

EXPLORING THE CAPACITY OF THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS (NPT) TO ACHIEVE UNIVERSAL DISARMAMENT THROUGH A CASE STUDY OF INDIA'S ENGAGEMENT WITH NUCLEAR NON-PROLIFERATION

EFTIHIA POPOVICH

India is not a party to the Treaty on Nuclear Non-Proliferation (*NPT*), but as an emerging superpower that is in possession of nuclear weapons it has the power to influence the delicate balance of the nuclear non-proliferation regime. This balance has now been threatened as a result of an agreement entered into between India and the United States allowing India the benefits of being party to the *NPT* without the need to assent to all of its restrictions. It is argued that this agreement, along with a number of subsequent agreements, has resulted in a breach of Article VI of the *NPT*, a provision essential to the accomplishment of the *NPT*'s object and purpose. This article considers how the agreements entered into by India and the United States have ultimately undermined any serious efforts towards disarmament under the *NPT* in the future.

I INTRODUCTION

The Treaty on the Non-Proliferation of Nuclear Weapons (*NPT*) assists in guaranteeing the safety of States and their citizens from nuclear coercion and threat.¹ In conducting a case study on India, an emerging super power, this article will demonstrate how the recent engagement between India and

¹ *Treaty on the Non-Proliferation of Nuclear Weapons*, opened for signature 1 July 1968, 729 UNTS 161 (entered into force 5 March 1970) ('*NPT*').

the *NPT* member States has undermined the capacity for the *NPT* to achieve universal nuclear disarmament.

India, a State which is not a party of the *NPT* and one which possesses nuclear weapons,² entered into an Agreement with the United States for the transfer of nuclear material which would be used towards India's civil, as opposed to military, nuclear facilities.³ Following this agreement, the Nuclear Suppliers Group (NSG), a group which controls nuclear exports internationally, waived international export requirements allowing India to expand its trading capacity to States other than the United States. India is not, and has never been a party to the *NPT* but now has, by way of these events, been provided 'with the same trade benefits of *NPT* members but without the non-proliferation obligations'.⁴ Both the Agreement and the Waiver, referred to as the "Indian Concessions" in this article, are considered in detail; it is argued that their creation has amounted to a breach of the "good faith" requirement in Article VI of the *NPT* and has detrimentally affected the international movement towards disarmament.

II THE *NPT* – ORIGIN AND STRUCTURE

The *NPT* is essential to the protection and survival of our society. With 189 States as parties, the *NPT* is the most widely signed treaty outside of the United Nations Charter.⁵ Its purpose is to 'prevent the spread of nuclear

² It is claimed that India in fact classifies as a de facto nuclear weapon State, see Faustin Ntoubbandi, 'Reflections on the USA-India Atomic Energy Cooperation' (2008) 13(2) *Journal of Conflict and Security Law* 273, 280.

³ 'Civil Nuclear Cooperation Agreement', (signed 2 March 2006), <http://responsiblenucleartrade.com/keydocuments/india_123_agreement_text.pdf>. The deal was sealed on 2 March 2006 and was subsequently legislated upon on 12 December 2006, see *Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act*, 22 USC § 8003 (2006). See also, Benjamin Wastler, 'Having its Yellow Cake and Eating it too: How the NSG Waiver for India Threatens to Undermine the Nuclear Non-Proliferation Regime' (2010) 33 *Boston Collage International and Competition Law Review* 201, 207-208. For further discussion of the initiative, see US Department of State, *U.S. – India: Civil Nuclear Cooperation*, <<http://www.state.gov/p/sca/c17361.htm>>; John R. Crook, 'Congress Approves Nuclear Cooperation Agreement with India; Agreement Signed and Brought Into Force' (2009) 103 *American Journal of International Law* 163, 103.

⁴ Wastler, above n 3, 201.

⁵ For a list of the parties to the *NPT* see, <<http://treaties.un.org/pages/>

weapons and weapons technology, to foster the peaceful uses of nuclear energy, and to further the goal of disarmament'.⁶ An assessment of the capacity of the *NPT* to achieve its aims becomes necessary and important as new events occur internationally. The *NPT* contains three pillars, namely, non-proliferation, disarmament, and knowledge sharing.⁷ These pillars underpin the motivation behind its creation; they encompass both the restrictions and the incentives behind the regime.⁸

The *NPT* was created for a number of reasons; however, most importantly, it was the pillar of disarmament which was the driving force.⁹ The aim of disarmament was the reason for which States could not freely trade or transfer nuclear weaponry.¹⁰ The creation of the *NPT*, and

showDetails.aspx?objid=08000002801d56c5>. A need for a method of nuclear control was sparked in the mid-20th century by a number of nuclear tests conducted by several States. For instance, between 1945 and 1970, 624 tests were conducted by the United States, 315 tests were conducted by the Soviet Union, 30 tests were conducted by France, 10 tests were conducted by China and 26 tests were conducted by the United Kingdom. For more information see Schweizerischer Erdbebendienst (SED) Swiss Seismological Service, *Nuclear Explosions since 1945* (19 May 2008), <http://www.seismo2009.ethz.ch/bsv/nuclear_explosions.html>. The only other document which has more parties is the *Charter of the United Nations* with 192 parties.

⁶ International Atomic Energy Agency, *International Conventions and Agreements: Treaty on the Non-Proliferation of Nuclear Weapons (NPT)*, <<http://www.iaea.org/Publications/Documents/Treaties/npt.html>>.

⁷ Günther Handl, 'The Nuclear Non-Proliferation Regime: Legitimacy as a Function of Process' (2010) 19 *Tulane Journal of International and Comparative Law* 1, 6; Wastler, above n 3, 207-208.

⁸ See generally, Wastler, above n 3. Non-proliferation and knowledge sharing, although important to the *NPT*'s success, are not discussed at any length in this article; its main focus being on the pillar of disarmament. For a discussion of the other two pillars see Daniel H. Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (Oxford University Press, 2011) 32.

⁹ *Non-Proliferation of Nuclear Weapons*, GA Res 2028 (XX) UN GAOR, 20th sess, 1382nd plen mtg, UN Doc A/RES/2028 (19 November 1965) para 2 (b), (c).

¹⁰ Edwin B. Firmage, 'The Treaty on Non-Proliferation of Nuclear Weapons' (1969) 63 *American Journal of International Law* 711, 722-739. See also, Mohamed I. Shaker, *The Nuclear Non-Proliferation Treaty, Origin and Implementation, 1959-1979* (Oceana Publications, 1980) vol 1-3; Zhang Xinjun, 'The Riddle of "Inalienable Right" in Article IV of the Treaty on the Non-Proliferation of Nuclear Weapons: Intentional Ambiguity' (2006) 5 *Chinese Journal of International Law* 647, 655.

specifically the pillar of disarmament, catered both for the want of a nuclear weapon-free world and for the need for mechanisms to be put in place for international progress in terms of peaceful nuclear use. At the time of the formation of the *NPT* there were already States which had created and tested nuclear weaponry. The *NPT* therefore had to separate States into two groups in order to ensure that it gained signatures from the largest number of States. These two groups were the Non-Nuclear Weapon States (NNWS) and the Nuclear Weapon States (NWS).¹¹ Pursuant to the treaty, a NWS is one which had exploded a nuclear weapon or explosive device prior to 1 January 1967.¹²

Where NNWS are concerned however, the *NPT* remains silent. Jonas points out that this implies that whichever State is not a NWS is a NNWS.¹³ Therefore, any State, even a State which is not a party to the *NPT* would be classified a NNWS; for example, States such as India, North Korea, Israel and Pakistan. The *NPT* associates different rules with different States depending on their classification. Importantly, Article I of the *NPT* requires that a NWS undertakes not to transfer nuclear materials to any NNWS, while Article II requires that NNWS undertake not to receive such materials.¹⁴ Through this agreement NNWS took a substantial risk but gained what was deemed the “inalienable right” to the access to, and use of, nuclear energy for peaceful purposes.¹⁵ Further NNWS were

¹¹ *NPT* art I, II.

¹² *NPT* art IX(3). As at the inception of the *NPT* this was limited to the United States, Russia, the United Kingdom, France and China, all of whom are the permanent members of the United Nations Security Council, and the only States which publicly acknowledged their possession of nuclear weapons.

¹³ David Jonas, ‘Variations on Non-Nuclear: May The “Final Four” Join the Nuclear Nonproliferation Treaty as Non-Nuclear Weapon States While Retaining Their Nuclear Weapons?’ (2005) 2005 *Michigan State Law Review* 417, 434-435, 437. See also, *NPT* art XI (3).

¹⁴ *NPT* art I. The article states that:

‘...directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices’.

NPT art II. This article specifically prohibits the transfer of:

‘...nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices’.

¹⁵ Their risk was the lack of nuclear protection afforded to those States which had

guaranteed that they would 'not be subject to either coercion or intimidation from those States which did have the weaponry'.¹⁶

The *NPT* also has mechanisms in place which validate the adherence to certain obligations.¹⁷ Under Article III of the *NPT*, reference is made to the International Atomic Energy Agency (IAEA); each State undertakes to accept the safeguards provided for in the IAEA's Statute and safeguard system with regard to each State's civil nuclear facilities.¹⁸ Article III does not ban civil nuclear cooperation with safeguarded facilities, which means that as long as a NNWS has the IAEA safeguards on its civil facilities, transfers to that State are not necessarily prohibited.¹⁹

a nuclear arsenal: see for more information, Jan Ruzicka and Nicholas J. Wheeler, 'The Puzzle of Trusting Relationships in the Nuclear Non-Proliferation Treaty' (2010) 86 *International Affairs* 69, 75. For more information on the benefits afforded to NNWS, see Handl, above n 7, 9.

¹⁶ Firmage, above n 10, 714, 718.

¹⁷ Daniel H. Joyner, 'The Nuclear Suppliers Group: Part 1: History and Functioning' (2005) 11(2) *International Trade Law & Regulation* 33, 34.

¹⁸ Note this body was formed in 1957 and is joined to the UN through an agreement: The Texts of the Agency's Agreements with the United Nations International Atomic Energy Agency, INFCIRC/11 (30 October 1959), <<http://www.iaea.org/Publications/Documents/Infcircs/Others/infcirc11.pdf>>.

The IAEA verifies compliance with the *NPT* and specifically detects the diversion of nuclear materials from peaceful uses to the production of nuclear weapons/explosive devices. Through an inspection scheme, the IAEA Board of Governors then has the power to determine whether there has been a breach of the *NPT* or the safeguards. Following the determination of a breach, the Board refers it to the United Nations Security Council for action or authorisation of remedial measures. For more information on the IAEA, see Joyner, above n 17.

¹⁹ *NPT* art III. See discussion, Robert G. Joseph - Under Secretary for Arms Control and International Security, 'Hearing on U.S.-India Civil Nuclear Cooperation Initiative' (Prepared remarks for the Senate Foreign Relations Committee Washington, DC, 2 November 2005), <<http://www.state.gov/t/us/rm/55968.htm>>, 4. The complexities and delicacy of balance between the status of a State and its obligations are discussed by Ntoubbandi, above n 2, 287. See also for similar views, Jack I. Garvey, 'To Fix the Nuclear Non-Proliferation Regime - Avoid State Classification' (2009) 21 *Florida Journal of International Law* 371, 339-340. Ruzicka and Wheeler, above n 15, 70, discuss the trust issues which exist in the power differential between States.

III INDIA'S NNWS STATUS – WHAT IS ITS PLACE?

India is not respected because it has acquired the capacity to launch rockets or satellites, or because of the size of its population...The world respects India because of its capacity to emerge as an economic powerhouse.²⁰

India is a growing super power in possession of a nuclear arsenal, which Singh argues has been created as a matter of State security rather than the want of a rise of domestic politics.²¹ Having not exploded a nuclear device prior to 1967 meant that even with nuclear weapons India was classified as a non-party NNWS under the *NPT*.²² These two very important points, namely, its NNWS status and its possession of nuclear weapons have made India an important case study in the context of the *NPT*.²³

India, although presented with opportunities to join the *NPT*, has remained outside the *NPT* regime for two main reasons: the *NPT*'s perceived inherent unfairness, and the necessity of having a nuclear deterrent for its neighbouring States: Pakistan and China.²⁴ This aside, India has made a number of efforts to attain nuclear disarmament in its

²⁰ John D. Giorciari, 'India's Approach to Great-Power Status' (2011) 35 *Fletcher Forum of World Affairs* 61, 74 n 44.

²¹ Jaswant Singh, 'Against Nuclear Apartheid' (1998) 77(5) *Foreign Affairs* 41, 47-49. India has a 'no-first-use' nuclear policy in which it retains a right to use nuclear weapons only against a State where India has been subjected to nuclear, chemical or biological attacks. See further, S Paul Kapur, "More Posture than Review" Indian Reactions to the US Nuclear Posture Review' (2011) 18(1) *Non Proliferation Review* 69, 77.

²² *NPT* art IX(3). India conducted its first nuclear test in 1974 followed by a second nuclear test in 1998; the Smiling Buddha, formally designated as Pokhran-I, exploded on 18 May 1974 and the Pokhran-II saw three nuclear explosives explode on 11 May and two on 13 May 1998.

²³ India's current nuclear arsenal is similar to Pakistan's, with approximately 60-70 warheads. This is around a quarter of China's arsenal: see discussion, Lavina Lee, 'Beyond Symbolism? The U.S. Nuclear Disarmament Agenda and Its Implications for Chinese and Indian Nuclear Policy' (2011) 91 *Foreign Policy Briefing* 1, 7. See also, Kapur, above n 21, 70, who also agrees with the approximation of India's arsenal where he states that it is said to be between 60 and 80 warheads.

²⁴ Singh, above n 21; Wastler, above n 3, 205.

own capacity; in fact Lee states that ‘India has behaved responsibly and has thus far maintained a strong record on preventing proliferation of its own home grown technologies’.²⁵

Nevertheless, the risk with India possessing nuclear weapons is not only limited to the fact that it is not a signatory to any nuclear control agreement. It also extends, as Garvey points out, to the fact that historically India is not transparent on national security matters, which poses a risk to international society.²⁶

IV THE INDIAN CONCESSIONS

Following 34 years of India remaining outside the *NPT* regime, India has finally managed to become the subject of two international concessions allowing it to gain the benefits of the *NPT* regime and gain international acceptance into the international nuclear community.²⁷ These concessions were made up of an Agreement and a Waiver.

The primary concession was an agreement made between India and the United States which allowed India access to nuclear trade with the United States.²⁸ This Agreement was a major step in India’s efforts towards

²⁵ Lee, above n 23, 8. India made calls for a ban on nuclear testing (1954), a non-discriminatory and respectively a ‘non-use of nuclear weapons’ treaty (1965 and 1978), a nuclear free zone (1982) and a phased complete elimination of nuclear weapons program (1988), all of which were rejected by the Nuclear Weapon States which considered the weapons essential for their security. See further, Singh, above n 21, 44.

²⁶ Garvey, above n 19, 384.

²⁷ Wastler, above n 3, 201.

²⁸ Herein referred to as “the Agreement”. On 18 July 2005 and 2 March 2006, President Bush and Prime Minister Singh issued joint statements pertaining to the relationship between the two countries with regard to nuclear cooperation. See Arms Control Association, *Joint Statement Between President George W. Bush and Prime Minister Manmohan Singh* (18 July 2005), <http://www.armscontrol.org/country/india/20050718_Joint_Statement_India> ; Arms Control Association, *U.S. Proposal for Changes to Nuclear Suppliers Group Guidelines Circulated March 2006* (27 March 2006), <http://www.armscontrol.org/projects/India/20060327_DraftNSGProposal>.

The Agreement is also referred to as the 123 Agreement due to the fact that the

increased nuclear knowledge and capability, and opened the doorway to full civil nuclear cooperation between the two countries.²⁹ In 2005 Robert Joseph, Under Secretary for Arms Control and International Security in the United States, stated that the Agreement was to be created in acknowledgement of India's need for nuclear power 'to sustain dynamic economic growth and to address its growing energy requirements in an affordable and environmentally-responsible manner'.³⁰ The Agreement was created to provide India with the technology it needed 'to build a safe, modern and efficient infrastructure that will provide clean, peaceful nuclear energy'.³¹

Although Joseph's statement outlined that the Agreement was in no way intended to affect the functioning of the *NPT*, nor was it an attempt to renegotiate the *NPT*, it was evident that other States were still uncertain about the impact it would have on the international community.³² It was clear that India had no intention of becoming a party to the *NPT* or in any way surrendering its nuclear weapons as a part of the Agreement.³³

Specifically, the Agreement granted consent to India for the use of certain nuclear fuel cycle activities (particularly, reprocessing) conditional on India establishing a new national facility which was subject to the IAEA safeguards and dedicated to reprocessing safeguarded nuclear material.³⁴ Importantly, the Agreement also committed India to subjecting its civil, as opposed to military, nuclear facilities to the IAEA safeguards.³⁵ This required India to separate its nuclear facilities into those which would be regarded military facilities and those which would be civil.³⁶

Agreement is made under section 123 of the *Atomic Energy Act of 1954*, Pub L No 83-703 §123, 68 Stat 919.

²⁹ 'U.S. - India Civil Nuclear Cooperation Initiative Bilateral Agreement on Peaceful Nuclear Cooperation', Fact Sheet (Washington, 27 July 2007), <<http://2001-2009.state.gov/r/pa/prs/ps/2007/89552.htm>>.

³⁰ Joseph, above n 19, 1.

³¹ *Ibid* 2. The Agreement reflects the fact that it was created in order to reflect the desire of both India and the United States to cooperate in nuclear safety, research and development, commercial trade in nuclear reactors, nuclear technology, and fuel: 'Civil Nuclear Cooperation Agreement', above n 3.

³² Joseph, above n 19, 2-4.

³³ *Ibid* 4.

³⁴ *Ibid*.

³⁵ 'U.S. - India Civil Nuclear Cooperation Initiative Bilateral Agreement on Peaceful Nuclear Cooperation', above n 29.

³⁶ 'Civil Nuclear Cooperation Agreement', above n 3.

Following the Agreement, and in order to make it internationally viable, the Nuclear Suppliers Group (NSG), which controls all international nuclear exports, needed to waive various requirements under their export guidelines in order to allow trade to occur on an international level between India and all nuclear supplier States. The NSG is a non-legal group which facilitates nuclear trade in a manner which is consistent with international nuclear non-proliferation norms, largely with those outlined in the *NPT*.³⁷ The NSG has two sets of guidelines which act to assist in safe nuclear trade and which also govern the behaviour of the NSG's member States.³⁸ The first and most relevant set of guidelines refer to export requirements of nuclear materials and technology and act 'simply as a harmonised iteration of principles establishing norms' for NSG member States to adhere to in 'their national export control efforts'.³⁹ Importantly, these guidelines do not allow transfers of nuclear material and knowledge to any State unless *all nuclear facilities* in the receiving State are fully safeguarded according to the IAEA safeguard system.⁴⁰ This requirement is called the *full-scope safeguard* requirement of the NSG.

The Waiver, or the 'Statement on Civil Nuclear Cooperation with India', concluded on 6 September 2008, raised some significant questions in international law.⁴¹ Prior to the Waiver, under paragraph 4 of its

³⁷ See generally, information provided in Arms Control Association, *The Nuclear Suppliers Group (NSG) at a Glance* (May 2006), <<http://www.armscontrol.org/system/files/NSG.pdf>>. See generally, Joyner, above n 17. The NSG formed as a gradual evolution of the Zangger Committee, the NSG's predecessor. This evolution was necessary following the 1974 nuclear test conducted by India. For more information, see IAEA, Information Circular, 'Communication Received from the Permanent Mission of the Netherlands on Behalf of the Member States of the Nuclear Suppliers Group' (29 November 2000) INFCIRC/539/Rev.1/Corr.1., 2; Wastler, above n 3, 205. The NSG is not a legal body in the technical sense, see Joyner, above n 17, 38.

³⁸ IAEA, above n 37, 38.

³⁹ Joyner, above n 17, 36. These are listed in the 'Trigger List' within the guidelines. See IAEA, above n 37, 3, citing, 'INFCIRC/254, Part 1 and Part 2 (as amended)'. Note, the second set of guidelines pertains to the export of dual use materials; however, these guidelines are irrelevant in the context of this article.

⁴⁰ Joyner, above n 17, 34; IAEA, above n 37, 7. See also, *NPT* art IV, III, respectively.

⁴¹ Nuclear Suppliers Group, *Statement on Civil Nuclear Cooperation with India*, (signed 6 September 2008), <http://www.armscontrol.org/system/files/2008_0906_Final_NS_G_Statement.pdf>. Kesav M. Wable, 'The U.S.-India Strategic Nuclear Partnership: A Debilitating Blow to the Non-Proliferation Regime'

guidelines, the NSG had the *full-scope safeguards* as a prerequisite to receiving the supply of any nuclear equipment or material.⁴² Additionally, under paragraphs 6 and 7 of the guidelines there were restrictions with regard to enrichment and reprocessing (ENR) technology in that any supplied equipment or technology could not be used to enrich uranium beyond 20 percent; making it weapons grade material.⁴³ The Waiver waived the *full-scope safeguards* requirement under paragraph 4 of the guidelines and expressly allowed ENR exports to India, subject to paragraphs 6 and 7.⁴⁴ This meant that nuclear transfers from NSG members to India were allowed despite the fact that India does not allow international supervision over *all* its nuclear activities and is not a party to the *NPT*.⁴⁵ India could therefore engage in whatever activities it deemed appropriate with regard to its military facilities with nothing but its own safeguards guiding its behaviour and with no threat of it breaching any international laws.⁴⁶

Finally, the Agreement was approved by the US Congress. This was the final move in a series of events which were required to be undertaken in order for the Indian Concessions to be considered complete both with the United States and India, and internationally.⁴⁷

(2008) 33 *Brooklyn Journal of International Law* 719, 758. The deal threatens the legitimacy of the *NPT* by creating this Agreement which is inconsistent with the purpose of the *NPT* creating a dangerous precedent for other NWS.

⁴² IAEA, Information Circular, 'Communication Received from the Permanent Mission of Brazil regarding Certain Member States' Guidelines for the Export of Nuclear Material, Equipment and Technology' (7 November 2007), INFCIRC/254/Rev.9/Part 1.

⁴³ Federation of American Scientists, *Uranium Production* (1 January 2013), <http://www.fas.org/programs/ssp/nukes/fuelcycle/centrifuges/U_production.html>.

⁴⁴ See Nuclear Suppliers Group, above n 41. See also, Wable, above n 41, 724 (discusses steps taken and the terms); 'U.S. - India Civil Nuclear Cooperation Initiative Bilateral Agreement on Peaceful Nuclear Cooperation', Fact Sheet (Washington, 27 July 2007) <http://www.archive.usun.state.gov/fact_sheet/ps_w7.pdf>; Ntoubbandi, above n 2, 275-277; IAEA, above n 37, 4.

⁴⁵ Nuclear Suppliers Group, above n 41.

⁴⁶ One of the most basic notions of international law is that of State Sovereignty. This notion explains that a State should not be bound in international law if it has not consented to be bound. In India's case, it has not consented to anything but the two Concessions and therefore cannot ever be in breach of the *NPT*. See Donald K Anton, Penelope Matthew and Wayne Morgan, *International Law, Cases and Materials* (Oxford, 2005, 2008 ed) ch 1.

⁴⁷ The Agreement was legislated upon on 12 December 2006, see *Henry J. Hyde United States-India Peaceful Atomic Energy Cooperation Act*, 22 USC § 8003

Observers of the *NPT* such as Ntoubbandi, Wable, Ruzicka and Wheeler, and Crook stated that the effect of this Waiver could be construed in two ways; the Agreement may either cause behavioural changes in existing members, or conversely, it may bring India further into the ambit of the regime.⁴⁸ Kuchawaha and Kapur state that there is an arguable case that the Waiver itself has requested of India a level of nuclear restraint which India already undertakes domestically.⁴⁹ In fact, even though India has not signed the *NPT*, it imposes strict safeguard systems on its own facilities.⁵⁰ NNWS have already given up many benefits to be a part of the regime and it seems more likely than not that the more significant the benefits that India receive as result of the Concessions, the less content the NNWS will be with their status and obligations.

Nevertheless, Giorciari asserts that the Indian Concessions have opened up the gateway to what India saw as a major impediment to its accession toward 'great power' status, without having to go against its original policy decision not to enter the *NPT*.⁵¹ Wastler also argues that India has not been detrimentally affected in how it deals with its nuclear technology; the legal obligations it assented to as part of the Concessions are not as demanding as those the *NPT* States must adhere to.⁵² However, he also states that although the Waiver fails to limit India's future in the production of nuclear weapons, it does harmonise its export requirements with those of the NSG.⁵³ It seems therefore that the Waiver has not had limiting effects; India has instead found its way to the incentives of the regime and taken advantage of them without needing to adhere to any of the restrictions.

(2006). See also discussion of the initiative, US Department of State, above n 3. See for discussion, Wable, above n 41, 724-725; Joseph G. Silver, 'The Global Partnership: The Final Blow to the Nuclear Non-proliferation Regime?' (2008) 21 *New York International Law Review* 69, 84 -85.

⁴⁸ Ntoubbandi, above n 2, 273. These two views are also supported by other writers as mentioned at 274; Wable, above n 41, 720-721; Ruzicka and Wheeler, above n 15, 83. The United States claims that the latter is in fact the purpose of the Agreement, see especially, Crook, above n 3, 103. See also, Joseph above n 19, 1, where it is argued that it the Agreement was in fact created to bring India closer to the *NPT* regime.

⁴⁹ Sumeet Kuchawaha, 'Indian Experience on Nuclear Commerce and Liability Issues' (2010) 5(1) *Construction Law Journal* 19, 20; see also, Kapur, above n 21, 77.

⁵⁰ For instance, it criminalises the transfer of sensitive nuclear technology through trade and/or brokering: see Wastler, above n 3, 207-208.

⁵¹ Giorciari, above n 20, 77.

⁵² Wastler, above n 3, 207-208, 212-214.

⁵³ *Ibid* 212-214.

V THE LEGALITY OF THE INDIAN CONCESSIONS – VIENNA CONVENTION ON THE LAW OF TREATIES

Critical to establishing the effect of the Indian Concessions, or the Breach as it will be referred to herein, Article VI of the *NPT*, a fundamental undertaking and obligation towards future disarmament through negotiations conducted in “good faith”, needs to be assessed.⁵⁴ Singh and Chinkin, in their joint advice discuss the importance of “good faith” in understanding and interpreting the *NPT*, and establish that it can be used to determine what the object and purpose of the *NPT* is.⁵⁵ This interpretation of “good faith” becomes a crucial stepping stone to the analysis undertaken in this article as it provides for the environment through which disarmament is to be achieved. To this end, it is necessary to look at and utilise the Vienna Convention on the Law of Treaties (*VCLT*).⁵⁶

The *VCLT* is the main source of treaty interpretation containing some of the most important tools for unlocking the meaning of any treaty. Amongst some of these important tools are Articles 31 and 32 of the *VCLT*. These two Articles outline the General Rule of Interpretation and the Supplementary Means of Interpretation respectively.⁵⁷ They are applicable to the interpretation of Article VI of the *NPT* as they are considered Customary International Law and as such States are legally bound by Articles 31 and 32 without a need to prove neither their consent to be bound nor their belief in these articles’ obligatory nature.⁵⁸

⁵⁴ *NPT* art VI.

⁵⁵ Joint Advice of Rabinder Singh QC and Christine Chinkin regarding the Mutual Defence Agreement and the Nuclear Non-Proliferation Treaty, found in Rebecca Johnson, ‘Renewal of US-UK Nuclear Cooperation ‘in Breach of *NPT*’ say Eminent Lawyers’, *Disarmament Diplomacy* (online), Issue no 78, July/August 2004, <<http://www.acronym.org.uk/dd/dd78/78news02.htm>>.

⁵⁶ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) (*VCLT*).

⁵⁷ See, *VCLT* art 31, 32, respectively. See also, Joyner, above n 10, 22-23.

⁵⁸ Lisa Tabassi, ‘The Nuclear Test Ban: Lex Lata Or De Lege Ferenda?’ (2009) 14(2) *Journal of Conflict & Security Law* 309, 332-333. The *VCLT*, which came into effect in 1980, is not a retrospectively applied treaty. This necessarily means that it does not apply to the *NPT*, which came into force ten years earlier. Customary International Law (CIL), however, allows for obligations within the *VCLT* to be applied regardless. CIL comprises of two elements which are reflected in Article 38(b) of the *Statute of the International Court of Justice*; State Practice and *Opinio Juris Sive Necessitatis*. See for

Both of these Articles provide for a specific form of interpretation. Primarily, Article 31 requires that one should first begin with an interpretation of the treaty with reference to the ordinary meaning of the relevant part of the treaty.⁵⁹ One should then seek to determine the meaning of a specific part of the treaty in line with the context and both the object and purpose of the treaty.⁶⁰ Under Article 31, in order to determine the object and purpose of a treaty, one commonly begins with the preamble which contains the ‘underlying motivation behind the treaty’.⁶¹ Article 32, on the other hand, allows an interpreter to move away from the text of the treaty, where there is an ambiguity in its meaning, and refers to any “supplementary material” or *travaux préparatoires*.⁶²

The text of Article VI of the *NPT* demonstrates one of its aims; effectively, ‘to pursue negotiations in good faith on effective measures

instance, *Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia) (Judgment)* [2002] ICJ Rep 625, [37]; *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6 [41]; Silver, above n 47, 74-75; Joyner, above n 8; Malcolm Shaw, *International Law* (Cambridge University Press, 2003) 839.

⁵⁹ *VCLT* art 31, states that:

‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

⁶⁰ ‘Panel Report, *United States – Sections 301-310 of the Trade Act of 1974 (US-Section 301)*, WT/DS152/R, para 7.22’ as cited in Joyner, above n 8, 23.

⁶¹ *VCLT* art 31(2). See also, Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 192-197. Gardiner notes that notwithstanding the wording of Article 31, a treaty is capable of having multiple purposes. Jonas states that in interpreting a treaty, once reference has been made to its plain meaning, one must give heed to not only subsequent agreements made under the treaty, pursuant to Article 31, but also to subsequent practice: see Jonas, above n 13, 446-448. See also, *VCLT* art 31(3)(a), (b).

⁶² *VCLT* art 32. See also, Ronald J. Sievert, ‘Working Toward A Legally Enforceable Nuclear Non-Proliferation Regime’ (2010) 34 *Fordham International Law Journal* 93, 94. See also, Joyner where it is stated that this material should be referred to ‘subsequent to and only as a conformational supplement to the primary analysis conducted pursuant to Article 31’. Joyner goes on to state that it is common practice for States and tribunals to refer to any relevant *travaux préparatoires* in order to assist with the interpretation of a treaty. He warns, however, that *travaux préparatoires* are not an authentic means of interpretation but are rather ‘evidence to be weighed against other relevant evidence’: Joyner, above n 8, 25, 33. See also, ‘Third Report on the Law of Treaties, Yearbook of the ILC, 1964, Vol II, 58, para 20-21’: as cited at 25, n 11.

relating to... nuclear disarmament'.⁶³ In order to determine the implication of these terms they need to be considered with reference to previous interpretations of their application within the international environment. The meaning of Article VI will not only be interpreted with reference to its text, but also with reference to a wider analysis of the *NPT* in order to provide a supportive framework and a substantiation of its importance.

The obligation of “good faith negotiations” is to be interpreted with due consideration of its plain meaning as required under Article 31 of the *VCLT*.⁶⁴ Under Article VI, States which are a party to the *NPT* have an ‘obligation to proactively, diligently, sincerely, and consistently pursue “good faith negotiations” on effective measures relating to’ non-proliferation, knowledge sharing and disarmament.⁶⁵ It is in Article VI where all States party to the *NPT*, and more importantly NWS, agree to the legal obligation towards the aim of disarmament. The International Court of Justice shed some light on the interpretation of “good faith negotiations”, stating that such negotiations should be meaningful;⁶⁶ where parties are willing to compromise;⁶⁷ where the negotiation itself is not

⁶³ *NPT* art VI. The article states that:

‘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’.
[Emphasis added]

⁶⁴ *VCLT* art 31.

⁶⁵ Joyner, above n 8, 99.

⁶⁶ *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Merit)* [1969] ICJ Rep 3. The ICJ stated at [85(a)] that negotiating parties should:

‘Not merely . . . go through a formal process of negotiation...’

But rather:

‘Are under an obligation so to conduct themselves that the negotiations are meaningful...’

See also John Burroughs, ‘The Imperative of Good Faith’ (Speech delivered for the Lawyers Committee on Nuclear Policy. 18-19 June 2010), <<http://www.reachingcriticalwill.org/legal/NPT/prepcom09/ngostatements/GoodFaith.pdf>> 3; Elizabeth J. Shafer, ‘Good Faith Negotiation, the Nuclear Disarmament Obligation of Article VI of the NPT, and Return to the International Court of Justice’ (Paper presented at International Seminar, *Abolition of Nuclear Weapons, War and Armed Forces*, sponsored by the University of Costa Rica Faculty of Law and the International Association of Lawyers Against Nuclear Arms, 26 January 2008, San Jose, Costa Rica) 5.

⁶⁷ Burroughs, above n 66, 3, citing Genevieve Guyomar, ‘Arbitration Panel/Tribunal of the Agreement on German External Debt AFDI 1973’, in

unjustifiably delayed;⁶⁸ and where serious efforts are made to achieve an agreement.⁶⁹ In undertaking “good faith negotiations” one would assume therefore that the negotiations themselves should not be undermined through any other actions of the negotiating parties.

Article 26 of the *VCLT* imposes a general requirement of “good faith” on parties to any treaty in the execution of their obligations.⁷⁰ Mohammed Bedjaoui stated, in his key note address at the Conference on Good Faith in 2008, that ‘good faith is a fundamental principle of international law, without which all international law would collapse’.⁷¹ However, it must be acknowledged that there is no consensus in international law on how to define “good faith”, making its general application even more complex.⁷² Adding to this complexity with an open interpretation of “good faith”, it was stated by the International Court of Justice in its Advisory Opinion regarding Nuclear Weapons in 1996 that ‘the principle of good faith is a long established principle of international law with a justiciable legal meaning in the context of the creation and performance of legal obligations’.⁷³ John Burroughs stated, as speaker on the topic ‘The

XIX, Part II, Recueil des Sentences Arbitrales, 27-64:

‘...parties must make every effort...to reach a mutually satisfactory compromise, even going so far as to abandon previously inflexibly held positions’.

Burroughs, above n 66, 3, also citing ‘Arbitration between Kuwait and the American Independent Oil Company (AMINOIL)’ (1982):

‘...good faith as properly to be understood: sustained upkeep of negotiations over a period appropriate to the circumstances, awareness of the interests of the other party, and a persevering quest for an acceptable compromise’.

⁶⁸ *Lake Lanoux Arbitration (France v Spain) (Awards)* (1957) 12 R. Int’l Arb 281. See also John Burroughs, above n 66, 4; Shafer, above n 66, 4-5.

⁶⁹ *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Marine Area (Canada/US) (Judgement)* [1984] ICJ Rep 130 [87]. See also, Burroughs, above n 66, 5.

⁷⁰ *VCLT* art 26, states:

‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’.

⁷¹ Mohammed Bedjaoui, ‘Keynote Address’ (Conference on Good Faith, International Law, and Elimination of Nuclear Weapons: The Once and Future Contributions of the International Court of Justice, 1 May 2008, Geneva), <<http://www.lcnp.org/disarmament/2008M>> 18.

⁷² Scott D. Sagan, ‘Good Faith and Nuclear Disarmament Negotiations’ in George Perkovich and James M. Acto (eds), *Abolishing Nuclear Weapons: A Debate* (Carnegie Endowment for International Peace, 2009) 204.

⁷³ Joyner, above n 8, 98, citing *Nuclear Test Case (Australia v France)*; (*New Zealand v France*) (*Judgment*) [1974] ICJ Rep 97, 253, 457. See also

Imperative of Good Faith’, that “good faith” essentially means ‘keeping promises in a manner true to their purposes and working sincerely and cooperatively to attain agreed objectives’.⁷⁴ In applying the concepts above, it is then argued in this article that a duty of “good faith” is therefore owed by the United States and by the other NSG members towards the real achievement of complete and universal nuclear disarmament and that the Indian Concessions undermine future efforts of such negotiations.

The Concessions allow for India to receive transfers of nuclear knowledge and material, and have also led to a number of other agreements being entered into by India to the same effect.⁷⁵ This adds to the growing disincentive for India to ever become a signatory to the *NPT* and further for current member States of the *NPT* to remain a part of the current nuclear regime. Moreover, any future negotiations undertaken will be conducted with the full knowledge that India is now able to access information about nuclear material, is able to gain the benefit of civil nuclear knowledge and has no restriction on whether it creates nuclear weaponry or not. These Concessions therefore go against the very essence of conducting negotiations towards disarmament with clean hands. It creates an attractive precedent for any States which tire of the power differential which already exists between NNWS and NWS.

Further to the interpretation of “good faith”, one must look to the object and purposes pursuant to Article 31 of the *VCLT*.⁷⁶ Here, in order to determine the object and purpose, reference to the preamble of the *NPT* is permitted and although the preamble is not a quantitative indication of what the object and purpose of the *NPT* is, it does assist in its determination.⁷⁷ The preamble of the *NPT* specifically refers to

Burroughs, above n 66, 1; Bedjaoui, above n 71, 18.

⁷⁴ Burroughs, above n 66, 1.

⁷⁵ Subsequent deals demonstrate the fact that India has received significant gain as a result of the Concessions while the *NPT* regime on the other hand, has suffered. For instance, on 30 September 2008, India and France signed a nuclear Civil Co-operation Agreement and on 5 December 2008 and 7 December 2009, Russia and India signed similar deals. Additionally, several fuel supply agreements have been entered into with the Government of Kazakhstan and that of Namibia. For more information see Kuchawaha, above n 49, 21.

⁷⁶ Joyner, above n 8, 30.

⁷⁷ *Ibid.*

disarmament in five of its paragraphs; there are in fact more words and sections in the preamble dedicated to disarmament than there are to any of the other two aims of the *NPT*.⁷⁸ The text of the preamble explicitly states that in creating the *NPT*, the States declared ‘their intention to achieve at the earliest possible date the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament’.⁷⁹

The preamble, however, remains a starting point in the interpretation of a treaty and should be followed by a contextual analysis of the substance and structure of the *NPT*.⁸⁰ Under Article 31(3)(a) and (b) of the *VCLT* one can also refer to any subsequent agreement or practice between the parties regarding the interpretation of the treaty or the application of its provisions. Therefore, in a similar fashion to the argument developed by Chinkin and Singh in their joint advice regarding the Mutual Defence Agreement and the *NPT*, reference should be made to the *NPT* Review Conferences which have been held at five-year intervals since the *NPT*'s adoption in 1970.⁸¹ Each Conference has been held with the aim of assessing the operation of the *NPT* and has sought to produce a final document which would provide an assessment of the implementation of the *NPT*'s provisions and make recommendations on measures to strengthen the *NPT* in the future.⁸² During the *NPT* Review Conferences held in 1995, 2000, and 2005 there were significant references to the importance of disarmament as a part of the *NPT*.⁸³ Sagan, also referring to these documents for an interpretive purpose, establishes that the final documents from these conferences are a demonstration of a common ground between the States party to the *NPT*.⁸⁴

⁷⁸ Ibid.

⁷⁹ *NPT* Preamble.

⁸⁰ *VCLT* art 31.

⁸¹ Singh and Chinkin, above n 55, [32]-[36]. See also information about conferences, Women's International League for Peace and Freedom, *Non-Proliferation Treaty (NPT) Reaching Critical Will* (2013), <<http://www.reachingcriticalwill.org/legal/NPT/NPTindex1.html>>.

⁸² 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Final Documents of the 2010 Review Conference on the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)* (3-28 May 2010), <<http://www.un.org/en/conf/npt/2010/>>.

⁸³ See discussion in Sagan, above n 72, 205-208.

⁸⁴ Ibid 206. In 2000, a series of steps were agreed upon during the conference, two of which were specifically dedicated to disarmament: see specifically, *2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons Final Document*, UN Doc NPT/CONF.2000/28 (Parts I, II) 14 [6, 9].

To further substantiate the claim that disarmament is an object and purpose of the *NPT*, Article 32 of the *VCLT* allows reference to supplementary material in order to support any determination that disarmament is one of the objects and purposes of the *NPT*.⁸⁵ With the support of writers such as Shaker, Silver, Joyner and a number of General Assembly Resolutions it is evident that during the *NPT*'s inception, NNWS had demanded two things from NWS. Firstly, that the *NPT* acknowledges the NNWS right to use nuclear power for civil purposes; and that NWS move toward nuclear disarmament in good faith which would form a part of the concurrent effort towards general and complete disarmament.⁸⁶ Further, Shafer established that this goal of disarmament was looked upon by NNWS as a step towards the achievement of general and complete disarmament and also a step towards more balanced obligations between NWS and NNWS.⁸⁷ This idea that disarmament acts as an important stepping stone in the achievement of the objective of the *NPT*, is further strengthened by Joyner's statement that the object and purpose of the *NPT* is to be found in its three pillars; disarmament, non-proliferation and knowledge sharing, all of which he establishes should be considered of equal weight.⁸⁸ This implies for instance that although there may be strong arguments regarding the other pillars of the *NPT*, as they have been more widely discussed in previous years, the discussion of the pillar of disarmament remains just as important and necessary as it ever has.

The above interpretation of Article VI and "good faith negotiations" in conjunction with analysis conducted using Article 31 and 32 of the *VCLT*

⁸⁵ *VCLT* art 32. See also discussion in Gardiner, above n 61, 196-197; Joyner, above n 8, 31.

⁸⁶ *General and Complete Disarmament*, GA Res 1378 (XIV) UN GAOR, 14th sess, 840th plen mtg, Agenda Item 70, UN Doc A/RES/1378(XIV) (20 November 1959); *Question of Disarmament*, GA Res 1660 (XVI) UN GAOR, 16th sess, 1067th plen mtg, Agenda Item 19, UN Doc A/RES/1660(XVI) (28 November 1961); *Question of Disarmament*, GA Res 1664 (XVI) UN GAOR, 16th sess, 1070th plen mtg, Agenda Item 19, UN Doc A/RES/1660(XVI) (04 December 1961); *Prevention of Wider Dissemination of Nuclear Weapons*, GA Res 1665 (XVI) UN GAOR, 16th sess, 1070th plen mtg, Agenda Item 81, UN Doc A/RES/1665(XVI) (4 December 1961); *The Urgent Need for Suspension of Nuclear and Thermo-Nuclear Tests*, GA Res 1762 (XVII) UN GAOR, 17th sess, 1165th plen mtg, Agenda Item 77, UN Doc A/RES/1762(XVII) (6 November 1962). See discussion in Shaker, above n 10, vol 1; Joyner, above n 8, 27; Silver, above n 47, 79.

⁸⁷ Shafer, above n 66, 13-14. See also, Shaker, above n 10, vol 1, 31.

⁸⁸ Joyner, above n 8, 32.

can be used to contextually establish the true obligation under Article VI. Utilising this knowledge, it can be said that Article VI requires that:

NPT States conduct negotiations towards disarmament in which each negotiation is approached and concluded in good faith whereby the combination of such negotiations can be deemed to be a serious effort towards the complete and general elimination of nuclear weapons.⁸⁹

In this sense, conducting negotiations towards disarmament while at the same time concluding agreements to allow States to continue to manufacture nuclear weapons and yet still receive the incentives under the *NPT* regime would necessarily mean that the negotiations towards disarmament become redundant. This would be analogous to an environmentalist advocating protection of forests in one country and yet burning down the forests in another.

VI THE BREACH: ARTICLE 60 OF THE VCLT AND STATE RESPONSIBILITY

In order to assess a breach one must primarily look to the type of breach it is; a material breach under Article 60 of the *VCLT* or a breach of State Responsibility.⁹⁰ Chinkin and Singh's argument in their joint advice on whether the United Kingdom was in breach of the *NPT* by its renewal of the Mutual Defence Agreement with the US can be applied in the context of this article.⁹¹ Their advice assessed the possibility that an agreement between two States could undermine the *NPT* through a breach of Art VI.⁹² They established that it would be strongly arguable that the ultimate effect of the Mutual Defence Agreement was not in accordance with the obligation under Article VI of the *NPT*. The assessment used in this joint advice has been used to develop the assessment of a breach of Art VI of the *NPT* below.

⁸⁹ This is a statement formulated by the author based on the interpretation of the object and purpose of the *NPT* undertaken in this article.

⁹⁰ *VCLT* art 60.

⁹¹ Singh and Chinkin, above n 55, [1]-[2]. The joint advice was developed at the request of the British American Security Information Council (BASIC), the Acronym Institute for Disarmament Diplomacy and Peacerrights.

⁹² Singh and Chinkin, above n 55, [43]-[47].

Under Article 60 of the *VCLT*, a breach needs to be material in order for there to be redress.⁹³ A material breach can occur in one of two ways; however, relevant to this assessment of Article 60 is the second of the two ways. This part of the Article states that:⁹⁴

A material breach of a treaty, for the purposes of this article, consists in:

- (a) ...
- (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

It is argued that Article VI is in fact ‘a provision essential to the accomplishment of the object or purpose of the treaty’ and that a breach of Article VI could be considered a material breach of the *NPT*.⁹⁵ It follows that the United States has materially breached the *NPT* by creating the Agreement with India which effectively means that even if future negotiations *are* conducted in “good faith”, general and complete disarmament will always be undermined by the fact that now India will never have any incentive to get rid of its nuclear weaponry. Importantly, this same argument could also be directed to any number of NSG member States due to their adoption of the Waiver. It could therefore be strongly argued that even though India would not be in breach of any obligations regardless of their compliance with the Concessions, the United States and the NSG member States could all be said to have materially violated Article VI of the *NPT*.

In the instance that a material breach could not be established, the principles of State Responsibility could be drawn upon to establish the same breach. Singh and Chinkin, in their joint advice, explained that along with the interpretive tools found in the *VCLT*, questions relating to the complicity of States with their obligations under any particular treaty can be determined with reference to the principles of State Responsibility.⁹⁶ Under the principles of State Responsibility, breaches of international law are not limited to material breaches and instead are applicable to even minor breaches of treaty obligations.⁹⁷ Singh and Chinkin establish that the

⁹³ *VCLT* art 60.

⁹⁴ *VCLT* art 60(3)(b).

⁹⁵ *VCLT* art 60(3)(b). See also, Singh and Chinkin, above n 55.

⁹⁶ Singh and Chinkin, above n 55, [14].

⁹⁷ *Gabcikovo-Nagyymaros Project (Hungry/Slovakia) (Judgment)* [1997] ICJ Rep 7 [57].

International Law Commission defines a breach of an international obligation as occurring ‘when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character’.⁹⁸ Therefore, the obligation of “good faith negotiations” and the obligation that these “good faith negotiations” be conducted in order to achieve the object and purpose of the *NPT* become obligations which can be breached. Hence the argument of this article becomes that the obligations under Article VI have in fact been breached by the creation of the Indian Concessions which have rendered those obligations redundant in that *universal* nuclear disarmament will not be achieved whether or not “good faith negotiations” take place in the future.

It is argued therefore that whether the Breach amounts to a material breach or invokes one of the principles of State Responsibility, the Indian Concessions nevertheless constitute a breach of Article VI of the *NPT*.

VII THE BREACH’S EFFECT ON DISARMAMENT

The advocacy of nuclear disarmament was already floundering prior to the Concessions taking place.⁹⁹ Acheson shows in his paper “Beyond the 2010 NPT Review Conference: What’s Next for Nuclear Disarmament?” that NNWS on many occasions expressed their discontent with the lack of meaningful commitment to disarmament by NWS.¹⁰⁰ For instance, during the 2010 Nuclear Review Conference, the NNWS expressed this discontent through the Non Aligned Movement, a group of 120 member States which are not formally aligned with or against any major powers.¹⁰¹ This group called for a complete ban on the transfer of nuclear material (including technology, information etc) to all States not party to the *NPT* ‘in a manner consistent with the decision on principles and objectives for nuclear non-

⁹⁸ *Responsibility of States for Internationally Wrongful Acts*, GA Res 56/83, UN GAOR, 56th Sess, 6th plen mtg, Agenda Item 162, Supp No 10, UN Doc A/56/10 (12 December 2001) art 12.

⁹⁹ See discussion in Ray Acheson, ‘Beyond the 2010 *NPT* Review Conference: What’s Next for Nuclear Disarmament?’ (2010) 66 *Bulletin of the Atomic Scientists* 77, 77-78.

¹⁰⁰ *Ibid.* See also Ntoubbandi, above n 2, 287.

¹⁰¹ For more information see The Non Aligned Movement, *Background* (21 September 2011), <<http://www.nam.gov.za/background/index.html>>.

proliferation and disarmament adopted by consensus'.¹⁰² Further, NNWS believe that the fact that NWS and non-party NNWS continue to modernise their nuclear arsenals is not only harmful to the *NPT* but also a risk to international peace and security.¹⁰³ Their statement boldly identifies, as that any such action constitutes a breach of Article VI of the treaty by the NWS.¹⁰⁴ Therefore, this implies that any weakening of the already fragile movement towards disarmament could be a major threat to the *NPT* regime as a whole.¹⁰⁵

Having analysed and established the status of the *NPT* and India, the Indian Concessions and the Breach, it is argued that this Breach can be said to have affected the movement toward complete and general disarmament in a number of ways. Many of the observers of the *NPT* have offered their own interpretation of what may result from these Concessions. Ntoubbandi, on one hand, states that the main objective of the Concessions was to firstly establish a long term strategic relationship with India and secondly, to subject India to the international safeguards, something which Ntoubbandi himself acknowledges may not have necessarily been the outcome of the Concessions.¹⁰⁶ Miller and Scheinman, and Wastler, on the other hand, argue that these Concessions are a risk to international security as they ultimately free up India's national uranium supply for complete use towards its military facilities, considering it receives transfers of uranium to use towards its civil facilities.¹⁰⁷ Furthermore, Wable argues that the

¹⁰² 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, *Final Document of the on its 4th Session, Held in New York from 3-28 May 2010- Volume 1- Part I: Review of the operation of the Treaty, as provided for in its article VIII (3), taking into account the decisions and the resolution adopted by the 1995 Review and Extension Conference and the Final Document of the 2000 Review Conference Conclusions and recommendations for follow-on actions*, UN Doc NPT/CONF.2010/50 (Vol I)(18 June 2010), 4 [12].

¹⁰³ H.E. Dr R.M. Marty Natalegawa, Minister for the Foreign Affairs of the Republic of Indonesia, 'Statement on behalf of the NAM States Party to the Non-Proliferation of Nuclear Weapons Treaty (NPT) (Statement before the 2010 Review Conference of the Parties to the Non-Proliferation of nuclear weapons Treaty, United Nations Headquarters, New York, 3 May 2010) <http://www.un.org/en/conf/npt/2010/statements/pdf/nam_en.pdf>, 3.

¹⁰⁴ Ibid 3.

¹⁰⁵ Wable, above n 41, 720-721.

¹⁰⁶ Ntoubbandi, above n 2, 275-276. See also Wable, above n 41, 730, Wable agrees that these concessions have detrimentally affected the *NPT* and have left room for significant divergences from the *NPT*'s aims.

¹⁰⁷ Marvin Miller and Lawrence Scheinman, 'Israel, India, and Pakistan: Engaging

Concessions have created a loophole which can be ‘used to legitimize activities that may in fact be directed towards weapons proliferation’.¹⁰⁸ This article however, looks to three further possible effects of the Breach as follows.

A *Legitimising Concerns – Undermining Effectiveness of NPT?*

Primarily, the Breach has increased the legitimacy of the concerns that the NNWS have with the *NPT*, undermining its general effectiveness. NNWS are already concerned with how little has been done with regard to disarmament by the NWS. Acheson states that the Concessions and specifically the Agreement between India and the United States can be said to have contributed to the current loss in confidence in the *NPT* process.¹⁰⁹ Wable also states that the effect of the Concessions could spread as far as the International Atomic Energy Agency (IAEA) in that it may also have the effect of weakening the already fragile structure of the IAEA and its safeguards.¹¹⁰ He states that the fact that India has the freedom to declare ‘what is and is not a civilian (as opposed to military) facility, the declaration is unrepresentative of a state’s actual production and use of nuclear materials, namely any use directed at weapons production’.¹¹¹ Wable suggests that this necessarily means that ‘India intends to retain exclusive and opaque control over its military uses for nuclear materials’.¹¹² These comments in the literature suggest that the already faltering belief in the prospect of disarmament being achieved has been further aggravated by the introduction of the Indian Concessions and the reception they are receiving internationally.

B *A Dangerous Precedent*

The Breach also has wider implications which have the potential to undercut the functioning of the *NPT*. The effect of the Concessions could potentially change the behaviour of the current member states to the

the Non-NPT States in the Nonproliferation’ (2003) 33 *Arms Control Today* 15, 16. See also, Wastler, above n 3, 208. The argument here is that this diversion will ultimately lead to a breach of Article I of the *NPT*.

¹⁰⁸ Wable, above n 41, 729.

¹⁰⁹ Acheson, above n 99, 81.

¹¹⁰ Wable, above n 41, 727-728 n 39-41.

¹¹¹ *Ibid.*

¹¹² Wable, above n 41, n 36.

NPT.¹¹³ Garvey and Kimball explain that the primary issue affecting the *NPT* member States is that these Concessions have removed the legal barrier for other NWS to undertake similar agreements with India or other States.¹¹⁴ These two authors state that the Concessions pose the real threat of withdrawal of NNWS from the *NPT* in order for them to gain the same benefits as India.¹¹⁵ Wastler similarly states that ‘the NSG Waiver for India may prompt several *NPT* members to consider withdrawing from the treaty’.¹¹⁶ Wable concludes that over time, due to the precedent created with the Concessions, whatever little progress has been made toward the achievement of disarmament will be undone.¹¹⁷ India has struck many more nuclear deals since the Concessions were adopted.¹¹⁸ The effects of these deals are commented on by Ruzicka and Wheeler who further question the strength of the *NPT* if these deals were to increase in number.¹¹⁹ The Concessions present yet another incentive which would entice, not only States to withdraw from the *NPT* due to the possibility of owning a nuclear arsenal and retaining the benefits of the *NPT*, but would also entice those remaining outside of the *NPT*, like Pakistan, to attempt to enter into similar deals as India therefore also removing, for Pakistan, any incentive to ever join the *NPT* regime.¹²⁰

¹¹³ See discussion, above n 48.

¹¹⁴ See discussion in Miller and Scheinman, above n 107, 19; Wable, above n 41, 724; Ruzicka and Wheeler, above n 15, 70.

¹¹⁵ Garvey, above n 19, 389. See also, Wastler, above n 3, 210-211; Daryl Kimball, *Text, Analysis, and Response to NSG ‘Statement on Civil Nuclear Cooperation with India’* (6 September 2008), Arms Control Association <<http://www.armscontrol.org/node/3345>>, for a discussion of the conditions assented to.

¹¹⁶ Wastler, above n 3, 210-211. See also, Kimball, above n 115, for a discussion of the conditions assented to.

¹¹⁷ Wable, above n 41, 724, which discusses steps taken and the terms.

¹¹⁸ At the time of writing this article, India was in the process of gaining the support of Australia by having Australia lift its ban of uranium exports to India: see Sarah-Jane Tasker, ‘Mining Juniors Anticipate Foreign Interest with Uranium Exports to India’, *The Australian* (online), 16 November 2011, <<http://tinyurl.com/theaustralian-16112011>>.

¹¹⁹ Ruzicka and Wheeler, above n 15, 83; Ntoubbandi, above n 2, 286.

¹²⁰ At the time of writing this article, Pakistan had in fact made moves towards entering into similar deals with China and effectively contributing to the nuclear arms race. Pakistan was also demanding equal treatment for themselves from Australia. See, eg, Amanda Hodge, ‘Fear Trade Move Will Trigger Arms Race’, *The Australian* (online), 16 November 2011, <<http://tinyurl.com/theaustralian-triggerarmsrace>>; ‘Pakistan Wary Over Australia-India Manoeuvres’, *ABC* (online), 15 November 2011, <<http://tinyurl.com/abcap-pakistanwary-15112011>>; Michael Edwards, ‘Pakistan Says it Should be Allowed to Buy Uranium’ *ABC* (online), 15

C *State Distinctions – Further Separation*

Finally, the Breach can be said to have further affected the already inherent issues with the power differential between NNWS and NWS. This differential exists due to the fact that ‘the NNWS assumed a potentially great vulnerability, because by forsaking the possibility of getting nuclear weapons, they exposed themselves to the actions of the NWS’.¹²¹ Miller and Scheinman argue that the Concessions blur the distinction between *NPT* States and non-party NNWS and therefore undermine the treaty.¹²² Ruzicka and Wheeler explained the significance of this inherent power differential which exists between States. This article acknowledges that significance and its importance to the success of the *NPT*, and acknowledges the risk if the power differential is propagated further.¹²³ Garvey argues that the Concessions, and any deals flowing from them, indicate a ‘profound distortion at odds with the goals of non-proliferation’ and that ‘the ineptitude of the distinction between nuclear and non-nuclear states is likely to increase in frequency and magnitude’.¹²⁴ Natalegawa stated that the unfairness inherent in the divide between NWS and NNWS has been further widened whereby NWS and non-party NNWS continue to modernise their nuclear arsenals at a risk to international peace and security.¹²⁵ The Breach has widened the distinction between NWS and NNWS and ultimately risks the delicate balance holding the *NPT* together.

November 2011, <<http://www.abc.net.au/pm/content/2011/s3367265.htm>>; ‘US to Object to China-Pakistan Nuclear Deal’, *Times of India* (online), 15 June 2010, <<http://tinyurl.com/timesofindia-consensusapproval>>; Ben Packham and Sean Parnell ‘Pakistan a potential uranium customer, says Ziggy Switkowski’, *The Australian* (online), 5 December 2011, <<http://www.theaustralian.com.au/national-affairs/in-depth/alp-opens-way-to-gay-australians-marrying-overseas/story-fnba0rxe-1226214109309>>. See also discussion in Handl, above n 7, 13. See also Britain’s attempt to add into the NSG: Fredrik Dahl, ‘Britain lobbies for nuclear export group to admit India’, *Reuters* (online), 14 June 2013, <<http://www.reuters.com/article/2013/06/14/us-nuclear-india-britain-idUSBRE95D0ZA20130614>>.

¹²¹ Ruzicka and Wheeler, above n 15, 75.

¹²² Miller and Scheinman, above n 107, 19.

¹²³ Ruzicka and Wheeler, above n 15, 70.

¹²⁴ Garvey, above n 19, 378, 374.

¹²⁵ Natalegawa, above n 103, 3.

VIII RECOMMENDATIONS

A *Meaningful Treaty Review*

The first recommendation to increase the *NPT*'s capacity to achieve universal nuclear disarmament is to reconsider and effectively utilise the current *NPT* review mechanism. Review Conferences, held at five-year intervals and attended by *NPT* member States, assess the implementation of the *NPT*'s provisions and attempt to further strengthen it.¹²⁶ The problem with this current approach is that the Review Conference Final Documents have no real power of change. For example, the 2000 Review Conference Final Document outlines 13 Practical Steps towards disarmament.¹²⁷ The United States agreed with these steps during this Conference, but subsequently had the freedom to reject them and did so during the 2005 Conference.¹²⁸ This is an indication that the Review Conferences are not assisting the movement towards disarmament; the documents produced do not become binding on States even if a State assents to agreed measures. Garvey argues that the *NPT*, if it is to achieve universal disarmament, must enhance the regimes and mechanisms already in place in order to achieve disarmament in the future.¹²⁹ The issue which arises however is, as Müller aptly states, 'if actors are the problem, only actors can provide the solution', this therefore begs the question of who will begin to solve the problem in order for others to follow.¹³⁰ To this end, the purpose of the Review Conferences should be reassessed and they should be utilised in a more meaningful way in order to ensure that the future of the *NPT* is guaranteed.

¹²⁶ 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), *Background* (3-28 May 2010), <<http://www.un.org/en/conf/npt/2010/background.shtml>>.

¹²⁷ Arms Control Association, *U.S. Implementation of the "13 Practical Steps on Nonproliferation and Disarmament" Agreed to at the 2000 NPT Review Conference* (4 April 2002), <<http://www.armscontrol.org/aca/npt13steps>>.

¹²⁸ Institute of Peace and Conflict Studies, *From 2000 to 2010 NPT REVCON: Are the 13 Practical Steps Still Relevant?* (24 June 2010), <<http://www.ipcs.org/article/nuclear/from-2000-to-2010-npt-revcon-are-the-13-practical-3167.html>>.

¹²⁹ Garvey, above n 19, 400.

¹³⁰ Harold Müller, 'Compliance Policies: A Critical Analysis of Multilateral Arms Control Treaty Enforcement' (2000) *The Nonproliferation Review* 77, 78-87. A compliance policy encompasses the totality of efforts to deal with cases where it appears possible that another party does not abide by, or is in breach of, an agreement.

B *Adopting and Adapting Currently Used Methods*

There are methods of review ensuring compliance and enforcement currently used throughout international law which cater for specific areas of the law. Below are two current methods which could be applied to the *NPT*.

1 *The IAEA*

Under Article III of the *NPT* the IAEA is given responsibility for ensuring that the obligations relating to the IAEA required under the *NPT* are adhered to.¹³¹ The IAEA has an inspection scheme which ultimately refers a breach to the United Nations Security Council for action or authorisation of remedial measures.¹³² This review process should be undertaken for *all* obligations under the *NPT* in order for any non-adherence and/or breach to be assessed. The success of such a recommendation would most importantly rely on discussion occurring in the General Assembly as well as the Security Council, to ensure breaches are debated by all States and not just the five Security Council members.

2 *Anti-Terrorism Methods*

Garvey interestingly argues that a construction similar to a framework of legal obligations and mandatory sanctions resembling those used in anti-terrorism resolutions would benefit the future of the *NPT*.¹³³ He states that a more formalised deterrence method, which is prescriptive in nature, is essential to the success of the *NPT*. He argues that ideally, 'would-be proliferators would be forewarned that discovery of proliferation would trigger a collective response, including sanctions, and if sanctions should be deemed inadequate by the Security Council, the use of force'.¹³⁴ Although the idea of the use of force should not be taken lightly, the use of sanctions can be used to avoid a myriad of breaches. This would not only act as a necessary deterrent for many breaches of the *NPT* but would also return to the NNWS some of their lost protection.

¹³¹ *NPT* art III.

¹³² The power for the Security Council to address such problems and action such measures lie in Chapter VII of the *Charter of the United Nations*. See generally, Joyner, above n 17.

¹³³ Garvey, above n 19, 347. See also SC Res 1373, 56th sess, 4385th mtg, S/Res/1373 (28 September 2001); SC Res 1377, UN SCOR, 56th sess, 4413th mtg UN Doc S/RES/1377 (12 November 2001).

¹³⁴ Garvey, above n 19, 348.

C *Conditional Withdrawal and/or Signature*

The final recommendation, which has been constructed as a result of the analysis undertaken in this article, is that any withdrawal from the *NPT* should be conditional in nature. Currently, withdrawal from the *NPT* is governed by Article X of the *NPT*.¹³⁵ Any withdrawal from the *NPT* should however be conditional on the withdrawing State not being able to undertake similar deals as India upon its withdrawal; that it is a *bona fide* withdrawal. However, in the event that a withdrawing State chooses to create an arsenal and the conditional withdrawal is deemed unworkable, it is suggested that an additional condition be employed. Currently, as Jonas points out, there is nothing within the *NPT* which explicitly prohibits a non-party NNWS 'from possessing nuclear weapons upon accession to the *NPT*'.¹³⁶ The assumption, if this were ever the case, would be that if a non-party NNWS wanted to join the *NPT* it could keep its 'existing stocks of nuclear weapons for a limited time, but could not manufacture additional weapons upon accession'.¹³⁷ Therefore, for this second condition to be successful, any withdrawn or non-party State which owns a nuclear arsenal would need to discard all nuclear stockpiles as a condition prior to re-joining the *NPT*, if the case were ever to arise.¹³⁸ Jonas suggests, similarly, that if a condition such as this were to be adopted it would need to be under a suitable 'time-bound framework' by which, on entering the *NPT* new members will have a certain time period to relinquish their arsenal at which point they will become NNWS in the true sense of the term.¹³⁹

IX CONCLUSION

The *NPT* was created as an integral part of the progress of the international community. This article demonstrates that the *NPT* relies on a delicate balance between the obligation which States have under the nuclear regime and their relationships with each other.¹⁴⁰ The Indian Concessions provided

¹³⁵ *NPT* art X.

¹³⁶ Jonas, above n 13, 443. See the wording of *NPT* Article II which states that NNWS are 'not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices'.

¹³⁷ Jonas, above n 13, 445.

¹³⁸ *Ibid* 444; where it is stated that 'the fact that South Africa dismantled its nuclear weapons immediately prior to *NPT* accession was a political decision not mandated by the Treaty'.

¹³⁹ *Ibid* 445.

¹⁴⁰ Ntoubbandi, above n 2, 287. See also for similar views, Garvey, above n 19.

India with access to nuclear materials and knowledge without requiring any real commitment to disarmament, creating a disincentive for India to ever realistically join the *NPT*. These Concessions amounted to a breach of Article VI of the *NPT*, an Article which is material to the success of universal disarmament and the *NPT* as a whole. The Concessions make any future “good faith negotiations” under Article VI redundant in the sense that *universal* disarmament has become unlikely.¹⁴¹ This Breach can be categorised as either a material breach or a breach of the principles of State Responsibility.¹⁴² The Breach has enhanced the concerns which States not only have with the realistic achievement of disarmament, but also the concerns they already had with the growing power differential amongst themselves.¹⁴³ It has gone so far as to create a dangerous precedent in which there is an incentive to withdraw, rather than join, the *NPT*.¹⁴⁴

A number of commentators including Ruzicka and Wheeler, Acheson, Evans and Kawaguchi, Ntoubbandi, and Wastler have stated that the fundamental problem with the *NPT* is that as long as nuclear weapons are used as a method of security, there will never be universal nuclear disarmament.¹⁴⁵ These commentators demonstrate, through their discussions of this problem, that there is a need for a clarification of what the “realistic goal” of the *NPT* should be and whether universal nuclear disarmament is in fact possible.¹⁴⁶ The Breach has contributed to the difficulty of answering this question and has led to a situation whereby disarmament is cast to the side as a problem for future generations to consider. No matter how the Breach is perceived to have impacted on the *NPT*, it is evident that this international move has detrimentally impacted on the capacity of the *NPT* to achieve universal disarmament.

¹⁴¹ *NPT* art VI. See also interpretations of *VCLT* art 31, 32, 60 in sections V and VI of this article.

¹⁴² *VCLT* art 60.

¹⁴³ Acheson, above n 99, 81. See also, Wable, above n 41, n 36.

¹⁴⁴ See discussion in Miller and Scheinman, above n 107, 19; Wable, above n 41, 724; Ruzicka and Wheeler, above n 15, 70.

¹⁴⁵ Ruzicka and Wheeler, above n 15, 78. See also, Acheson, above n 99, 84; Gareth Evans and Yoriko Kawaguchi, ‘Eliminating Nuclear Threats: A Practical Agenda for Global Policymakers’ (Report of the International Commission on Nuclear Non-Proliferation and Disarmament, 2009), <<http://www.icnnd.org/reference/reports/ent/index.html>>; Ntoubbandi, above n 2, 286; Wastler, above n 3, 208.

¹⁴⁶ Lee, above n 23, 8.