

SCOTT D. SAGAN

## Good Faith and Nuclear Disarmament Negotiations

George Perkovich and James Acton have written an important, but flawed, contribution to the global debate about nuclear disarmament. It is important because it breaks more new intellectual ground, and digs deeper into the subject, than any previous study on the topic. The authors present particularly novel and subtle analyses of two specific issues that will need to be addressed if we are to move safely toward a nuclear-weapon-free world: the challenge of effective verification of very small nuclear arsenals or zero nuclear weapons; and options to enhance the International Atomic Energy Agency (IAEA) safeguards system and promote international control of the nuclear fuel-cycle to prevent proliferation in the future.

The paper is flawed, however, in two related ways. First, by focusing almost exclusively on the disarmament endgame, the authors take attention away from what the nuclear-weapon states actually committed to do under Article VI of the Nuclear Non-Proliferation Treaty (NPT) and whether they have upheld that commitment. Under Article VI, the nuclear-weapon states did not commit themselves to *achieve* complete nuclear disarmament; instead, all NPT member states committed “to *pursue negotiations in good faith* on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament.”<sup>1</sup> Have the nuclear-weapon states pursued negotiations in good faith? As I will show in this essay, it is important to focus on what constitutes a “good-faith effort” in disarmament negotiations in order to understand the past failures of NPT

Review Conferences and to help produce a more cooperative and safer nuclear future. Second, the authors' important analysis of international control over the nuclear fuel-cycle fails to place this issue in the context of the same commitment of the non-nuclear-weapon states under Article VI. Instead, like virtually all scholarly and diplomatic discussions of the issue, this Adelphi Paper conceives of nuclear fuel-cycle control as a debate over how best to create acceptable constraints on the so-called inalienable right given under Article IV for NPT member states to pursue peaceful nuclear energy production. The final section of my critique therefore presents a reconceptualization of this issue, calling for negotiations about international control of the fuel-cycle as an obligation of the states that don't possess nuclear weapons to meet their Article VI commitment to work in good faith toward nuclear disarmament.

### **To Pursue Negotiations in Good Faith**

What is the origin of the NPT's phrase "to pursue negotiations in good faith"? What is the common legal understanding of "good faith" behavior? How have different governments interpreted Article VI over time? During the negotiations that led to the NPT in 1968, neither the United States nor the Soviet Union wanted to include any linkage between the NPT and other arms control and disarmament negotiations, preferring a simpler treaty and one whose prospects for success could not be damaged by failures in arms control negotiations.<sup>2</sup> However, a number of non-aligned nations—most prominently, India and Sweden—called for linking specific nuclear disarmament and arms control agreements to the NPT, even proposing to make the ratification of the Comprehensive Test Ban Treaty (CTBT) a prerequisite for the entry into force of the NPT.<sup>3</sup> Facing a potential stalemate, the Mexican government proposed the compromise solution: to require all states "to pursue negotiations in good faith" toward nuclear disarmament.<sup>4</sup> Fearful that the NPT might otherwise fail, Moscow and Washington (and the majority of the nonaligned movement, with the exception of India and Pakistan) agreed to accept the Mexican compromise language in the final version of Article VI. Agreeing to pursue negotiations was acceptable for the United States, because it did not commit the superpowers, as U.S. Ambassador Gerald Smith stated, "to achieve any disarmament agreement, since it is obviously impossible to predict the exact nature and results of such negotiations."<sup>5</sup>

Although the Vienna Convention on the Law of Treaties requires that every treaty be interpreted and performed "in good faith," there is no consensus in international law about how to define "good faith." This

phrase, as David Koplow nicely notes, is “one of those excruciatingly ambiguous terms in the lawyer’s vocabulary.”<sup>6</sup> In American domestic law, however, some accepted general principles have emerged as guideposts for what constitute a “good-faith” effort, and also what constitutes “bad-faith” behavior. The common law of contract in most, if not all, American jurisdictions imposes a duty on contracting parties to perform their contractual obligations in good faith, but the courts have not articulated an operational standard defining precisely what that means.<sup>7</sup> *The Restatement of Law of Contracts*, however, does offer a detailed explanation of good-faith commitments and violations of good-faith performance:

Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving ‘bad faith’ because they violate community standards of decency, fairness or reasonableness. ... A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party’s performance.<sup>8</sup>

An assessment of whether the United States has met its Article VI obligations in recent years should therefore start by examining commitments made at earlier NPT Review Conferences, making assessments about “the justified expectations of the other party” and judging whether the Bush administration practiced “evasion of the spirit of the bargain” in its negotiations at the 2005 NPT Review Conference.

### **The 1995, 2000, and 2005 NPT Review Conferences**

At the 1995 NPT Review Conference, the member states agreed to a permanent extension of the NPT and also agreed on a set of “Principles and Objectives for Nuclear Non-Proliferation and Disarmament,” noting that “the achievement of the following measures is important in the full realization and effective implementation of article VI:”

(a) The completion by the Conference on Disarmament of the negotiations on a universal and internationally and effectively verifiable Comprehensive Nuclear-Test Ban Treaty no later than

1996 ...; (b) The immediate commencement and early conclusion of negotiations on a non-discriminatory and universally applicable convention banning the production of fissile material for nuclear weapons or other nuclear explosive devices ...; (c) The determined pursuit by the nuclear-weapon States of systematic and progressive efforts to reduce nuclear weapons globally, with the ultimate goals of elimination of those weapons, and by all States of general and complete disarmament under strict and effective international control.<sup>9</sup>

At the 2000 NPT Review Conference, delegates from both nuclear- and non-nuclear-weapon states agreed to a more extensive final document outlining thirteen “practical steps for the systematic and progressive efforts to implement Article VI of the Treaty,” including to: “without delay and without conditions ... achieve the early entry into force of the Comprehensive Nuclear-Test-Ban Treaty”; “preserving and strengthening the ABM [Anti-Ballistic Missile] Treaty”; “increased transparency by the nuclear-weapon States with regard to their nuclear weapons capabilities”; and “the further development of the verification capabilities that will be required to provide assurance of compliance with nuclear disarmament agreements for the achievement and maintenance of a nuclear-weapon-free world.”<sup>10</sup> U.S. Ambassador Norman A. Wulf announced that “the elements of the final document are a demonstration of common ground—the acknowledgment of shared attitudes not only about the ends, but also about the means of the nuclear non-proliferation regime” and proclaimed that “there is no doubt that the United States will seek to move forward on the nuclear disarmament agenda set forth in the final document.”<sup>11</sup>

Between the 2000 NPT Review Conference and the 2005 NPT Review Conference, however, the Bush administration came into office and withdrew from the ABM Treaty; signed the Moscow Treaty with Russia, which contained no verification provisions; and announced that it would not seek Senate ratification of the CTBT. At the 2005 NPT Review Conference, many governments complained about the failure of the United States (and other nuclear-weapon states) to meet the specific 13 Steps outlined earlier. Such complaints came not only (and predictably) from the Iranian delegation,<sup>12</sup> but also from allies of the United States and many neutral parties. The representative of the non-nuclear-weapon states in the European Union, for example, called on the nuclear-weapon states to adhere to “the commitments made by relevant states at the 2000 Review Conference.”<sup>13</sup> The representative of the New Agenda Coalition (Brazil, Egypt, Ireland,

Mexico, South Africa, Sweden, and New Zealand) similarly called on the United States to “reconsider its approach to the CTBT” and stated that the 1995 “Principles” and the “13 practical steps” agreed to in 2000 “form the basis of the international community’s expectation, both in legal and moral terms, that the nuclear weapons states are making progress toward nuclear disarmament.”<sup>14</sup>

The Bush administration’s position, however, both during and after the 2005 NPT Review Conference, was that the 13 Steps were obsolete and had no legal status. In May 2005, Assistant Secretary of State Stephen G. Rademaker told a reporter that “we think the 13 Steps reflect a statement of views that were relevant to the year 2000” adding that “those of us who actually care about the future of the nuclear nonproliferation regime need to focus on the real problems of today, not a historical discussion of problems that were identified five years ago.”<sup>15</sup> In their official speeches at the 2005 NPT Review Conference, Bush administration spokesmen consistently maintained that the United States was in full compliance with Article VI and failed to even mention the 13 Steps agreement.<sup>16</sup> Indeed, Ambassador Christopher Ford later complained that discussions of the 13 Steps were “disarmament compliance fetishism” and argued:

The 13 Steps amount to no more than any other political declaration by a convocation of national representatives: their statement of belief, at that time, regarding what would be best. There is nothing wrong with such statements. ... But one should not confuse such exhortations with legal obligations or mistake them for definitive treaty interpretive criteria.<sup>17</sup>

This position is undoubtedly correct with regard to the legal standing of the 13 Steps statement; NPT Review Conference final reports are not signed by heads of state or ratified by legislatures and do not therefore have the same legal status as do international treaties. And no Bush administration official went so far as to call for a public renunciation of Article VI. Yet the behavior of the administration at the 2005 NPT Review Conference—especially the refusal to discuss the 13 Steps agreed upon earlier—did violate the good-faith criteria of “consistency with the justified expectations of the other party” and fit the American Law Institute’s criteria of bad faith as an “evasion of the spirit of the bargain.” I am not arguing that individual U.S. diplomats acted in bad faith, but it is worth repeating the American Law Institute’s statement that “subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified.”<sup>18</sup> Just as importantly, given the history of the links between

the CTBT negotiations and the NPT, the refusal of the Bush administration to request reconsideration of the CTBT by the Senate and the subsequent failure to pursue any further negotiations designed to strengthen the treaty and make it more acceptable to the United States, can reasonably be seen as cutting against the Article VI commitment “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race.”

The authors’ focus on challenges to final disarmament is good, but it should not lead analysts to ignore the need for movement on practical steps, including the CTBT, to restore momentum toward disarmament at the 2010 NPT Review Conference. The place to start, I would argue, is to acknowledge directly that the United States has not met all of the objectives it sought to achieve in the 2000 13 Steps agreement and to revisit the issues to craft a new consensus about what immediate steps can be taken now. The good news is that many non-nuclear-weapon states are willing to engage in such cooperative discussions. As Deepti Choubey notes after extensive interviews with diplomats and government leaders from around the globe, “most officials conceded that some steps [of the 13 Steps] need to be updated.”<sup>19</sup> The bad news is that there will be precious little time for a new U.S. administration to develop its own positions and lay the diplomatic groundwork necessary for a successful reengagement before the 2010 NPT Review Conference.

### **Rethinking the Article IV–Article VI Link**

Article IV of the NPT simply states: “Nothing in this Treaty shall be interpreted as affecting the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty.”<sup>20</sup> The expected global expansion of the use of nuclear power, however, will lead to increases in the demand for enriched uranium and reprocessed plutonium, and many proposals have been developed at the IAEA and elsewhere for reducing the danger that states could start their own nuclear fuel production facilities and thereby move closer to developing nuclear weapons if they later chose to withdraw from the treaty. Mohammed ElBaradei has been particularly forceful in warning of the security risks inherent in such a world of multiple “virtual nuclear weapons states.”<sup>21</sup>

The authors correctly note that many non-nuclear-weapon states fear that any effort to create multinational fuel-cycle facilities (plants owned and operated by multiple states) or international facilities (plants owned and operated by an international organization) could cut against their

“inalienable right” as specified in Article IV. (It should always be remembered, however, that even this “inalienable right” is in reality conditional upon the non-nuclear-weapon state in question being “in conformity” with Articles I and II. It is too often forgotten, in the debate over the Iranian nuclear program, for example, that a state in violation of its Article II commitment “not to seek or receive any assistance in the manufacture of nuclear weapons” has at least temporarily sacrificed its rights under Article IV.)

The authors label the various proposals for multilateral or international fuel-cycle facilities “the radical approach” to managing nuclear fuel production in the future. Their subtle analysis does identify many technical problems with these schemes, including the difficulty of providing credible guarantees of fuel supply; the danger that future rogue actors (such as A. Q. Khan) would be trained at international plants; the continuing risks of construction of clandestine fuel-cycle facilities; and the enduring problem that the costs of international or multilateral ownership could prove prohibitive. They also conclude with a useful, and I think accurate, recognition of the political necessity for equal treatment for nuclear-weapon states and non-nuclear-weapon states under any revised fuel-cycle regime: “non-nuclear-weapon states are unlikely to agree to new rules or arrangements for limiting access to fuel-cycle capabilities unless all states play by the same rules.”

What is missing here is the conceptual change of framework that is needed to encourage the non-nuclear-weapon states to take more responsibility for designing both a new fuel-cycle regime and simultaneously contributing to the eventual elimination of nuclear weapons. Perkovich and Acton actually recognize the strategic necessity but fail to follow through on the need for a new conceptual framework. They conclude the discussion of sensitive fuel-cycle facilities by noting the following: “if no acceptable form of regulation can be established for the proliferation-sensitive activities that many states which today promote disarmament are seeking to conduct, the abolition of nuclear weapons may not prove possible.”

If that is true, however (and I think it is), then the non-nuclear-weapon states also need to recognize that entering into negotiations about international control of the nuclear fuel-cycle is actually part of *their* Article VI commitment “to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race.” While it will certainly be critical for the nuclear-weapon states to renew and reenergize their commitment to work toward nuclear disarmament before the 2010 NPT

Review Conference, if we are to move safely toward the common goal of nuclear disarmament it will also be necessary for the states that do not possess nuclear weapons to understand the reciprocal nature of Article VI commitments and the necessity for negotiating serious constraints on the spread of enrichment and reprocessing facilities.

### **A Final Observation**

*Abolishing Nuclear Weapons* is, despite these lacunae, a major contribution to the debate about the global nuclear future. Perkovich and Acton have done us a great service by mapping out the road toward abolishing nuclear weapons and identifying obstacles on the highway, dangerous turns just around the corner, and major gaps in our knowledge of the distant terrain ahead. Indeed, the publication of this Adelphi Paper should be seen in itself as a positive, personal example of American and British cooperation to honor national commitments to work in good faith toward the eventual goal of nuclear disarmament.



## Notes

- <sup>1</sup> NPT (1968), Article VI. (emphasis added).
- <sup>2</sup> On the negotiation history, see Mohamed Shaker, *The Nuclear Non-Proliferation Treaty: Origin and Implementation 1959–1979*, vol. 2 (London: Oceana Publications, 1980), pp. 555–648; and Christopher A. Ford, “Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons,” *Nonproliferation Review*, vol. 14, no. 3, November 2007, pp. 401–28.
- <sup>3</sup> Shaker, *The Nuclear Non-Proliferation Treaty*, pp. 568–9.
- <sup>4</sup> *Ibid.*, p. 571.
- <sup>5</sup> As quoted in *ibid.*, p. 567.
- <sup>6</sup> David A. Koplow, “Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty?” *Wisconsin Law Review*, vol. 301 (1993), pp. 367–8.
- <sup>7</sup> Steven J. Burton, “Breach of Contract and the Common Law Duty to Perform in Good Faith,” *Harvard Law Review*, vol. 94, no. 2, December 1980, p. 369.
- <sup>8</sup> *Restatement (Second) of the Law of Contracts*, Section 205, Comment (c). Restatements of the law are produced by the American Law Institute and are considered authoritative statements of predominant common law doctrine across jurisdictions; they are treated by courts as persuasive but not binding interpretations of the law.
- <sup>9</sup> “Decision 2: Principles and Objectives for Nuclear Non-proliferation and Disarmament,” May 11, 1995, pp. 9–12, in *Final Document, Part I, Organization and Work of the Conference* (NPT/CONF.1995/32, Part I, Annex), 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons. Official Record, New York, 1995, <http://www.un.org/Depts/ddar/nptconf/2142.htm>. Also see Thomas Graham Jr., “NPT Article VI Origin and Interpretation,” in Michael May, ed., *P-5 Nuclear Doctrines and Article VI*, Stanford University, CISAC Conference Report, 2008, pp. 45–62, <http://se1.isn.ch/serviceengine/FileContent?serviceID=ISN&fileid=A1922900-22FC-9098-0396-D4BF15BE9B64&lng=en>.
- <sup>10</sup> *Final Document*, 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, April 24–May 19, 2000 (NPT/CONF.2000/28), Part I and Part II, pp. 14–15. October 10, 2008, <http://www.reachingcriticalwill.org/legal/npt/2000FD.pdf>.
- <sup>11</sup> Norman A. Wulf, “Observations From the 2000 NPT Review Conference,” *Arms Control Today*, November 2000, [http://www.armscontrol.org/act/2000\\_11/wulf](http://www.armscontrol.org/act/2000_11/wulf).
- <sup>12</sup> Islamic Republic of Iran, “Concluding Statement by H. E. Dr. M. Javad Zarif, permanent representative of the Islamic Republic of Iran to the UN, at the 2005 NPT Review Conference,” New York, May 27, 2005, <http://www.reachingcriticalwill.org/legal/npt/RevCon05/GDstatements/Iranfinalstate.doc>, pp. 2–3.
- <sup>13</sup> Statement by Minister Delegate for Foreign Affairs of Luxembourg, Nicolas Schmidt, on behalf of the European Union, New York, May 2, 2005, <http://www.reachingcriticalwill.org/legal/npt/RevCon05/GDstatements/Luxembourg-EU.pdf>, p. 10.
- <sup>14</sup> Statements by Ambassador Tim Caughley, New Zealand, on behalf of The New Agenda Coalition—Brazil, Egypt, Ireland, Mexico, South Africa, Sweden and New Zealand, New York, May 18, 2005, <http://www.reachingcriticalwill.org/legal/npt/RevCon05/GDstatements/NZ-NAC.pdf>.
- <sup>15</sup> Stephen G. Rademaker, “Zeroing in on Non-Compliance,” *Arms Control Today*, vol. 35, May 2005, [http://www.armscontrol.org/act/2005\\_05/Rademaker](http://www.armscontrol.org/act/2005_05/Rademaker).
- <sup>16</sup> See Stephen G. Rademaker, “U.S. Statement at the 2005 NPT Review Conference,” May 2, 2005, <http://www.reachingcriticalwill.org/legal/npt/RevCon05/GDstatements/U.S.pdf>; and “2005 Non-Proliferation Treaty (NPT) Review Conference: U.S. Objectives,” Bureau of Arms Control, Washington D.C., April 21, 2005, [http://www.nti.org/e\\_research/official\\_docs/dos/doso22105.pdf](http://www.nti.org/e_research/official_docs/dos/doso22105.pdf).
- <sup>17</sup> Ford, “Debating Disarmament,” p. 411 and p. 413.
- <sup>18</sup> *Restatement (Second) of Law of Contracts*, Section 205, Comment (d).

<sup>19</sup> Deepti Choubey, *Are New Nuclear Bargains Attainable?* (Washington, D.C.: Carnegie Endowment for International Peace, October 2008), p. 13, [http://www.carnegieendowment.org/files/new\\_nuclear\\_bargains.pdf](http://www.carnegieendowment.org/files/new_nuclear_bargains.pdf).

<sup>20</sup> NPT (1968), Article IV.

<sup>21</sup> Mohamed ElBaradei, "Addressing Verification Challenges," Statements of the Director General: Symposium on International Safeguards, October 16, 2006, <http://www.iaea.org/NewsCenter/Statements/2006/ebsp2006no18.html>.