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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE REPUBLIC OF THE MARSHALL ISLANDS, Plaintiff, v. **THE UNITED STATES OF AMERICA, *et al.***, Defendants.	Case No. 4:14-cv-01885-JSW **Reply Memorandum in Support of Motion to Dismiss** Hearing Date: October 10, 2014 Time: 9:00 A.M. Courtroom: Oakland Courthouse, Courtroom 5 – 2nd Floor, 1301 Clay Street Oakland, CA 94612

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INTRODUCTION AND ISSUES PRESENTED

Plaintiff, a sovereign nation, asserts that the United States has failed to carry out its obligation under the Nuclear Non-Proliferation Treaty ("NPT") to negotiate in good faith on nuclear disarmament. It asks the Court to adopt its interpretation of the NPT, declare the United States in breach, and compel compliance by directing the United States to convene multilateral disarmament negotiations.

Although Plaintiff portrays its position as a routine exercise of treaty interpretation within the Article III powers of the Court, the relief Plaintiff seeks—a judicial order attempting to resolve a dispute between two national governments over the interpretation of an international agreement calling for good faith negotiations—is unprecedented. Plaintiff's opposition brief does nothing to dispel the extraordinary justiciability concerns presented by the Complaint. First, Plaintiff alleges no injury in fact sufficient to confer standing, and any meaningful relief for the injuries it does allege would depend on the unforeseeable actions of foreign nations not before the Court. Second, even if Plaintiff had met its burden on standing, the political question doctrine would bar judicial review of issues constitutionally committed for resolution to the political branches, including the far-reaching issues of national security and foreign affairs raised in the Complaint.

Apart from these threshold issues, Plaintiff has failed to state a claim for relief. Article VI of the NPT neither creates rights or obligations enforceable in U.S. courts nor provides a cause of action under the treaty. And even if Plaintiff had judicially enforceable rights under the NPT, its failure to pursue them in a timely manner would preclude any possible relief here. Finally, Plaintiff has failed to demonstrate that venue is proper in this district. In short, Plaintiff's opposition brief neither overcomes the clear-cut limitations on the Court's jurisdiction nor shows that the Complaint states a valid claim for relief. The Complaint therefore should be dismissed.

ARGUMENT

I. Plaintiff Has Failed to Allege The Necessary Elements of Standing

A. The Potential Threat of Nuclear War Is Insufficient to Establish Standing

In the absence of any concrete, imminent, or particularized injury, Plaintiff seeks to base standing on the "increased nuclear threat caused by the U.S. refusal to negotiate." Oppos. Br. (ECF No. 28) ("Oppos Br.") at 3. But Plaintiff's apprehension about the uncertain effects of U.S. foreign policy decisions is not a cognizable injury in fact, *see Johnson v. Weinberger*, 851 F.2d 233, 235 (9th Cir. 1988), and even it were, the prospect that a favorable decision would redress the "increased nuclear threat" is too remote to satisfy the redressability requirement, *see Greater Tampa Chamber of Commerce v. Goldshmidt*, 627 F.2d 258, 263-64 (D.C. Cir. 1980).

With respect to injury in fact, the Government demonstrated in its opening brief that subjective fears about the dangers of nuclear proliferation are not a basis for Article III standing. USG MTD (ECF No. 25) ("MTD") at 3. In response, Plaintiff analogizes this case to *Mass. v. EPA*, 549 U.S. 497 (2000) and *FEC v. Akins*, 524 U.S. 11 (1998), maintaining that the alleged injury here is no less concrete than the alleged injuries that supported standing in those cases. Oppos. Br. at 3. In both the cited cases, however, it was a showing of concrete and ongoing harm, not speculation about future harm, that formed the basis for the Court's standing decision. The plaintiffs in *Mass*. did not ask the Court to indulge inferences about the uncertain and indefinite consequences of unregulated motor-vehicle emissions. Rather, they alleged that they were already suffering harm from motor-vehicle emissions, and that the harm would only worsen if the emissions continued unabated. *Mass.*, 549 U.S. at 521. Similarly, the plaintiffs in *Akin* asserted that the Federal Election Commission's failure to classify an interest group as a "political committee" subject to certain federal reporting requirements deprived them of information they would have otherwise received had the group been

required to report. *Akins*, 524 U.S. at 13-14. Not receiving the information was a concrete and ongoing harm. *Id*. at 20-21. Here, by contrast, Plaintiff's subjective fears about an increased risk of nuclear war do not constitute the kind of imminent, concrete harm required for Article III standing.

With respect to redressability, the Government's opening brief explained that it is not enough for Plaintiff to speculate that ordering the requested relief would make Plaintiff any safer or reduce the global threat of nuclear weapons. MTD at 3-4. Plaintiff must show that it is "likely," not merely "speculative," that the injury would be redressed by a favorable decision, *Talenti v. Clinton*, 102 F.3d 573, 576 (D.C. Cir. 1996), and an injury that can be redressed only in concert with third-party sovereigns whose actions are independent and not before this Court cannot satisfy that standard, *Greater Tampa Chamber of Commerce*, 627 F.2d at 263-64. Here, Plaintiff's contention that the requested relief would reduce the chance of nuclear conflict rests on a speculative chain of assumptions, beginning with the notion that a call for disarmament negotiations would be heeded by other nuclear powers.

Plaintiff does not dispute that, under this standing theory, meaningful relief depends on the strategic choices of foreign governments not before the Court; rather, Plaintiff disputes that it would be "speculative" to infer that such governments would participate in U.S.-led negotiations. Oppos. Br. at 3. In support, Plaintiff points to widespread international support for a 2012 U.N. working group on multilateral disarmament, noting that "of 182 votes, only the U.S and three other nations voted to oppose the negotiations." Oppos. Br. at 3. But this observation does nothing to alter the fact that the relief Plaintiff seeks requires diplomatic negotiations and agreement among multiple sovereign states.[1]

[1] Indeed, Plaintiff's opposition brief does not identify the three other opposing nations (France, Russia, and the United Kingdom), nor does it mention that these nations (together with the United States) comprise four of the five Nuclear Weapon States Party to the NPT, or that China, the fifth

B. Plaintiff Cannot Base Standing on The Alleged Denial of The "Benefit of Its Bargain"

Plaintiff's allegation that it has been denied the benefit of its treaty bargain likewise fails on redressability grounds. As Plaintiff explains, Article VI "reflects the grand bargain made by the parties to it: the non-nuclear weapon States agreed not to acquire nuclear weapons and the States possessing nuclear weapons agreed to negotiate their elimination." Compl. ¶ 38. But here again, the prospect that a favorable decision will provide meaningful relief—that is, that other nuclear powers would participate in disarmament negotiations judicially compelled by a U.S. Court—depends on the independent choices of foreign nations not party to the lawsuit. Standing cannot rest on such a tenuous basis. *See Greater Tampa Chamber of Commerce*, 627 F.2d at 263-64.

In an effort to avoid this obvious impediment, Plaintiff attempts to recast its injury as a breach by the United States, describing its alleged harm as that of a treaty party "that has honored its NPT obligations but is not receiving the *quid pro quo* of good faith disarmament negotiations promised by the U.S." Oppos. Br. at 2. But Plaintiff cannot escape the redressability requirement by framing its injury as if it were based on alleged U.S. non-compliance alone.[2] *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."). Even if it were proper for the Court to inject itself in this foreign policy dispute (*see infra*, Section II),

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Nuclear Weapon State Party, has refused to participate in the working group's discussions.[1] Thus, if Plaintiff's contention proves anything, it is that judicially directed action by the U.S. will not by itself result in multilateral disarmament negotiations.

[2] Although focused on U.S. compliance, the Complaint and the sources cited therein leave no doubt that Plaintiff believes that *all* of the nuclear powers have violated their obligations under the NPT. *See, e.g.*, Compl. ¶ 79 (quoting article asserting that "currently all five of the nuclear-weapon states" are "in blatant violation of the disarmament article"); Compl. ¶ 76 (linking "nuclear weapon countries' failure to disarm with other countries' increased efforts at nuclear proliferation). Thus, for judicial intervention to yield any meaningful relief, the requested relief would have to cure the alleged "blatant violations" of the other nuclear powers.

the redressability of Plaintiff's alleged injury would still depend on the actions of other independent nations. Article VI is not a bilateral obligation between the United States and the Marshall Islands, and the "grand bargain" objective of "nuclear disarmament" could not be achieved through actions by the United States alone. Indeed, what Plaintiff "bargained for" in Article VI was good faith negotiations on the part of "[e]ach of the Parties to the Treaty," including all of the nuclear weapon states.

Moreover, even if the injury could be properly framed in terms of U.S. breach, Plaintiff's allegations about the causes of the alleged breach ask the Court to delve into the various policies and programs that Plaintiff alleges contribute to U.S. non-compliance, including the U.S.'s failure to ratify the Comprehensive Nuclear-Test-Ban Treaty; the U.S.'s withdrawal from the 1972 Anti-Ballistic Missile Treaty and its subsequent deployment of missile defense systems, Compl. ¶¶ 63-64; and the ongoing modernization of the U.S.'s nuclear force structure, *id*. ¶¶ 63-69; Oppos. Br. at 13. The fact that the Court would be required to supervise U.S. policy determinations on a range of national security and foreign affairs matters beyond NPT negotiations and outside the Court's purview only underscores the impossibility of redressing Plaintiff's injury.[3]

II. A Federal Court Should Not Adjudicate This Claims of A Treaty Violation

Even assuming, *arguendo*, that Plaintiff could satisfy the requirements of Article III standing at the pleading stage, the Government demonstrated in its opening brief that Plaintiff's claim raises a

[3] Nor can Plaintiff escape the redressability requirement by characterizing its injury as "procedural." Plaintiff does not identify a provision in the NPT that confers anything remotely akin to a "procedural right," at least not as that term was described by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). But even assuming the doctrine could be applied in this setting, Plaintiff would still lack standing because, for reasons explained above, it has not identified a corresponding "concrete interest that is affected by the deprivation." *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *see also Friends of St. Frances Xavier Cabrini Church v. FEMA*, 658 F.3d 460, 467-68 (5th Cir. 2011) (injury from failure to follow process for addressing public objections could not by itself support standing).

fundamentally non-justiciable political question. MTD at 4-6. While all of the overlapping factors for determining a political question are present in this case, several bear emphasis here: the authority to resolve disputes between national governments over the interpretation or application of a treaty is constitutionally committed to the political branches; there are no judicially manageable standards for determining whether the United States has breached its obligations under Article VI of the NPT; and an attempt to resolve the matter would express a lack of respect due to the political branches and risk conflicting and potentially embarrassing pronouncements by various branches on one question. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).

A. The Resolution of A Treaty Dispute Regarding Good Faith Negotiations Among Sovereigns Is Constitutionally Committed to The Executive Branch

Plaintiff never comes to terms with the extraordinary justiciability concerns presented by a lawsuit between the United States and another sovereign over the interpretation of an obligation to engage in "negotiations in good faith on effective measures relating to . . . nuclear disarmament" under a multilateral treaty. The power to negotiate with foreign nations is "exclusively granted to the Executive Branch under the Constitution," and the courts have no role in ordering such negotiations, much less dictating what the negotiating position of the United States must be. *See, e.g., Earth Island Inst. v. Christopher*, 6 F.3d 648, 653 (9th Cir. 1993). In *Earth Island*, the Ninth Circuit was asked to enforce a statute requiring the Secretary of State to initiate negotiations with foreign countries to develop treaties to protect sea turtles. The Court held that the question presented was not justiciable, rejecting appellants' argument that the "lawsuit merely asks the district court to review and interpret congressional legislation." *Id.* In distinguishing the decisions relied upon by appellants (including *Japan Whaling)*, the Court explained that "the district courts [in those cases] were not enforcing a statute that directed the executive to negotiate with foreign countries." *Id.* Although, as Plaintiff

observes, *Earth Island* happened to involve a constitutional challenge, that aspect of the case had no meaningful bearing on the Court's justiciability analysis.

Nor is it the judiciary's role to adjudicate another country's claim that the United States has breached a treaty obligation owed to it. As the Supreme Court observed in the *Head Money Cases*,

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Head Money Cases, 112 U.S. 580, 598 (1884); *see also Holmes v. Laird*, 459 F.2d 1211, 1220 (D.C. Cir. 1972) (observing that it has "consistently been held that courts cannot command the United States to take action assertedly necessary to the performance of a treaty. . . ."); *Kwan v. United States*, 84 F. Supp. 2d 613, 623 (E.D. Pa. 2000), *aff'd*, 272 F.3d 1360 (Fed. Cir. 2001) ("It is well established that the judiciary cannot order the government of the United States to comply with the terms of an agreement with another sovereign."); *Canadian Transp. Co. v. United States*, 430 F. Supp. 1168, 1172 (D.D.C. 1977) (same).[4]

Plaintiff maintains that federal courts have an "Article III duty to interpret treaties even when they involve foreign relations issues." Oppos. Br. at 5. It is true, of course, that not all foreign affairs cases involve political questions, *see, e.g.*, *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012), and that courts have, in certain settings, interpreted disputed treaty provisions, including in cases where the United States is a party, *see* Compl. ¶ 5 (summarizing early Supreme Court treaty decisions). But

[4]The case for abstention is especially strong in this case, because the NPT concerns a subject matter that is *itself* traditionally entrusted to the political branches. *See El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) ("The complex, subtle, and professional decisions as to the . . . control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability.") (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

none of those cases involved a foreign government seeking to enforce a treaty against the United States.

Plaintiff directs the Court to *Japan Whaling* and *Zivotofsky v. Clinton*, but neither of those decisions is remotely relevant. In *Japan Whaling*, Congress had directed the Secretary of Commerce to "certify" any nation whose fishing practices ran afoul of the terms of an international treaty. *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 226 (1986). Although the statute in question had been enacted in connection with U.S. obligations under the treaty, the question before the Court was whether the Secretary's action violated the statute, not whether it violated a treaty. *Id.* at 231. The challenge presented a purely legal question of statutory interpretation, and the Court was not required to interpret the treaty, much less asked to enforce it pursuant to the claim of a foreign country. *Id.* Similarly, the question in *Zivotofsky* boiled down to whether Congress impermissibly intruded into the Executive Branch's recognition authority by enacting a statute that directs the Secretary of State to record Israel as the birthplace of U.S. citizens born in Jerusalem. *Zivotofsky*, 132 S. Ct. 1421, 1427 (2012). That question, of course, is categorically different from the one presented here.

B. The Court Lacks Judicially Manageable Standards to Resolve This Dispute, And Its Resolution Would Interfere with the Prerogatives of the Executive Branch

Plaintiff also fails to identify any judicially manageable standards for determining whether the United States has carried out its obligations under Article VI. What constitutes "good faith" efforts towards negotiations on "effective" disarmament measures are determinations for the political branches to make, using the resources and expertise developed in conducting the nation's diplomatic and military affairs, and taking into account the complex and ever-changing international security environment. The judiciary, by contrast, has no standards for determining whether certain negotiating behavior constitutes good faith, no statutory or case law to guide its analysis, and no way

to translate legal rules into workable judicial remedies. *See, e.g.*, *Aktepe v. United States*, 105 F.3d 1400, 1403 (11th Cir. 1997) (explaining that courts are "unschooled in the delicacies of diplomatic negotiation [and] the inevitable bargaining for the best solution of an international conflict.") (internal quotations omitted).

Plaintiff asserts that the Court has manageable standards for determining the meaning of "good faith." Oppos. Br. at 6. But applying the "good faith" standard to the discharge of this international treaty obligation would require the Court to tread well beyond the judicial domain to consider numerous policy judgments as to what, under prevailing international norms, constitutes a good faith effort to undertake "effective measures relating to the cessation of the nuclear arms race," and, conversely, what policy positions or other actions might demonstrate a lack of good faith. In this context, an application of the "good faith" standard would plainly not be susceptible to judicially manageable standards.[5]

Moreover, Plaintiff has no answer for the serious intrusion into the Executive Branch's foreign policy sphere that an exercise of judicial review here would require. Whether the United States is in compliance with the NPT is not only a question whose resolution is entrusted to the political branches; it is a question the Executive Branch has already answered. *See* MTD at 6. Moreover, imposing the requested relief would require determining whether the negotiating framework chosen by the United States would satisfy Article VI, and to assess a host of discretionary judgments vested in the Executive Branch, such as how to achieve and measure progress toward non-proliferation compliance, as well as whether it would be sufficient merely to convene negotiations or

[5] *Cf. El-Shifa Pharm Indus. Co.*, 607 F.3d at 844, 847 (finding that defamation challenge to statements made by U.S. government officials in justification of military attack overseas did not present a straightforward application of the common-law defamation standard because the allegedly defamatory statements could not be "severed from the initial justifications for the attack," and that those justifications, in turn, could not be evaluated "without first fashioning out of whole cloth some standard for when military action is justified").

whether the United States would also be required to bring diplomatic pressure to bear on foreign governments that refuse to participate. The Court cannot address these issues without improperly entangling itself in the diplomatic sphere or expressing a "lack of the respect due" to the Executive Branch by risking conflicting pronouncements on U.S. compliance with the NPT. *See Baker*, 369 U.S. at 217; *see also Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 980 (9th Cir. 2007).

III. Plaintiff's Claims Are Based on A Treaty Provision that Is Not Self-Executing And Does Not Create A Cause of Action

Next, even if Plaintiff could establish standing and its claims were properly justiciable, it would still lack a valid claim in U.S. court. As explained in the Government's opening brief, "[f]or any treaty to be susceptible to judicial enforcement it must both confer individual rights and be self-executing." *Cornejo v. Cty. of San Diego*, 504 F.3d 853, 856 (9th Cir. 2007).

As a preliminary matter, the opposition brief misconstrues the self-execution analysis. Plaintiff asserts that implementing legislation is necessary to give effect to a treaty provision only if the treaty "'manifests an intention' that it shall not be effective 'without the enactment of implementing legislation.'" Oppos. Br. at 9-10 (quoting Restatement (3d) Foreign Relations § 111(4). However, Plaintiff is mistaken to the extent it argues that there is a presumption for self-execution in the absence of treaty language to the contrary. *Medellin v. Texas* makes clear that, "although treaties may comprise international commitments," they are not judicially enforceable—that is, they are not self-executing—"*unless* Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." 552 U.S. 491, 505 (2008) (emphasis added). This shows that while the self-executing analysis begins with the text of the treaty, the question also turns on whether the President and Senate intended the treaty to be enforceable in U.S. courts. Here, a careful study of the treaty's text, drafting history, and post-ratification understanding all confirm that Article VI neither creates judicially enforceable federal law

nor provides a cause of action in domestic courts. Contrary to Plaintiff's assertion, the language of Article VI reflects that it is non-self-executing. The phrase "undertakes to pursue negotiations" is "not a directive to domestic courts"; rather, '"[t]he words of [Article VI] call upon governments to take certain action."' *Id*. (quoting *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988); *see also Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346-47 (2006).

Plaintiff asserts that the drafting history and post-ratification understanding of Article VI reflects the treaty parties' intent to create a binding legal obligation. But the United States does not dispute that Article VI comprises an international legal obligation. The preliminary question for this Court is whether the obligation provides a basis to seek relief in domestic courts. Mandatory language (*i.e.*, "tangible commitment" or "unequivocal undertaking," Oppos. Br. at 10-11) is not sufficient to establish enforceable rights where the treaty's text, history, and post-ratification understanding weigh against self-execution. *See Islamic Rep. of Iran v. Boeing Co.*, 771 F.2d 1279, 1283-84 (notwithstanding mandatory language of Accords that questions of interpretation "shall be decided" by the Tribunal, history of Accords established that it was not self-executing). The Government has already explained why the text forecloses a finding that Article VI is self-executing, and it demonstrated in the opening brief that Article VI's negotiating history and post-ratification understanding support that conclusion. *See* MTD at 8-9; 115 Cong. Rec. 6204 (1969) (Senator Fulbright referring to the principle that an alleged treaty breach "becomes the subject of international negotiations and reclamations," and that "[i]t is obvious that with all this Judicial courts have nothing to do and can give no redress."); 136 Cong. Rec. S9303-02 (daily ed. June 28, 1990) (sponsor of resolution to reaffirm objectives of NPT noting that "[t]he NPT is not self-executing.").

Plaintiff's attempt to challenge this drafting history is not persuasive. For example, Plaintiff's contention that Senator Fulbright was discussing the absence of a judicial remedy following

withdrawal from the treaty (as opposed to non-compliance) is neither accurate nor relevant.[6] Whether he was discussing breach or withdrawal has no bearing on his statements about a foreign government's ability to enforce a treaty obligation in U.S. courts.

Moreover, even if the alleged breach were subject to review in domestic courts, Plaintiff would still lack a cause of action to assert its claim. Plaintiff has made clear that it is not invoking the Administrative Procedure Act or any other recognized cause of action. Rather, Plaintiff invokes Article VI itself, reasoning (i) that a treaty is "essentially a contract between two sovereign nations," (ii) that "the rights and obligations created by a treaty belong to those signatory parties," and (iii) that per *Marbury v. Madison*, "every right, when withheld, must have a remedy." Oppos. Br. at 9.

Generally, "international agreements, even those directly benefiting private persons, . . . do not create private rights or provide for a private cause of action in domestic courts . . . ." *Cornejo*, 504 F.3d at 859 (internal quotation omitted). Although we are not concerned here with "private" rights of action, this general rule still bars relief because Plaintiff cannot point to an act of Congress or a provision of the NPT that creates a cause of action on behalf of a State Party in U.S. courts.

Plaintiff's contention that "every right . . . must have a remedy" is simply not true in this context. Treaty rights do not always correspond with effective remedies in U.S. courts, and even treaties that provide compensation for a breach "only set forth substantive rules of conduct . . . . They do not create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Cornejo*, 504 F.3d at 859 (quoting *Argentine Republic v. Amerada Hess Shipping Co.*, 488 U.S. 428, 442 (1989).

[6]Senator Fulbright was discussing the remedies available to treaty parties when Congress enacts statutes that are inconsistent with U.S. treaty obligations, 115 Cong. Rec. 6204 (1969); his discussion of withdrawal from the NPT came later, *id*. at 6205.

IV. Venue in This District Is Improper

Plaintiff contends that venue is proper because the suit was brought in a district in which "a defendant in the action resides." 28 U.S.C. § 1391(e)(1)(A). But, as explained in the Government's opening brief, courts have consistently held, even under the revised venue statute, that the United States' agencies "reside" for venue purposes in Washington D.C. *See* MTD at 10-11. Plaintiff's interpretation of § 1391(e)(1)(A) is foreclosed by decisions holding that venue determinations for federal and non-federal defendants are separate. *See Rogers v. Civil Air Patrol*, 129 F. Supp. 2d 1334, 1338 (M.D. Ala. 2001); *Nat'l Ass'n of Life Underwriters v. Clarke*, 761 F. Supp. 1285, 1293 (W.D. Tex. 1991). Plaintiff's view also cannot be squared with the venue statute as a whole. If the definition of residency in § 1391(e)(1)(A) were interpreted to mean that federal defendants can be sued, under § 1391(c)(2), anywhere they are subject to personal jurisdiction, the remainder of § 1391(e)(1), which establishes venue requirements in actions involving federal defendants, would be rendered meaningless, for federal defendants would be subject to nationwide venue without regard to where the events giving rise to the action occurred (§ 1391(e)(1)(B)), or where the plaintiff resides (§ 1391(e)(1)(C)). That is not what the statute provides or what Congress intended.

Plaintiff also renews its contention that venue is proper under § 1391(e)(1)(B) because a "substantial part of the events or omissions giving rise to the claims occurred" in this district. In support, Plaintiff argues that nuclear modernization programs carried out at Lawrence Livermore National Laboratory ("Livermore") are "in breach of the treaty obligations that are the subject of this suit." Oppos. Br. at 13. But Plaintiff's reliance on the location of Livermore is a pretext. The foreign policy decisions at issue here concern the manner in which the U.S. carries out its Article VI obligations and emanate from the highest levels of the Executive Branch in Washington, D.C., the headquarters of the federal defendants responsible for the work at Livermore (the Department of

Energy, the Secretary of Energy, and the National Nuclear Security Administration). The Complaint cannot reasonably be cast as a challenge to the technical, day-to-day work at Livermore.[7]

V. Plaintiff's Claims Are Untimely

Should all the foregoing bars to judicial review be insufficient, this lawsuit should still be rejected as untimely. Under 28 U.S.C. § 2401, a civil action must be filed against the United States within six years after the plaintiff "knew or should have known of the wrong and was able to commence an action based upon that wrong." *Wild Fish Conservancy v. Salazar*, 688 F. Supp. 2d 1225, 1233 (E.D. Wash. 2010). Plaintiff does not dispute that it knew or should have known of the alleged U.S. breach at the time it acceded to the NPT in 1995. Rather, Plaintiff's primary response is that the time bar in 28 U.S.C. § 2401 is not applicable because the U.S.'s alleged failure to comply with Article VI is ongoing. Oppos. Br. at 14. Plaintiff misconstrues the scope of the continuing violation doctrine. As several courts have held, the doctrine applies only in cases involving a "continuing series of illegal acts, rather than the continued ill effects of a single violation." *Wild Fish Conservancy*, 688 F. Supp. 2d at 1235 (citing *Heartwood v. Norton*, 2005 WL 2656733 (S.D. Ohio 2005); *see also In Center for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1335 (11th Cir. 2006). Here, Plaintiff seeks to take the United States to task for a single violation – its alleged failure to undertake good faith negotiations relating to disarmament by an "early date." But the NPT has been in place for decades, and Plaintiff, which has been on notice of the United States' policies concerning the NPT for many years, could have raised its concerns long ago.[8]

[7] Of course, if Plaintiff is correct that the work at Livermore played a "substantial part" in the alleged treaty violation, this only underscores the reasons why its claims are not redressable. A court order directing the Defendants to convene disarmament negotiations would have no foreseeable effect on the work at Livermore.

[8] Moreover, public interest favors non-intervention by the Court, *see Eccles v. Peoples Bank of Lakewood Vill., Cal.*, 333 U.S. 426, 431 (1948), and Plaintiff's reference to decades of ongoing

CONCLUSION

For the foregoing reasons, defendants respectfully request dismissal of this lawsuit.

Dated: September 8, 2014

Respectfully submitted,

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nuclear research shows the major disruption and expense that would be caused by intervention now, despite its decision to wait two decades.

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2014, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system, which shall send notification of such filing to all CM/ECF participants.

/s/ Sam M. Singer

Sam Singer