be counterproductive, as agreements on certain other scores may come to present opportunities for earlier implementation." Id.

205. Mexico Paper, supra note 134, at 32 (American delegate assures NNWS that conclusion of NPT will drive the United States to redouble its efforts toward nuclear arms control); LAST CHANCE, supra note 20, at 80-83 (many NNWS criticized the NPT for failing to specify the disarmament measures that would follow it, but the General Assembly resolution endorsing the treaty was approved by a vote of 95-4, with 21 abstentions).
really remained there *implicitly* in any event. 206 Everyone realized that the NPT disarmament regime would be incomplete without a comprehensive test ban; the superpowers had committed to deliver one; and it might have seemed an excess of caution to insist that the obligation be stated once again in operative treaty language. 207

Again, the history of prior disarmament politicking provides an important element of context for this debate. Since World War II, the leading states had exchanged a variety of arms limitation proposals on a wide range of topics, covering conventional, nuclear, chemical, and other weaponry. On some occasions, a sponsoring country would “link” these issues, contending that the progression toward “general and complete disarmament” should be accomplished via a series of pre-agreed, carefully-timed stages. This way, the entire long-term structure of arms reduction would be articulated and advertised in advance, and each country could be confident that its national security would not be jeopardized at any point in the progression. 208 At other times, however, this effort to develop an all-encompassing, interlocking structure for disarmament appeared overly ambitious and paralyzingly complex. Some states therefore proposed more modest, single disarmament steps, which could be pursued independently, unattached to a grand scheme of total eradication. 209

During the 1950s and 1960s, the world oscillated between these two strategies, with each being advocated at various times by different partisans. The United States and the Soviet Union, at sequential points, took turns on both sides of this question. 210 By 1968, however, a

206. *See* Mexico Paper, *supra* note 134, at 28 (Comments of Swedish Representative: “From all points of view a test ban would be indicated as the issue most immediately to be considered according to the commitments made in draft article VI of the present treaty text.”). *See also* Nuclear Proliferation and the Near-Nuclear Countries 3 (Onkar Marwah & Ann Schulz eds., 1975) [hereinafter Marwah & Schulz]; Greb & Heckrotte, *supra* note 63, at 36, 39.

207. Of course, the geopolitical realities were that the NNWS collectively could not force a CTBT upon the United States or the Soviet Union. Regardless of what article VI said—no matter how specific and binding the NPT language appeared to be—if the superpowers refused to conclude a further test ban agreement, the NNWS enforcement options were weak. There would be little point, therefore, to insist upon inserting the stronger language directly into article VI—in any event, a CTBT would require the political good will of the superpowers.

208. ACDA History, *supra* note 139, at 15, 20 (Sweden and India provide examples of linkage, attempting to tie progress on a non-proliferation accord to progress on CTBT).

209. *See*, e.g., 1968 Hearings, *supra* note 47, at 203 (expressing the hope that several arms control initiatives—including notably SALT and CTBT—can proceed simultaneously, rather than sequentially, as the LTBT and NPT had done).

tentative consensus was emerging in favor of the incremental approach, as more countries were drawn to the strategy of taking advantage of whatever partial measures of arms control were attainable, even without deriving a clear picture of how to accomplish the entire long-term disarmament task.\footnote{211}

In this context, the movement of the CTBT reference from article VI to the preamble must have seemed like a modest, plausible step. It acknowledged the desirability of seizing the moment, concluding the limited arms control measure that was then available, and deferring for tomorrow the debates about the next stage. The NNWS were naturally hesitant to jeopardize the NPT by insisting upon resolving in it the controversy over exactly what additional measures would come next and when, while the NWS were adamant about retaining their flexibility.\footnote{212}

No one suggested at the time that CTBT was somehow suddenly off the international bargaining agenda altogether, that its deletion from article VI made it no longer important or obligatory. To the contrary, most observers considered that CTBT was the very next item to be taken up, that it was a top priority for the NWS as for the NNWS, and that the commitment to conclude such an accord "at an early date" would be redeemed very shortly.\footnote{213} Even the United States delegate assured the General Assembly in December 1968,

Foremost among the arms control issues which have seized our attention for more than two decades is the problem of nuclear disarmament. The Eighteen-Nation Committee on Disarmament recognized the pre-eminence of this area of concern in the programme of work which was adopted at its last session. From the discussion in this Committee it is also clear that, within the broad and complex field, the question of further

\footnotetext{211.}{ Citation to "general and complete disarmament" has remained a staple of the disarmament vocabulary, reflected in article VI of the NPT and in the preambles to several subsequent accords, each of which embodied only partial and incomplete progress toward that ultimate objective. See Biological Weapons Convention, supra note 30, pmbl., para. 2; ABM Treaty, supra note 179, pmbl., para. 6; SALT II, supra note 179, pmbl., para. 9.}

\footnotetext{212.}{ Mexico Paper, supra note 134, at 17, 35 (Soviet and United States delegates oppose the concept of linking NPT and CTBT, saying that strategy would merely delay and possibly scuttle the NPT); ACDA HISTORY, supra note 139, at 116 (Soviet delegation reaffirms interest in negotiating a CTBT and other measures, when NPT is concluded).}

\footnotetext{213.}{ The Soviet Union frequently highlighted CTBT as a top priority in the disarmament negotiating agenda. DOCUMENTS ON DISARMAMENT 1968, supra note 154, at 30, 370, 468, 556, 708. Other countries, too, anticipated concentration on test ban policy. See, e.g., Statements of Representatives of Japan and Sweden, reprinted in DOCUMENTS ON DISARMAMENT 1968, supra note 154, at 310, 428.}
limitations on nuclear weapon testing stands as a priority item.214

The inexact language of Article VI, therefore, was not produced by the parties' disagreement over CTBT, or by any unwillingness to express a commitment to halting nuclear testing; it was a much more narrow question of preserving for the negotiators a bit of "wiggle room," to allow them a reasonable period of time to prepare for follow-on negotiations, to get their technological, military, and diplomatic affairs in order, and to produce a satisfactory CTBT.215

3. SUBSEQUENT PRACTICE OF THE PARTIES

The next level of treaty interpretation analysis permits recourse to the parties' "subsequent practice," defined to include public statements, overt and tacit acquiescences, and other behaviors that may manifest the parties' original understanding or their de facto assent to an incremental evolution in the meaning of the obligations.216 In the case of the NPT, there is an unusually rich body of such data available, concentrated in the proceedings of the four review conferences, as well as from other traditional sources.

The first shards of relevant practice came in the various states' public declarations upon, or shortly after, the signing of the NPT. Many countries, while affiliating themselves with the non-proliferation effort, simultaneously stressed that this particular treaty was, at best, an incomplete product.217 Until the qualitative and quantitative nuclear

214. Mexico Paper, supra note 134, at 37-38. See also SEABORG, STEMMING THE TIDE, supra note 130, at 374 (quoting ACDA Director Foster as listing CTBT first among disarmament steps that would be pursued under article VI after conclusion of the NPT); Address by Secretary Rusk, reprinted in DOCUMENTS ON DISARMAMENT 1968, supra note 154, at 273, 276 (discussing CTBT as part of the answer to "What next?" in disarmament).

215. The NNWS were (and remain) divided in their assessment of article VI. Some concluded that the final language was too general and indefinite to provide a real commitment to specific measures of disarmament; others were also less than completely satisfied with the text, but accepted it, within the overall context of the NPT, as a tolerable expression of a commitment to undertake meaningful future steps. DOCUMENTS ON DISARMAMENT 1968, supra note 154, at 292, 319, 330, 400.

216. The Vienna Convention stresses the role of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation." Vienna Convention, supra note 132, art. 31.3(b). RESTATEMENT, supra note 132, §325.2; Carnahan, supra note 131, at 10-11.

217. See Mexico Paper, supra note 134, at 36 (United Kingdom delegate states, "In the nuclear field, my own priority is a ban on underground tests . . . . [I]t seems to us to be a measure of cardinal importance because we think that the real danger of vertical
arms race was curbed, via a CTBT, there would be little prospect that the nuclear menace could be reliably contained. 218

Notably, at the first session of the ENDC following the signature of the NPT, the United States and the Soviet Union, as co-chairs, submitted a proposed agenda for the future work of the body. Copying the language of article VI, the first item on the agenda was “Further effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament.” CTBT was then the first such measure identified by the co-chairs for discussion under this heading. 219

The United Nations General Assembly, in endorsing the NPT, also highlighted the outstanding promise of article VI and reaffirmed the crucial role that a comprehensive test ban agreement would play in promoting global security. 220 The General Assembly, in fact, has maintained a watchful eye on the CTBT question ever since, passing annual resolutions endorsing the concept, calling for negotiations, and

proliferation lies in the development of more sophisticated weapons systems.”); id. at 36 (Swedish delegate explains the “reasons for our persistent urging that [CTB] should be the next disarmament measure to be elaborated”); id. at 37 (Italy endorses prompt action on CTBT). See also Report of the ENDC, reprinted in DOCUMENTS ON DISARMAMENT 1968, supra note 154, at 591, 593; Final Document of the Conference of Non-Nuclear Weapon States, reprinted in DOCUMENTS ON DISARMAMENT 1968, supra note 154, at 668, 674 (proposing agendas for future disarmament negotiations, including CTBT).

218. JENSEN, supra note 8, at 43. Japan, for example, stated during the 1968 General Assembly session (where the draft NPT was endorsed) that the treaty did not embody an acceptable balance of mutual responsibilities between nuclear and non-nuclear states, that the treaty would “lose its moral basis” unless the NWS “kept their part of the bargain” by making the progress called for in article VI, and that the first step in that direction should be a ban on underground nuclear testing. LAST CHANCE, supra note 20, at 113. Similarly, at the 1968 summit meeting of non-aligned states, the NNWS asked the NPT drafters to provide more visible evidence of their plans to accord a high priority to nuclear arms control, and they listed CTBT first among their concerns. Marwah & Schulz, supra note 206, at 5.

219. DOCUMENTS ON DISARMAMENT 1968, supra note 154, at 583, 812; SHAKER, ORIGIN AND IMPLEMENTATION, supra note 139, at 579. This agenda did not include mention of the pending SALT negotiations, which were to be addressed in bilateral United States-Soviet Union talks, outside the ENDC.

220. General Assembly Resolution 2373 (XXII) (June 12, 1968), reprinted in DOCUMENTS ON DISARMAMENT 1968, supra note 154, at 431. See also General Assembly Resolution 2455 (XXIII): Urgent Need for Suspension of Nuclear and Thermonuclear Tests, reprinted in DOCUMENTS ON DISARMAMENT 1968, supra note 154, at 796; LAST CHANCE, supra note 20, at 126-34 (NNWS conference in 1968 endorsed NPT, but called for negotiations on CTBT to commence no later than March, 1969).

The Secretary-General of the United Nations observed in 1972, “There is an increasing conviction among the nations of the world that an underground test ban is the single most important measure, and perhaps the only feasible one in the near future, to halt the nuclear arms race, at least with regard to its qualitative aspects.” Goldblat Report, supra note 62, app. A, at 42.
regretting the lack of progress.\textsuperscript{221} The United Nations has conducted three “Special Sessions” on disarmament matters, each of which singled out test ban proposals for heightened consideration.\textsuperscript{222} The Conference on Disarmament (the eventual successor to the ENDC), in its various incarnations, has retained test ban as a primary focus of attention, never flagging in its efforts to highlight the issue and promote prospects for negotiation.\textsuperscript{223} The United States and the Soviet Union acknowledged the profound interest of the other states in the topic of test ban deliberations, and agreed to apprise them regularly of the progress achieved in their (now defunct) 1977-80 bilateral discussions.\textsuperscript{224}

Similarly, the NNWS have been consistent in their linkage of NPT and CTBT. As early as the August-September 1968 summit conference of non-aligned states, the non-nuclear weapons countries both (a) expressed apprehension about the dangers of the further dissemination of nuclear weapons and (b) called upon the NWS to conclude a CTBT “as an important step in the field of nuclear disarmament, and as a matter of high priority.”\textsuperscript{225}

In the formal multilateral deliberations at the 1975 NPT Review Conference, the first quinquennial event of its type, the NNWS placed CTBT squarely onto the center stage. Many other issues were discussed, too, some with substantial energy and dissention, but none approached CTBT in the depth of attention and the stridency of the debate. The primary NNWS complaint about the first five years of the NPT was the NWS failure to conclude a meaningful test ban agreement—the TTBT was

\begin{itemize}
\item \textsuperscript{221} Epstein, supra note 155, at 138 (in early 1970s, during SALT I negotiations, General Assembly continued annually to urge suspension of nuclear testing and the negotiation of a CTBT); JENSEN, supra note 8, at 43 (20 resolutions calling for an end to nuclear testing were adopted by the General Assembly between 1975 and 1984). In 1982, the United States was the lone dissenter when a resolution calling for the outlawing of nuclear tests passed 111 to 1 with 35 abstentions; 1990 U.N. Disarmament Y.B. 183-210, U.N. Sales No. E.91.IX.8.
\item \textsuperscript{223} Stein, supra note 62, at 49. The Committee on Disarmament (CD) has assumed from its predecessor (the ENDC) the role as “the single multilateral disarmament negotiating forum” of the international community. It is now a 40-nation body, affiliated with the United Nations, and it has taken the lead in developing proposals and texts for various arms control accords. BERNAUER, supra note 3, at 5.
\item \textsuperscript{224} See, for example, the trilateral report submitted by the negotiating states to the Committee on Disarmament in July, 1980, summarizing their progress to date in drafting a CTBT. \textit{Report on CTB Negotiations}, DEP’T ST. BULL., Nov. 1980, at 47-48.
\item \textsuperscript{225} Final Document of the Conference of Non-Nuclear States, \textit{reprinted in} SHAKER, ORIGIN AND IMPLEMENTATION, supra note 139, at 1005.
\end{itemize}
a woefully inadequate placebo. The 1975 Review Conference was therefore an unruly affair, and a deadlock was avoided at the last minute only through the personal efforts of the chair, Inga Thorsson of Sweden, who managed to cobble together a tolerable final report, which featured strong language on CTBT:

The Conference expresses the view that the conclusion of a treaty banning all nuclear weapons tests is one of the most important measures to halt the nuclear arms race. It expresses the hope that the nuclear-weapon States Party to the Treaty will take the lead in reaching an early solution of the technical and political difficulties on this issue. It appeals to these States to make every effort to reach agreement on the conclusion of an effective comprehensive test ban.

The tenor of the 1975 discussion also reveals an important, subtle point about the framework for the current debate. That is, the NNWS in 1975 were not merely asserting that they wanted a CTBT, or insisting that such an accord would have salutary effects on non-proliferation. Rather, they were saying, in addition, that the NWS already owed the world a CTBT, that such an agreement had previously been promised in conjunction with article VI, and that whereas the NNWS had already begun to “pay” their half of the NPT obligations (by verifiably giving up nuclear weapons), the NWS had so far illicitly tried to wiggle out of their reciprocal obligations to “pay” (through constraining the nuclear arms race). In short, CTBT was not some new demand of the NWS; it

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226. Onkar Marwah, Epilogue: The NPT Review Conference, Geneva, 1975, in Marwah & Schulz, supra note 206, at 303-06 (in a preparatory meeting convened prior to the 1975 review conference, experts listed CTBT first among their policy recommendations; during the Review Conference itself, the Conference President, in summarizing the first week of general debate, listed the need for a CTBT as the first item that had been elaborated). See Final Declaration of the Review Conference, supra note 181, at 558, 566; STOCKHOLM INT’L PEACE RESEARCH INST., WORLD ARMAMENTS AND DISARMAMENT YEARBOOK 1976, at 379-83; SHAKER, ORIGIN AND IMPLEMENTATION, supra note 139, at 630-31 (several NNWS proposed to amend the NPT to require a moratorium on nuclear testing).

227. Donnelly & Beckman, supra note 152, at 577, 581.

228. Final Declaration of the Review Conference, supra note 181, at 566. The Declaration also noted that several countries had called for a temporary moratorium on nuclear tests, pending a complete agreement, and additionally urged the nuclear powers “to limit the number of their underground nuclear weapons tests to a minimum.” Id.

229. Conference President Thorsson summarized the NNWS sentiment:

It seems to me that an enlightened world opinion, reflected in this case, in statements by non-nuclear-weapons states, rather impatiently awaits concrete and binding results of on-going bilateral negotiations, aiming at ending the
was presented as the key component in honoring a commitment already undertaken.220

A similar pattern obtained at the second review conference, in 1980. Again, there were occasional rumblings about possible NNWS defections from the NPT regime—implied threats to leave the treaty if the NWS did not do more to comply with article VI and conclude a CTBT.221 The hostility toward the NWS reached its peak as the Mexican delegation led the NNWS in demanding overt acknowledgement of the primacy of a test ban. The resulting impasse destroyed the conference, and no concluding document or final statement was issued—the assembly dissolved in disarray due to the unresolved antagonism over what the NNWS portrayed as NWS welshing on a fundamental treaty obligation.222

Notably, the 1980 Review Conference took place during the only post-1968 interval when the superpowers were actually engaged in active CTBT negotiations.223 From 1977 through 1980, the United States, the Soviet Union, and the United Kingdom registered significant accomplishments in the effort to negotiate a verifiable, mutually-acceptable multilateral CTBT.224 Such an accord might have amply satisfied the article VI standards, discharging the NWS’ shared obligations.225 If ever there was an occasion for the NWS to plead plausibly for NNWS patience and a bit more time, 1980 was it—yet the

quantitative and qualitative arms race, and reducing substantially the levels of nuclear armaments. Many have referred to the need for a time-table for results to be achieved through these negotiations. The agreement on a comprehensive test ban is clearly recognized as a most decisive element in these efforts. A least common denominator is apparent in the statements:

Article VI must be implemented, in letter and in spirit.

Donnelly & Beckman, supra note 152, at 577, 581.

220. Epstein, supra note 155, at 138.

221. Donnelly & Beckman, supra note 152, at 577, 582-83 (quoting Mohamed Shaker of Egypt, President of the 1985 NPT Review Conference, warning about defections from the NPT if the disarmament issues are not satisfactorily resolved).


223. By 1980, after the Soviet Union’s invasion of Afghanistan, the pace of all arms control negotiations, including the CTBT talks, slowed dramatically. YORK, supra note 79.

224. Id. at 282-323.

225. The 1977-80 negotiations, however, eventually focused on a treaty that would have an initial duration of only three years, far short of a discontinuance of testing “for all time” (as the LTBT preamble contemplated). It is therefore possible that the NNWS desire for a complete CTBT would not have been satisfied even then, and some states might still have declined to adhere. Id. at 304-05.
NNWS were unmoved. They regarded CTBT as "old business," something that should have been taken care of long ago, and they were ill-disposed to tolerate further extensions.236

The United States did not, at the first two Review Conferences, disassociate itself in any way from the consensus viewpoint about the importance of test ban agreements. In fact, the United States consistently underscored the commitment to article VI, the catalytic role that the superpowers would have to play in controlling the nuclear arms race, and the value of a CTBT.237 The United States never stated or implied that a CTBT was peripheral to the NPT, that it was merely one option among many for satisfaction of article VI, or that it was in any way a new idea which the NNWS were belatedly trying to read into the language of the NPT. The United States assertion regarding test bans was in the manner of "these things take time," but never "this thing should not (or need not) be promptly done."238

After the election of Ronald Reagan, however, the terms of the debate shifted. The United States, for the first time, backed away from the concept of a CTBT altogether, asserting, as noted above, a variety of shifting rationales for opposing a treaty.239 The new administration, committed to a massive buildup of nuclear and conventional forces, saw CTBT as an impediment to the effort to develop new types of nuclear weaponry, and marched in the opposite direction.

With the benefit of hindsight, we can identify a curious parallel between the case of the NPT and the case of the ABM treaty,240 which was also imperiled at this time. In the latter situation, a clear and hardy international agreement stymied the administration's effort to proceed with


237. Edward M. Kennedy, Article VI and the Importance of a Comprehensive Test Ban Treaty, in Khan, supra note 20, at 365, 367 (every post-World War II American President, until Ronald Reagan, supported the negotiation of a CTBT as a matter of priority).

238. Jimmy Carter asserted that "A comprehensive test ban would also signal to the world the determination of the signatory states to call a halt to the further development of nuclear weaponry." BULL. ATOM. SCIENTISTS, Oct. 1976, at 11, quoted in Goldanski & Davydov, supra note 178, at 149.

239. See supra text accompanying notes 83-114.

240. ABM Treaty, supra note 179.
futuristic "Star Wars" satellite-based missile interceptors under the Strategic Defense Initiative. The government, therefore, propounded a "new interpretation" of the ABM treaty, contorting its meaning, ignoring the historical record, and attempting to evade its object and purpose. A political firestorm of the first order ensued, and the constitutional and political battle continues to reverberate to this day.

A similar—but less publicized, and probably more successful—ploy was contemporaneously undertaken with the NPT. The Reagan administration, determined to abandon CTBT, undertook a de facto "reinterpretation" of article VI of the NPT, under which the commitment to a test ban could sanguinely be postponed indefinitely. The United States adopted the posture that article VI is imprecise, imposes no meaningful timetable, and speaks only vaguely about unnamed "measures" without specifying a CTBT or any other particular obligation. In this way, the nuclear arms buildup could continue apace and the administration could blithely espouse support for CTBT as a "long term goal"—but it was now a goal encumbered by a fistful of implausible preconditions. Prior to the 1980 presidential election and the subsequent American volte-face on test ban policy, there was nothing "ambiguous" about article VI; there was no international doubt that CTBT was the primary obligation of the NWS. It was the unilateral Reagan reinterpretation that cast doubt upon the meaning of the obligation, elevating an American change of heart into an alleged treaty ambiguity.

The third and fourth review conferences, in 1985 and 1990, respectively, followed the same weary pattern, producing only a hardening of views on both sides. The NNWS continued to insist that a CTBT was a requisite part of the overall non-proliferation regime, and moreover that there had been, in 1968-70, a meeting of the minds to this end.


243. In a 1988 report to Congress on "The Relationship Between Progress in Other Areas of Arms Control and More Stringent Limitations on Nuclear Testing," the Reagan administration asserted, "Thus we do not regard nuclear testing as an evil to be curtailed." Epstein, supra note 155, at 141.

244. Some have argued that the "reinterpretation" of the NPT occurred even earlier, with the NWS almost immediately downgrading their obligations under articles IV, V, and VI, and emphasizing instead the NNWS commitments under articles II and III. Munir A. Khan, Towards a Universal Framework of Nuclear Restraint, in NUCLEAR NON-PROLIFERATION AND THE NON-PROLIFERATION TREATY, supra note 155, at 45, 47-48.
effect, so a test ban had all along been understood as a legal obligation, albeit an imprecisely stated one. Resumptions of CTBT negotiations became at the head of nearly every country’s agenda of immediate disarmament steps. The United States, in opposition, averred that article VI mandated only whatever “measures” the superpowers found to be prudent and attainable, and that for the foreseeable future, CTBT was off-limits.

In 1985, a remarkable compromise was brokered, in which both the NNWS majority and the United States-United Kingdom minority autonomously asserted their views about CTBT in the final declaration. After recounting the various arms control initiatives that had been advanced, some with success, during the previous five years, and after recalling the commitment to CTBT that had been reflected in the NPT, the LTBT, and General Assembly resolutions, as well as in previous review conference reports, the 1985 declaration “reiterated its conviction that the objectives of Article VI remain unfulfilled and concluded that the nuclear-weapon States should make greater efforts.” It then added:

245. The Japanese delegate to the 1985 review conference asserted, My country has stressed the importance of the test ban as an important first step on the road to nuclear disarmament and thus objects to any nuclear tests by any state. A test ban is of importance in preventing the vertical as well as horizontal proliferation of nuclear weapons and would thus be an important complement of the NPT regime.


247. SEABORO, STEMMING THE TIDE, supra note 130, at 385-86.

The Conference except for certain States whose views are reflected in the following subparagraph deeply regretted that a comprehensive multilateral Nuclear Test Ban Treaty banning all nuclear tests by all States in all environments for all time had not been concluded so far and, therefore, called on the nuclear weapon States Party to the Treaty to resume trilateral negotiations in 1985 and called on all the nuclear-weapon States to participate in the urgent negotiation and conclusion of such a Treaty as a matter of the highest priority in the Conference on Disarmament.

At the same time, the Conference noted that certain States Party to the Treaty, while committed to the goal of an effectively verifiable comprehensive Nuclear Test Ban Treaty, considered deep and verifiable reductions in existing arsenals of nuclear weapons as the highest priority in the process of pursuing the objectives of Article VI.249

By 1990, even this type of Janus-faced formulation was unacceptable to many NNWS (led by Mexico), who insisted upon a more blatant assertion of the primacy of CTBT, and no concluding document at all was produced.250 The Conference considered a wide variety of verbal


The NNWS appeared to many observers in 1990 to be increasingly resolute on the question of CTBT. At a 1989 non-aligned summit meeting, parties concluded that a test ban was “essential” to the preservation of the NPT regime. During the 1990 review conference, the caucus of non-aligned and other NNWS agreed that the NPT would be enhanced by further measures of nuclear disarmament, and they specified the key steps necessary to satisfy article VI—the first three of which all related to CTBT. Some NNWS would have gone even further, labeling CTBT “indispensable” to the implementation of article VI and stating that “the continuing testing of nuclear weapons by the nuclear-weapon States Parties to the [NPT] would put the future of the [NPT] beyond 1995 in grave doubt.” George Bunn, The Non-Proliferation Treaty Review Conference of 1990,
formulations, seeking some common expression of concern and promise about past and future activities related to article VI, but the CTBT question left them hopelessly divided.251

The United States spokespersons attempted to develop some compromise language on test ban progress,252 and hoped to deflect NNWS fervor for a CTBT by (a) noting that article VI is a commitment for "each of the Parties," not solely the NWS, and many other countries had accumulated far worse records of relentless arms buildups than had the United States; (b) identifying a wealth of other arms control accords that had been completed during the previous five years, and suggesting that this record should appease the NNWS; and (c) underscoring the importance of the NPT, and of non-proliferation more generally, for all countries, suggesting that the world should not, in 1995, hold the NPT renewal "hostage" to its interest in a comprehensive nuclear test ban.253

Behind this posture lay the attitude that it was up to the United States unilaterally to determine whether and when to proceed with a CTBT, and

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251. In The Diplomatic Record 1990-91, at 195, 197 (David D. Newsom ed., 1992). Mexico even proposed language asserting that a CTBT would be "the single most important measure relating to cessation of the nuclear arms race at an early date," and that:

unwillingness of a Party to the Treaty to engage in multilateral comprehensive test ban treaty negotiations shall be deemed an act contrary to the spirit and letter of the Treaty since it represents non-compliance with the obligations under the Treaty.

Carnahan, supra note 131, at 13.


253. The United States was willing to have the final declaration state "that the discontinuance of nuclear testing would play a central role in the future of the NPT." But the United States also insisted on preserving the notion that yet another partial test ban agreement (e.g., a lower-threshold TTBT or an agreement embodying a reduced annual quota on the number of permitted explosions, rather than a complete CTBT) might satisfy the obligation of article VI, at least for purposes of placating the 1995 conference. Bunn, supra note 250, at 197-98; Fischer & Muller, supra note 250, at 555-84.

that the rest of the world had no legitimate role or mechanism for influencing this autonomous American decision.\textsuperscript{254}

In sum, therefore, in the ongoing debate, test ban proponents seek to establish only a relatively modest case regarding NPT compliance.\textsuperscript{255} They need not assert that article VI is only about a CTBT, that it necessarily requires a test cessation as the first act of nuclear arms control, or that the parties undertook to conclude a test ban (or any particular version of a test ban) by a fixed date. Instead, they rely upon the political and legal record to demonstrate: (a) that the parties, including the United States, had CTBT in mind—perhaps foremost in mind—when they drafted the “effective measures” language of article VI; (b) that the parties contemplated that such an accord, complementing the NNWS non-acquisition obligations, would be concluded promptly, pursuant to earnest, sustained negotiations; (c) that other measures of arms control, as valuable as they are and as important for long term global security as they will be, cannot be indefinitely substituted for a test ban agreement; and (d) that, overall, the idea of CTBT continues to play a special role in creating and sustaining the “basic bargain” of the NPT—we should not expect the indefinite perpetuation of the non-proliferation regime in the absence of significant movement toward an effective test ban accord.\textsuperscript{256}

Before concluding this section’s discussion of the meaning of “effective measures” in article VI, it is useful to step back from the fine-grained analysis of the legal interpretation of NPT text and history, to consider the CTBT political terrain from a more macroscopic perspective.\textsuperscript{257} That is, several key states have asserted that, for them, the link between the NPT and a CTBT is fundamental and indissoluble. Regardless of whether article VI states with convincing precision the

\textsuperscript{254} See Lehman Statement, supra note 253, at 112.

\textsuperscript{255} For the converse view, see Carnahan, supra note 131 (arguing that the NPT negotiators failed to reach consensus on any requirement for a CTBT, and subsequent practice reveals lack of unanimity on the desirability of such a treaty); Lewis A. Dunn, Nuclear Proliferation Watch: Some Thoughts on Future Challenges, in NEW TECHNOLOGIES FOR SECURITY AND ARMS CONTROL: THREATS AND PROMISE 91, 101 (Eric H. Arnett ed., 1989) (“A close look at the negotiating record does not support the view that a ban on all nuclear testing is the pre-eminent test of ‘good faith’ negotiations.”).

\textsuperscript{256} See Aaron Tovish, letter to the editor, N.Y. TIMES, Jan. 6, 1992; ZAMORA, supra note 113, at 17 (many countries would resist indefinite extension of NPT if United States is still conducting nuclear tests).

\textsuperscript{257} See Lewis Dunn, Nuclear Proliferation in the 1990s, in CRITICAL CHOICES: SETTING PRIORITIES IN THE CHANGING SECURITY ENVIRONMENT 221, 223 (Eric H. Arnett et al. eds., 1991) (CTBT has symbolic importance beyond its real merit: “If you go back into the negotiating record, you cannot find a clear link that the CTB is the only litmus test of whether [article VI] is being met. But that does not matter.”).
mandate for concluding a timely CTBT, these countries assert that they will judge the NPT, and they will react to 1995 proposals to renew or strengthen it, in the light of its accomplishment or failure to promote a test ban accord. Even if a pettifogging lawyer could conclude that the text, context, history, and practice of article VI do not quite nail down an agreed legal commitment to conclude a CTBT, these countries might nevertheless contend that the “spirit” of the NPT had been violated, that their security interests may not be well served by a system under which some states continue the headlong development of new nuclear weapons while others refrain, and that, overall, the treaty may no longer be worth sustaining or enhancing. 258

It is hard to assess how much of this international fury is purely a bluff. Non-proliferation really is in the interest of NNWS and NWS alike. Even if there were no CTBT, the world should not throw away one important measure of arms restraint simply out of frustration over the inability to prepare another. Responsible leaders in all countries should endeavor both to sustain the NPT and to create a CTBT—not make the former a hostage to the latter.

There is, moreover, reason to suspect that at least some substantial component of NNWS disquietude over the “discrimination” of the NPT is self-serving and insincere. That is, some countries may still harbor ongoing nuclear ambitions for their own narrow reasons—they see the nuclear option as a useful card to play in dealing with regional tensions or potential local hostilities. They might, therefore, choose to remain outside the NPT umbrella in any event, regardless of what the superpowers do about CTBT. The alleged shortcomings in the NPT regime, and the superpower failure to constrain their own nuclear developments in particular, continue to provide these “problem countries” with a handy, if cynical, “cover story.” 259

India and Pakistan are often cited as examples of this dynamic—both have criticized the NPT as incomplete pending the conclusion of a CTBT that would pinch off the NWS’ qualitative nuclear arms race as surely as the NNWS’ quantitative competition. Both have been, however, suspected of prolonging their own nuclear ambitions for other reasons, as well—dangling on the nuclear precipice may be perceived as advantageous

258. Rotblat, supra note 20, at 65; Goldblat, Twenty Years, supra note 23, at 11 (India, Argentina, and Brazil all still complain about the discriminatory nature of the NPT); Goldansky & Davidov, supra note 130, at 15, 23 (CTBT is “an indispensable condition for further existence of the [NPT].”).

259. Ronald F. Lehman, Lehman’s Lessons: The Arms Control Agenda, ARMS CONTROL TODAY, Dec. 1991, at 8, 12 (“For many of the countries that cause nonproliferation concerns, the CTB is a pretext.”); Schrag, supra note 62, at 28; Belmont Report, supra note 58, at 224; Last Chance, supra note 20, at 197.
in the recurrent South Asian military confrontations. Perhaps neither Pakistan nor India would sign a multilateral CTBT even if one were available and even if it did significantly constrain the United States and Russia. But it may be suggestive that both India and Pakistan have long adhered to the Limited Test Ban Treaty, a relatively “non-discriminatory” accord that constrains all nuclear parties equally.\textsuperscript{260} Perhaps the time has come to put to the test the stated willingness of those and other NNWS to join a truly effective non-proliferation order by removing their stated excuse.\textsuperscript{261}

Similarly, the historic non-participation of France and China long provided a plausible rationale for the United States and the Soviet Union to proceed only slowly and deliberately on nuclear testing matters. Arguably, the superpowers could be expected to go only so far, and only so quickly, toward nuclear restraints as long as the other nuclear powers remained on the sidelines. Now, however, that artificial constraint, too, has been largely removed: China has joined the NPT, France has suspended nuclear testing, and there is a real prospect that an effective cessation on nuclear explosions could be converted into a truly global ban.

These and other recent adherences have substantially bolstered the NPT, making the 1995 conference both an unprecedented opportunity and an abyssal danger. The world will shortly determine whether the NPT will be continued in force for a substantial period of time, or whether it will be consigned to history. The link between CTBT and the NPT—a link possessing both legal and political attributes—will play a key role in that decision.

At this point, the United States (with the United Kingdom in the role of spear-carrier) stands alone against the rest of the world’s interest in a test ban agreement. Whether the votes are tallied in General Assembly resolutions, the LTBT amendment conference, or the NPT review conferences, the result has always been the same: The United States is


\textsuperscript{261} Session I Debate, in Khan, supra note 20, at 102, 116-18 (many countries that have resisted joining the NPT on the grounds that it is discriminatory would be likely to join a CTBT); Goldanskii & Davydov, supra note 178, at 154-55, 158; Statement by Indian Representative, \textit{reprinted in DOCUMENTS ON DISARMAMENT 1968}, supra note 154, at 325 (Indian interest in a CTBT).
isolated in its interpretation of article VI and in its antipathy to test ban limitations. The pressure is mounting, and the stridency of the debate has reached increasingly tense levels.262

On the other hand, some experts are now suggesting a political transformation, predicting that the 1995 conference may be appreciably more henigian than its predecessors, with consensual support for extension of the NPT well within reach. They assert that the wealth of other arms control measures—the dazzling deep cuts achieved in START, the CFE reductions in conventional forces, and the rest of the panoply of progress—have obviated the need for a CTBT and satiated the NNWS desires.263 In today's post cold war world, some contend, CTBT has lost its saliency; by 1995 the rest of the world will be less driven by arms control matters in general, and CTBT in particular will seem a relatively minor point of incomplete accomplishment on an otherwise breathtaking record of disarmament.264

It is certainly possible that the world will relax as the cold war era tensions unwind, and the acrimony directed against the United States on test ban issues may begin to find other outlets. But the failure to conclude a CTBT is not yet a dead issue; the NNWS have not yet abandoned it as a key ingredient in the global security regime that the NPT attempted to create.265 Even if some of the "old time religion" on

262. The United States has also been the brake on test ban activities conducted inside the Conference on Disarmament (CD). The CD has retained each year a working group of scientific experts to address technical advances in the field of seismic verification. There have been repeated efforts—always rebuffed by the United States—to cede the CD a greater role in elaborating a full treaty. Kiselev, supra note 90, at 83-84.

263. Leonard speech, supra note 130. It has also been suggested that the NNWS pressure for a CTBT may be mitigated by another important exogenous factor. Mexico—long a leader in mobilizing international opinion in favor of a test ban—now has other, more immediate diplomatic concerns. Foremost among them may be the desire to conclude and implement an effective trade agreement with the United States, leading to the creation of a North American Free Trade Zone, which could prove to be enormously beneficial to the Mexican economy. Diplomatic horse-trading might therefore lead to Mexico agreeing to recede a bit on the CTBT issue, in return for American commitment to "sweeten" the trade accord.


265. Indeed, NNWS may plausibly turn this point on its head, asking why, in the context of all the other arms control accords that have recently been reached, has the United States still been unwilling to proceed with a CTBT? To the extent that the answer reveals an American interest in the possibility of someday developing new types of "third generation" nuclear arms, or in otherwise improving the performance, safety, or reliability of existing types of nuclear weaponry, then a CTBT—which would foreclose
test ban issues has faded, CTBT retains much of its resiliency as a point of concern and vitriol. Who knows what misadventures might occur at a heated 1995 conference; who could foresee with confidence the outcome of a crowded, disorderly assembly, where partisans might still be stinging from a quarter century of unrequited pursuit of a CTBT?

Thus, even if the arguments linking article VI and CTBT could be partially legally rebutted, they might retain their political cachet. If key countries in the third world view the NPT as a bad bargain, if they consider that they are foregoing a nuclear option that the NWS show no signs of abandoning for themselves, and if they perceive that no CTBT is forthcoming, they may desert the NPT at precisely the time when it is most needed and most powerful. At a minimum, NNWS may well resist efforts, sponsored by the United States and other non-proliferation stalwarts, to improve and enhance the NPT regime, such as by upgrading the timeliness and effectiveness of the IAEA on-site inspections.

Whether the nexus between the NPT and a CTBT is provided by international law operating through the penumbra of article VI, or

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266. A Canadian government official wrote in 1987, "Progress towards a CTB treaty has been traditionally associated with compliance on Article VI. For Canada, the achievement of a CTB treaty remains a fundamental and abiding Canadian objective. The Canadian government policy is that a CTB is a concrete, realistic measure which would constitute a major step in curbing the development of new and more sophisticated nuclear weapons."

Douglas Roche, Canada and the NPT: The Enduring Relationship, in NUCLEAR NON-PROLIFERATION AND GLOBAL SECURITY, supra note 22, at 165, 169. The Secretary-General of the United Nations said in 1985, "It is of direct importance to the future of humanity to end all nuclear explosions. No other means would be as effective in limiting the further development of nuclear weapons." Id. See also Ashok Kapur, The Future of the NPT: A View from the Indian Subcontinent, in NUCLEAR NON-PROLIFERATION AND GLOBAL SECURITY, supra note 22, at 201, 202-03 (critique of NPT as serving the interests of the superpowers, but not of the other states).

267. See Bunn, supra note 250, at 198-99 (attempting to assess how the votes might have been cast if the parties at the 1990 review conference had been polled on the strident Mexican position demanding a CTBT).

The NPT has never been quite beloved by some NNWS, who adhered to the treaty only reluctantly and who continue to view it as a discriminatory agreement, promoting the interests of NWS ahead of all others. Khan, supra note 244, at 47-48.

268. See FISCHER, STOPPING THE SPREAD OF NUCLEAR WEAPONS, supra note 26, at 185, 195, 238 (NPT requires negotiation of a CTBT, the NNWS have made it their top disarmament priority, and a variety of diplomatic mechanisms for producing a test ban agreement have been tried, to no avail).
whether it is provided by international politics operating through unsatisfied NNWS desires and ambitions, the international community would ignore it only at great peril. The harsh reality is that without a timely CTBT, or without at least some substantial progress in that direction, some key states will feel cheated by the attempted reinterpretation of article VI, they may be unwilling to prolong or strengthen the asymmetric arrangements of the NPT, and the arms control regime may fall into disastrous disarray.269

B. What Does “Good Faith” Require?

Article VI does not, and probably could not, require the conclusion of a CTBT or any other instrument by any particular date; it merely obligates the parties “to pursue negotiations in good faith.” The scope of that commitment is obscure—“good faith” is one of those excruciatingly ambiguous terms in the lawyer’s vocabulary270—but some traditional legal source materials shed a bit of light. Over the years, the phrase “good faith” has become a staple of international law discourse, and repeated practice has infused it with a greater level of content that might first be appreciated.271

269. John Simpson, Nuclear Non-Proliferation in the 1990s: An Agenda of Issues and Policy Choices, in NUCLEAR NON-PROLIFERATION: AN AGENDA FOR THE 1990S, supra note 57, at 192, 196 (CTBT has importance both as a symbol of commitment to the NPT and as a valuable measure of arms control); Miguel Marin-Bosch, The Non-Proliferation Treaty: Fifteen Years of Frustration, DISARMAMENT, Spring 1985, at 45-52. But see Kapur, supra note 266, at 205 (without a CTBT, “Article VI of the NPT has no force”).

270. BLACK’S LAW DICTIONARY 693 (6th ed. 1990) notes that “Good faith is an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage . . . .” The pervasiveness of the notion of good faith in various aspects of American law is illustrated by indexes to legal source materials, which contain citations under the heading “good faith” to dozens of areas of law, from bankruptcy to discovery to search and seizure to uniform commercial code. See Index to Annotations, ALR 2d, 3d, 4th, FED. (1986); GENERAL INDEX, AM. JuR. (2d ed. 1991).

Several different areas of law are worth examining; as we walk around the notion of good faith, viewing it from different perspectives, we can gain a better appreciation for its impact and role in modern international practice. None of these illustrations by itself can establish authoritatively what good faith requires in the context of article VI of the NPT, but together they can inform our search for its meaning by supplying diverse precedents.

1. INTERNATIONAL LAW: TREATY STANDARDS

The Vienna Convention on the Law of Treaties requires that every treaty be interpreted and performed in good faith.272 This obligation is widely considered to be central to the entire notion of treaty law, an essential predicate to the effective conduct of international affairs.273 Indeed, the requirement for good faith in executing international agreements underlies the fundamental principle of pacta sunt servanda, acknowledged as one of the key starting points for any rational system of international relations.274

Commentators have stressed that reliance upon the concept of “good faith” is not mere rhetoric. Different verbal formulations have been recommended for elaborating that term, and much ink has been shed in attempts to clarify the inherently vague language or to infuse it with some sort of consensus meaning.275 The continuing ambiguity, however, has not lessened the importance that the international community regularly attaches to the idea of good faith—in a wide variety of international law contexts, the phrase is invoked as a standard of conduct possessing meaning and power, albeit a large measure of uncertainty, too.276

275. Some early commentators argued that the proper standard of observance, at least for some types of treaties, was “utmost fidelity” rather than “good faith.” JOSEPH M. SWEENEY ET AL., THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 996 (3d ed. 1988).
The 1935 Harvard Research on the law of treaties, for example, concluded:

The phrase “carry out in good faith” as used in Article 20 [of the 1935 Harvard draft convention on the law of treaties] is not intended to suggest that the obligation of a State to fulfill its treaty engagements is merely one of good faith rather than a legal obligation. It has reference rather to the manner or spirit in which the obligation is to be performed—the degree of fidelity, strictness and conscientiousness manifested in the fulfillment of the promise made. The obligation to fulfill in good faith a treaty engagement requires that its stipulations be observed in their spirit as well as according to their letter, and that what has been promised be performed without evasion or subterfuge, honestly, and to the best of the ability of the party which made the promise.277

2. INTERNATIONAL LAW: WORLD COURT DELIBERATIONS

The International Court of Justice (ICJ) and its predecessor, the Permanent Court of International Justice (PCIJ), have on several occasions relied upon the notion of good faith, treating it as an important, although elusive, standard, applicable in a wide range of international law controversies. Like other authorities, the world courts have had little success in fashioning a precise definition of good faith, but have consistently evaluated it as a central obligation of the law of treaties (and of international dealings more generally), not as a point of drafter’s surplusage or empty palaver.278

In the 1948 Admission of a State to the United Nations, Advisory Opinion, for example, the ICJ assessed whether a state could in good faith import additional, frankly political, rationales into its decision about voting on UN membership for a rival applicant, or whether the legal criteria established by the Charter were designed to be the sole basis for admissions decisions.279 In the 1955 South-West Africa Voting Procedure, Advisory Opinion, several justices debated whether South Africa’s obligation toward the United Nations regarding activities in Namibia was a matter of enforceable law or merely a principle of moral

278. International arbitrations, too, have considered the concept of good faith and wrestled with its meaning, applying it even in the absence of an agreed definition. O’CONNOR, supra note 276, at 98-102.
279. 1948 I.C.J. 57 (May 28); O’CONNOR, supra note 276, at 82.
obligation. Similarly, in the 1962 Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), the ICJ evaluated the parties’ longstanding reliance upon an allegedly erroneous map used in demarcating the national boundaries, and determined that the map should be honored in good faith.

The world courts have also had occasion to pass directly upon language not too dissimilar from that contained in article VI of the NPT, and have used the opportunity to flesh out a bit more of what “good faith” requires in treaty negotiations. In the 1931 Railway Traffic Between Lithuania and Poland case, the PCIJ construed a League of Nations mandate recommending that the two nations enter into direct negotiations to resolve transportation issues lingering in the chaotic aftermath of World War I. The two parties accepted this recommendation and devoted considerable energies toward resolution of the dispute, but were unable to reach an accord. Poland then alleged in court that in the absence of agreement, Lithuania was nonetheless obligated promptly to open for traffic a vital railroad link. The PCIJ, however, wrote:

The Court is indeed justified in considering that the engagement incumbent on the two Governments in conformity with the Council’s Resolution is not only to enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements. This point of view appears, moreover, to have been that adopted by the Council at its subsequent meetings. But an obligation to negotiate does not imply an obligation to reach an agreement, nor in particular does it imply that Lithuania, by undertaking to negotiate, has assumed an engagement, and is in consequence obliged to conclude the administrative and technical agreements indispensable for the re-establishment of traffic on the Landwarow-Kaisiadorys railways sector.

More recently, in the 1969 North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark and Netherlands), the ICJ added to the articulation of “good faith” in negotiations. There, the court determined that several competing international law principles could be applicable to the drawing of a maritime boundary between the

280. 1955 I.C.J. 67 (June 7); O’CONNOR, supra note 276, at 85.
281. 1962 I.C.J. 6 (June 15); O’CONNOR, supra note 276, at 92.
283. Id. at 116.
contesting states, and that the parties were accordingly required to consider in good faith all the possibilities, not simply those that promoted individual self-interest. The court directed:

[T]he parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of an agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.285

The phrase “good faith” has therefore regularly merited international judicial respect and weight, despite its imprecision. Good faith is taken seriously as a matter of international law, even by a world court which affirms that “[r]estrictions upon the independence of States cannot therefore be presumed”286 and which has taken pains to assert that it is guided strictly by legal criteria, not by the “softer” considerations of morality or general equity.287

3. UNITED STATES LAW: HUMAN RIGHTS

Within domestic United States jurisprudence, the famous case of Sei Fujii v. State288 casts interesting light upon this proposition. There, the plaintiff challenged the validity of a California escheat law as discriminatory against certain categories of aliens,289 and he asserted, inter alia, that the human rights provisions of the United Nations Charter established a justiciable right to own land.290 The California Supreme
Court held to the contrary, finding that articles 55 and 56 of the Charter were not “self-executing,” since they were intended to create long term objectives or requirements for future political steps, rather than to provide specific rights and remedies that would be immediately enforceable in an American court.

In so doing, however, the court was careful not to hold that articles 55 and 56 were void or meaningless. Indeed, the court underscored the importance of the moral commitment they contained, asserting that “we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or our foreign affairs.” In short, even though the human rights language of the UN Charter was vague and aspirational, and even though it was not sufficiently precise to instigate an immediately enforceable cause of action by a private litigant, it was nonetheless fully valid on the international plane. It created binding obligations for the United States and corresponding governments, and it could not be dismissed as mere rhetoric. Although the UN Charter provisions did not state with the requisite specificity any particular obligations, they did create law—they did require the United States and other parties to do something to pursue the lofty objectives.

4. UNITED STATES LAW: LABOR RELATIONS

One substantial body of United States jurisprudence in which the notion of “good faith” has long played a prominent role is labor law, specifically the tangled construction of the National Labor Relations Act,

then states, “All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.”

More generally, the Charter refers to “respect for the obligations arising from treaties” in its preamble, and elsewhere specifically requires parties to fulfill their Charter obligations “in good faith.”

291. *Sei Fujii*, 242 P.2d at 620-22. Under United States practice, a treaty that is “self-executing” becomes effective in domestic law immediately upon its entry into force, and it may confer enforceable rights to be vindicated in court. In contrast, a “non-self-executing” treaty requires some act of domestic lawmaking before it can have direct consequences inside the country. The test for assessing whether a treaty is self-executing is obscure, focusing upon whether the drafters of the treaty intended it to be immediately operative as domestic law, or whether it was addressed more to the legislature than to the courts, anticipating subsequent enactments to effectuate it. *Restatement*, supra note 132, § 111.3-.4; Carlos M. Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992).

292. The California Supreme Court went on to rule in favor of the plaintiff, based upon the 14th Amendment, which the majority found to preclude this type of discrimination against a category of aliens. *Sei Fujii*, 242 P.2d at 622-30.

293. *Id.* at 622.
which requires management and unions to bargain collectively in good faith on a variety of workplace issues. There, too, the precise parameters of the obligation are opaque, but courts and commentators have taken the mandate seriously and attempted to import reliable meaning.

The NLRB has therefore scrutinized the interstices of the private bargaining process, assessing whether the negotiators exhibit a "sincere desire to reach an agreement." Thus, a failure to enter into bargaining at all, insisting upon retaining unilateral freedom of action, has been held to be an unfair practice, as has procrastination, unnecessarily delaying the conclusion of a deal. Under some circumstances, failing to offer new proposals, sticking only with proposals known to be unacceptable to the other side, or withdrawing proposals that could form the basis for agreement have been determined to be actions not consistent with "good faith." Also, unilateral actions undertaken away from the bargaining table that fundamentally alter the status quo and


to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.


298. NLRB v. Katz, 369 U.S. 736, 743 (1962) ("[T]here is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact.").

299. NLRB v. Cable Vision, 660 F.2d 1, 4-5 (1st Cir. 1981) (management foot-dragging, leading to an unusually slow pace of negotiation, coupled with empty promises to "study" and "consider" union proposals—and rarely making any substantial concessions in return—was not good faith); Clear Pine Moldings, Inc. v. NLRB, 632 F.2d 721, 728-29 (9th Cir. 1980).

300. Soule Glass & Glazing Co. v. NLRB, 652 F.2d 1055, 1103 (1st Cir. 1981).
thereby compromise the chances for success in the negotiations are considered illegitimate. 301

Courts have elaborated the meaning of “good faith” in this context, by inspecting an employer’s motivations and subjective intentions, as manifested by the proposals issued and the responses to union demands. 302. The statute makes clear that there is no requirement for the parties to agree, or for either side to offer concessions or accept compromises, 303 and it is permissible to engage in “hard bargaining,” using economic leverage and insisting upon your own terms even to the point of reaching an impasse. 304 But behavior variously characterized as “shadow boxing” or “surface negotiation,” insincerely “going through the motions,” will not suffice under the law. 305

Courts in labor cases freely acknowledge the difficulty in making these fine subjective determinations, and they require a close dissection of the history of negotiating positions and ploys. Nevertheless this type of retrospective analysis is routinely undertaken, and the elusive term “good faith” has frequently revealed its teeth, demanding more forthcoming negotiating behavior from private parties. 306

5. ARMS CONTROL: THE SVERDLOVSK INCIDENT

The sphere of international diplomacy offers another gloss on concepts related to the notion of “good faith.” Throughout the 1980s, the United States government regularly raised concerns about Soviet activities alleged to be inconsistent with the obligations of the Biological Weapons Convention. 307 Specifically, the United States asserted that a 1979

301. Metromedia, Inc., KMBC-TV v. NLRB, 586 F.2d 1182, 1188 (8th Cir. 1978); Soule Glass, 652 F.2d at 1084; Clear Pine Moldings, 632 F.2d at 729-30.
302. Pittsburgh-Des Moines Corp. v. NLRB, 663 F.2d 956, 959 (9th Cir. 1981).
303. Pease Co. v. NLRB, 666 F.2d 1044 (6th Cir. 1981); Seattle-First Nat’l Bank v. NLRB, 638 F.2d 1221, 1226 (9th Cir. 1981); NLRB v. Tomco Communications, Inc., 567 F.2d 871 (9th Cir. 1978).
305. NLRB v. Overnite Transportation Co., 938 F.2d 815 (7th Cir. 1991); Seattle First Nat’l Bank, 638 F.2d at 1227; NLRB v. Cable Vision, 660 F.2d 1, 3 (1st Cir. 1981); Clear Pine Moldings, 632 F.2d 721.
306. Soule Glass, 652 F.2d 1055; Seattle First Nat’l Bank, 638 F.2d 1221; Glomac Plastics, Inc. v. NLRB, 592 F.2d 94 (2d Cir. 1979); Continental Insurance Co. v. NLRB, 495 F.2d 44 (2d Cir. 1974).
307. BWC, supra note 30. The treaty obligates its parties never to develop, produce, stockpile, acquire or retain any biological weapons agents, exempting the retention of only small quantities used in defensive research or other peaceful purposes. Id. art. I. It was the first modern treaty to accomplish true “disarmament,” ridding the parties of an entire category of weaponry.
outbreak of anthrax in the Siberian city of Sverdlovsk (now called Yekaterinburg) may have been triggered by an accidental explosion at a secret, illegal biological weapons facility there. The initial Soviet response acknowledged the epidemic, but asserted that it had been caused by black market sales of tainted beef, historically common in the area. This proffered explanation did not satisfy all Western observers, who identified inconsistencies in the available data and requested additional information.308

The Soviets responded with essentially a stonewall denial of impropriety, declining to provide further data and refusing to permit access by outside experts who could have clarified the situation. The United States, proceeding with only inadequate, second-hand data, never formally charged the Soviet Union with a violation of the substantive disarmament provisions of the Biological Weapons Convention.309 At the same time, however, the United States and others did press the issue in various diplomatic contacts with the Soviets, citing article V of the treaty, under which the parties agree “to consult one another and to cooperate in solving any problems which may arise.”310 The United States argued that the adamant Soviet failure to be more forthcoming in the dispute resolution process was itself a compliance issue, independent of the substantive merits of the incident.311

308. Elisa D. Harris, Sverdlovsk and Yellow Rain: Two Cases of Soviet Noncompliance?, 11 INT’L SECURITY 41 (1987). Some Western observers concluded that the reported symptoms of the Sverdlovsk victims were inconsistent with the type of anthrax that could be associated with eating spoiled meat, and more likely due to the inhalation of disease germs, as from a laboratory accident. Certain other Soviet governmental responses to the incident also suggested the occurrence of a military disaster, rather than simply a runaway black market. But overall, the evidence was inconclusive. Id. at 51-56. Later, the Soviet and Russian governments began to release bits of additional information about the 1979 incident, but the full story remained murky until June, 1992, when Boris Yeltsin acknowledged the existence of the illegal facility responsible for the epidemic. R. Jeffrey Smith, Yeltsin Blames ’79 Anthrax on Germ Warfare Efforts, WASH. POST, June 16, 1992, at A1; Milton Leitenberg, Anthrax in Sverdlovsk: New Pieces to the Puzzle, 22 ARMS CONTROL TODAY, Apr. 1992, at 10.

309. Harris, supra note 308, at 46. The United States government said, We continue to be dissatisfied with Soviet explanations regarding an outbreak of anthrax in Sverdlovsk in 1979. We have raised the issue repeatedly with the Soviets since March 1980, and have been told that the outbreak stemmed from the consumption of contaminated meat. However, based on information available to the U.S., we concluded that the outbreak occurred as a result of an accidental release of anthrax spores from a prohibited BW facility. Bush Administration’s report to the Congress on Soviet Noncompliance with Arms Control Agreements 6 (Feb. 23, 1990).

310. BWC, supra note 30, art. V.

In short, the United States in that context took very seriously the obligation—stated in admittedly general, imprecise language—to engage in international diplomacy and to endeavor to reach a constructive, mutually-acceptable solution. The United States brushed aside Soviet statements that their grudging, partial disclosures had been sufficient, and the United States insisted upon a higher level of active collaboration and sincerity. There, at least, the obligation to try to reach an agreement in a delicate area of national security policy was elevated in importance and enforceability.  

6. ARMS CONTROL: SALT AND OTHER MATTERS

Finally, other existing arms control agreements also provide some useful precedents because several treaties deliberately obligate the parties to pursue subsequent accords embodying deeper cuts in permitted weaponry, or other, more powerful measures of disarmament. The SALT I negotiations, for example, found the parties able to agree upon stringent controls on strategic defensive systems, but only a relatively modest freeze on strategic offensive arms. This situation was tolerable for a five-year interim accord, but the parties also undertook “to continue active negotiations” toward substantial reductions in the existing offensive arsenals. In fact, the United States declared unequivocally that unless such further cuts were promptly developed, America might be unwilling


The BWC has no verification provisions, and the dispute resolution mechanism consists essentially of a requirement for consultation and cooperation (article V) and the possibility of referring any problems to the United Nations Security Council (article VI). Recently, there have been proposals to strengthen the verification mechanisms, to provide a data reporting system and the capability for international inspections. Jozef Goldblat & Thomas Bernauer, Towards a More Effective Ban on Biological Weapons, 23 BULL. PEACE PROPOSALS 35 (1992).

312. Similarly, in the mid-1980s, the United States made a series of diplomatic demarches to the Soviet Union regarding compliance with the LTBT, asserting that Soviet nuclear weapons testing practices had allowed radioactive debris to vent into the atmosphere and drift outside Soviet territory, in contravention of article I.1(b). Moscow officials were unresponsive on the issue, and the United States government complained that “our repeated attempts to discuss these occurrences with Soviet authorities have been rebuffed . . . . Soviet refusal to discuss this matter calls into question their sincerity on the whole range of arms control agreements.” President’s Unclassified Report, Soviet Noncompliance With Arms Control Agreements (Dec. 2, 1987), reprinted in DEP’T ST. BULL., Mar. 1988, at 51, 54.

313. ABM Treaty, supra note 179.

314. Interim Agreement on Strategic Offensive Arms, supra note 179.

315. ABM Treaty, supra note 179, art. XI; Interim Agreement on Strategic Offensive Arms, supra note 179, art. VII.
to continue its adherence to the existing limitations upon either strategic defenses or offenses. Similar commitments for future negotiations on deeper reductions were written into the SALT II agreement and have been issued with respect to START, as well.

In the same vein, negotiations in the field of chemical and biological weapons proceeded in incremental fashion, with each step in the progression explicitly contemplating its own follow-on. The 1972 Biological Weapons Convention tackled only half of the overall problem (and it was considered, for various military and technological reasons to be by far the easier half), but the negotiating parties also undertook (in language patterned after the NPT), “to continue negotiations in good faith with a view to reaching early agreement on effective measures for the prohibition” of chemical weapons, too. Despite this “vague” treaty language, and despite the absence of a legally enforceable timetable, the negotiating states doggedly pursued a comprehensive chemical weapons convention. After more than two decades of sustained bargaining in one forum or another, a satisfactory chemical weapons treaty has at last emerged, redeeming the 1972 commitment. Other examples could also be added to the list of arms control agreements.
mandating future negotiations—usually with no greater precision (but occasionally with greater success) than article VI of the NPT.\footnote{See, e.g., Seabeds Arms Control Treaty, supra note 23, art. V; CFE Treaty, supra note 2, art. XVIII.}

In sum, the content of “good faith” is admittedly ambiguous. It is impossible to state with precision exactly what the parties are required to do, when they must do it, or how much flexibility they must demonstrate in order to reach a CTBT or other accord. International law, like domestic United States law, has not progressed to the point where aspirational terms are defined with much specific operational content.

On the other hand, the term “good faith” is not meaningless. There is an obligation to try to reach agreement.\footnote{See 1968 Hearings, supra note 47, pt. 2, at 352 (Secretary of State Rogers conceding that if the Soviet Union indicates an interest in negotiating toward a possible limitation on ABM systems, article VI of the NPT obligates the United States to enter into good faith negotiations, rather than simply proceeding with unilateral deployments).} There is an obligation to negotiate.\footnote{Article VI of the NPT obligates the parties “to pursue” the requisite negotiations; arguably this commitment could be said to be one step removed from an immediate obligation “to conduct” negotiations. In practical terms, however, the mechanism for “pursuing” any durable agreement would be via negotiations, and no party has argued that this aspect of the semantics of article VI is a significant loophole providing the United States or other parties with appreciably greater freedom or flexibility to escape the basic obligation. See SHAKER, ORIGIN AND IMPLEMENTATION, supra note 139, at 570.} There is an obligation to attempt to fashion proposals that could solve the problems and be acceptable to the other side.\footnote{See NPT THIRD REVIEW CONFERENCE BRIEFING No. 1, supra note 157, at 2 (quoting a United Kingdom delegate saying, “I cannot prove (the nuclear powers’) sincerity. An act of faith rather than objective data is required. I accept that when they pledge themselves to pursue negotiations in good faith to end the nuclear arms race at an early date they mean what they say.”).} There is an obligation under the NPT to develop “effective” measures, not merely empty “window dressing,” and to address the critical problems in realistic ways.\footnote{It could be argued that the TTBT and PNET (and their 1990 protocols) were so permissive that they did not rise to the level of “effective measures” of nuclear arms control as mandated by article VI. Agreements that were merely cosmetic or symbolic would not discharge the NPT obligations.} And it would be reasonable to infer some temporal qualifications: Surely, a party could not fairly attempt to take immediate advantage of the favorable portions of a bargain and simultaneously defer forever its reciprocal performance. Surely a party could not, consistent with good faith, postpone the satisfactory conclusion of mandatory negotiations to some impossibly-distant future, laden with implausible conditions precedent. Most clearly, a party could not legitimately “change its mind” about the wisdom, desirability, or feasibility of
carrying out the requirements—at least not if it expected the other parties
to continue to comply with their own treaty commitments.

C. What Are the Consequences of a Breach?

If the United States has been obligated by article VI to do something
about negotiations toward a CTBT, and if the Reagan and Bush
administrations nonetheless determined not to comply, what are the
implications under international law?

The first inquiry is whether the non-performance constitutes a
“material breach” of the treaty. The Vienna Convention on the Law of
Treaties defines a material breach as a “violation of a provision essential
to the accomplishment of the object or purpose of the treaty.”\(^{328}\) The
Preamble to the NPT, and other materials cited above, clearly indicate
that the promotion of progress toward a CTBT was one of the leading
objects and purposes of the NPT parties. If the superpowers had been
overtly unwilling to commit to constraining their own qualitative nuclear
arms race, there is little doubt that many of the NNWS negotiators in
1968 would have stayed away from such a fundamentally one-sided trade.
Failure to pursue a comprehensive test ban accord, therefore, goes to the
heart of the NPT, constituting a fundamental abrogation.

The Vienna Convention specifies both the range of remedies
available to an innocent party in the event of a material breach of a
multilateral treaty, and the procedures to be invoked in vindication of the
rights. Following a mandatory period of notification and settlement
attempts,\(^{329}\) the injured states may unanimously elect “to suspend the
operation of the treaty in whole or in part or to terminate it.”\(^{330}\) Short
of unanimity (very unlikely in the case of the NPT) any individual state
“specially affected by the breach” may respond by suspending or
terminating the treaty between itself and the defaulting state.\(^{331}\) Lesser
remedies, such as a decision to decline to renew the treaty substantially

\(^{328}\) Vienna Convention, supra note 132, art. 60.3(b). See Ralph Earle II & John

\(^{329}\) Vienna Convention, supra note 132, arts. 65-67.

\(^{330}\) Id. art. 60.2 (a). The injured states could decide to make the suspension or
termination effective solely between themselves and the breaching state, or among all
parties. Id. Similar recourse is available to an innocent party aggrieved by the breach
of a bilateral treaty such as the TTBT. Id. art. 60.1.

\(^{331}\) Id. art. 60.2 (b). In addition, any party may suspend or terminate the treaty
between itself and the violator, if the treaty is such that a material breach “radically
changes the position” of every party. Id. art. 60.2 (c).
beyond its initial twenty-five year duration, would also be available as a matter of political due course.\textsuperscript{332}

In the case of the NPT, these traditional remedies might appear unavailing or counterproductive for provoking a CTBT, but they would have appreciable dramatic effect and political clout nonetheless. An NNWS party or group of parties could conceivably declare that the United States had committed a material breach, and could react by suspending their own corollary NPT obligations. A state might withhold cooperation with some or all IAEA safeguards, such as by suspending the reporting of required data or blocking the access of IAEA inspectors. An aggrieved state might even renge on the fundamental premise of the treaty, by announcing that it was then undertaking an independent national program to receive, manufacture, or otherwise acquire its own nuclear device.\textsuperscript{333}

The most interesting response that the United States might assert to this putative finding of breach would be to attempt to invoke the doctrine of \textit{rebus sic stantibus}, or fundamental change of circumstances, as an excuse for non-performance. The Vienna Convention, like customary international law, is generally inhospitable to claims of changed circumstances,\textsuperscript{334} and (unlike domestic United States contract law, where analogous doctrines are applied with some frequency) few, if any,  

\footnotesize{\textsuperscript{332} The NPT also contains a now-standard provision under which a party may withdraw from the treaty on three months’ notice, “if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country.” NPT, \textit{supra} note 7, art. X.1.\textsuperscript{333} Under the multilateral NPT, each party undertakes obligations toward all other parties, not solely toward the United States, and those other multilateral obligations would survive even a determination that the United States had committed a material breach. Therefore, perhaps the most extreme remedies would be unavailable, unless a complaining state alleged that the failure to conclude a CTBT (an obligation incumbent upon all parties under the NPT) was a material breach attributable to all. In addition, each NNWS party to the NPT has negotiated a separate “safeguards agreement” with the IAEA, specifying the applicable inspections and reporting procedures inside its territory. Each safeguards agreement is an independent international agreement, and a United States breach of the NPT would not automatically provide a basis for invalidating these subsidiary accords. On the other hand, most safeguards agreements specify that they shall remain in effect only so long as the NPT is in effect for that particular state, so a suspension or termination of the NPT might function as a release.\textsuperscript{334} The Vienna Convention, \textit{supra} note 132, art. 62, provides:  

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

   (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

   (b) the effect of the change is radically to transform the extent of the obligations still to be performed under the treaty.
international law cases have been decided through reliance upon that principle.\textsuperscript{335}

In some respects, however, the exacting standards of article 62 of the Vienna Convention might be met here. The transformation of global politics since 1970—indeed, within the past five years alone—has certainly been dazzling and far reaching. The fundamental re-ordering of the global security structure was manifestly “not foreseen” by the negotiators; it has altered the “essential basis” for the treaty and served “radically to transform” the parties’ obligations.\textsuperscript{336} The United States could plausibly argue that the “new world order” requires a cautious re-appraisal of even long-standing security arrangements and commitments.

But these developments are not the sort of “fundamental changes” that should allow the United States unilateral permission to wiggle out of article VI. First, the current amelioration of world tensions, while not exactly “foreseen” by the NPT parties, was precisely the type of goal they were attempting to promote. The NPT was designed to improve security, to facilitate the reduction of massive nuclear arsenals, and to assist the parties in reaching a rapprochement. The fact that at least partial success has been attained so suddenly should not now eviscerate the treaty’s remaining obligations.

Second, the recent disarmament changes have, in the main, made a CTBT more desirable, attainable, and safe for the United States and the rest of the world. These days, even more than in 1968, a freeze on nuclear weapons development would promote the security interests of the United States and others, by foreclosing a dangerous and destabilizing path for renewal of international tensions. The alleged “fundamental changes” do not justify departure from article VI’s commitment to pursue a test ban; they reinforce it. The only real “fundamental change” has been that the United States has politically “changed its mind” about the wisdom or desirability of a CTBT—and that type of remorse is not legally protected.

Unlike many modern arms control agreements, the NPT does not incorporate a specialized dispute-resolution mechanism.\textsuperscript{337} Presumably,
therefore, allegations about breach would continue to be fought out in the diplomatic arena, in tribunals such as the 1995 Review Conference, the Committee on Disarmament,\(^{338}\) or the LTBT Amendment Conference.\(^{339}\)

The United Nations Security Council could also play a role in addressing the dispute. The resurgence in vigor and importance of that organization is salutary for many aspects of international order, but the continuing veto power ensures that, as a practical matter, nothing very critical of the United States position could emerge there on this question.\(^{340}\) Conceivably, the International Court of Justice could also be called upon to construe the meaning of article VI, but unless the relevant parties consented to jurisdiction, there would be little basis for an authoritative or effective determination.\(^{341}\)

Even without a direct finding of a material breach, and short of initiating international legal actions against the United States, NNWS parties dissatisfied with the record of American non-performance on CTBT could respond in other damaging ways. For several years, the United States has spearheaded international diplomatic efforts to develop consensus on a variety of measures for strengthening the non-proliferation regime. The United States and its allies (principally, but not exclusively, the other NWS) have sought to enhance the timeliness of the data reported

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\(^{338}\) See supra note 262.

\(^{339}\) The 1991 LTBT Amendment Conference ended amidst some disarray on the question of its future activities. It is possible that the conference will reconvene in the coming years, but its mandate and timing—and the degree of United States participation—remain unclear. SCHRAO, supra note 62, at 166-71; Miguel Marin-Bosch, Amendment Conference to the Partial Test-Ban Treaty, 14 DISARMAMENT 83 (1991).


\(^{341}\) The United States has withdrawn from the compulsory jurisdiction of the International Court of Justice, and would be unlikely to consent to jurisdiction in a contentious case testing the power of article VI of the NPT. The ICJ, however, also has the authority to issue an “advisory opinion” when requested to do so by the United Nations Security Council or the General Assembly. Such a case could provide an opportunity to clarify the interpretation of the NPT. U.N. CHARTER art. 96; Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179, arts. 36, 65. See Roberto Ago, “Binding” Advisory Opinions of the International Court of Justice, 85 AM. J. INT’L L. 439 (1991) (considering the possible impact of an advisory opinion).
to the IAEA, to improve the caliber and size of the IAEA inspection staff, and to upgrade the ability of the agency to carry out short-notice inspection of suspicious sites. The recent revelations about Iraq's covert nuclear weapons program provided fresh impetus to the effort to fortify the IAEA's capabilities.

Some of these initiatives have met with general worldwide approval, and prior NPT review conferences have developed a large measure of accord on documents and procedures to effectuate the needed improvements. So far, however, the bulk of the reforms have not been implemented, as the NNWS have held them "hostage" to movement on CTBT. Until some new developments resolve that impasse, it seems quite unlikely that major necessary upgrades in the operations of the IAEA—and other efforts to enhance the NPT and the non-proliferation regime generally—can occur. Thus, even if the NPT survives 1995 intact, continuing discord over CTBT will probably preclude substantial emendation.

IV. THE BOTTOM LINE

Substantial uncertainty continues to swirl around the NPT. There is ambiguity about the core meaning of article VI; there is anxiety about the post-1995 future of the treaty; and there is disquieting apprehension about the viability of the nuclear non-proliferation regime in the post-cold-war world. If there is no CTBT, and no meaningful, concerted progress toward one, by the time of the next Review Conference, the diplomatic confrontation could be profound. In this situation, this Article offers the following five conclusions.

First, the imprecision and the downright mushiness of article VI mean that as a practical matter it is impossible to state with conviction exactly what actions are required by whom and at what time. It is illegitimate, for example, to read a fixed timetable into the treaty, or to construe it as requiring that the United States offer particular diplomatic concessions to reach any particular version of a CTBT by any established date. The treaty drafters simply did not reach the level of specificity that would be required to convert the "good faith" aspirations into an enforceable calendar.

Second, the United States and its negotiating partners have already provided a substantial—and, more recently, a dazzling—array of arms control accords. In some instances, these achievements go well beyond what even the most optimistic observers would have fantasized about only a few years ago, and they are definitely relevant and powerful in helping to establish a case for the proposition that article VI is being honored. Even regarding test ban accords, there has been some progress: The TTBT and PNET, finally brought into force, represent the type of
stepwise advancement toward a CTBT that many observers contend offers the surest, safest path.  

Third, however, this record simply is not enough to satisfy article VI. Progress on other arms control agreements—however laudable and important—is insufficient to discharge the responsibility to seek, in good faith, a comprehensive test ban treaty, too. The United States cannot satisfy this NPT obligation by substituting other types of performance and deferring the CTBT forever. Some reasonable leeway could be permitted, and the superpowers were entitled to considerable flexibility in working their way through the diverse agenda of arms control issues—but the NPT did not give them a blank check. At some point, even a vague obligation of “good faith” negotiations gets stretched to the breaking point.

Fourth, therefore, the United States is now in breach of article VI of the NPT. This conclusion would be much harder to justify if the United States were currently engaged in negotiations toward further testing restrictions, or if the recent American presidents had declared themselves still committed to the objective of ceasing nuclear weapons testing on a reasonable timetable. In that situation, observers would have to parse the bargaining process carefully, attempting to determine which side is “really” blocking progress, which countries are cynically just going through the motions of negotiations that they have no genuine intention of concluding successfully, and which leaders are not, overall, bargaining in good faith. That task, given the secrecy that traditionally shrouds the arms control negotiations process, usually proves impossible. Where the bargaining is ongoing—even where, as with chemical weapons, it proceeds at only a glacial pace—it is hard to establish bad faith.

342. Darryl Howlett & John Simpson, The NPT and the CTBT: An Inextricable Relationship?, PROGRAMME FOR PROMOTING NUCLEAR NON-PROLIFERATION, 1 ISSUE REVIEW 6 (Mar. 1992); Belmont Report, supra note 58; John Simpson, Nuclear Testing Limits: Problems and Prospects, 33 SURVIVAL 500 (1991). But see Michael Krepon, U.S. Must Build on Arms Pact Momentum Beyond Cold War Era, DEF. NEWS, July 13-19, 1992, at 21 (arguing that a phased approach toward a CTBT might have been reasonable at one time, but now the process should speed up).

343. Cf., Palme, Keynote Address, supra note 20, at 27 (charging that the trilateral U.S.-U.K.-U.S.S.R. negotiations toward a CTBT were insufficient, and the NWS have accordingly failed to comply with their article VI obligations).

344. SCHRAO, supra note 62, at 29-31 (noting that, in retrospect, we can identify cyclic behavior in Soviet and American attitudes toward CTBT: whenever either side was sincerely ready to conclude a treaty, the other managed to throw up subtle but effective roadblocks).

345. Article IX of the BWC, supra note 30, requires the parties to continue negotiations “in good faith” toward a comprehensive prohibition on chemical weapons. Fitful negotiations on this subject proceeded in a variety of multilateral fora, for over two decades, and the progress has sometimes been minuscule—a chemical weapons treaty has only now emerged. BERNAUER, supra note 3; John M. Goshko, Draft Chemical Arms
Here, however, the proof has been readily apparent. The United States flatly refused to discuss a CTBT for twelve years. Despite unilateral Soviet and Russian moratoria on testing, the United States continued its own explosions program and declined to enter into new negotiations. The Bush administration worked to frustrate diplomatic efforts to elaborate and draft a CTBT, and abandoned commitments that the Reagan administration—and Bush officials themselves—had provided to the Congress about a timely resumption of negotiations after the TTBT and PNET were modified and ratified. In short, the American leadership acted to postpone CTBT indefinitely, asserting that no test ban treaty would be appropriate until attainment of some far-off nirvana, when nuclear weapons have disappeared as an element of the United States security structure. None of this is consistent with a binding obligation under international law to pursue CTBT negotiations “in good faith.”

In addition, the failure to continue test ban deliberations stands in flat violation of article I of the TTBT, which—without any of the NPT’s fuzzy language of “good faith”—mandates that “[t]he Parties shall continue their negotiations with a view toward achieving a solution to the problem of the cessation of all underground nuclear weapon tests.” The use of the

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346. See supra notes 83-114 and accompanying text.

347. American diplomats hindered the efforts of the international community at the 1991 LLTB Amendment Conference and during the annual Conference on Disarmament deliberations, where most other countries preferred rapid progress toward a CTBT. SCHRAO, supra note 62, at 51, 107; GOLDBLAT, TWENTY YEARS, supra note 23, at 35; Zamora, LLTB Amendment Conference to Continue, But No Test Ban in Sight, ARMS CONTROL TODAY, Mar. 1991, at 14.

348. Supra notes 93-98 and accompanying text. It might be possible to characterize the Reagan/Bush attitude and statements as akin to an “anticipatory breach” or “denunciation” of the obligations of the NPT, LLTB, and TTBT. In that event, there would be two overlapping causes of action for aggrieved NNWS: first, the verbal announcement of the American intention to violate the accords, and second, the actual failure to comply with the obligations to conduct good faith negotiations. See Vienna Convention, supra note 132, arts. 56 (denunciation of a treaty) and 60 (defining material breach of a treaty); RESTATEMENT, supra note 132, §§ 332 (denunciation) and 335 (material breach).

349. Supra notes 85-86 (U.S. statements abandoning CTBT).

350. TTBT, supra note 70, art. 1.3.
verb "continue" in that 1974 formulation is already something of an anachronism, since the United States for over a decade refused to participate in any such negotiations, but the obligation, and the American violation of it, are clear. Thus, a bilateral United States-Russia treaty (TTBT) and two critical multilateral treaties (LTBT and NPT) stand imperiled.

The 1992 statute and the election of a new president have initiated the long-awaited reversal of this twelve-year pattern of breach, as the current United States moratorium and the promise of prompt CTBT negotiations radically depart from the behavior of the Reagan and Bush administrations. But even this return to law-abiding behavior does not automatically "cure" the longstanding breach, and the political and legal repercussions will have to be sorted out in the light of the Clinton administration's actual performance in developing a test ban treaty.

Finally, this finding of a United States breach is not without its consequences. As the sole remaining military superpower, the United States may feel immune from effective enforcement or retaliation, and no one is going to be able to force a CTBT upon a recalcitrant American president. But the international legal maneuvering (perhaps declaring a breach and implementing the Vienna Convention remedies, for example) would have some weight; the political disquietude will carry significant costs; and the dangers of rupture of the global non-proliferation campaign in 1995 may be severe indeed. We have already seen that review conference efforts to improve the NPT (such as through the enhancement of the IAEA safeguards system) founder over dissatisfaction with article VI, and the prospects for the most significant strengthening in the non-proliferation regime are likely to continue to be frustrated until the NNWS are satisfied on the test ban issue. In the long term, violation of international law is usually not free.

V. CONCLUSION

It does not come easily or comfortably to argue that the United States has violated a solemn international agreement of such surpassing importance. We want to believe that our government operates lawfully, fairly, and wisely in the international arena, even when we are confronted with stark evidence of repeated, wilful misdeeds. Nevertheless, this study and its conclusion that the United States has, indeed, transgressed the commitments of article VI of the NPT provides a vantagepoint for offering three sets of closing remarks, related to nuclear testing, nuclear

non-proliferation, and international law and security policy more generally.

A. Nuclear Testing

The comprehensive test ban treaty is an idea whose time has finally come. The political weight of the test ban movement is clearer than ever. Most countries around the world are strongly supportive of, and increasingly insistent upon, efforts to halt nuclear explosions, and a good many of them would place this item at the top of their list of disarmament objectives. They consider a global, permanent test ban treaty to be the most important item of "unfinished business" on the world's disarmament agenda, and they remain convinced that it would be a tremendous boon to their security. Even more than further reductions in strategic offensive arms, CTBT has become a focus of world attention, and the United States (sometimes with the United Kingdom) stands in isolation in opposition. The impatience of the NNWS is surging, and 1995 looms as a potential crisis. CTBT will not by itself end the dangers of nuclear weaponry, but in the current political milieu, it provides the most important missing element in the struggle for stability—it is the logical next step for disarmament efforts.352

At the same time, the legal dimension of the pursuit of a CTBT is also emerging with increasing clarity. Article VI of the NPT, together with preambular and operative language in the LTBT and the TTBT, establishes a firm legal commitment to develop a comprehensive test ban on a realistic timetable. The United States can no longer plausibly maintain that a CTBT is merely optional, aspirational, or one goal among many. Instead the United States is under a legal obligation to pursue a test ban in good faith—the exact parameters of this commitment are undefinable, but there is no justification for declining to negotiate or for deferring those talks forever with impossible conditions and qualifications.

352. As the arguments against a CTBT have fizzled, it has become increasingly apparent that the United States need not choose between the pursuit of our own national security and the accommodation of other countries' interests. Instead, a realistic appraisal of today's global military alignment reveals that a halt to nuclear testing will serve both goals simultaneously. The former vocabulary, presenting a tension between these competing security policies, is therefore obsolete. See William Epstein, The Nuclear Testing Threat, BULL. ATOM. SCIENTISTS, July-Aug. 1990, at 35, 37 (quoting a U.S. Arms Control and Disarmament Agency official as saying, "If the U.S. is forced to choose between its own national security and its nuclear testing program versus the survival of the NPT—which we would dearly like to see—the U.S. would choose maintenance of its own national security and therefore its own nuclear testing program.").
We said we would do it, other countries acted in deliberate reliance upon our commitment, and there is no valid excuse for further delay.

One puzzling question in this regard is the possible application of additional interim measures, imposing further constraints on nuclear explosions but once again stopping short of a full CTBT. If the United States were still unwilling to take the plunge toward a complete cessation of testing, how would the rest of the world react in 1995 to proposals to negotiate yet another scheme of partial regulation? A reduced threshold treaty (perhaps lowering the allowable ceiling to ten or twenty-five kilotons yield), a quota treaty (permitting each side no more than, say, three tests per year), or some combination of the two could be developed, with any of several formulas for eventually reducing the residual testing to zero or nearly that.\(^{353}\) Such a program could allow the world to “phase in” a CTBT, rather than accepting the full set of constraints all at once, permitting the nervous segments of the American defense establishment to accommodate themselves more gradually to a world without nuclear explosions.\(^{354}\)

The global political impact of such a proposal is hard to gauge. Surely, some countries would gladly accept whatever progress the NWS were able to register, and a gradual but certain tightening of the nuclear-testing noose would be accepted as being far more meaningful than the charade of TTBT/PNET. Just as surely, other countries would oppose any further interim steps as self-serving efforts to perpetuate the anachronism of NWS hegemony, and would complain that only a CTBT would have any real impact or appeal.\(^{355}\) A unilateral or negotiated moratorium on testing would undoubtedly be welcomed, even if a sustained period was required to convert it into a durable, global, and verifiable test ban treaty. My own sense is that the majority of the world—like a majority of the United States Congress—has lost its patience with the turgid, step-wise progress toward a CTBT; that efforts to interpose yet another incremental stage would not be well-received; and that at this point in the deconstruction of the edifice of cold war security policy, the global demand is “CTBT or nothing.”

\(^{353}\) The 1992 statute, supra notes 116-18 and accompanying text, has imposed new legal limitations upon future United States testing and mandated a moratorium beginning in 1996. It also contemplates the negotiation of a CTBT by that date. Any future test ban treaty that fell short of a CTBT would therefore require the development of a new legislative consensus.

\(^{354}\) Belmont Report, supra note 58, at 246-53; George Leopold, U.S. Officials Waver On Nuclear Arms Tests, DEFENSE NEWS, July 13-19, 1992, at 11 (quoting former Chair of the Joint Chiefs of Staff as supporting a CTBT).

\(^{355}\) George Perkovich, Time Out in Nuclear Asia, CHRISTIAN SCI. MONITOR, June 18, 1992, at 19; Bunn, supra note 250, at 197-98, 209.
Regarding efforts to arrest the spread of weapons of mass destruction, the political and legal considerations again push in sympathetic directions. Politically, the international community is beginning to recognize that getting a handle on the spread of advanced weapons is now at least as important to the future of United States and global security as any additional fine-tuning of the strategic relationship with Russia. Indeed, the erstwhile “third world” is now the likely point of origin for the most intense and deadly future hostilities and the major source of unresolved conflicts that might jeopardize our national interests. As the strategic nuclear threat fades, and as the traditional specter of massive conventional war in Europe becomes increasingly improbable, the hazards posed by the dissemination of nuclear and other advanced weaponry into additional, sometimes unstable and hostile, nations becomes our top security priority.

A CTBT, by itself, would not erase all our security dilemmas, and it might not initially attract the participation of all the dangerously near-nuclear states. But at the very least, it would provide the United States and its allies with a renewed sense of legitimacy and purpose in the non-proliferation effort—and an enhanced moral and political vantage point to pressure the remaining holdouts into abandoning their nuclear weapons options.356

In the past, efforts to check the spread of nuclear weaponry have traditionally taken a back seat, compared with the glitzier challenges of bilateralism. Diverse foreign relations interests often crowded out the non-proliferation concerns when the United States was dealing with critical countries on a wide range of issues.357 The convoluted interactions with Pakistan are a key example of this phenomenon, in which the American preoccupation with confronting the Soviet Union (by funneling assistance to the Afghan mujahadeen rebels) led United States presidents to stifle the non-proliferation concerns, looking the other way while Islamabad resolutely pursued a nuclear capacity.358 Even the tragedy in Iraq is at least partially explainable in terms of American


willingness to tolerate an insidious nuclear development program, so long as the sponsoring country serves our purposes in other geopolitical confrontations. In the twenty-first century, in contrast, the United States will have to be much more attentive to the North-South dichotomy, and much more alert to the incipient dangers of nuclear, chemical, biological, or other weapons proliferation. We will have to care more about—and construct policies to oppose more resolutely—the spread of weaponry, not consistently deferring that issue in favor of other, seemingly more pressing, bilateral questions. Tending to the needs of the NPT will have to be a permanent assignment, not an episodic task assumed only every few years when a Review Conference, like a Brigadoon fantasy, fleetingly reappears.

The international non-proliferation regime, of course, is more than just the NPT; all would not be lost even if that central document were to fail. In fact, it is possible to argue that the norm of nuclear non-proliferation is now so well established that it has evolved into a binding facet of customary international law, enveloping even non-parties and providing an independent source of authority even if the treaty itself were to succumb in 1995. The NPT, like all legal instruments, is not an

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360. As a point of precedent, the United States government did consciously decide in 1965 to elevate the importance of nuclear non-proliferation. National leaders deliberately opted to sacrifice other important foreign policy goals (then, the interest in promoting a NATO multilateral nuclear force), where necessary, to give greater priority to efforts to interdict the spread of nuclear weaponry. SEABORG, STEMMING THE TIDE, supra note 130, at 143. A similar realignment of national strategy is necessary today.

361. The United States has already begun to elevate weapons proliferation as an issue of international concern, and President Bush recently signed a secret finding that authorizes the CIA to develop plans, including covert action programs, to arrest the spread of weapons. Bush Approved Covert Action by CIA to Halt Spread of Arms, L.A. TIMES, June 21, 1992, at A20. It is, however, peculiar that the United States has responded to the proliferation challenge by accentuating the military or paramilitary, rather than the diplomatic, options.

362. Joseph Pilat, A World Without the NPT?, in NUCLEAR NON-PROLIFERATION: AN AGENDA FOR THE 1990s, supra note 57, at 165; Jorge M. Pando, Some Regional Aspects of the Nuclear Non-Proliferation Regime, 13 DISARMAMENT 99 (1990); Joseph S. Nye, Jr., New Approaches to Nuclear Proliferation Policy, 256 SCIENCE 1293 (1992) (international non-proliferation regime is centered in the NPT, but includes independent institutions such as the IAEA and regional arrangements such as the Latin American nuclear weapons free zone).

363. Customary international law is binding upon nations independently of its possible incorporation into a treaty, and it affects even countries which have refrained from adhering to the more express form of international law. RESTATEMENT, supra note 132, §102. For the view that nuclear non-proliferation may have achieved the character
end in itself; it is a vehicle for accomplishing certain human objectives.\textsuperscript{364} If conditions change and a new security structure is required, then the NPT should adapt, too. Accordingly, there have already been proposals to amend the NPT, eliminating the most invidious discriminatory aspects and gradually converting the treaty into a more durable, comprehensive disarmament pact enforcing nuclear and other controls more symmetrically upon all its parties.\textsuperscript{365}

The NPT, however, remains terribly important today. It is still the key component of the international regime opposing the eruption of new nuclear threats. It is still the most widely-accepted arms control agreement in history. It is still the main bulwark of non-proliferation, and efforts to amend or replace it are likely to lead to chaos, to a drawn-out period of uncertainty, and to dilution of the non-proliferation imperative.\textsuperscript{366} Sustaining the treaty past 1995 is, therefore, the single most important arms control objective of the coming years.\textsuperscript{367}

At the same time, the NPT is in serious trouble. The NNWS have tolerated its inequality for over two decades, and their patience is wearing thin. Many have condemned it as discriminatory, outraged that the NWS have not done more to fulfill the article VI commitment, especially regarding CTBT. The implied threats about NNWS withdrawal and about termination (or only short extension) in 1995 must be taken more seriously.\textsuperscript{368} An increasing number of NNWS may come to agree with the NWS negotiator who, years ago, described the NPT as one of the

\textsuperscript{364} Bhalchandra Udgaonkar, Beyond Non-Proliferation, in Nuclear Non-Proliferation and the Non-Proliferation Treaty, supra note 155, at 168, 177.

\textsuperscript{365} Lewis A. Dunn, It Ain't Broke—Don't Fix It, BULL. ATOM. SCIENTISTS, July-Aug. 1990, at 19, 20; Mohamed I. Shaker, A Dialogue Between the Parties and Non-Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 13 DISARMAMENT 114, 119 (1990); Goldansky & Davidov, supra note 130, at 22-23; Epstein, supra note 155, at 132, 144.

\textsuperscript{366} See Dunn, supra note 22, at 22; James F. Keeley, Legitimacy, Capability, Effectiveness and the Future of the NPT, in Nuclear Non-Proliferation and Global Security, supra note 22, at 25, 43.

\textsuperscript{367} President Bush called the NPT, "the principal barrier to the spread of nuclear weapons, and it remains a hallmark in our long quest for peace and for peaceful nuclear cooperation among nations." Statement to the Fourth NPT Review Conference (Aug. 1990), reprinted in Non-Proliferation: A Compilation of Basic Documents, supra note 253, at 105.

\textsuperscript{368} Ashok Kapur, Dump the Treaty, BULL. ATOM. SCIENTISTS, July-Aug. 1990, at 21, 22; K. Subrahmanyam, The Link Between Horizontal and Vertical Proliferation, in Khan, supra note 20, at 136, 144.
“greatest con games of modern times.”\textsuperscript{369} Certainly, the efforts to enhance and strengthen the NPT verification regime have already proven problematic. Only by promptly fulfilling its obligations in good faith can the United States rescue the NPT and avoid the disintegration of the global non-proliferation campaign, at a time when much better outcomes are now attainable and urgent.\textsuperscript{370}

\textbf{C. International Law and International Security}

It is in evaluation of the international legal dimension of the NPT that the United States leadership perhaps has the most to learn. Oddly, what is required here is first of all a greater willingness to take seriously America’s own speeches about a “new world order” and the primacy of the rule of law. That is, the United States asserted repeatedly during the war with Iraq that the stakes involved nothing less than respect for international obligations and deference to the legitimate demands of the world community.\textsuperscript{371} That rhetoric was correct then, and it is even more correct now.

The United States has more to gain than any other country from the further establishment and promotion of international law. More than any other state, we rely upon the ability to reach practical accommodations to achieve our international ends. We, more than others, depend upon notions of “good faith” to sustain efficient international commerce. We are the foremost maker of significant treaties and have the greatest possible stake in sustaining that form of international communications, ensuring that this vital coin of the global realm is not debased through facile evasions or short-sighted exploitation of the vagaries of language. When the global economy and the global security system evolve to place even greater reliance on diplomatic, legal, and judicial systems—rather

\textsuperscript{369} LAST CHANCE, supra note 20, at 118. See also Sun Jiadong, China’s Position on Nuclear Non-Proliferation, in Khan, supra note 20, at 33, 34; SEABORG, STEMMING THE TIDE, supra note 130, at 371 (quoting a former diplomat as saying, “If we had known in 1968 how little the nuclear powers would do . . . to meet their end of the Nonproliferation Treaty bargain by controlling their arms race, I would have advised my government not to sign the treaty.”).

\textsuperscript{370} David A. Fischer, Eastern Europe After Pax Sovietica, BULL. ATOM. SCIENTISTS, July-Aug. 1990, at 23 (ending the NPT would gravely complicate proliferation concerns in Eastern Europe, where prior Soviet domination kept a lid on earlier potential nuclear dangers).

\textsuperscript{371} President George Bush, Address to Joint Session of Congress, reprinted in N.Y. TIMES, Sept. 12, 1990, at A20 (describing the objective of a “new world order” and asserting “today that new world is struggling to be born. A world quite different from the one we’ve known. A world where the rule of law supplants the rule of the jungle . . . . America and the world must support the rule of law. And we will.”).
than on warfare—for resolution of disputes and for ensuring the smooth conduct of everyday affairs, the United States will be the greatest winner. Arms control accords, from START to the Biological Weapons Convention to the Open Skies Treaty, depend upon the sufferance of other states—only by entrenching a norm of good faith compliance with the full intentions and spirit of the agreements can the United States ensure its ability to achieve vital national security goals.

It might sometimes appear that the United States, with its unchallenged superiority in high-technology intercontinental mechanisms of violence, would be well positioned to throw its military weight around.\textsuperscript{372} The greater insight, however, is that the United States has an even more profound "comparative advantage" in peaceful, legalistic proceedings. The more the world turns toward the rule of law, and the more successfully the United States can set an example of honoring even a vague and imprecise commitment to negotiate "in good faith," the more we will serve our true long-run interests. The illustration of a rogue state, successfully reneging upon its international obligations, is hardly the model that the United States should promote. Even if we could, in the short run, "get away with it," the precedent of disrespect for international law would disserve our overall goals. As Thomas Jefferson wrote over two centuries ago:

\begin{quote}
I think with others, that nations are to be governed with regard to their own interest, but I am convinced that it is their interest, in the long run, to be . . . faithful to their engagements, even in the worst of circumstances, and honorable and generous always.\textsuperscript{373}
\end{quote}

It may be appropriate, as the modern world is re-creating its legal and political institutions, to go back to some of those ancient principles, to shed some of the haphazard arrangements for preserving the fragile peace to which we acclimated ourselves during the artificial bipolarity of the cold war. The discriminatory aspects of the NPT are now


obsolete;\textsuperscript{374} the continued U.S. insistence upon nuclear testing is now anachronistic and counterproductive. Perhaps international affairs can now take more seriously the notion that states are obligated, not merely to tolerate each other, but actively to cooperate in shared pursuit of planetary objectives.\textsuperscript{375} This concept of mandatory collaboration has long been enshrined in international rhetoric,\textsuperscript{376} but its realization has been obscured by the cold war. Perhaps now we can move it to the next plateau of international life.

In the more immediate perspective, a comprehensive test ban treaty is now required—required both by binding obligations of international law and by enlightened security concerns of the modern world. “Good faith” in arms control mandates test ban treaty negotiations that the United States should have undertaken and concluded long ago. The United States would be foolish and illegitimate to continue to dishonor this commitment.

\begin{footnotesize}
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\item It might not yet be possible to eliminate all vestiges of discrimination, and the world has always sustained various tiers of nations possessing different security needs and assets. The United Nations Charter, for example, is profoundly discriminatory in reserving special perquisites for the permanent members of the Security Council. Perhaps that arrangement, too, is in need of revision, but there is some residual plausibility in treating the NWS and the NNWS differently, at least for a transitional period. \textit{See} Joseph S. Nye, Jr., \textit{NPT: The Logic of Inequality}, FOREIGN POLICY, Summer 1985, at 123.
\item \textit{See} Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, \textit{supra} note 271 (asserting “the duty of states to co-operate with one another in accordance with the [U.N.] Charter”).
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