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Article

Accepted Version

Evans, C. P. (2020) Creating an environment for nuclear disarmament (CEND): a good faith effective measure pursuant to article VI NPT or empty gesturing? Cambridge International Law Journal, 9 (2). pp. 201-224. ISSN 2398-9181 doi: 10.4337/cilj.2020.02.05 Available at <https://centaur.reading.ac.uk/92314/>

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To link to this article DOI: <http://dx.doi.org/10.4337/cilj.2020.02.05>

Publisher: Edward Elgar

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Creating an Environment for Nuclear Disarmament (CEND): A Good Faith Effective Measure Pursuant to Article VI NPT or Empty Gesturing?

Abstract:

It has been 50 years since the adoption of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT), which established the obligation upon all state parties to work towards nuclear disarmament under Article VI. Yet despite extensive reductions in nuclear weapons stockpiles since the Cold War peaks, nuclear arms control and disarmament efforts are currently in disarray. After the Intermediate-Range Nuclear Forces Treaty was terminated in 2019, New START remains the only bilateral limitation on US and Russian nuclear forces in operation and is due to expire in February 2021. The US has justified its limited nuclear disarmament progress on the premise that the current international security environment is not conducive to further nuclear disarmament progress. Instead, the US has recently promoted a new initiative called Creating an Environment for Nuclear Disarmament (CEND). The initiative aims to provide a platform for all states to engage in constructive dialogue to identify ways to improve the international security environment which make nuclear deterrence necessary, while addressing the hurdles which currently impede progress towards nuclear disarmament. Significantly, the US regards CEND as an 'effective measure' and illustration of its commitment towards disarmament under Article VI. This article seeks to address the US claim that CEND represents a good faith, effective measure towards nuclear disarmament pursuant to Article VI. This will revisit existing doctrinal interpretative debates concerning the obligation under Article VI, particularly the requirements that negotiations and measure be adopted in good faith, and what constitutes an effective measure towards nuclear disarmament. The discussion will then determine whether the CEND initiative itself can be considered a good faith, effective measure towards nuclear disarmament, by considering its purpose, origins and implementation and actions of the US.

Keywords: NPT, nuclear weapons, CEND, disarmament, good faith

I. Introduction

Fifty years ago, on 5 March 1970, the Treaty on the Non-Proliferation of Nuclear Weapons¹ – the 'cornerstone' instrument of the nuclear non-proliferation and disarmament legal

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

framework² – entered into force. Although initially negotiated to address the threat posed by further horizontal nuclear weapon proliferation during the 1960's,³ the NPT also established the first legally-binding obligation incumbent upon all state parties to 'pursue negotiations in good faith on effective measures' relating to nuclear disarmament under Article VI. Yet while the non-proliferation arm of the treaty has proved fairly successful, the nuclear disarmament pillar under Article VI has often been neglected.⁴ Despite the significant reduction in the number of stockpiled nuclear weapons in the US and Russia from the Cold War peak of approximately 70,000 nuclear weapons,⁵ there remains an estimated 13,410 nuclear weapons that are either stockpiled or operationally deployed.⁶ In addition, each of the nuclear-weapon-possessing states (NWS) are investing heavily in the modernisation of their respective nuclear forces,⁷ with the Trump Administration recently requesting an additional \$44.5 billion for the 2021 fiscal year as part of an overhaul of the US nuclear arsenal and current delivery systems.⁸

Moreover, current nuclear arms control and disarmament efforts are also experiencing a severe crisis. The Trump Administration has withdrawn from the Joint Comprehensive Plan of Action (JCPOA) in May 2018, a political agreement which imposed various restrictions on Iran's civilian nuclear activities,⁹ and quickly reimposed targeted economic sanctions against

² As described by Daniel H Joyner, *International Law and the Proliferation of Weapons of Mass Destruction* (Oxford University Press, 2009) 8; and Masahiko Asada, 'The Treaty on the Non-Proliferation of Nuclear Weapons and the Universalization of the Additional Protocol' (2011) 16 *Journal of Conflict and Security Law* 3, 3.

³ Many commentators note the primary objective of preventing horizontal proliferation of nuclear weapons to further states, see Morton A Kaplan, 'The Nuclear Non-Proliferation Treaty: Its Rationale, Prospects and Possible Impact on International Law' (1969) 18 *Journal of Public Law* 1, 3; Gro Nystuen and Torbjørn Graff Hugo, 'The Nuclear Non-Proliferation Treaty' in Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds), *Nuclear Weapons Under International Law* (Cambridge University Press, 2014) 376. Others take a view shared by this author that each of the objectives of non-proliferation, disarmament and peaceful uses of nuclear energy should be considered equally significant, see Daniel H Joyner, *Interpreting the Nuclear Non-Proliferation Treaty* (Oxford University Press, 2011) 32; Nigel D White, 'Interpretation of Non-Proliferation Treaties' in Daniel H Joyner and Marco Roscini (eds), *Non-Proliferation Law as a Special Regime* (Cambridge University Press, 2012) 112-13.

⁴ See Waheguru Pal Singh Sidhu, 'The Nuclear Disarmament and Non-Proliferation Regime' in Paul D Williams (ed), *Security Studies: An Introduction* (2nd ed, Routledge Publishing, 2012) 410; Nystuen and Hugo (n 3) 396.

⁵ See Robert S Norris and Hans M Kristensen, 'Global Nuclear Weapons Inventories, 1945-2010' (2010) 66 *Bulletin of the Atomic Scientists* 77, 81-82.

⁶ For a useful overview of the status of each nuclear-weapon-possessing state's nuclear weapons stockpiles, see Hans M Kristensen and Matt Korda, 'Status of World Nuclear Forces' (*Federation of American Scientists*, updated April 2020) <<https://fas.org/issues/nuclear-weapons/status-world-nuclear-forces/>> accessed 24 April 2020.

⁷ For an overview of current nuclear-weapon-states modernisation efforts, see Women's International League for Peace and Freedom, 'Assuring Destruction Forever: 2019', (*Reaching Critical Will*, April 2019) <<http://reachingcriticalwill.org/images/documents/Publications/modernization/assuring-destruction-forever-2019.pdf>> accessed 24 April 2020.

⁸ Kingston Reif, 'Trump Budget Boosts Nuclear Efforts' (2019) 49 *Arms Control Today* 22.

⁹ For a discussion of the restrictions imposed by the JCPOA, see Daniel H Joyner, *Iran's Nuclear Programme and International Law: From Confrontation to Accord* (Oxford University Press, 2016) 221-46.

Iranian officials and infrastructure.¹⁰ The US withdrew from the Intermediate-Range Nuclear Forces Treaty (INF Treaty) in August 2019 following accusations that Russia had been violating the treaty restrictions by deploying its SSC-8 cruise missile.¹¹ As of 1 April 2020, New START remains the only bilateral limitation on US and Russian nuclear forces and is due to expire on 5 February 2021.¹² Despite an apparent willingness on Russia's part,¹³ the US has so far not expressed any clear interest in renewing New START for an additional five-years unless China's nuclear programme is also incorporated into the agreement.¹⁴

The US has recently sought to justify this sequence of events on the premise that the current deteriorating international security environment is not conducive to further progress and negotiations on nuclear disarmament.¹⁵ Instead, the deterioration of relations amongst the NWS actually makes nuclear weapons more essential for US security interests both at home and abroad. However, instead of idly waiting for improved security conditions to arise, the US recently began promoting a new initiative called 'Creating an Environment for Nuclear Disarmament' (CEND).¹⁶ The initiative seeks to provide a platform for all states, both nuclear and non-nuclear, to engage in constructive and open dialogue to identify ways to improve the international security environment which presently makes nuclear deterrence necessary for the NWS. This, in turn, can allow participating delegations to address the obstacles which currently impede progress towards nuclear disarmament pursuant to Article VI of the NPT.¹⁷

This article seeks to address the claim made by the US that CEND represents an 'illustration of its commitment to pursuing "effective measures" on disarmament within the

¹⁰ See e.g. Daniel H Joyner, 'The United States' "Withdrawal" from the Iran Nuclear Deal' (*E-International Relations*, 21 August 2018) <<https://www.e-ir.info/2018/08/21/the-united-states-withdrawal-from-the-iran-nuclear-deal/>> accessed 24 April 2020.

¹¹ Shannon Bugos, 'U.S. Completes INF Treaty Withdrawal' (2019) 49 *Arms Control Today* 24.

¹² Kingston Reif, 'New START at a Glance' (*Arms Control Association*, January 2020) <<https://www.armscontrol.org/factsheets/NewSTART>> accessed 24 April 2020.

¹³ Russia has previously stated that it is open to extending New START unconditionally on numerous occasions, see Kingston Reif and Shannon Bugos, 'Putin Invited U.S. to Extend New START' (2020) 50 *Arms Control Today* 25.

¹⁴ This is discussed by Thomas Countryman, 'Russia, China, Arms Control, and the Value of New START' (2019) 49 *Arms Control Today* 14; and Kingston Reif and Shannon Bugos, 'Extend New START – The World Can't Afford a U.S.-Russia Nuclear Arms Race Too' (*Just Security*, 10 April 2020) <<https://www.justsecurity.org/69613/extend-new-start-the-world-cant-afford-a-u-s-russia-nuclear-arms-race-too/>> accessed 24 April 2020.

¹⁵ See e.g. Christopher A Ford, Assistant Secretary for the Bureau of International Security and Nonproliferation, 'Creating the Conditions for Nuclear Disarmament: A New Approach' (*James Martin Centre for Nonproliferation Studies*, 17 March 2018) <<https://www.state.gov/remarks-and-releases-bureau-of-international-security-and-nonproliferation/creating-the-conditions-for-nuclear-disarmament-a-new-approach/>> accessed 24 April 2020.

¹⁶ Working paper submitted by the United States of America, 'Operationalizing the Creating an Environment for Nuclear Disarmament (CEND) Initiative', NPT/CONF.2020/PC.III/WP.43, 26 April 2019.

¹⁷ See Section II for further discussion of CEND.

meaning of Article VI of the NPT'.¹⁸ It questions this assertion and seeks to determine whether the CEND initiative amounts to an 'effective measure' that has been adopted in 'good faith' by the US for the purposes of Article VI. Following this brief introduction, Section II explores the origins of CEND and identifies the underlying rationale behind the initiative and its apparent objectives. Section III then examines the nature of the nuclear disarmament obligation within Article VI, particularly the requirement that negotiations be adopted in 'good faith', and what may constitute an 'effective measure' relating to nuclear disarmament too. Finally, Section IV will determine whether CEND satisfies the aforementioned requirements of Article VI detailed in Section III.

II. Origins and Purpose of CEND

The Trump Administration was not the first to emphasise the need to improve security conditions to facilitate nuclear disarmament progress. The Obama Administration in its 2010 Nuclear Posture Review recognised that the 'conditions that would ultimately permit the United States and others to give up their nuclear weapons without risking greater international instability and insecurity are very demanding'.¹⁹ Similar rhetoric also surrounds the proposed Middle East Nuclear-Weapon-Free Zone (NWFZ). Whilst Egypt has suggested that the Zone will facilitate further peace talks in the region, Israel and the US argue that a NWFZ should only be negotiated once peace has been achieved.²⁰

However, it was not until March 2018 that Assistant Secretary Christopher Ford first outlined what would eventually become the CEND initiative, originally titled 'Creating the Conditions for Nuclear Disarmament' (CCND).²¹ Shortly after his introductory presentation, the US released an official Working Paper during the April 2018 NPT Preparatory Committee which explained the underlying rationale behind the initiative, in clear terms:

'If we continue to focus on numerical reductions and the immediate abolition of nuclear weapons, *without addressing the real underlying security concerns*

¹⁸ NPT/CONF.2020/PC.III/WP.43 (n 16) 2.

¹⁹ United State of America, 'Nuclear Posture Review' (*Department of Defense*, April 2010) <https://dod.defense.gov/Portals/1/features/defenseReviews/NPR/2010_Nuclear_Posture_Review_Report.pdf> accessed 24 April 2020, 48.

²⁰ Abraham Shandel, 'Removing Weapons of Mass Destruction from the World's Most Volatile Region: How to Achieve a WMD-Free Zone in the Middle East' (2014) 46(1) *Georgetown Journal of International Law* 315, 341. See also, Marco Roscini, 'International Law, Nuclear Weapon-Free Zones and the Proposed Zone Free of Weapons of Mass Destruction in the Middle East' in Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds), *Nuclear Weapons Under International Law* (Cambridge University Press, 2014).

²¹ Ford (n 15).

*that led to their production in the first place, and to their retention, we will advance neither the cause of disarmament nor the cause of enhanced collective international security’.*²²

Having highlighted the relationship between the condition of the international security environment and progress towards nuclear disarmament, the US outlined its prospective vision for its initiative:

‘the United States seeks a more meaningful and realistic *dialogue*, one that has a genuine prospect of moving us toward the nuclear weapons-free world we collectively seek. Such a dialogue *would address those underlying security concerns that have made the retention of nuclear weapons necessary* to forestall conflict between the major powers and maintain strategic stability... Our goal is progress, not rhetoric or simply virtue-signalling; for us, the choice of a constructive dialogue is clear’.²³

The document emphasises how this security focus is a repeated theme of US discourse, and proceeds to offer a ‘roadmap’ identifying ‘some of the discrete tasks that would need to be accomplished for such conditions to exist’,²⁴ including: overcoming the existing challenges facing the international security environment, including the decreased international stability caused by Russian and Chinese nuclear weapons development and modernisation; the necessity of maintaining an effective deterrent capability throughout the disarmament process; and improving dialogue among states to ease tensions and build both trust and confidence as a ‘necessary starting point for fostering conditions for nuclear disarmament’.²⁵ The Working Paper also reiterated that preventing non-proliferation remains crucial for nuclear disarmament progress to ensure the NWS ‘have confidence’ that non-nuclear weapon states are not seeking nuclear weapons.²⁶

²² Working paper submitted by the United States of America, ‘Creating the Conditions for Nuclear Disarmament’, NPT/CONF.2020/PC.II/WP.30, 18 April 2018, 1 (emphasis added).

²³ *ibid* (emphasis added).

²⁴ *ibid*.

²⁵ *ibid*, 2-3.

²⁶ *ibid*, 3-4.

Despite its initial release in May 2018, implementation of the initiative by the US did not proceed particularly quickly,²⁷ although the US continued to promote CCND in various disarmament forums and regional events.²⁸ By early 2019, the initiative was revamped as CEND, particularly because some concern was expressed that the ‘conditions’ would have imposed further ‘preconditions’ that would have to be satisfied before nuclear disarmament could proceed.²⁹ Such concerns were addressed by Under Secretary Thompson at the 2018 UN General Assembly First Committee:

‘I know the word “conditions” has caused consternation for some, so allow me to clarify: this is not an effort to place additional “conditions” or roadblocks on progress on nuclear disarmament. Rather, “conditions” refers to the state of the security environment and its unfortunate deterioration’.³⁰

Despite the name change, the content of the initiative did not change significantly. CEND, in its present incarnation, was presented to the Conference on Disarmament in March 2019 by Assistant Secretary Ford, who further explained the underlying premise that informed the US decision to adopt the initiative:

‘Our initiative is a new one, and represents both a conceptual break from, and an effort to build upon, the remarkable progress that has been made in bringing down our nuclear arsenal since its Cold War Peak... The basic insight here, of course – and which animated our new initiative – is that these impressive

²⁷ Potter suggests that this may have been due to political bureaucratic infighting at the US Department of State, William C Potter, ‘Taking the Pulse at the Inaugural Meeting of the CEND Initiative’ (*James Martin Centre for Nonproliferation Studies*, 15 July 2019) <https://www.nonproliferation.org/taking-the-pulse-at-the-inaugural-meeting-of-the-cend-initiative/#_ftnref9> accessed 24 April 2020.

²⁸ See Christopher A Ford, Assistant Secretary for the Bureau of International Security and Nonproliferation, ‘Nonproliferation Policy and Priorities: A United States Perspective’ (*European Union Nonproliferation and Disarmament Conference*, 18 December 2018) <<https://www.state.gov/nonproliferation-policy-and-priorities-a-united-states-perspective/>> accessed 24 April 2020.

²⁹ As noted by Sebastian Brixey-Williams, ‘Reporting on Nuclear Disarmament’ (*BASIC*, March 2019) <<https://www.basicint.org/wp-content/uploads/2019/03/Brixey-Williams-Reporting-on-Nuclear-Disarmament-2019-%E2%80%93-93-WEB.pdf>> accessed 24 April 2020, 14-15. This concern is discussed further in Section IV.b.

³⁰ Statement by Andrea L Thompson, Under Secretary for Arms Control and International Security, US Department of State (*United Nations General Assembly First Committee*, 10 October 2018) <https://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com18/statements/10Oct_US.pdf> 1, accessed 24 April 2020.

reductions *did not bring about* the end of Cold War tensions, but *rather instead resulted from the easing of those tensions*'.³¹

With the above in mind, the rationale behind CEND becomes clear. The US has advanced the proposition that '[A]ny viable path towards disarmament must therefore take into consideration, and try to ameliorate, the problems of the security environment that presently impede progress toward this shared goal'.³² Unless these existing security challenges and hurdles are adequately addressed, 'it will be very hard, or even impossible to imagine any future for nuclear disarmament at all'.³³ In effect, CEND is inspired by the idea that nuclear disarmament does not occur in a vacuum, but is instead a product of improvements to the wider international security environment.³⁴ The initiative therefore provides a new forum for all states to engage in open, constructive dialogue identifying and addressing the root causes of the deteriorating international security environment which makes nuclear deterrence essential and impedes any near-term progress on nuclear disarmament. Rather than attempting to negotiate unobtainable numerical reductions and participating in fruitless discussions on the next stages towards nuclear disarmament, the CEND initiative 'adopts an incremental approach on easing global tensions to promote security environment for nuclear disarmament'.³⁵

During the 2019 NPT Preparatory Committee, the US released a further Working Paper outlining the operationalisation of CEND, including proposals to establish the 'Creating an Environment Working Group' forum.³⁶ The objective of the working group would be to 'identify a list of issues or questions relating to the international security environment affecting disarmament prospects, and establish subgroups to examine and address these factors'.³⁷ According to Heather Williams, a Lecturer in Defence and Security Studies at King's College London, more than 40 states participated the first meeting in Washington,³⁸ including all five-

³¹ Christopher A Ford, Assistant Secretary for the Bureau of International Security and Nonproliferation, 'Our Vision for a Constructive, Collaborative Disarmament Discourse' (*US Department of State*, 26 March 2019) <<https://www.state.gov/our-vision-for-a-constructive-collaborative-disarmament-discourse/>> accessed 24 April 2020 (emphasis added).

³² NPT/CONF.2020/PC.III/WP.43 (n 16) 2.

³³ As stated by Ford (n 31).

³⁴ As noted by Heather Williams, 'CEND and a Changing Global Nuclear Order' (*European Leadership Network*, 18 February 2020) <<https://www.europeanleadershipnetwork.org/commentary/cend-and-a-changing-global-nuclear-order/>> accessed 24 April 2020.

³⁵ Rizwana Abbasi, 'Creating an Environment for Nuclear Disarmament' (*E-International Relations*, 2 August 2019) <<https://www.e-ir.info/2019/08/02/creating-an-environment-for-nuclear-disarmament/>> accessed 24 April 2020.

³⁶ NPT/CONF.2020/PC.III/WP.43 (n 16) 3.

³⁷ *ibid.*

³⁸ Williams (n 34).

NPT recognised NWS,³⁹ and the non-NPT nuclear-weapon-possessing states India, Pakistan and Israel, which have been hesitant to engage in nuclear disarmament discussions in the past.⁴⁰ Discussions held so far focused on the three themes identified within the Working Paper submitted to the 2019 NPT PrepCom; 1) reducing the incentives for states to acquire or increase their nuclear weapon stockpiles; 2) the role of multilateral institutions; and 3) interim measures to reduce nuclear weapon related risks.⁴¹ In future meetings, the subgroups will discuss their specific set of issues or questions, and prepare ‘progress reports’ to the Working Group. It had been suggested that each subgroup would be required to produce programmes of work to be submitted ‘around the time of the 2020 RevCon’,⁴² which has since been postponed following the outbreak of the COVID-19 pandemic.⁴³

Various statements and Working Papers released by the US have sought to make explicit that CEND is firmly grounded within, and legitimised by the NPT text itself. In particular, the US has explained how CEND is inspired directly by the NPT preamble,⁴⁴ which recognises the importance of ‘easing of international tension and the strengthening of trust between States in order to facilitate’ nuclear disarmament.⁴⁵ Assistant Secretary Ford also highlights this intrinsic relationship between the status of the international security environment and progress towards nuclear disarmament as recognised by the NPT preamble, and argues that this

‘centrality of security conditions is one that some may have forgotten during earlier post-Cold War years, during which the nuclear superpowers had the luxury of being able to coast forward in implementing sweeping disarmament steps for a long time merely on the strength of an easing of tensions that has already taken place’.⁴⁶

³⁹ Article IX(3), NPT. A NWS is defined as a state ‘which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January, 1967’. This includes the United States, the Soviet Union (and its successor state, Russia), the United Kingdom, France and China.

⁴⁰ As noted by Potter (n 27).

⁴¹ Shannon Bugos, ‘U.S. Hosts Nuclear Disarmament Working Group’ (2019) 49 *Arms Control Today* 37.

⁴² Williams (n 34).

⁴³ See letter from Gustavo Zlauvinen, President-designate of the 2020 NPT Review Conference, 29 March 2020, <<https://www.un.org/sites/un2.un.org/files/letter-from-the-president-designate-20-136nve.pdf>> accessed 24 April 2020.

⁴⁴ See e.g. NPT/CONF.2020/PC.II/WP.30 (n 22) 3; NPT/CONF.2020/PC.III/WP.43 (n 16) 2.

⁴⁵ Preambular paragraph 12, NPT.

⁴⁶ Ford (n 31).

Finally, and most significantly, the US has explicitly framed CEND as an illustration of its commitment to pursuing ‘effective measures’ towards nuclear disarmament under Article VI.⁴⁷ The remainder of this article will analyse this specific assertion and determine whether the US claim can be sustained.

III. The Requirements of Article VI

The NPT remains the most significant nuclear non-proliferation and disarmament instrument ever adopted, and one of the most successful arms limitation instruments of all time.⁴⁸ The treaty represents a ‘Grand Bargain’ struck between the NWS and non-nuclear-weapon states (NNWS), each of which assume a different set of obligations.⁴⁹ Under Article II, the NNWS commit to never receive the transfer of, ‘manufacture or otherwise acquire’ nuclear weapons by any means. In addition, the NNWS are required to negotiate and conclude safeguards agreements with the International Atomic Energy Agency (IAEA) to monitor and ensure that acquired nuclear materials and technology are used only for peaceful purposes.⁵⁰ In exchange for relinquishing the right to acquire nuclear weapons, Article IV reaffirms the ‘inalienable right’ of all states to develop peaceful uses of nuclear energy.

The NWS, for their part, agreed to reciprocal non-proliferation obligations not to transfer ‘to any recipient whatsoever, nuclear weapons or other nuclear explosive devices’, and not to assist or encourage the manufacture of nuclear weapons.⁵¹ Moreover, and most importantly for the purposes of this discussion, Article VI establishes the nuclear disarmament obligations under the NPT applicable to all state parties. Article VI provides 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’.⁵²

⁴⁷ NPT/CONF.2020/PC.III/WP.43 (n 16) 2.

⁴⁸ For a selection of excellent analyses of the NPT, see Joyner (n 2) 3-76; Mohamed I Shaker, *The Nuclear Nonproliferation Treaty: Origin and Implementation, 1959-1979, Volumes I-III* (Oceana Publications, 1980). A useful summary is also provided by Nystuen and Graff Hugo (n 3).

⁴⁹ As noted widely, see e.g. Joyner (n 2) 9; Nystuen and Graff Hugo (n 3) 374; James A Green, ‘India’s status as a Nuclear Weapons Power under Customary International Law’ (2012) 24 *National Law School of India Review* 125, 130.

⁵⁰ Article III, NPT.

⁵¹ Article I, NPT.

⁵² Article VI, NPT (emphasis added).

Thus Article VI imposes three distinct, yet interrelated objectives, which state parties are obliged in good faith to negotiate effective measures towards: first, the cessation of the nuclear arms race at an early date; second, nuclear disarmament; and third, a treaty on general and complete disarmament under strict and international control.⁵³ This article is concerned with the second of these objectives, and more specifically the two-fold test of ‘good faith’ and ‘effective measures’ relating to nuclear disarmament that must be pursued for the purposes of Article VI.

a. ‘Effective Measures’

There has been considerable debate and uncertainty surrounding the meaning of ‘effective measures relating to nuclear disarmament’, and specifically the actions which the NPT requires in order to meet the goal of nuclear disarmament. Unfortunately, Article VI itself provides virtually no indication of precisely what actions would constitute effective measures. Despite efforts by the NNWS to include identifiable steps and measures that should be pursued towards the objective of nuclear disarmament under Article VI,⁵⁴ the NWS were unwilling to accept any precise disarmament obligations, fearing that this would have potentially distracted efforts away from the non-proliferation objectives of the NPT.⁵⁵ Instead, the final ambiguous text of Article VI, which failed to impose any precise measures to be pursued, was adopted as ‘the only solution acceptable to the two super-Powers’.⁵⁶

As a result, the NPT remains deliberately vague in relation to what steps and actions would amount to ‘effective measures’ relating to nuclear disarmament. This stands in contrast with the third objective listed under Article VI, which explicitly requires negotiation on a ‘*treaty on general and complete disarmament under strict and effective international control*’.⁵⁷ Consequently, one could argue that Article VI provides extensive flexibility to its state parties

⁵³ As recognised widely, see e.g. Daniel H Joyner, ‘The Legal Meaning and Implications of Article VI of the Non-Proliferation Treaty’ in Gro Nystuen, Stuart Casey-Maslen and Annie Golden Bersagel (eds), *Nuclear Weapons Under International Law* (Cambridge University Press, 2014) 406; Daniel Rietiker, ‘The Meaning of Article VI Treaty on the Non-proliferation of Nuclear Weapons’ in Jonathan L Black-Branch and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law* (Asser Press, 2014) 52; Monique Cormier and Anna Hood, ‘Australia’s Reliance on US Extended Nuclear Deterrence and International Law’ (2017) 13 *Journal of International Law and International Relations* 3, 26.

⁵⁴ Edwin B Firmage, ‘The Treaty on the Non-Proliferation of Nuclear Weapons’ (1969) 63 *American Journal of International Law* 711, 734.

⁵⁵ As noted by Eedson L M Burns, ‘The Non-Proliferation Treaty: Its Negotiation and Prospects’ (1969) 23 *International Organizations* 788, 802. See also statement by the UK to the same effect, United Kingdom, Eighteen Nation Disarmament Committee, ENDC/PV.295, 21 March 1967, 4 as cited by Shaker (n 48) Vol II, 566.

⁵⁶ Shaker (n 48) Vol II, 572.

⁵⁷ See Article VI, NPT.

to pursue a wide range of measures, both unilateral and multilateral in nature, pursuant to nuclear disarmament. As Joyner notes:

‘The nuclear disarmament clause lacks any reference to a ‘treaty... under strict and effective international control’, suggesting that nuclear disarmament may proceed through other means other than a treaty and need not be subject to international verification. *Article VI thus grants relatively broader flexibility to determine how to meet this obligation* – including, for example, through unilateral measures’.⁵⁸

This approach is also shared by Ford, who argues that a state party

‘might show itself to be satisfying the requirement to “pursue negotiations in good faith on effect measures” *in innumerable ways*: unilateral measures that might catalyse reciprocity or a greater willingness to engage in negotiations among negotiating partners; bilateral or multilateral measures; steps to ease international tensions that produce arms races and make it hard to reduce nuclear arsenals, and so forth’.⁵⁹

According to this view, even unilateral reductions in nuclear stockpiles, alongside a variety of other initiatives, could constitute ‘effective measures’ towards the cessation of the nuclear arms race and nuclear disarmament. In fact, the NWS have been quick to point to unilateral and bilateral agreements including the INF Treaty and New START as evidence of compliance with their obligations under Article VI,⁶⁰ and generally view any reduction in nuclear stockpile numbers, regardless of size, to satisfy the requirement imposed by Article VI.⁶¹ This broad conception of ‘effective measures’ has attracted support from Rietiker, who argues that arms control arrangements can constitute important ‘partial’ disarmament steps.⁶² Kiernan similarly suggests that arms control measures constitute a ‘logical’ partial precursor to complete

⁵⁸ Joyner (n 53) 411 (emphasis added).

⁵⁹ Christopher A Ford, ‘Debating Disarmament: Interpreting Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons’ (2007) 14 *Non-Proliferation Review* 401, 411 (emphasis added).

⁶⁰ Joyner (n 3) 69-71.

⁶¹ As noted by Joyner (n 53) 400.

⁶² Rietiker (n 53) 65.

disarmament.⁶³ Indeed, Bourantonis suggests arms control agreement may therefore be seen as ‘keeping with the spirit and letter of Article VI’.⁶⁴

Joyner however claims that such evidence of compliance provided by the NWS is in fact ‘erroneous and obfuscatory’ and instead represents more limited arms control policies rather than disarmament measures as expressly required by Article VI.⁶⁵ This is a subtle, but highly significant distinction. Quite simply, arms control measures are designed to establish partial, strategically acceptable reductions and limitations on the number of deployed of arms but continue to envision a role of the subject weapon within military strategy and policy. By contrast, disarmament measures form part of a broader programme ‘whose stated object is the complete elimination of their subject weapons from national arsenals’.⁶⁶ While the short-term objectives of both concepts are certainly similar, only measures which facilitate and contribute towards the longer-term objective of the complete elimination of a category of weapons will satisfy Article VI from Joyner’s perspective. Of course, this distinction can be easier to maintain in the abstract than in practice.

A more pragmatic approach is offered by Roscini, who reaches a middle ground which this author finds persuasive. He instead argues that ‘arms control measures are consistent with Article VI *provided that they are the first step* of a good faith process towards the ultimate goal of nuclear disarmament’.⁶⁷ This would seem to offer support for the position advanced by Kiernan and Rietiker, and suggests that the measures that can be adopted pursuant to nuclear disarmament can be relatively broad.⁶⁸ Instead, what is more significant for Roscini is whether a particular measure was adopted in ‘good faith’, with the meaningful intention and purpose of advancing nuclear disarmament. As Roscini states, ‘[i]t appears, in my personal opinion, that arms control measures are consistent with Article VI *provided that they are the first step of a good faith process towards the ultimate goal of nuclear disarmament*’.⁶⁹ In other words, while the effective measures adopted pursuant to Article VI can certainly be broad, what matters is

⁶³ Paul M Kiernan, ‘Disarmament’ Under the NPT: Article VI in the 21st Century’ (2012) 20 *Michigan State International Law Review* 381, 385.

⁶⁴ Dimitrios Bourantonis, ‘The Negotiation of the Non-Proliferation Treaty, 1965-1968: A Note’ (1997) 19 *International History Review* 347, 357.

⁶⁵ Joyner (n 3) 104.

⁶⁶ *ibid*, 102; Sir Clive Rose, ‘Multiple Approaches to Arms Control and Disarmament’ (1982) 38 *The World Today* 422, 422.

⁶⁷ Marco Roscini, ‘On Certain Legal Issues Arising from Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons’ in Ida Caraccioli, Marco Pedrazzi, Talitha Vassalli di Dachenhausen (eds), *Nuclear Weapons: Strengthening the International Legal Regime* (Eleven International Publishing, 2015) 17.

⁶⁸ See Rietiker (n 53) 65; Kiernan (n 63).

⁶⁹ Roscini (n 67) 17.

whether the measure under scrutiny has been adopted in good faith as part of a process towards the goal of nuclear disarmament.

In reality, this approach bears similarity to Joyner's aforementioned position. Although he is reluctant to accept arms control measures as evidence of compliance with Article VI, Joyner argues that Article VI requires each NPT party to pursue in good faith,⁷⁰ negotiation on measures which must relate to 'the complete elimination of nuclear weapons from national arsenals, *or at the very least on effective measures that are part of a policy program* whose stated object is the complete elimination of nuclear weapons from national arsenals', through progressive programmatic steps.⁷¹ In other words, NPT parties will satisfy Article VI if the measure in question is adopted in good faith, with the intention and aim of genuinely advancing complete nuclear disarmament, as opposed to than merely facilitating arms control, strategic-based objectives. This neatly demonstrates that the notions of 'good faith' and 'effective measures' are distinct, yet closely intertwined criteria which a state must show to demonstrate compliance with Article VI.

A final point to consider is that any measures adopted relating to nuclear disarmament must be 'effective', suggesting that the measure in question should be 'successful in producing a desired or intended result'.⁷² In many ways, this is only logical, yet it does highlight that determining the 'effectiveness' is often an outcome-based assessment which much occur with the benefit of hindsight. As such, it is perhaps more prudent to determine whether a new initiative, such as CEND, has the 'potential' to constitute an effective measure for the purposes of Article VI, whilst leaving a more conclusive determination as to its 'actual' effectiveness can only be made at a later stage. That said, it is evident that some measures can immediately be dismissed as ineffective. Koplow, for example, highlights how the Threshold Test-Ban⁷³ and Peaceful Nuclear Explosion Treaties⁷⁴ were 'so permissive that they did not rise to the level of 'effective measure' of nuclear arms control as mandated by article VI'.⁷⁵ In other words, agreements that are merely 'cosmetic or symbolic would not discharge the NPT

⁷⁰ As determined in Section III.b below.

⁷¹ Joyner (n 3) 102-04; Roscini (n 67) 16-17.

⁷² 'Effective', Definition 1 (Lexico Online Dictionary) <<https://www.lexico.com/definition/effective>> accessed 24 April 2020.

⁷³ Treaty on the Limitation of Underground Nuclear Tests (adopted 3 July 1974, entered into force 11 December 1990) 13 ILM 906.

⁷⁴ Treaty on Underground Nuclear Explosions for Peaceful Purposes (adopted 28 May 1976, entered into force 11 December 1990) 1714 UNTS 387.

⁷⁵ David A Koplow, 'Parsing Good Faith: Has the United States Violated Article VI of the Nuclear Non-Proliferation Treaty' (1993) *Wisconsin Law Review* 301, 378, footnote 327 in particular.

obligations’,⁷⁶ and would clearly not be considered either ‘effective’, or as a measure adopted in good faith with the intention of trying to achieve nuclear disarmament as discussed next.⁷⁷

b. The Requirement of ‘Good Faith’ under Article VI

Although effective measures are therefore broad in theory, a more significant issue concerns whether the measure has been pursued and adopted in ‘good faith’. An important debate exists as to whether Article VI establishes a *pactum de negotiando*, a *pactum de contrahendo*, or an obligation which falls somewhere in between.⁷⁸ Although the NWS have generally avoided discussing the precise scope of the obligations contained in Article VI,⁷⁹ the US generally regards nuclear disarmament as an aspirational goal, in contrast to the more concrete and measurable non-proliferation objectives of the NPT.⁸⁰ Indeed, Assistant Secretary Ford in a non-official capacity has previously argued that Article VI only requires states to ‘pursue good faith negotiations towards the article’s stated goals, but they are not legally required – and could not reasonably be legally required – to conclude such negotiations’.⁸¹ Instead, Ford suggests that Article VI imposes a limited obligation to merely try to pursue negotiations,⁸² thereby acknowledging that such negotiations may never take place to begin with.

This position contrasts with the approach taken by the International Court of Justice in the *Nuclear Weapons Advisory Opinion*, where the Court preferred an expansive, or ‘two-fold’ interpretation of Article VI. Here, the Court held that Article VI goes beyond a ‘mere obligation of conduct; the obligation involved here is an obligation to *achieve a precise result* – nuclear disarmament in all its aspects’,⁸³ and that ‘there exists an obligation to *pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament*’.⁸⁴ Many scholars⁸⁵ and

⁷⁶ *ibid.*

⁷⁷ See Section III, b.

⁷⁸ Cormier and Hood (n 53) 28-35 also allude to a similar three-pronged categorisation of the interpretative approaches that exist. For a discussion of these concepts, see generally Hisashi Owada, ‘Pactum de Contrahendo, Pactum de Negotiando’ (2008) *Max Planck Encyclopaedia of International Law*.

⁷⁹ Joyner (n 3) 69-70.

⁸⁰ See e.g. Statement of Christopher A Ford, Assistant Secretary for International Security and Nonproliferation, US Department of State (*Second Session of the Preparatory Committee to the 2020 NPT Review Conference*, 23 April 2018) <https://reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom18/statements/23April_US.pdf> 3, accessed 24 April 2020.

⁸¹ Ford (n 59) 408.

⁸² *ibid.*, 411.

⁸³ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep 226, [99] (*Nuclear Weapons Advisory Opinion*) (emphasis added).

⁸⁴ *Nuclear Weapons Advisory Opinion*, [105(2)(F)] (emphasis added).

⁸⁵ See e.g. Alessandra Pietrobon, ‘Nuclear Power’s Disarmament Obligation under the Treaty on the Non-Proliferation and the Comprehensive Nuclear Test-Ban Treaty: Interactions Between Soft and Hard Law’ (2014) 27 *Leiden Journal of International Law* 169, 179-80.

NNWS have demonstrated support for this more substantive interpretation of Article VI.⁸⁶ However, this interpretation undoubtedly stretches the ordinary meaning of the terms used in Article VI in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties,⁸⁷ which only requires NPT parties to pursue negotiations in good faith in the direction of nuclear disarmament, without explicitly imposing an obligation to achieve nuclear disarmament *per se*.⁸⁸ Moreover, this interpretation also seems flawed when considering the broader context of the NPT. Indeed, when one compares the vague obligation under Article VI with the clear-cut obligation incumbent on each of the NNWS to ‘negotiate *and* conclude’ nuclear safeguard agreements with the IAEA in Article III(4), there is a marked contrast between the precision, clarity and extent of each obligation.⁸⁹

This, however, is not to suggest that Article VI is entirely devoid of any practical purpose. Instead, Article VI is given additional force through the requirement that negotiations should be pursued in ‘good faith’, which operates on two levels: first, good faith when interpreting the terms of the NPT generally; and second, the understanding of good faith during the implementation of the Article VI obligations specifically.⁹⁰ The former reaffirms standard rules of treaty interpretation under Article 31(1) VCLT, and that a treaty’s terms must be interpreted in good faith.⁹¹ This requires, at a minimum, that an interpretation should ‘give some meaning and role’ to the provision in the treaty’s context which ultimately helps ‘fulfil the aims of the treaty’.⁹² As such, the interpretation of all of the NPT provisions should seek to

⁸⁶ See e.g. Statement by Don MacKay, Permanent Representative of New Zealand, on Behalf of the New Agenda Coalition (*Second Session of the Preparatory Committee for the 2010 NPT Review Conference*, 28 April 2008) <[https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/WMD/Nuclear/NPT2010Prepcom/PrepCom2008/delegates%20statements/New%20Zealand%20\(on%20behalf%20of%20NAC\).pdf](https://unoda-web.s3-accelerate.amazonaws.com/wp-content/uploads/assets/WMD/Nuclear/NPT2010Prepcom/PrepCom2008/delegates%20statements/New%20Zealand%20(on%20behalf%20of%20NAC).pdf)> accessed 24 April 2020.

⁸⁷ Articles 31-32, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) establish the primary rules of treaty interpretation.

⁸⁸ Joyner (n 53) 405. See also Ford (n 59) 411; Roscini (n 67) 17-18.

⁸⁹ This point is noted specifically by Roscini, *ibid*, 18.

⁹⁰ Joyner (n 53) 408.

⁹¹ The ICJ has held the VCLT rules on treaty interpretation to be reflective of customary international law, see *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6, [241]; *LaGrand (Germany v United States of America)* [2001] ICJ Rep 466, [99]. For a useful analysis of treaty interpretation in the context of disarmament law, see White (n 3).

⁹² Article 31(1), VCLT (emphasis added).

⁹² Richard Gardiner, *Treaty Interpretation* (2nd ed, Oxford University Press, 2016) 168. Indeed, it has been noted elsewhere that the principle of effectiveness, though not explicitly referenced in either Articles 31 or 32 of the VCLT, informs the principles of good faith and object and purpose during interpretation, see Jean-Marc Sorel and Valérie Boré Eveno, ‘Application and Interpretation of Treaties, Art. 31 1969 Vienna Convention’ in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions of the Law of Treaties* (Oxford University Press, 2011) 817.

give effect to the underlying objects and purposes of the NPT; non-proliferation, ensuring access to the benefits of peaceful nuclear energy and nuclear disarmament.⁹³

The role of good faith and its application to the obligation to negotiate has received some attention by the ICJ. In the *North Sea Continental Shelf Cases*, the Court determined that the requirement of good faith with respect to negotiations means that:

‘the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and *not merely to go through a formal process of negotiations*... they are under an obligation so to conduct themselves that the negotiations are *meaningful*’.⁹⁴

This was similarly reiterated in the *Gabčíkovo-Nagymaros* case, whereby the ICJ noted that ‘the principle of good faith obliges the Parties to apply it [a treaty] in a reasonable way in such a manner that its purpose can be realized’.⁹⁵ Therefore, while the requirement to negotiate in good faith does not impose an obligation upon state parties to reach agreement, the principle does require that ‘serious efforts’ are made towards this end.⁹⁶ In other words, NPT states must ultimately demonstrate a meaningful and ‘genuine intention to achieve a positive result’ towards nuclear disarmament,⁹⁷ and must act ‘to the best of their abilities to observe the treaty stipulations in their spirit and according to their letter’.⁹⁸

The obligation to negotiate in good faith has also been discussed by international tribunals. In the *Lake Lanoux Arbitration*, the arbitral panel suggested that the obligation to negotiate in good faith would be breached in the case of an ‘unjustified breaking off of the discussions, abnormal delays... or in the cases of violation of the rules of good faith’.⁹⁹ This would seem particularly applicable to the case of Article VI given the ‘foot-dragging that has characterised disarmament efforts’ of the NWS so far.¹⁰⁰ Moreover, should any purported negotiations or measures impose additional delays, or perhaps even prevent the achievement

⁹³ Joyner (n 53) 407.

⁹⁴ As noted in *North Sea Continental Shelf Cases* (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*) [1969] ICJ Rep 39, 47-48 (emphasis added).

⁹⁵ *Gabčíkovo-Nagymaros Dam Project* (*Hungary v. Slovakia*) [1997] ICJ Rep 7, [142].

⁹⁶ *Case Concerning Claims Arising out of Decisions of the Mixed Graeco/German Arbitral Tribunal set up under Article 304 in Part X of the Treaty of Versailles* (*Greece v. Federal Republic of Germany*) Decision of 26 January 1972, 47 ILR 418, 57.

⁹⁷ *Delimitation of the Maritime Boundary in the Gulf of Maine Area* (*Canada/United States of America*) [1984] ICJ Rep 246, [87].

⁹⁸ Rietiker (n 53) 58.

⁹⁹ *Lake Lanoux Arbitration* (*France v. Spain*) Award of 16 November 1957, 24 ILR 101, 128.

¹⁰⁰ Joyner (n 53) 409.

of nuclear disarmament, such efforts would undoubtedly constitute bad faith efforts to prolong the attainment of nuclear disarmament.¹⁰¹ In a similar vein, empty gesturing, or mere lip-service efforts in pursuit of Article VI will clearly not satisfy the requirement of good faith in this context.¹⁰²

As a result, Article VI imposes an obligation upon all states parties to meaningfully, ‘proactively, diligently, sincerely and consistently pursue good faith negotiations’,¹⁰³ with the ultimate *aim and intention* – rather than the legal obligation – of achieving nuclear disarmament.¹⁰⁴ This would fall somewhere in between the extreme positions offered by Ford and the ICJ, and more accurately reflects the text of the NPT interpreted according to Article 31 VCLT.¹⁰⁵ Moreover, this approach is also reconcilable with the *travaux préparatoires* of Article VI, recourse to which is permitted by Article 32 VCLT,¹⁰⁶ in which the NWS only agreed to a limited obligation to ‘pursue’ rather than ‘conclude’ negotiations.¹⁰⁷ Naturally, of course, if states parties are in compliance with this good faith obligation to negotiate under Article VI, there will likely be an identifiable ‘trajectory’ towards the achievement of nuclear disarmament in the future.¹⁰⁸

IV. Does CEND Satisfy These Criteria?

In light of the preceding analysis, the following seeks to determine first, whether CEND constitutes an effective measure relating to nuclear disarmament envisaged under Article VI, and second, whether its adoption and implementation by the US was carried out in good faith with the intention of advancing nuclear disarmament. As will become clear, whilst CEND can potentially satisfy the first criterion of ‘effective measures’, it is less conclusive whether the US has acted in good faith to pursue meaningful progress towards nuclear disarmament.

a. CEND as an Effective Measure

¹⁰¹ International Association of Lawyers Against Nuclear Arms and the International Human Rights Clinic of Harvard Law School, ‘Good Faith Negotiations Leading to the Total Elimination of Nuclear Weapons: Request for an Advisory Opinion from the International Court of Justice (Cambridge, MA, 2009) 27.

¹⁰² Cormier and Hood (n 53) 32-33.

¹⁰³ Joyner (n 3) 99.

¹⁰⁴ Roscini (n 67) 22; Cormier and Hood (n 53) 32. A similar conclusion in this regard was reached in the *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, [2011] ICJ Rep 644, [132]-[134].

¹⁰⁵ Roscini (n 67) 19, 22.

¹⁰⁶ Article 32, VCLT can be used to confirm the interpretation reached having applied the general rule under Article 31(1).

¹⁰⁷ As noted by Shaker (n 48) Vol II, 572.

¹⁰⁸ This point was noted by Cormier and Hood (n 53) 33.

As explained above,¹⁰⁹ Article VI is silent on what constitutes an effective measure towards nuclear disarmament, and instead grants flexibility to NPT parties to negotiate or unilaterally adopt a variety of measures towards this objective. Rather than only numerical, irreversible reductions in the number of stockpiled nuclear weapons, it is possible that a wide array of measures could satisfy the nuclear disarmament obligation under Article VI. Arguably the most useful test, advanced by Joyner,¹¹⁰ is that the measure under assessment must form part of ‘a policy program whose stated object is the complete elimination of their subject weapons from national arsenals, through progressive programmatic steps’.¹¹¹

Despite this ambiguity and degree of flexibility, recent NPT Review Conferences have shed some light on possible steps that would constitute effective measures for the purposes of Article VI. Indeed, it has been suggested – at least academically¹¹² – that the ‘Thirteen Practical Steps Towards Disarmament’ adopted at the 2000 NPT Review Conference should be considered as evidence of subsequent agreement amongst state parties regarding the interpretation of the treaty or the application of its provisions’ under Article 31(3)(a) VCLT.¹¹³ As a result, although the Final Documents of NPT Review Conferences do not create binding legal obligations upon NPT states parties, they can provide interpretative clarification as to what state parties meant by the phrase ‘effective measures’, particularly when one considers that the Final Document was adopted by consensus by the attending NPT parties.¹¹⁴ By a similar logic, the broader 64-Point ‘Action Plan’ identified at the 2010 NPT Review Conference may also provide further interpretative guidance.¹¹⁵

However, although this certainly can be valuable in assessing whether a particular initiative constitutes an ‘effective measure’ by conforming to one or more of the identified steps, Ford rightly argues that the ‘13 Steps’:

¹⁰⁹ See Section III.a.

¹¹⁰ And similarly supported by Roscini (n 67) 16-17.

¹¹¹ Joyner (n 53) 413.

¹¹² See for some scholarly support for this position, *ibid*, 411-14; Roscini (n 67) 17. Though conversely, see Mika Hayashi, ‘Article VI of the NPT in Light of the ILC Draft Conclusions on Subsequent Agreements and Practice’ (2020) 22(1) *International Community Law Review* 84. It is worth noting that the US has since withdrawn its support for these steps soon after their adoption, see Statement by J Sherwood McGinnis, Deputy U.S. Representative to the Conference on Disarmament (*Second Session of the Preparatory Committee for the 2005 NPT Review Conference*, 1 May 2003) <https://www.reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom03/2003statements/1May_US.pdf> accessed 24 April 2020.

¹¹³ 2000 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document, NPT/CONF.2000/28, 2000, 14-15 (‘13 Steps’).

¹¹⁴ As noted by Burrus M Carnahan, ‘Treaty Review Conferences’ (1987) 81 *American Journal of International Law* 226, 229.

¹¹⁵ 2010 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, Final Document NPT/CONF/2010.50, Vol. I, 2010; Conclusions and Recommendations, 19-29, particularly Actions 3-22 concerning nuclear disarmament (‘Action Plan’).

‘by their own terms in no way claim to be an exhaustive list in the ways in which states party can satisfy their Article VI obligations... Pursuing fulfilment of the 13 Steps might indeed be a way to demonstrate good faith efforts towards nuclear disarmament and thereby ensure good credentials as a compliant state party... There is, however, no suggestion that these particular steps are the *only* way that compliance can be demonstrated’.¹¹⁶

While this argument is certainly correct, and neither the ‘13 Steps’ nor the ‘Action Plan’ constitute an exhaustive catalogue of all conceivable effective measures relating to nuclear disarmament,¹¹⁷ it remains the case that compliance with these identified measures can represent a ‘yardstick’ to measure and assess state compliance with Article VI.¹¹⁸ There is certainly some indication that CEND conforms to some of these identified steps.

As well as identifying tangible steps to reduce nuclear weapons numbers or prohibit the production of fissile material,¹¹⁹ both the ‘13 Steps’ and the ‘Action Plan’ similarly emphasise the variety of possible measures which would demonstrate compliance with Article VI. Most notable for present purposes, Step 9 and Action 5 encourages the NWS to take steps towards nuclear disarmament ‘in a way that *promotes international stability*’. Furthermore, and in relation to recognising the need to improve international stability, Step 9(2) and Action 5(g) emphasise the importance of taking additional steps to ‘further enhance transparency and increase mutual confidence’ between the nuclear weapon states. Considering the underlying purpose of CEND,¹²⁰ it seems reasonable to conclude that the initiative closely aligns with these identified Steps and Actions to promote transparency amongst the NWS, alongside the need to proceed with nuclear disarmament in a way which improves international stability. In other words, one could argue that CEND constitutes a measure which conforms to and ultimately implements the aforementioned steps reached by consensus by the NPT state parties in both the 2000 ‘13 Steps’ and 2010 ‘Action Plan’, and may therefore be indicative of US compliance with Article VI.

¹¹⁶ Ford (n 59) 412 (emphasis added).

¹¹⁷ Joyner (n 53) 412 also accepts the non-exhaustive nature of the measures under the ‘13 Steps’ and the ‘Action Plan’.

¹¹⁸ *ibid*; Roscini (n 67) 17; International Association of Lawyers Against Nuclear Arms and the International Human Rights Clinic of Harvard Law School (n 103) 29.

¹¹⁹ Indeed, a Fissile Material Cut-Off Treaty is recognised as a key disarmament measure by Step 3, and Actions 15-6.

¹²⁰ See Section II.

In addition, although the NPT text itself is silent on what effective measures towards disarmament should be pursued, the US has explicitly sought to frame CEND as situated within the NPT framework.¹²¹ Indeed, the US has highlighted how the NPT preamble notes the need to further ease international tension and strengthen trust between states ‘in order to facilitate the cessation of the manufacture of nuclear weapons’ and achieve the ‘liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons’.¹²² This suggests that the US has specifically aimed to situate the nuclear disarmament obligation under Article VI within the entire context of the NPT.¹²³ As a result, the CEND initiative amounts to an effective measure by easing international tensions in order to facilitate nuclear disarmament as required by the NPT preamble, and thus constitutes an effective measure relating to nuclear disarmament for the purposes of Article VI. In many ways, this reflects the approach taken in relation to the Comprehensive Nuclear Test-Ban Treaty.¹²⁴ In the case of the CTBT, the need to achieve the ‘discontinuance of all test explosions of nuclear weapons’ was similarly identified as a non-binding objective to be pursued in the NPT preamble,¹²⁵ and has since been regarded as perhaps the most significant effective measures towards nuclear disarmament under Article VI.¹²⁶

As well as amounting to a measure envisaged with the NPT process, there are further indications that CEND has been effective in practice too. The UK, for example, has suggested that the initiative provides a ‘fresh’ perspective for states to find ‘new angles from which we can approach familiar problems’ which presently impede progress on nuclear disarmament.¹²⁷ This alludes to the value of the ‘Creating an Environment Working Groups’ forum and discussions held so far, moving away from the sterility of present discourse which is plaguing the Conference on Disarmament, and NPT Review Conference process. This view is also shared by Williams, who argues that while ‘current institutions underpinning the global nuclear

¹²¹ See e.g. NPT/CONF.2020/PC.II/WP.30 (n 22) 3; NPT/CONF.2020/PC.III/WP.43 (n 16) 2.

¹²² Preambular paragraph 12, NPT.

¹²³ A consideration which is also reflected in Article 31(1), VCLT, which notes the importance of considering a treaty’s context when interpreting the meaning of its provisions.

¹²⁴ Comprehensive Nuclear-Test-Ban Treaty GA Res 50/245, UN Doc A/RES/54/254 (17 September 1996, adopted 10 September 1996), which adopted Draft Comprehensive Nuclear-Test-Ban Treaty GA Res 50/1027 UN Doc A/50/1027 (26 August 1996) (CTBT).

¹²⁵ Preambular paragraph 11, NPT.

¹²⁶ See e.g. Step 1 and Action 10 of the 2000 and 2010 NPT Review Conference Final Documents respectively as clear examples of this. Many commentators have also emphasised the inextricable link between the NPT and CTBT, see generally Pietrobon (n 86); Jenifer Mackby, ‘The NPT-CTBT Connection’, in Jonathan L Black-Branch and Dieter Fleck (eds), *Nuclear Non-Proliferation in International Law – Volume V* (Asser Press, 2020).

¹²⁷ Statement by the Aidan Little, Representative of the United Kingdom (*Conference on Disarmament, Plenary Session*, 26 March 2019) <[https://www.unog.ch/80256EDD006B8954/\(httpAssets\)/8D1F196AD2E2D2AAC12583CB004301FB/\\$file/20190326+UK+statement+\(CEND+panel+discussion\).pdf](https://www.unog.ch/80256EDD006B8954/(httpAssets)/8D1F196AD2E2D2AAC12583CB004301FB/$file/20190326+UK+statement+(CEND+panel+discussion).pdf)> accessed 24 April 2020.

order are not fit for purpose’, the CEND initiative can serve ‘a practical purpose of generating new ideas for promoting nuclear disarmament and reducing nuclear risks’.¹²⁸

Moreover, commentators in attendance at both ‘Creating an Environment Working Groups’ in Washington and the UK have expressed their general satisfaction with the discussions held, specifically in relation to the openness of participating states, freedom of the discussion, and the absence of ‘finger-pointing’ amongst the delegations.¹²⁹ This is likely due to the use of the Chatham House Rule during the discussions, which undoubtedly helped encourage transparency and build confidence amongst the NWS on sensitive issues with the awareness that such discussions and information shared would remain anonymous outside of the forum. Moreover, the informal nature of CEND discussion also avoids the repetitive and counter-productive exchange of pre-prepared statements in the Conference on Disarmament, where states generally talk past one another and side-step any meaningful discussions of the practicalities of reducing nuclear risks and developing beneficial disarmament measures.¹³⁰

As a result, CEND certainly has the potential to amount to an effective measure towards nuclear disarmament envisaged by Article VI in theory, as its present operationalisation has so far shown. The confidence-building nature of the discussions can certainly help address some of the obstacles that face collective progress towards nuclear disarmament. This, along with the underlying objectives of improving transparency, trust and confidence between the NWS in particular, aligns with the envisaged measures that which have been identified in the Final Document of NPT Review Conferences, which further suggests that CEND is firmly rooted within the NPT itself. As such, whilst CEND can constitute an effective measure for the purposes Article VI, precisely how much of a positive impact the initiative can have in revitalising additional progress and steps towards nuclear disarmament remains to be seen.

b. In Good Faith?

What is undoubtedly more debateable and less certain is whether the US has both adopted and implemented CEND in good faith, with the genuine intention and aim of meaningfully, proactively and diligently advancing the goal of nuclear disarmament.¹³¹ Before proceeding, a brief caveat is in order. Given that CEND is an initiative launched by the US as an ‘illustration

¹²⁸ Williams (n 34).

¹²⁹ Potter (n 27).

¹³⁰ A point similarly noted by Caleb Yip, ‘Advancing Nuclear Disarmament in an Increasingly Dangerous World’ (*DIPNOTE: US Department of State Official Blog*, 21 August 2019) <<https://www.state.gov/advancing-nuclear-disarmament-in-an-increasingly-dangerous-world/>> accessed 24 April 2020.

¹³¹ The standard of good faith noted in Section III.b.

of its commitment to pursuing “effective measures” on disarmament within the meaning of Article VI of the NPT’,¹³² the discussion below focuses specifically on the actions, statements and practice of the US in relation to CEND. In other words, the purpose of this Article – and Section – is not to determine whether other NWS such as Russia and China are acting in good faith as so required by Article VI by considering their response to an involvement in the initiative, but rather whether the US has acted in good faith through its adoption and implementation of CEND so far.

There are some reasons why one could claim that CEND represents a legitimate attempt to pursue an effective measure towards nuclear disarmament in good faith. First, if the US is genuinely of the opinion that it cannot make any additional progress towards its nuclear disarmament obligations in the present international security environment, the endorsement and promotion of CEND could reasonably be considered a legitimate attempt to address existing impediments to nuclear disarmament and should therefore be rightfully applauded.¹³³ In effect, its adoption could indicate a ‘good faith’ step by the US to try and address what it perceives to be the largest hurdle impeding nuclear disarmament progress, rather than simply standing by without making effort to address such challenges.

Moreover, the discussions held within the Creating the Environment Working Group sessions can also demonstrate the good faith implementation of CEND by the US. Rather than the discussions being US-led, the dialogue so far has emerged organically among participating delegations, reaching natural points of consensus relating to the challenges facing disarmament.¹³⁴ More importantly however, this demonstrates a willingness of the US to listen to the interests and concerns of other states, both nuclear and non-nuclear, and incorporate such concerns into the discussions to be held.¹³⁵ Taken together, this suggests that CEND could constitute a ‘meaningful’, good faith measure that demonstrates a ‘willingness to compromise’ on the part of the US, which provides ‘a unique opportunity for bridge-building’ amongst NPT parties.¹³⁶

¹³² NPT/CONF.2020/PC.III/WP.43 (n 16) 2.

¹³³ As noted by Lyndon Burford, Oliver Meier, and Nick Ritchie, ‘Sidetrack or Kickstart? How to Respond to the US Proposal on Nuclear Disarmament’ (*Bulletin of the Atomic Scientists*, 19 April 2019) <<https://thebulletin.org/2019/04/sidetrack-or-kickstart-how-to-respond-to-the-us-proposal-on-nuclear-disarmament/#.XL3kRhmrTbc.twitter>> accessed 24 April 2020. The authors similarly point to the fact that the US has at least tried to adopt a new approach to identify and address these existing hurdles.

¹³⁴ Heather Williams @heatherwilly (Twitter, 10 July 2019) <<https://twitter.com/heatherwilly/status/1148933112044371969>> accessed 24 April 2020.

¹³⁵ An indication of good faith noted within the *North Sea Continental Shelf Cases* (n 96) 47.

¹³⁶ As suggested by Williams (n 136).

In addition, it is possible that CEND could instigate additional ‘good faith’ measures over time, depending on the nature of the dialogue that takes place and the future ambitions of the initiative. If the initiative subsequently identifies deliverable solutions to address the underlying challenges preventing further disarmament progress,¹³⁷ the discussions which take place would likely be more akin to negotiations, carried out diligently, cooperatively, and constructively with a view to reaching conclusions on future effective measures towards disarmament.¹³⁸ In other words, as well as constituting an effective measure adopted in good faith itself by addressing the security challenges impeding process on disarmament, CEND could provide a useful forum outside of the stagnated Conference on Disarmament to pursue further nuclear disarmament related measures. Such an outcome would certainly demonstrate good faith efforts by both the US, and all participants in the initiative, but of course is dependent upon whether the US intends CEND to naturally develop into a negotiating forum.

However, there are many reasons to question the sincerity of the US promotion of the initiative. To begin, although the initiative positively aims to address growing geopolitical tensions which present hamper progress on nuclear disarmament, the US has conveniently, and somewhat unsurprisingly, failed to acknowledge its own contribution towards the deterioration security environment through its withdrawal from arms control instruments including the JCPOA and INF Treaty,¹³⁹ and its recent uses of military force against Iran.¹⁴⁰ In its 2018 Working Paper – which outlined the initiative – the US advanced approximately 15 conditions that needed to be improved before disarmament could feasibly progress.¹⁴¹ Each of these ‘conditions’ clearly aligns with US-centred security interests, such as the threat posed by Russian and Chinese nuclear weapon modernisation efforts, the possible proliferation of

¹³⁷ Which Christopher Ford has recently noted was a potential possibility at the now postponed 2020 NPT Review Conference, see Christopher A Ford, Assistant Secretary for the Bureau of International Security and Nonproliferation, ‘Moving Forward with the CEND Initiative’ (*Wilton Park*, 20 November 2019) <<https://www.state.gov/moving-forward-with-the-cend-initiative/>> accessed 24 April 2020.

¹³⁸ Thus, satisfying the standard posed by Joyner (n 53) 410; Joyner (n 3) 99.

¹³⁹ See (n 9) – (n 11).

¹⁴⁰ Recently for example, the US conducted a targeted strike directed against Qassem Soleimani, leader of Iran’s Quds Force. See for a discussion of this attack, Special Rapporteur Agnes Callamard, ‘Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/HRC/44/38, 29 June 2020; Mary Ellen O’Connell, ‘The Killing of Soleimani and International Law’ (*EJIL: Talk!* 6 January 2020) <<https://www.ejiltalk.org/the-killing-of-soleimani-and-international-law/#more-17808>> accessed 24 April 2020; Patryk I Labuda, ‘The Killing of Soleimani, the Use of Force against Iraq and Overlooked Ius Ad Bellum Questions’ (*EJIL: Talk!* 13 January 2020) <<https://www.ejiltalk.org/the-killing-of-soleimani-the-use-of-force-against-iraq-and-overlooked-ius-ad-bellum-questions/#more-17824>> accessed 24 April 2020.

¹⁴¹ See generally NPT/CONF.2020/PC.II/WP.30 (n 22) See for a useful discussion of these conditions, Rebecca D Gibbons, ‘Can This New Approach to Nuclear Disarmament Work?’ (*War on the Rocks*, 23 January 2019) <<https://warontherocks.com/2019/01/can-this-new-approach-to-nuclear-disarmament-work/>> accessed 24 April 2020.

nuclear weapons in Iran, and North Korea's nuclear and ballistic missile-related activities.¹⁴² Although the US has gradually adopted a more inclusive view of other states' security interests – a move which should rightly be praised as a good faith effort to compromise and listen to the concern of other NWS and NNWS – it could be suggested that the underlying purpose of CEND remained centred upon addressing US security concerns, instead of analysing and addressing common challenges shared amongst the international community of states which make nuclear weapons dependency essential.

Moreover, although the US views CEND as an effort to ease international tensions as called for by the NPT preamble through constructive, open and fruitful dialogue,¹⁴³ these stated intentions are not reflected in its statements and discussions with other NWS outside of 'Creating the Environment Working Groups'. For example, in a statement delivered to the UN General Assembly First Committee in October 2019, the US began by referencing CEND, repeating the idea that a constructive exchange of dialogue 'can lead to real, tangible progress in the field of nuclear disarmament'.¹⁴⁴ Yet just a few paragraphs later, the statement turns its attention towards Russia and China, claiming somewhat antagonistically that both states

'are expanding their arsenals and engaging in activities *that impede our ability to make progress on disarmament*. They are revisionist in their aims and bent on deploying new, destabilizing weapons. If this trend continues, China's and Russia's increasing military might *will eventually provide them with the means to dismantle* the liberal democratic order'.¹⁴⁵

The statement continues along this line of rhetoric, blaming Russia for the INF Treaty's demise, and China's lack of transparency in relation to its own nuclear weapons programme.¹⁴⁶ A further statement released just days later again played the 'blame-game', pointing the finger once more at both Russia and China as bearing a 'large part' of the responsibility for the demise

¹⁴² NPT/CONF.2020/PC.II/WP.30 (n 22) 2-3.

¹⁴³ See Section II.

¹⁴⁴ Thomas G DiNanno, Deputy Assistant Secretary and Senior Bureau Official, Bureau of Arms Control, Verification and Compliance, US Department of State (Statement delivered to the 2019 UN General Assembly First Committee, 10 October 2019) <http://reachingcriticalwill.org/images/documents/Disarmament-fora/1com/1com19/statements/10Oct_US.pdf> accessed 24 April 2020.

¹⁴⁵ *ibid*, 2.

¹⁴⁶ *ibid*, 2-3.

of the international security environment.¹⁴⁷ Regardless of the accuracy of the claims,¹⁴⁸ this hostile rhetoric clearly runs counter to the purported objective of CEND to reduce international tensions and promote transparency amongst NWS. The fact that the US fails to endorse its own aims of constructive discussion elsewhere indicates a lack of sincerity and inconsistency when supposedly implementing CEND in good faith as required by Article VI.

Furthermore, and particularly worrisome, in adopting CEND, the US has dismissed the continued applicability of identified measures including the ‘13 Steps’ and ‘Action Plan’ by claiming that the traditionally endorsed ‘step-by-step’ approach to nuclear disarmament has failed,¹⁴⁹ and cannot progress any further in today’s security environment.¹⁵⁰ This disassociation with, and abandonment of the step-by-step approach traditionally endorsed by both the US and its NATO allies further reinforces the concerns of sceptics that CEND is merely empty rhetoric which risks delaying the implementation of previously identified disarmament measures reached by consensus.¹⁵¹ Having said this, one could claim that the primary objective of CEND is focused on addressing real challenges preventing disarmament, rather than striding for aspirational, and ultimately unachievable outcomes endorsed through the ‘13 Steps’ and ‘Action Plan’.¹⁵² In this sense, the realistic approach taken through CEND intends to achieve reasonable pragmatic outcomes, as opposed to simply wishing for ambitious efforts to materialise at some distant stage in the future.

One could also persuasively argue that CEND represents little more than a ‘fig leaf’ attempt to demonstrate compliance with Article VI and an effort to offset complaints by the NNWS that the NWS have made little to no progress towards nuclear disarmament in recent years.¹⁵³ This point gains additional traction when one considers the timing of the initiative’s

¹⁴⁷ See generally, Statement of Ambassador Robert A Wood, Delegation of the United States of America (United Nations General Assembly First Committee, 22 October 2019) <<http://statements.unmeetings.org/media2/21999515/usa.pdf>> accessed 24 April 2020.

¹⁴⁸ Analysts have noted that both Russia and China are updating and in the latter case expanding their nuclear forces, see Hans M Kristensen and Matt Korda, ‘Russian Nuclear Forces, 2020’ (2020) 76(2) *Bulletin of the Atomic Scientists* 102; Hans M Kristensen and Matt Korda, ‘Chinese Nuclear Forces, 2019’ (2019) 75(4) *Bulletin of the Atomic Scientists* 171. At the same time, however, the US is equally expanding its nuclear forces and capabilities, see Hans M Kristensen and Matt Korda, ‘United States Nuclear Forces, 2020’ (2020) 76(1) *Bulletin of the Atomic Scientists* 46.

¹⁴⁹ As noted by Tariq Rauf, ‘The NPT at 50: Perish or Survive?’ (2020) 50 *Arms Control Today* 12, 13; Daryl G Kimball, ‘Addressing the NPT’s Midlife Crisis’ (2020) 50 *Arms Control Today* 3.

¹⁵⁰ Paul Meyer, ‘Creating an Environment for Nuclear Disarmament: Striding Forward or Stepping Back?’ (2019) 49 *Arms Control Today* 6, 8.

¹⁵¹ Tariq Rauf, ‘Thoughts on the 74th Anniversary of the Hiroshima Nagasaki Attacks’ (*Atomic Reporters*, 12 August 2019) <<http://www.atomicreporters.com/2019/08/creating-the-conditions-and-environment-to-never-disarm/>> accessed 24 April 2020.

¹⁵² This point is made by Ford (n 31).

¹⁵³ Gibbons (n 143); Emily B Landau and Shimon Stein, ‘New US Initiative: Creating an Environment for Nuclear Disarmament (CEND)’ (*Institute for National Security Studies*, 13 June 2019)

launch, quickly following the recent negotiation of the Treaty on the Prohibition of Nuclear Weapons in July 2017,¹⁵⁴ but also preceding the now postponed tenth NPT Review Conference initially scheduled for May 2020.¹⁵⁵ Landau and Stein, for example, have suggested that the adoption of CEND may have occurred as an attempt to ‘counter the momentum created in the past two years by the Treaty on the Prohibition of Nuclear Weapons and as an effort to alleviate the pressures and criticism that will accompany the 2020 Review Conference’.¹⁵⁶ In addition, it also remains uncertain whether the US will actively encourage the participation of TPNW supporting states within the CEND process. Failure to do so would question the legitimacy of CEND by ignoring the legitimate security concerns of the NNWS which led to the adoption of the TPNW in the first place.¹⁵⁷

Furthermore, and in relation to the previous point, there is a genuine risk that the CEND process may offer an opportunity for the NWS to advance justifications for the continued retention of nuclear weapons in the present day while marginalising discussions on how best to move towards nuclear disarmament.¹⁵⁸ In other words, the conditions narrative behind CEND would merely create an excuse for the NWS to do nothing at all.¹⁵⁹ Applying the *Lake Lanoux* approach discussed previously,¹⁶⁰ the initiative may constitute a bad faith measure because in reality the US is simply seeking to prolong, and unjustifiably delay efforts towards nuclear disarmament.¹⁶¹

Finally, and perhaps most significantly, it has been suggested by critics that the CEND initiative aims to impose additional criteria or ‘conditions’ which must be satisfied before progress on disarmament can be achieved.¹⁶² Although the US has attempted to dismiss these fears,¹⁶³ it has similarly recognised that the ‘conditions’ rhetoric will require NPT states to accept additional commitments ‘beyond’ its legally-binding treaty obligations established by Article VI.¹⁶⁴ While the US references the need to improve international stability in the NPT

<https://www.inss.org.il/publication/new-us-initiative-creating-environment-nuclear-disarmament-cend/> accessed 24 April 2020.

¹⁵⁴ Treaty on the Prohibition of Nuclear Weapons, UN Doc A/CONF.229/2017/8, 7 July 2017 (TPNW).

¹⁵⁵ Both of these points are alluded to by Brad Roberts, ‘On Creating the Conditions for Nuclear Disarmament: Past Lessons, Future Prospects’ (2019) 42 *The Washington Quarterly* 7.

¹⁵⁶ A similarly point is raised by Landau and Stein (n 153).

¹⁵⁷ A point similarly made by Burford, Meier, and Ritchie (n 135).

¹⁵⁸ Abbasi (n 35).

¹⁵⁹ Tomoko Kurokawa, ‘How to Overcome the Impasse on Nuclear Disarmament: An Interview with Thomas Countryman’ (2019) 2 *Journal for Peace and Nuclear Disarmament* 586, 603.

¹⁶⁰ *Lake Lanoux Arbitration* (n 101) 128.

¹⁶¹ As noted by Gibbons (n 143).

¹⁶² Burford, Meier, and Ritchie (n 135).

¹⁶³ See e.g. Thompson (n 30).

¹⁶⁴ NPT/CONF.2020/PC.II/WP.30 (n 22) 3.

preamble to support its stated illustration of compliance with its nuclear disarmament obligation, Article VI itself does not set any requirement or condition that international security conditions should be relatively stable before disarmament may proceed.¹⁶⁵ Although a treaty's preamble forms part of its context for the purposes of treaty interpretation, the preamble cannot be used in a manner which contradicts the plain meaning of the text established.¹⁶⁶ As a result, the imposition of further 'conditions' distorts the obligation in Article VI, and may unjustifiably delay efforts nuclear disarmament contrary to the requirement of good faith.

Moreover, this 'conditions' rhetoric requirement an improved security environment before nuclear disarmament can progress ignores the simple fact that further steps towards nuclear disarmament may itself offer a 'major contribution to the lessening of risks and international enmity'.¹⁶⁷ Indeed, by turning a blind eye to this possibility, the US fails to acknowledge the benefits and mutual confidence-building that would stem from further multilateral, or even bilateral reductions in nuclear weapon stockpiles. This risks repeating the same problems facing the proposed Middle East NWFZ, where Egypt has consistently argued that disarmament can facilitate peace, whilst Israel conversely claims that any progress on realising a NWFZ will be the result of achieving peace in the region.¹⁶⁸ The unfortunate result of these polarising positions, however, is that no progress has been made for decades in addressing this 'insurmountable hurdle', as neither side is willing to admit the logic of the others argument.¹⁶⁹ In light of this precedent, one can convincingly argue that it is simply be utopian thinking and unrealistic to suggest that nuclear disarmament progress must wait until a perfect, Kantian vision of perpetual peace emerges.¹⁷⁰ Instead, improving international security conditions and advancing nuclear disarmament form two sides of the same coin, and must therefore progress in tandem.

V. Conclusion

There are good reasons to be sceptical about whether CEND constitutes an effective measure adopted and implemented by the US in good faith pursuant to Article VI. While the initiative

¹⁶⁵ As noted by Joyner (n 3) 100.

¹⁶⁶ See Article 31(2), VCLT; Max H Hulme, 'Preambles in Treaty Interpretation' (2016) 164 *University of Pennsylvania Law Review* 1281.

¹⁶⁷ Burford, Meier, and Ritchie (n 135).

¹⁶⁸ Shadeling (n 20); Roscini (n 20).

¹⁶⁹ Landau and Stein (n 155).

¹⁷⁰ A point made by Ireland during the 2019 NPT PrepCom, see Statement of Ireland (2019 Preparatory Committee Meeting of Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 2 May 2019) <http://reachingcriticalwill.org/images/documents/Disarmament-fora/npt/prepcom19/statements/2May_Ireland.pdf> 2, accessed 24 April 2020.

could constitute an effective measure because it has so far encouraged discourse that may ultimately lead to nuclear disarmament progress over time, there are valid concerns as to whether the initiative has been adopted in good faith by the US, with the meaningful intention of advancing nuclear disarmament. This is particularly true when one considers both the history of NWS compliance with Article VI, alongside recent actions and performance of the NWS in relation to nuclear disarmament efforts and the deteriorating security environment more generally.¹⁷¹ Instead, the classification of CEND as an ‘effective measure’ bares all the hallmarks of a lip-service attempt to demonstrate compliance with Article VI in light of the recently adopted TPNW, and the now postponed NPT Review Conference in May 2020. Moreover, initiative also risks prolonging the negotiation of other identified measures under the 13 Steps and Action Plan and imposes additional conditions that must be addressed before nuclear disarmament can progress. All of these concerns forces one to question whether the US has adopted CEND in good faith to advance nuclear disarmament. Consequently, whilst CEND could theoretically constitute an effective measure which would demonstrate compliance with Article VI, the underlying motives and intentions behind the initiative raises questions as to whether the US has adopted CEND in good faith to pursue nuclear disarmament.

¹⁷¹ Similarly noted by George Perkovich, ‘Will You Listen? A Dialogue on Creating the Conditions for Nuclear Disarmament’ (*Carnegie Endowment for International Peace*, 2 November 2018) <<https://carnegieendowment.org/2018/11/02/will-you-listen-dialogue-on-creating-conditions-for-nuclear-disarmament-pub-77614>> accessed 24 April 2020.