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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THE REPUBLIC OF THE MARSHALL ISLANDS,	Case No. 4:14-cv-01885-JSW
Plaintiff,	**Motion to Dismiss**
v.	Hearing Date: September 12, 2014 Time: 9:00 A.M.
THE UNITED STATES OF AMERICA, *et al.*,	Courtroom: Oakland Courthouse, Courtroom 5 – 2nd Floor, 1301 Clay Street Oakland, CA 94612
Defendants.	

NOTICE OF MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on September 12, 2014, or as soon thereafter as the matter may be heard before the Honorable Jeffrey S. White, in the District Court for the Northern District of California, in Courtroom 5–2nd Floor, Defendants will and hereby do move to dismiss the claims presented in Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12, and based upon the arguments presented in the accompanying memorandum of law, other briefing, and such other arguments presented at the hearing.

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SUMMARY OF ARGUMENT

Plaintiff, the Republic of the Marshall Islands, alleges that the United States has breached its obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT"). For several reasons, this lawsuit should be dismissed.

First, plaintiff has failed to allege that it has suffered a concrete injury caused by defendants' actions that is redressable by this Court. *See Johnson v. Weinberger*, 851 F.2d 233, 235 (9th Cir. 1988).

Second, plaintiff's request that this Court declare that the United States "is in continuing breach of the obligations under Article VI of the [NPT]" and order the United States to "***call[] for and conven[e]*** negotiations for nuclear disarmament in all its aspects," Compl. at 28, is barred by the political question doctrine. *See Earth Island Inst. v. Christopher*, 6 F.3d 648, 650, 653 (9th Cir. 1993).

Third, Article VI of the NPT, a provision regarding negotiations among States, is not self-executing, and it does not provide a cause of action that would permit suit in federal court. *See Medellin v. Texas*, 552 U.S. 491, 505 (2008); *see also Cornejo v. Cnty. of San Diego*, 504 F.3d 853, 861 (9th Cir. 2007).

Fourth, venue is improper in this district pursuant to 28 U.S.C. § 1391(e)(1). *Cf. Wilson v. Dep't of the Army*, No. 3:13-cv-643-H (WVG), 2013 WL 6730281, Slip Op. at *1 (S.D. Cal. Dec. 19, 2013).

Finally, the statute of limitations, laches, and the public interest preclude the remedy that plaintiff requests. *See Apache Survival Coal. v. United States*, 21 F.3d 895, 905 n.12, 905-06 (9th Cir. 1994); *Wild Fish Conservancy v. Salazar*, 688 F. Supp. 2d 1225, 1233 (E.D. Wash. 2010).

INTRODUCTION

Plaintiff alleges that the United States has breached its obligations under Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT" or "Treaty") by allegedly failing to pursue in good faith negotiations on nuclear disarmament. Plaintiff requests that this Court declare the United States in breach of its Treaty obligations and order the United States to call for and convene, within one year from the Court's judgment, negotiations on nuclear disarmament. For the reasons stated in the summary of argument and further explained below, plaintiff's claims are not cognizable in this Court and the remedy it seeks is not one this Court can, or should, provide. If plaintiff believes the United States has breached its treaty obligations, it may pursue the issue as a matter of foreign relations, rather than trying to manufacture a cause of action in federal court.

STATEMENT OF ISSUES

1. Does plaintiff have standing to raise its claims?

2. Is plaintiff's request that this court direct negotiations on nuclear disarmament barred by the political question doctrine?

3. Is the NPT self-executing and, if so, does it provide a private cause of action?

4. Is venue proper in this district?

5. Is plaintiff entitled to raise its claims after failing to file suit for almost two decades after acceding to the NPT?

BACKGROUND

The NPT entered into force in 1970, and at present 189 States are party to the treaty. *See* Department of State, Nuclear Nonproliferation Treaty, *at* http://www.state.gov/t/isn/npt/. According to the Report accompanying the Senate's resolution of advice and consent to

ratification, the NPT's "fundamental purpose is to slow the spread of nuclear weapons by prohibiting the nuclear weapon states which are party to the treaty from transferring nuclear weapons to others, and by barring the nonnuclear-weapon countries from receiving, manufacturing, or otherwise acquiring nuclear weapons." Treaty on the Non-Proliferation of Nuclear Weapons, S. EX. REP. 91-1 at 1 (1969).

Plaintiff, having acceded to the Treaty in 1995, *see* Compl. ¶ 13, has sued the United States in this Court alleging that the United States has failed to comply with Article VI of the Treaty. Plaintiff simultaneously filed complaints against the United States and several countries in the International Court of Justice, *see* ICJ Press Release (Apr. 25, 2014), *at* http://www.icj-cij.org/docket/files/159/18302.pdf, making similar claims. Article VI provides that "[e]ach 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." *See* Compl. ¶ 6. Plaintiff requests a declaratory judgment that the United States has breached this obligation, as well as injunctive relief requiring the United States to, *inter alia*, "***call[] for and conven[e]*** negotiations for nuclear disarmament in all its aspects" within one year. *Id*. at 28.

ARGUMENT

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

The constitutional separation of powers, as embodied in Article III of the Constitution, restricts the subject matter jurisdiction of the federal courts to the resolution of specific "'cases' and 'controversies'" and prevents courts from taking action to address matters better suited to legislative or executive action. *Allen v. Wright*, 468 U.S. 737, 750 (1984). One manifestation of the "case or controversy" limitation is the requirement of "standing." *Warth v. Seldin*, 422 U.S.

490, 498–99 (1975) (internal quotation mark omitted). Standing entails three elements: "injury in fact, causation, and redressability." *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The plaintiff bears the burden of establishing each of the three elements. *See Defenders of Wildlife*, 504 U.S. at 561.

Plaintiff alleges two injuries in its Complaint to support its standing. First, plaintiff asserts that the "failure" of the United States to "honor its Article VI commitments . . . leaves Plaintiff Nation exposed to the dangers of existing nuclear arsenals and the real probability that additional States will develop nuclear arms." Compl. ¶ 92. Such a generalized and speculative fear of the potential danger of nuclear proliferation does not constitute a concrete injury required to establish injury in fact. *See Johnson v. Weinberger*, 851 F.2d 233, 235 (9th Cir. 1988) ("Inferences concerning the uncertain and indefinite effects of the nation's strategic defense policy are, at best, speculative."); *Pauling v. McElroy*, 278 F.2d 252, 254 (D.C. Cir. 1960) (holding that plaintiffs lacked standing in suit to enjoin nuclear testing because the alleged injury was shared in common with "all mankind.").

In addition, even assuming a concrete injury, plaintiff has not established causation or redressability. The United States is not the only State with nuclear weapons, and the United States alone cannot therefore be identified as the source of plaintiff's purported injury.[1] Moreover, it is entirely speculative whether, should this Court declare the United States in breach of its Article VI obligations and order the United States to call for and convene negotiations for

[1] Indeed, plaintiff's claim that the United States is the cause of its purported injury is particularly unfounded in light of the fact that the United States has undertaken, pursuant to the Amended Compact of Free Association, "full authority and responsibility for security and defense matters in or relating to the Republic of the Marshall Islands," and is obligated to defend the RMI and its people from attack or threats of attack "as the United States and its citizens are defended." *See* Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, tit. 3 art. 1, § 311, 117 Stat. 2720, 2820 (2003).

nuclear disarmament, any other nuclear weapon state would agree to participate in such negotiations, let alone whether such a conference would lead to the cessation of the nuclear race or nuclear disarmament. *See* Compl. ¶ 93; *see also Gonzales v. Gorsuch*, 688 F.2d 1263, 1267 (9th Cir. 1982) (citing *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 263-64 (D.C. Cir. 1980) (holding that the invalidation of an international agreement would not redress injury because relief depended on the conduct of a foreign sovereign)).

Plaintiff's second allegation in support of its standing—that it has been denied the "benefit of its Treaty bargain" —is similarly incapable of redress by this Court. Compl. ¶ 92. Whatever the nature of that benefit, this Court could not provide relief that would remedy that alleged harm because such a remedy necessarily depends on the actions of other State Parties to the Treaty not before this Court.[2] What plaintiff actually wants is an advisory opinion that would allow it to "determine its next steps in pursuit of the grand bargain represented by the Treaty." *Id*. ¶ 93. This Court lacks jurisdiction to issue such an opinion. *See, e.g., MacCaulay v. U.S. Foodservice, Inc.*, 152 F. Supp. 2d 1229, 1230 (D. Nev. 2001) ("It is improper for a United States District Court to express advisory opinions about what an agency within the executive branch will do or require.").

II. Plaintiff's Request for this Court to Dictate United States Negotiations Regarding Nuclear Disarmament Is Prohibited by the Political Question Doctrine

Plaintiff urges this Court to declare that the United States "is in continuing breach of the obligations under Article VI of the [NPT] to pursue negotiations in good faith" and to order that the United States "take all steps necessary to comply with its obligations under Article VI . . . within one year of the date of this Judgment, including by ***calling for and convening***

[2] In fact, the named defendant agencies are not even responsible for leading U.S. negotiations with foreign states concerning nuclear proliferation.

negotiations for nuclear disarmament in all its aspects." Compl. at 28. Such negotiations, in plaintiff's view, would occur "as required and within the construct contained in the foregoing Declaratory Judgment." *Id.*

In sum, plaintiff seeks an order (1) declaring the United States in breach of its obligations under a multilateral international treaty, (2) requiring the United States to conduct "in good faith" multilateral negotiations with foreign States, including the specific remedy of calling for and convening negotiations on nuclear disarmament "in all its aspects," and (3) requiring such negotiations to take place within "one year of the date of this Judgment" and within the "construct" set forth by this Court (presumably under the threat of contempt sanctions should the Court deem the negotiations insufficient).

In light of the principles set out in *Baker v. Carr*, 369 U.S. 186, 208-26 (1962), it is difficult to conceive of a case that is less suited for judicial resolution than the present one. "The most appropriate case for applicability of the political question doctrine concerns the conduct of foreign affairs." *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659, 665 (N.D. Cal. 2002); *see also Chi. & S. Air Lines v. Waterman S.S. Corp. Civil Aeronautics Bd.*, 333 U.S. 103, 111 (1948). Indeed, "[i]t 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." *Kwan v. United States*, 84 F. Supp. 2d 613, 623 (E.D. Penn. 2000); *see also Antolok v. United States*, 873 F.2d 369, 379 (D.C. Cir. 1989); *Holmes v. Laird*, 459 F.2d 1211, 1220, 1220 n.61 (D.C. Cir. 1972) (collecting cases); *Z & F Assets Realization Corp. v. Hull*, 114 F.2d 464, 471 (D.C. Cir. 1940).

As an initial matter, an order of this Court declaring the United States in violation of its international Treaty obligations would squarely contradict, and interfere with, the position of the United States that it is "in compliance with all its obligations under arms control,

nonproliferation, and disarmament agreements and commitments." Department of State, Adherence to and Compliance With Arms Control, Nonproliferation, and Disarmament Agreements and Commitments (2013), *at* http://www.state.gov/t/avc/rls/rpt/2013/211884.htm#part1npt (last visited July 18, 2014); *see also Spectrum Stores Inc. v. Citgo Petroleum Corp*., 632 F.3d 938, 951 (5th Cir. 2011); *Smith v. Reagan*, 844 F.2d 195, 199 (4th Cir. 1988); *Z&F Assets*, 114 F.2d at 471.

Moreover, even if this Court deemed it proper to decide whether the United States is in breach of its international obligations, it would have no standards by which it could determine, *inter alia*, the framework for future negotiations, or decide whether future negotiations would be sufficient. *See, e.g.*, *Smith*, 844 F.2d at 200 ("The Hostage Act is broad and open-ended. . . . Each of these nebulous directives vests extraordinary discretion in the executive."). Indeed, this Court's involvement in the NPT regime and multilateral disarmament negotiations could have myriad unanticipated consequences. For example, the arbitrary "one year" timeframe sought by plaintiff or the absence of nations not before this Court would present entirely new variables to confront in negotiations.

Echoing these concerns, the Ninth Circuit previously declined to exercise such authority in a similar context. In *Earth Island Institute v. Christopher*, 6 F.3d 648, 650, 653 (9th Cir. 1993), the Ninth Circuit held that plaintiffs' request for an order requiring the Executive to "initiate treaty negotiations" is "not one that is justiciable in any federal court." According to the Ninth Circuit, "[t]he statute's requirement that the Executive initiate discussions with foreign nations violates the separation of powers, and this court cannot enforce it." *Id*. at 652.

Accordingly, this case presents a political question that is not justiciable in federal court.

III. The NPT Is Not Self-Executing And Does Not Provide a Private Cause of Action

Plaintiff's claims should also be dismissed because Article VI of the NPT is not self-executing and thus may not be directly enforced in United States courts. In addition, the NPT does not provide a private cause of action.

"A treaty is, of course, 'primarily a compact between independent nations,'" and, as such, "[i]t ordinarily 'depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.'" *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)). "'If these [interests] fail, its infraction becomes the subject of international negotiations and reclamations . . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress.'" *Id.*

Courts address the question of whether a treaty is directly judicially enforceable by determining whether it is self-executing, with the Supreme Court having made it clear that a "non-self-executing" treaty "does not by itself give rise to domestically enforceable federal law," but rather "depends upon implementing legislation passed by Congress." *Id*. Courts determine whether a treaty is self-executing by examining the text of a treaty, its "negotiation and drafting history . . . as well as 'the postratification understanding' of signatory nations." *Id*. at 507 (quoting *Zicherman v. Korean Air Lines Co*., 516 U.S. 217, 226 (1996)). The understandings of the President and the Senate at the time of ratification are also essential to determining whether the treaty was intended to be self-executing. *See id*. at 526. "It is . . . well settled that the United States' interpretation of a treaty is entitled to great weight." *Id.* at 513 (internal quotation omitted).

There is no intent expressed in the text of Article VI, the ratification history of the NPT, or its post-ratification understanding that Article VI is self-executing. Article VI provides that

the "Parties to the Treaty undertake[] 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." 21 U.S.T. 483. And the preamble to the Treaty notes the "intention" of the parties "to achieve . . . the cessation of the nuclear arms race and to undertake effective measures in the direction of nuclear disarmament," towards which the "cooperation of all States" is "[u]rg[ed]." *Id.*

Such language does not suggest that Article VI was intended to be enforced in federal courts. Indeed, Article VI "is . . . silent as to any enforcement mechanism" in the event of non-compliance. *Medellin*, 552 U.S. at 508. Accordingly, Article VI "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). "In other words, [Article VI of the NPT] reads like 'a compact between independent nations' that 'depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it.'" *Medellin*, 552 U.S. at 508-09 (quoting *Head Money Cases*, 112 U.S. at 598); *see also Bond v. United States*, 134 S. Ct. 2077, 2084 (2014); *Head Money Cases*, 112 U.S. at 599; *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

The intent of the Senate in ratifying the Treaty confirms this conclusion. Because the issue of judicial enforcement of Article VI of the NPT was not a central feature of the ratification debate, the record lacks any indication that Article VI was intended to be enforceable in domestic courts. To the contrary, when the issue of the legal effect of the treaty was raised, Senator Fulbright, Chair of the Committee on Foreign Relations, explained that, should Congress later abrogate the treaty, the "infraction becomes the subject of international negotiations and

reclamations . . . . *It is obvious that with all this the judicial courts have nothing to do and can give no redress*." 115 Cong. Rec. 6204 (1969) (internal quotations omitted) (emphasis added).

The post-ratification history of the NPT also supports the conclusion that Article VI is not self-executing. Indeed, in conjunction with the fourth review conference on the NPT in 1990, the Senate agreed to a concurrent resolution to "reaffirm the support of the parties for the objectives of the NPT" and to express the sense of the Senate that the treaty has been of great use to the United States. *See* 136 Cong. Rec. S9303-02 (daily ed. June 28, 1990). In presenting the concurrent resolution, its sponsor expressly indicated that "[t]he NPT is not self-executing." 136 Cong. Rec. S7152-01 (daily ed. June 5, 1990). Rather, "[s]ignatories must actively pursue policies in favor of nonproliferation and monitor developments closely if the treaty is to succeed." *Id*.

Indeed, despite multiple conferences on the NPT post-ratification, there has been no indication that the United States or any of the other State Parties contemplated any domestic enforcement mechanism for alleged violations of the Treaty. Rather, State Parties have specifically indicated that "concerns over compliance with any obligation under the Treaty by any State Party should be pursued through diplomatic means." 2010 Review Conference, Final Document at 3, *available at* http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2010/50 (VOL.I) (last visited July 18, 2014).

Even if this Court finds that the NPT is self-executing, further inquiry would be needed to determine whether it creates a private cause of action that provides for the enforcement of the treaty by individuals in federal court. *See Serra v. Lappin*, 600 F.3d 1191, 1197 (9th Cir. 2010); *Cornejo v. Cnty. of San Diego*, 504 F.3d 853, 856 (9th Cir. 2007). "Whether or not aptly

characterized as a 'presumption,' the general rule is that [i]nternational agreements, even those directly benefiting private persons, generally 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).

Unlike other agreements that could be interpreted to provide a private cause of action, Article VI of the NPT concerns only negotiations between nation States. *See id.* at 861 ("The Vienna Convention on Consular Relations is an agreement among States whose subject matter-'Consular Relations'-is quintessentially State-to-State."). Accordingly, Article VI does not provide a cause of action that would permit plaintiff to enforce the Article in federal court.

Because plaintiff has failed to identify either a right that is enforceable by a federal court or a cause of action to enforce the alleged right, this case should be dismissed.[3]

IV. Venue Is Improper in this District

Under 28 U.S.C. § 1391(e)(1), venue for civil actions brought against the agencies of the United States and their employees in their official capacities is proper in any judicial district in which "(A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action." The burden

[3] The Declaratory Judgment Act provides neither a substantive basis for relief nor a cause of action. *See, e.g.*, *Bisson v. Bank of Am.*, 919 F. Supp. 2d 1130, 1139 (W.D. Wash. 2013). And because judicial review under the Administrative Procedure Act ("APA") is dependent on other substantive sources of law, the APA does not provide a cause of action for enforcement of a non-self-executing treaty. *See Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 943 (D.C. Cir. 1988); *De La Torre v. United States*, No. C 02-1942 CRB (consolidated), 2004 WL 3710194 (N.D. Cal. Apr. 14, 2004) (unreported). Plaintiff's Complaint does not state an APA claim. Instead, it simply identifies the APA as the waiver of sovereign immunity to permit suit—an issue that has caused division in this Circuit. *See Villegas v. United States*, 926 F. Supp. 2d 1185, 1207 (E.D. Wash. 2013). However, the requirements of the APA, including (but not limited to) its limitation on challenges to discrete or final agency action, would preclude APA relief.

of demonstrating that venue is satisfied resides with plaintiff. *AJZN, Inc. v. Yu*, 12-CV-03348-LHK, 2013 WL 97916 at *1 (N.D. Cal. Jan. 7, 2013).

Plaintiff argues that "[d]efendant, the United States of America, is deemed to reside in this district because it is subject to this Court's personal jurisdiction in this action." Compl. ¶ 27 (citing 28 U.S.C. § 1391(c)(2)). However, that analysis improperly conflates the venue provision for the federal government (§ 1391(e)) with the venue provision for corporations and other like entities (§ 1391(c)(2)). "Venue determinations for federal and non-federal defendants are separate," *Rogers v. Civil Air Patrol*, 129 F. Supp. 2d 1334, 1338 (M.D. Ala. 2001) (quoting *National Ass'n of Life Underwriters v. Clarke*, 761 F.Supp. 1285, 1293 (W.D. Tex. 1991)), and the requirements in § 1391 (b) and (c) are of no consequence in a case in which each defendant is a government official or agency. Although section 1391(c), which had previously applied to corporations only, was amended in 2011 to extend to unincorporated associations and like entities, Federal Courts Jurisdiction and Clarification Act of 2011, Pub. L. 112-63, Title II, § 202, 125 Stat. 788 (2011), the purpose of the amendment was to "restore the parity of treatment contemplated in *Denver & Rio Grande* [*W. R.R. Co. v. Bhd. of R.R. Trainmen*, 387 U.S. 556 (1967)]," in which "the Court ruled that unions were to be treated like corporations for Federal venue purposes." H.R. REP. NO. 112-10 at *21 (2011).

The expansion of section 1391(c) to apply to unions, unincorporated associations, and like entities has no bearing on the venue statute applicable to the federal government. To hold otherwise would be to render any subsection other than 1391(e)(1)(A) wholly irrelevant, as the United States would be subject to suit regardless of the location of real property or the residence of a plaintiff. *See Reuben H. Donnelley Corp. v. F.T.C.*, 580 F.2d 264, 267 (7th Cir. 1978) ("To hold that a federal agency can be sued . . . wherever it maintains an office would, as a practical

matter, render [the remaining subsections of section 1391(e)] superfluous."); *Kings Cnty. Econ. Cmty. Dev. Ass'n v. Hardin*, 333 F. Supp. 1302, 1304 (N.D. Cal. 1971). Thus, despite the revision to subsection 1391(c)(2), courts have continued to hold that agencies headquartered in Washington, D.C., are residents of the District of Columbia. *See, e.g., Wilson v. Dep't of the Army*, No. 3:13-cv-643-H (WVG), 2013 WL 6730281, Slip Op. at *1 (S.D. Cal. Dec. 19, 2013); *see also Exxon Corp. v. DOE*, No. Civil CA-3-78-0420-W (consolidated),1979 WL 1001 at *2 (N.D. Tex. June 1, 1979) (unreported).[4]

Plaintiff next asserts that venue is proper because "a substantial part of the events or omissions giving rise to the claims occur or occurred in this District," based on the assertion that the National Nuclear Security Administration has a "nuclear weapons lab" in this district. Compl. ¶¶ 28-30. However, it is unclear how that fact bears anything more than a tangential relationship to this case when plaintiff's claims are based on an alleged failure to conduct international negotiations, and plaintiff states expressly that it "is not requesting that the U.S. be compelled toward unilateral disarmament." *Id*. ¶ 103.

Accordingly, venue is improper in this district, and this case should be dismissed.

V. This Court Cannot, And Should Not, Grant Plaintiff Its Requested Relief After Failing to Raise Its Claim in Federal Court for Almost Two Decades

Pursuant to 28 U.S.C. § 2401(a), "all civil actions against the United States must be filed within six years after the right of action first accrues," *i.e.* when 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). Here, plaintiff alleges that "[m]ore than 44 years have passed . . . and the U.S. has not pursued negotiations in good

[4] The National Nuclear Security Administration ("NNSA") is headquartered within DOE in Washington, D.C. *See* NNSA, Contact Us, *at* http://nnsa.energy.gov/contactus.

faith." Compl. ¶ 63. Indeed, plaintiff alleges that the "early date" for negotiations "has long since passed." *Id*. Moreover, plaintiff acceded to the treaty in 1995, *id*. ¶ 13, yet almost two decades passed before plaintiff chose to file suit.

Plaintiff suggests that the United States is in "continuing breach of the treaty." Compl. at 14. However, the alleged "continuation" of the purported wrong does not entitle plaintiff to delay unreasonably in pursuit of a legal remedy. Indeed, "[p]laintiff['s] interpretation . . ., taken to its logical end, suggests a *de facto* elimination of any statute of limitation, for the limitation period would never begin to accrue." *Wild Fish Conservancy*, 688 F. Supp. 2d at 1236; s*ee also Citizens Legal Enforcement & Restoration v. Connor*, 762 F. Supp. 2d 1214, 1229-30 (S.D. Cal. 2011); *Gros Ventre Tribe v. United States*, 344 F. Supp. 2d 1221, 1229 n.3 (D. Mont. 2004).

Even if the statute of limitations did not bar plaintiff's claim, this Court should still refuse to grant the requested relief. "A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest." *Eccles v. Peoples Bank of Lakewood Vill., Cal.*, 333 U.S. 426, 431 (1948); *see also Wilton v. Seven Falls Co*., 515 U.S. 277, 282 (1995). Here, the issuance of declaratory (and associated injunctive) relief would be contrary to the public interest, as it would risk interfering with the efforts of the Executive Branch in the foreign and military arenas, where discussions regarding the appropriate steps in support of nuclear disarmament are ongoing. Indeed, the next review conference on the NPT is scheduled for 2015 at the United Nations in New York, and, as always, the matter of efforts under Article VI will be the subject of discussion among the multitude of State Parties.

The inequity of a declaratory judgment in the present case is highlighted by the fact that the NPT has been in force since 1970, *see supra* at 1, that plaintiff acceded to the treaty in 1995,

Compl. ¶ 13, and that the International Court of Justice issued the ruling on which plaintiff heavily relies in 1996, *id*. ¶ 43. Plaintiff should not now be permitted to raise its claims in disruption of the diplomatic context that has prevailed for a generation. *See Apache Survival Coal. v. United States*, 21 F.3d 895, 905 n.12, 905-06 (9th Cir. 1994) ("We note that a declaratory judgment, because it is equitable in nature, can be barred by laches.").

CONCLUSION

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

Dated: July 21, 2014

Respectfully submitted,

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2014, I electronically filed the foregoing document and accompanying proposed order with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the counsel of record in this matter who are registered on the CM/ECF system.

/s/ Eric R. Womack
ERIC R. WOMACK