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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

THE REPUBLIC OF THE MARSHALL ISLANDS, A NON-NUCLEAR-WEAPON STATE PARTY TO THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS,

Plaintiff,

v.

THE UNITED STATES OF AMERICA; et. al.,

Defendants.

No. 14-CV-01885-JSW

OPPOSITION TO MOTION TO DISMISS

Hon. Jeffrey S. White
Hearing: September 12, 2014; 9:00 a.m.
Oakland Courthouse
Courtroom 5—2nd Floor
1301 Clay Street
Oakland, CA 94612

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SUMMARY OF ARGUMENT

Plaintiff asks this Court to interpret the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT") and resolve the dispute over whether the U. S. is currently complying with it. As recently confirmed, the judicial duty to "say what the law is" may involve challenges to Executive conduct involving foreign affairs. *Zivotofsky v. Clinton*, 132 S.Ct. 1421 (2012). Defendants cite no case that bars this suit and the Court should deny Defendants' motion.

First, as an NPT *signatory*, Plaintiff has sufficiently pled standing. *Jamaica v. U.S.*, 770 F.Supp. 627 (M.D. Fla. 1991) (as a party, a foreign country has standing to assert a treaty breach).

Second, political question doctrine does not bar this case. *See Japan Whaling v. Am. Cetacean*, 478 U.S. 221, 230 (1986) (court interprets law even where "[a] decision may have significant political overtones"); *Zivotofsky*, 132 S.Ct. at 1428 (for a valid law, the U.S. "must be ordered to compl[y] . . . political question doctrine is not implicated"); *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006) (Executive breached Geneva Conventions); *Jewel v. NSA*, 673 F.3d 902, 912 (9th Cir. 2011); *EEOC v. Peabody*, 400 F.3d 774, 784 (9th Cir. 2005) (courts "regularly review the actions of federal agencies to determine whether they comport with applicable law"); *Ala. v. U.S.*, 84 F.3d 410 (11th Cir. 1996) (court determines if Executive breached duty to negotiate in good faith). Defendants' reliance on *Earth Island Inst. v. Christopher*, 6 F.3d 648 (9th Cir. 1993), is in error. Decided before *Zivotofsky*, *Earth Island* also concerned the constitutionality of statutory directives to the President. *Id.* But Defendants have never claimed the NPT is unconstitutional; and Article VI reflects the Executive's own binding obligation.

Third, NPT Article VI is self-executing. The Article VI obligation runs from the Executive to other NPT parties and no legislation is required to make that obligation effective. *Cook v. U.S.*, 288 U.S. 102, 119 (1933); Restatement (3d) Foreign Relations § 111(4). Article VI's pre-ratification history and post-ratification practice also support this conclusion. Defendants' cases concern, generally, third party treaty rights and pose no bar here.

Fourth, venue is pled sufficiently under 28 USC §1391: (i) the entity defendants are deemed to reside here; and (ii) U.S. nuclear vertical proliferation occurs at the Livermore Lab in this district.

Finally, Defendants, who have the burden of proof, have not proven this suit untimely. *See, e.g.*, *Citizens Legal Enforcement v. Connor*, 540 F. App'x.587, 588 (9th Cir. 2013).

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I. STATEMENT OF ISSUES.

1. Whether Plaintiff, as a party to the NPT, has sufficiently pled standing to assert a breach of it.

2. Whether the narrow political question doctrine bars Count III at this pleading stage.

3. Whether Article VI legally binds the U.S. with respect to other NPT parties.

4. Whether Plaintiff has sufficiently pled venue.

5. Whether Defendants have proven, as an affirmative defense, that the claims are untimely.

If the Court *sua sponte* finds material any issues not raised by Defendants, Plaintiff respectfully requests briefing thereon.

II. LEGAL STANDARD.

Defendants do not challenge Count I, but challenge Counts II and III facially. They cite no subpart of Rule 12 or its legal standards. For both a Rule 12(b)(1) facial challenge and a Rule 12(b)(6) motion, the Court must construe the Complaint in favor of Plaintiff and assume all well pled facts are true. *Leite v. Crane*, 749 F.3d 1117, 1121 (9th Cir. 2014); *Aschroft v. Iqbal*, 556 U.S. 662 (2009).

III. STATEMENT OF FACTS.

The RMI, a party to the NPT, asks this Court to interpret NPT Article VI (Count I), apply facts to determine if the U.S. is in compliance with it (Count II) and, if not, order the U.S. to comply with it (Count III). Comp. ¶¶ 3, 6, 13, 23, 93, 97, 102. Plaintiff does not, as Defendants argue, ask the Court to "direct" negotiations, or "decide whether *future* negotiations would be sufficient." *Cf.* Motion to Dismiss ("MTD") p. 1, 6 *with* Comp. ¶ 59. In acceding to the NPT in 1995, the RMI bargained for the U.S. duty to negotiate for the elimination of nuclear weapons. *Id.* ¶¶ 38-39, 45, 70, 92 (describing "grand bargain" made by NPT parties). In 2010, the U.S. committed unequivocally to comply with Article VI. *Id.* ¶ 52.

Nevertheless, in 2013 the U.S. initiated new vertical proliferation plans. *Id.* ¶¶ 66-70, 83, 60 (Weston Decl. at ¶¶ 11-12, 20). Recently, moreover, the U.S. (i) stated that compliance with Article VI is conditioned on improved nonproliferation results by non-NPT parties, *id.* ¶ 84, and (ii) opposed in 2012 proposals to take forward multilateral disarmament negotiations. *Id.* ¶ 78. U.S. officials also recently stated that nuclear disarmament is now "only worth pursing in so far as it increases national security," and that nuclear disarmament is "not something that could happen in today's world." *Id.* ¶¶ 77, 82. Article VI, by its express terms, is not discretionary; the U.S. *must* engage in good faith

negotiations. *Id.* ¶¶ 38-40. The U.S. is not engaging in good faith negotiations under Article VI. *Id.* ¶¶ 80, 85, 87, 102, 60 (Weston at ¶¶ 9, 12, 24, 28, 32). No other legal venue exists for resolution of this dispute. *Id.* ¶¶ 9, 31, 46.

IV. ARGUMENT: THE COURT SHOULD DENY DEFENDANTS' MOTION

A. Plaintiff has Sufficiently Pled Standing.

Like any treaty, the NPT is an agreement among nations, each of which has standing to assert a breach. *See Jamaica*, 770 F.Supp. at 630, n.6 ("[a]s a contracting party to the treaty, Jamaica has standing to assert its claim that the treaty has been violated"); *U.S. v. Tapia-Mendoza*, 41 F.Supp.2d 1250, 1253 (D. Utah 1999) ("signatory nations generally have standing to enforce treaty provisions"). Defendants' argument to the contrary misconstrues the "injury, causation and redressability" analysis from *Lujan v. Def. of Wildlife*, 504 U.S. 555 (1992). Plaintiff's harm is that of a party that has honored its NPT obligations but is not receiving the *quid pro quo* of good faith disarmament negotiations promised by the U.S. Comp. ¶¶ 38, 39, 45, 70, 78, 92. This harm is caused by the actions and inactions of the U.S. and would be redressed by the U.S. conforming its conduct to the declaratory and injunctive relief Plaintiff seeks.[1] *Id.* ¶ 92-93. Defendants can point to no court that has denied standing to a party to an agreement alleging a current breach. Instead, Defendants' inapposite cases involve rights "pervasively shared" by "all mankind." *Johnson v. Weinberger*, 851 F.2d 233, 235 (9th Cir. 1988). *See also Pauling v. McElroy*, 278 F.2d 252, 254 (D.C. Cir. 1960). The rights asserted here arise under the NPT and are held only by NPT state parties, who bargained for those rights.[2] No more is needed to establish Plaintiff's standing.

Additionally, Defendants ignore the substantial body of law that applies where a claimed injury is procedural in nature, so that "normal standards for redressability and immediacy" need not be met. *Mass. v. EPA*, 549 U.S. 497, 517-18 (2007). Instead, a plaintiff has standing "if there is some possibility that the requested relief will prompt the injury-causing party to reconsider." *Id.* at 518; *Ctr. for Food*

[1] If, as Defendants imply, U.S. breach of Article VI causes no harm, then the NPT would be at risk for failure of legal consideration, which the U.S. has never alleged. *See* Comp. ¶¶ 38, 45, 70.

[2] Defendants wrongly assert that U.S. breach of the NPT could cause no harm because the U.S. defends Plaintiff under the Compact of Free Association. MTD p.3, n.1. But in the Compact, the U.S. confirms that it will act "in accordance with the principles of international law and the Charter of the United Nations." Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, § 311(c), 177 Stat. 2720, 2820 (2003); 48 USC §1921(b). The Compact does not relieve the U.S. of NPT obligations.

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Safety v. Vilsack, 2010 WL 3835699, *3 (N.D. Cal. 2010) ("some uncertainty about redressability and causality is allowed") *citing Lujan*, 504 U.S. at 573, n.7. A plaintiff asserting a procedural injury need not show that the procedure would have yielded a different result, but only that the procedure "was connected to the substantive result." *Mass. v. EPA*, 549 U.S. at 518, *citing Sugar Cane Growers v. Veneman*, 289 F.3d 89, 94-95 (D.C. Cir. 2002).

Defendants' arguments are similar to those that the Supreme Court rejected in *Mass. v. EPA*, 549 U.S. 497, and *FEC v. Akins*, 524 U.S. 11 (1998).[3] The *Akins* plaintiffs' voting injury resulting from non-disclosure of PAC donors was surely no more concrete than Plaintiff's injury resulting from the increased nuclear threat caused by the U.S. refusal to negotiate. And, just as greenhouse gases from other nations did not defeat standing based on the increased risk of global warming caused by the U.S. in *Mass. v. EPA*, so too do the existence of other nuclear states not defeat causation and redressability for standing here. *Mass. v. EPA*, 549 U.S. at 526. *See also Vill. of Arlington v. Metro. Housing*, 429 U.S. 252, 261 (1977) (affirming standing to challenge conduct, notwithstanding other uncertainties that still exist). Importantly, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion dismiss, [courts] presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S.at 561 (internal citations, quotation marks, and alterations omitted). And, as a separate factual matter, and contrary to Defendants' unsupported claim, participation of other nations is not speculative. *See, e.g.*, Comp. ¶ 78 (regarding U.S. refusal in 2012 to participate in negotiations; of 182 votes, only the U.S. and three other nations voted to oppose the negotiations. UN Doc A/67/PV.48, pp 20-21).[4]

This case is in stark contrast to *Greater Tampa Chamber v. Goldschmidt*, 627 F.2d 258 (D.C. Cir. 1980), cited by Defendants. The *Goldschmidt* plaintiffs sought to invalidate an executive agreement between the U.S. and the U.K., which they alleged diminished the air service to and from the U.K. *Id*. at 258. Given the U.K.'s sovereign rights over its airspace, the court concluded that the redress of

[3] The U.S.'s failure to negotiate denies Plaintiff the procedure to which it is entitled under the NPT. In *Akins* and *Mass. v. EPA*, Congress created by statute the right to a procedure. Here, the NPT parties created the right. Following Senate consent and ratification, the right became law. *See* Const. Art. VI, Sec. 2.

[4] *See also* J. Burroughs & J. Cabasso, Introduction, *in Nuclear Disorder or Cooperative Security* 6 (2007), *available at:* http://wmdreport.org/ndcs/online/ (the U.S. "is the decisive actor in setting the tone and agenda on nuclear weapons and related international security matters.").

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plaintiffs' injury required not only the invalidation of the agreement, but the U.K.'s willingness to enter into a new one, and plaintiffs conceded that the U.K. was unwilling to do so. *Id.* at 263. Here, Plaintiff's injury would be redressed by U.S. adherence to its NPT obligations irrespective of the actions of others, because Plaintiff would receive the benefit of its bargain *from the U.S.* Likewise, *Gonzales v. Gorsuch*, 688 F.2d 1263 (9th Cir. 1982) is no bar. In *Gonzales*, the court describes several circumstances in which redressability is lacking, such as where "the requested relief will actually worsen the plaintiff's position." *Id.* at 1267. None of the *Gonzalez* circumstances, however, are present here.

Finally, Defendants' "advisory opinion" argument is a red herring. *See MacCaulay v. U.S. Foodservice, Inc.*, 152 F.Supp.2d 1229 (D. Nev. 2001) (advisory opinion where tax code interpretation is reviewable by Tax Court). Plaintiff does not seek reviewable advice; it seeks injunctive and declaratory relief to redress a current dispute as to the meaning of Article VI, and a current U.S. breach. Defendants' adherence to that relief will inform Plaintiff's next steps and provide Plaintiff with a measure of the conduct it contracted for under the NPT. Comp. ¶¶ 93, 97, 102.

B. The Narrow Political Question Doctrine Does Not Bar this Suit at the Pleading Stage.

Defendants cite no case where any court extended the political question doctrine to bar a dispute between treaty parties, and this Court should not do so. *See Baker v. Carr*, 369 U.S. 186, 211 (1962) (it is "error to suppose that every controversy which touches foreign relations lies beyond judicial cognizance."). Interpreting the NPT under Count I "is emphatically the province and duty of the judicial department." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353-54 (2006); Restatement (3d) Foreign Relations § 326, n.3 (1987) ("courts have been clear . . . that interpretation of a treaty for purposes of a case before them is a legal and not a political question").[5] Likewise, Executive compliance under Counts II and III is properly before this Court. *Hamdan*, 548 U.S. at 613 (Executive breached "the four Geneva Conventions" and lower court abstention "was not appropriate."); *Boumediene v. Bush*, 553 U.S. 723, 741, 745 (2008) (no political question in habeas case against the President; "judiciary has the duty and authority to call the Executive branch to account.").

[5] Were this not so, "judicial recognition of an executive power to decide, by presidential fiat, that certain treaty interpretation issues are non-justiciable would destroy the balance between the executive and judicial branches . . . ." D. Sloss & D. Jinks, *Is the President Bound by the Geneva Conventions*? 90 Cornell L.Rev. 97, 185 (2004).

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In *Baker*, the Court identified six factors to determine whether a question is "political" in nature. *Baker*, 369 U.S. at 217. Plaintiff will show in the first through fourth paragraphs below why the six factors do not bar this suit, then explain why Defendants' remaining cases and arguments are inapposite.

First, authority to resolve this case is not textually committed to the Executive, but to the judiciary. *See* Const. Art. VI, Sec. 2 ("[t]his constitution, and the laws of the United States . . . and *all* treaties made . . . under the authority of the United States shall be the supreme *law* of the land . . . .) (emphasis added); *id.* Art. III ("[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, . . . [and to] Controversies to which the United States shall be a Party."). As held in *Japan Whaling*, 478 U.S. at 230, courts have an Article III duty to interpret treaties even where they involve foreign relations issues. Faced with an argument similar to Defendants, the Supreme Court recently clarified the political question doctrine in *Zivotofsky*, 132 S.Ct. 1421. There, the U.S. argued that whether the Executive must comply with a statute and stamp a passport with "Israel" was a nonjusticiable political question because the requested relief could contradict express U.S. foreign policy with Israel. The Supreme Court disagreed, finding lower courts had confused constitutionality with justiciability:

> [T]he Judiciary has a responsibility to decide cases properly before it, even those it "would gladly avoid." Our precedents have identified a narrow exception to that rule, known as the "political question" doctrine. We have explained that a controversy "involves a political question . . . where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" . . . Resolution of [this] claim demands careful examination of the textual, structural, and historical evidence put forward by the parties . . . . This is what courts do. The political question doctrine poses no bar . . . .

Id. at 1427, 1430 (citations omitted). Defendants cite no provision of the Constitution that textually commits this dispute to the political branches; indeed there is none.

Second, NPT Article VI expressly requires "negotiations in good faith" so the standard is "discoverable." *See, e.g., U.S. v. Munoz-Flores*, 495 U.S. 385, 395-96 (1990) ("[s]urely a judicial system capable of determining when punishment is 'cruel and unusual,' when bail is '[e]xcessive,' when searches are 'unreasonable,' and when congressional action is 'necessary and proper' . . . is capable of making the more prosaic judgments . . . ."). A claim is nonjusticiable if governed by *no discoverable* standard. *See Alperin v. Vatican Bank*, 410 F.3d 532, 552-53 (9th Cir. 2005) (Dismissal of WWII looting

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claims on political question grounds reversed: "Courts must ask whether they have the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.' . . . [L]itigation management difficulties [do] not mean that courts 'lack . . . judicially discoverable and manageable standards'"). The good faith standard, "turning as it does on objective reasonableness, should not be difficult to apply." *U.S. v. Leon*, 468 U.S. 897, 924 (1984). *See also Ala. v. U.S.*, 84 F.3d 410 (11th Cir. 1996) (federal court will determine whether Executive breached obligation to negotiate in good faith with state); Restatement (2d) Contracts §205, Comment d (in good faith standard, subjective belief is not at issue; good faith is breached even though an actor believes her conduct justified.); Comp. ¶¶ 54-57,60 (Weston ¶ 11-12). Novel claims do not render nonjusticiable those standards that "are well developed, although they have not often been applied to these facts." *LA County Bar v. Eu* 979 F.2d 697, 702 (9th Cir. 1992) (novel analysis not removed from "institutional competence of the judiciary").

Third, by ratifying the NPT, the U.S. already made the initial policy decision to obligate the Executive to negotiate in good faith on disarmament and cessation of the nuclear arms race. Thus, this Court need not "make an explicit or implicit policy determination that [U.S. conduct under the NPT] is a good or a bad thing." *Wang v. Masaitis*, 416 F.3d 992, 996 (9th Cir. 2005).[6] Deciding whether the Executive follows the law is not a policy decision. *Cf. Glenn v. Rumsfeld*, 2006 WL 515626, *5 (N.D. Cal. 2006) (whether Executive complied with its own regulations is justiciable and does not require review of government's reasons for conduct); *U.S. v. Decker*, 600 F.2d 733 (9th Cir. 1979) (whether U.S. conduct violated treaty with Canada was justiciable); *EEOC v. Peabody*, 400 F.3d 774, 784 (9th Cir. 2005) (courts "regularly review the actions of federal agencies to determine whether they comport with applicable law").

Fourth, the last three *Baker* factors carry less weight – indeed, they were absent in the *Zivotofsky* analysis – and none bar this case. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion); *Alperin*, 410 F.3d at 545-46 (descending importance of *Baker* tests is "borne out" by subsequent cases). This case does not (i) require the Court to express lack of respect to the Executive;[7] (ii) present an

[6] Defendants' speculation that judgment here could have "myriad unanticipated consequences" or that potential "absence of nations" in negotiations could "present entirely new variables" is premature.

[7] *See*, D. Sloss, *supra* n. 5 at 184 (2004) (Courts interpreting a treaty in conflict with Executive "are not manifesting a lack of respect for the executive. Rather, they are exercising their constitutional power to decide cases in accordance with . . . the Treaties.").

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unusual need for unquestioning adherence to a political decision already made; or (iii) require dismissal due to potential Executive embarrassment.[8] *See, e.g.*, *Japan Whaling*, 478 U.S. at 229; *EEOC*, 400 F.3d at 784 (reversing political question holding on claim disputing Executive lease approval); *Jewel*, 673 F.3d at 912 (reversing political question holding in warrantless eavesdropping case: even where "claims arise from political conduct and in a context that has been highly politicized, they present straightforward claims of [legal] rights, not political questions."). If Executive embarrassment were enough, the Supreme Court would not have ruled against Secretary Clinton and President Bush on political question claims in *Zivotofsky* and *Boumediene*, respectively.[9]

Finally, Defendants' cases pose no bar. In *Spectrum Stores v. Citgo*, 632 F.3d 938 (5th Cir. 2011), the court found nonjusticiable an alleged foreign oil conspiracy claim implicating Executive relations with Saudi Arabia. But the Fifth Circuit distinguished a situation that *is justiciable*—where the Executive position is "codified in a treaty that [the court is] merely asked to interpret . . . [and then to] compel U.S. officials to act according to the law"—which describes the present case. *Id*. at 951. Defendants' reliance on *Earth Island* is likewise unavailing. *Earth Island*, 6 F.3d at 653, just as *Zivotofsky*, 132 S.Ct. 1421, concerned the constitutionality of Congressional directives, via statute, to the President. Unlike the Defendants in *Earth Island*, Defendants here have never claimed that NPT Article VI is unconstitutional. Rather, they claim the Executive is in compliance with NPT Article VI, not that the Executive need not comply with it. Because Article VI sets forth the obligation negotiated *by* the Executive and consented to by the Senate, there is no dispute over "whether Congress or the Executive is 'aggrandizing its power at the expense of another branch.'" *Cf. id*. at 1428 (citation omitted); *Earth Island*, 6 F.3d at 653. As clarified in *Zivotofsky*, 132. S.Ct. at 1430, whether the Executive must comply

[8] Where U.S. conduct already generates embarrassment for alleged failure to comply with a treaty, a judicial decision could help, either by substantiating U.S. compliance or requiring it. *See*, D. Sloss, *supra* n.5; Comp. ¶¶ 8, 81, 83, 85, 90, 91.

[9] In its first 50 years, "the Supreme Court decided nineteen cases in which the U.S. government was a party, a . . . party raised a [treaty] claim or defense, and the Court decided the merits of that claim or defense. The U.S. government won fewer than twenty percent of these cases." D. Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 NYU Ann. Surv. Am. L. 497, 498-99 (2007). Courts resolved treaty disputes even where the U.S. claimed national security interests were at stake. *U.S. v. Laverty*, 26 F.Cas. 875 (D. La. 1812) (No. 15569A) (court interpreted the phrase "*as soon as possible*" in Louisiana treaty, rejecting U.S. position); *U.S. v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801) (treaty "must be obeyed, or its obligation denied" and "ought always to receive a construction conforming to its manifest import.").

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with the law is a justiciable question. *See also e.g.*, *Gros Ventre Tribe v. U.S.*, 469 F.3d 801, 810 (9th Cir. 2006) (citation omitted) (Indian nation cannot force the U.S. to take specific action *unless* "a treaty . . . imposes, expressly or by implication, that duty."). Defendants' final cases are inapposite. *Cf. Antolok v. U.S.*, 873 F.2d 369 (D.C. Cir. 1989) (finding jurisdiction expressly divested by prior settlement); *Smith v. Reagan*, 844 F.2d 195 (4th Cir. 1988) (dispute over Executive investigation into missing veterans was subject to "extraordinary discretion" and thus nonjusticiable); *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir. 1972) (assuming Germany breached international agreement, whether U.S. was required in turn to forego its own international obligation was nonjusticiable); *Chi. & S. Air v. Waterman*, 68 S.Ct. 431 (1948) (Executive discretion to award air navigation route based on national defense not reviewable); *Zivkovich v. Vatican Bank*, 242 F.Supp.2d 659 (N.D. Cal. 2002) (claim for World War II reparations was political question, contrary to Ninth Circuit in *Alperin*, 410 F.3d at 552).

In sum, Defendants' sweeping contention that the Court must abstain because a future ruling could "squarely contradict, and interfere with" an Executive position, is contrary to *Zivotofsky*, *Boumediene*, *Hamdan*, *Japan Whaling*, *Decker* and *Jewel*. *See also, e.g.*, *TWA v. Franklin Mint*, 466 U.S. 243, 254 (1984) (Court not bound to uphold Executive determination under treaty convention if it is "contrary to . . . the Convention itself."). The U.S. has not abrogated the NPT, but instead claims current compliance.[10] Comp. ¶ 8. The Article VI obligation is not discretionary. But the U.S. is not negotiating, has instead adopted new vertical proliferation measures, and claims now that its Article VI promise is conditioned on the conduct of *non*-NPT parties. Comp. ¶¶ 38-40, 45, 57, 66, 69, 84. The judicial duty to say what the law is, at times involves cases challenging Executive conduct in foreign affairs. If the NPT is valid law, then the Executive "must be ordered to . . . compl[y] with [it] . . . political question doctrine is not implicated." *Zivotofsky*, 132 S.Ct. at 1428.

C. Article VI Legally Binds the U.S.—The Self-Executing Treaty Doctrine Is No Bar.

Defendants assert that Article VI of the NPT is not "self-executing" and does not provide a "private" cause of action. They cite no case holding that a treaty party may not seek judicial enforcement of its terms, however. Instead, Defendants' cases concern third parties seeking redress for a treaty breach. This is a critical distinction: a state-party's treaty rights are fundamentally different than those of

[10]Defendants claim no sovereign immunity. *See Trudeau v. FTC*, 456 F.3d 178, 187 (D.C. Cir. 2006) ("APA's waiver of sovereign immunity applies to any suit whether under the APA or not.")

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a third party. A treaty "is essentially a contract between two sovereign nations," *Wash. v. Wash. Comm. Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979), and the rights and obligations created by a treaty belong to those signatory nations. *U.S. v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975). As a treaty is "designed to protect the sovereign interests of nations," moreover, "it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress." *U.S. v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988). *See also Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir. 1990); *U.S. v. Rosenthal*, 793 F.2d 1214, 1232 (11th Cir. 1986) ("it is the contracting foreign government that has the right to complain about a [treaty] violation."). Here, Plaintiff claims rights directly under the treaty – not derivatively as a third-party claimant – and Plaintiff is entitled to enforce those rights. "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. 137, 147 (1803).

Interpretation of Article VI, like any treaty, must begin with its text. *Air France v. Saks*, 470 U.S. 392, 396-97 (1985). Because a treaty is not only "the law of this land [] but also an agreement among sovereign powers," it is appropriate to consider the NPT negotiating and drafting history, as well as "the postratification understanding of the contracting parties." *Zicherman v. Korean Air*, 516 U.S. 217, 226 (1996); *U.S. v. Stuart*, 489 U.S. 353, 365-66 (1989). The text of Article VI, its pre-ratification history, and the NPT parties' subsequent conduct all support Plaintiff's right to bring this action.

First, the Article VI text indicates it is self-executing. Article VI places a legal obligation on the Executive. Comp. ¶ 6. As an obligation *on the Executive* running to the other NPT parties, no further legislative act is necessary to make that obligation effective. *Cook*, 288 U.S. at 119 ("the Treaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions."); *TWA*, 466 U.S. 243.[11] Defendants argue, nevertheless, that Article VI requires implementing legislation to bind the Executive. But implementing legislation is only necessary to make a treaty provision effective if (a) the treaty "manifests an intention" that it shall not be effective "without

[11] *See also, e.g., Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Mont.), *2007 I.C.J. Reports 43* (Judgment ¶ 162) ("The ordinary meaning of the word 'undertake' is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation. It is a word regularly used in treaties setting out the obligations of the Contracting Parties . . . . It is not merely hortatory or purposive. The undertaking is unqualified . . . .").

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the enactment of implementing legislation," (b) the Senate requires implementing legislation in giving its consent, or (c) "implementing legislation is constitutionally required." Restatement (3d) Foreign Relations § 111(4). None of these applies here. Nothing in Article VI establishes that legislation was required for it to be effective. Nor did the Senate require implementing legislation when consenting to the NPT.[12] There is, finally, no constitutional reason that implementing legislation is required.[13]

Defendants also argue that Article VI is not self-executing because it lacks an "enforcement mechanism." It is unclear what "enforcement mechanism" Defendants contemplate, however. Their argument is also based on a line of *Medellin* taken out of context. *Medellin v. Texas*, 552 U.S. 491 (2008). *Medellin* does *not* hold that treaty "silence" with respect to enforcement is the *sine qua non* of executory status, *id*. at 508, nor that a treaty must explicitly contemplate "self-execution" to have effect. To the contrary, the Court instructs that "neither our approach nor our cases require that a treaty provide for self-execution in so many talismanic words..." *Id.* at 521. Article VI, in sum, places a legal obligation on the Executive and no "talismanic words" are necessary to trigger that obligation. *See id.*; *Cook*, 288 U.S. at 119.

Second, Article VI's legislative and drafting history reflects the clear intent of the U.S. and the NPT parties to create a binding obligation—an "*inescapable responsibility*."[14] The reports of the Senate Committee on Foreign Relations indicate it was "fully aware of the mutual responsibilities the nuclear weapon states party to the treaty [] assumed" under Article VI, and that it "commit[ed] all parties to pursue negotiations in good faith relating to a cessation of the arms race and to nuclear disarmament."[15] Indeed, Senate debates describe Article VI as the "potentially most important clause" of the NPT because it "commits" the nuclear powers to negotiations pursuant to its terms.[16] The drafting history of the NPT is in accord, as it reflects the parties' insistence that Article VI constitute a "legal obligation to negotiate" and a "tangible commitment." *See* Comp. ¶ 45, n.26, *citing* E. Firmage, *The Treaty on the*

[12]This is done, for example, when the Senate attaches a declaration to a treaty that it is not self-executing, which it did not do for the NPT. *See, e.g.*, L. Damrosch, *The Role of the U.S. Senate Concerning "Self-Executing" and "Non-Self-Executing" Treaties*, 67 Chi. Kent L.Rev. 515 (1991).

[13]The most common example where legislation is constitutionally required is where treaty provisions pertain to actions constitutionally entrusted to the House, such as appropriation of funds. *See id.* at 517.

[14]115 Cong. Rec. 6198, 6204 (1969) (emphasis added).

[15]Report of Senate Committee on Foreign Relations, Exec. Report No. 91-1 (March 4, 1969) p.18; Report of Senate Committee on Foreign Relations, Exec. Report No. 90-2 (Sept. 26, 1968) p.7.

[16]115 Cong. Rec. 6198, 6203-04 (1969) (emphasis added)

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Non-Proliferation of Nuclear Weapons, 63 Am. J. Int'l L. 711, 733 (1969) (analyzing Article VI drafting and negotiation history).

Defendants' highly selective citations to the NPT legislative history concern the *wrong* treaty provisions. *Cf.* Restatement (3d) Foreign Relations § 111, Comment h ("Some provisions of an international agreement may be self-executing and others non-self-executing."). The snippet of Senate debate cited by Defendants concerns the lack of a judicial remedy *following withdrawal* from the treaty, not non-compliance with the treaty while it remains the law. And the Senate Resolutions cited by Defendants were not only proposed decades after the treaty, but the "self-execution" comment quoted by Defendants concerns the NPT's Article III verification provisions. Defendants, finally, cite to no aspect of the NPT's drafting history supporting their position.

Third, the NPT parties' post-ratification conduct supports Plaintiff's view. In periodic "Treaty Review Conferences," NPT parties repeatedly reaffirmed the Article VI obligation, calling it an "unequivocal undertaking." Comp. ¶¶ 49, 52. And when the International Court of Justice ("ICJ") interpreted the NPT, it held that "[t]here exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament . . . ." Comp. ¶ 9.[17] Defendants cite no post-ratification conduct refuting the Article VI legal obligation. Their cite to "diplomatic means" for compliance issues, in the 2010 NPT Review Conference Final Document, MTD p. 9, concerns NPT Articles I and II, *not* VI.

In short, though analogous examples are few,[18] no law bars this action. Defendants' argument relies, at base, on *dicta* regarding a *hypothetical* treaty breach case between nations—providing that the options are to resume diplomacy or declare war—that originated in *Edye v. Robertson*, 5 S.Ct. 247, 254 (1884) (the "*Head Money*" cases). The *Head Money dicta*, however, is no bar here.

> [The *Head Money* cases] should have . . . little relevance . . . since they held only that the judiciary would not enforce a treaty in the face of inconsistent legislation subsequently enacted by Congress. . . . [D]octrine never precluded any foreign state from voluntarily initiating suit or waiving immunity [and] U.S. law has never closed domestic courts to foreign states . . . . There is

[17] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), *1996 I.C.J. Reports 226* (1996) (Judgment ¶ 105(2)F).

[18] For example, the U.S. has sued on behalf of foreign nations to enforce their treaty rights, with no "self-executing" bar. *See U.S. v. Glen Cove*, 322 F.Supp. 149 (E.D.N.Y.) (collecting cases, concluding that the U.S. could sue on behalf of USSR and treaty need not "be enforced only by the foreign government making itself a party to litigation before state or federal courts."), *aff'd* 450 F.2d 884 (2d Cir. 1971).

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> no present reason why foreign states should not be able voluntarily to submit their treaty claims for adjudication by U.S. courts.

See L. Damrosch, *The Justiciability of Paraguay's Claim of Treaty Violation*, 92 Am. J. Int'l L. 697 (1998) (citations omitted). Indeed, if the Constitution provides no federal jurisdiction over international agreement disputes, all cases between nations in the Court of International Trade would be unconstitutional. Likewise, all cases in which nations sue the U.S. for extradition treaty violations would be unconstitutional. *Cf*., *e.g.*, *Jamaica*, 770 F.Supp. 627. In *Sanchez-Llamas*, 548 U.S. at 343, moreover, the U.S. cited the *Head Money dicta* to support the argument that there was "a presumption that a treaty will be enforced through political and diplomatic channels, rather than through the courts." Refusing to so hold, the Court assumed without deciding that the treaty at issue did create judicially enforceable rights. *Id.* Likewise, the Supreme Court qualified the *Head Money* dicta in *Medellin*, 552 U.S. at 505, stating, again in *dicta*, that treaties "ordinarily" depend on the interest and honor of the parties. "Ordinarily" does not mean "exclusively."

Nor does *Medellin* pose any bar to this action. *Medellin* capped a line of cases involving third-party claims under the Vienna Convention on Consular Relations ("VCCR") and whether the VCCR overrode U.S. state criminal and/or post-conviction procedures in the absence of implementing legislation. In *Medellin*, the Court held that the ICJ's interpretation of the VCCR did not automatically bind U.S. state courts under the UN Charter. It explained that enforcement of the ICJ decision, in derogation of limitations on post-conviction (habeas) relief imposed by U.S. state law, was inconsistent with (i) the enforcement mechanisms under the relevant treaties, *id*. at 511-12; (ii) the postratification understanding of treaty parties, *id*. at 516-17; and (iii) the "option of noncompliance" the U.S. retained under the UN Charter, *id*. at 511. It also held that the President could not unilaterally abrogate state criminal statutes in favor of the ICJ decision, by Presidential memorandum, *id*. at 530-32. *Medellin* does not bar this case, where Article VI is an unqualified Executive obligation, and the U.S. has never claimed that it, or any NPT party, retains the option of noncompliance with Article VI.[19]

[19]Most of Defendants' cases concern claims by third party individuals regarding violations of the VCCR or similar treaties. *See Cornejo v. San Diego*, 504 F.3d 853, 854 (9th Cir. 2007) (VCCR); *Comm. of U.S. Citizens v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988) (U.N. Charter). Others concern *expressly* non-self-executing treaties. *Bond v. U.S.*, 134 S.Ct. 2077, 2084 (2014) (Chemical Weapons Convention); *Serra v. Lappin*, 600 F.3d 1191, 1997 (9th Cir. 2010) (ICCPR). Finally, *Foster v. Neilson*, 27 U.S. 253, 314 (1829), held in a third-party property dispute that a treaty is "to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative

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D. Plaintiff has Sufficiently Pled Venue.

Venue is proper under both 28 U.S.C. § 1391(e)(1)(A) and (B). Section 1391(e)(1)(A) provides that this action may be brought in any judicial district in which "a defendant in the action resides." Residency is defined "[f]or all venue purposes" in Section 1391(c)(2), which provides that an "entity with the capacity to sue and be sued . . . shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question . . . ." *Id.* Section 1391(c), as amended by the Federal Courts Jurisdiction and Venue Clarification Act of 2011, defines the residence of litigants for *all* venue purposes, "*which clearly includes Section 1391(e)*." *See* 14D Wright & Miller, Fed. Prac. & Proc. Juris. §3815 at 341 (4th ed.) (emphasis added).[20] As Defendants do not dispute that this Court has personal jurisdiction over the U.S. and the Nuclear Weapons Agencies, *see* Comp. ¶ 27, venue is proper under Section 1391(e)(1)(A), *see* Fed.R.Civ.P. 12(h) (personal jurisdiction is waivable). Defendants' mistaken argument is: (i) contrary to the plain language of amended Section 1391(c); (ii) based on cases predating the 2011 amendment to Section 1391(c)(2); and (iii) unsupported by their single post-2011 case, which had no allegation of personal jurisdiction and residency pursuant to Section 1391(c)(2). *Cf. Wilson v. Dept. of the Army*, 2013 WL 6730281 (S.D. Cal. 2013).

Venue is also proper under 28 U.S.C. § 1391(e)(1)(B) because "a substantial part of the events or omissions giving rise to the claim occurred" in this district. The U.S. carries out nuclear weapons modernization programs in only three labs, in breach of the treaty obligations that are the subject of this suit. Comp. ¶¶ 28-30, 57, 67, 69, 60 (Weston ¶ 12). One lab is located in this district. *Id.* This district thus bears a substantial connection to the events giving rise to this action. *See Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 357 (2d Cir. 2005) (venue requires "significant events or omissions material to the plaintiff's claim must have occurred in the district in question, even if other material events occurred elsewhere").[21] Defendants' assertion that it is "unclear" what relationship this case bears to this

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provision."

[20] "The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there." *BedRoc Ltd. v. U.S.*, 541 U.S. 176, 183 (2004) (internal quotation marks omitted).

[21] *See also* Senate Report, *infra* n. 14 at 6204 ("The gravest threat to mankind's survival lies . . . in the dangers of 'vertical' proliferation of nuclear weapons systems in the possession mainly of the two super powers. Article VI not only points the way but it places upon us an inescapable responsibility.")

district is insufficient to defeat venue because, on a Rule 12(b)(3) motion, "the trial court is obligated to draw all reasonable inferences in favor of the nonmoving party and resolve all factual conflicts in favor of the non-moving party." *Murphy v. Schneider Nat'l*, 362 F.3d 1133, 1138 (9th Cir. 2003).

E. Neither Statute of Limitations, Laches, nor "Public Interest" Bars These Claims.

Statute of Limitations. Defendants must prove a limitations bar, but they proffer no facts and allege no date on which these claims allegedly accrued. *See, e.g.*, *Kingman Reef v. U.S.*, 541 F.3d 1189, 1197 (9th Cir. 2008); *Cedars-Sinai v. Shalala*, 125 F.3d 765 (9th Cir. 1997) (§ 2401(a) is not jurisdictional). Moreover, claims "cannot be dismissed unless it appears beyond a doubt that [plaintiff] can prove no set of facts that would establish the timeliness of the claim." *Von Saher v. Norton Simon*, 592 F.3d 954, 969 (9th Cir. 2010) (citation omitted). Defendants seek an inference that the first NPT breach must have occurred by 1996 when the ICJ ruled, and that all recent breaches are barred. The untenable result would be that the U.S. is no longer legally bound by Article VI. *See, e.g.*, *Page v. U.S.*, 729 F.2d 818, 821 (D.C. Cir. 1984) ("Just as *res judicata* cannot bar a claim predicated on events that have not yet transpired, knowledge acquired in 1972 that one has a claim could not trigger time limitations on allegedly tortious conduct that had not then occurred.").

In 2010 the U.S. renewed its Article VI commitment to an "unequivocal undertaking . . . to accomplish the total elimination of their nuclear arsenals." Comp. ¶ 52.[22] Despite this commitment, it has since opposed Article VI negotiations, and erected preconditions to negotiation. Comp. ¶ 78, 84. Plaintiff seeks only current and prospective relief, not relief for conduct that occurred historically. *See, e.g.*, *Citizens Legal*, 540 F.App'x at 588 (affirming district court decision on which Defendants rely, but emphasizing that although a challenge to the original [action] was time-barred, to the extent plaintiff challenges the "failure to . . . operate on an ongoing basis in accordance with applicable law, and seeks prospective relief to correct such failures, its claims are not time-barred."); Comp. ¶¶ 1, 66-69, 73, 78. Defendants' other cases are likewise inapposite, because they are based on stale, final agency action. *See Wild Fish v. Salazar*, 688 F.Supp.2d 1225 (E.D. Wa. 2010) (claim accrued on date regulatory permit,

[22]Separately, Defendants have not factually foreclosed the continuing claims doctrine where no APA final agency action is alleged and the U.S. owes a continuing duty under Article VI. *See Central Pines v. U.S.*, 61 Fed.Cl. 527, 537-40 (Fed.Cl. 2004) (summary judgment denied where facts insufficient to foreclose continuing claims doctrine); *Wilderness Soc'y v. Norton*, 434 F.3d 584 (D.C. Cir. 2006) (claim for what the government "has yet to do" is unlikely to be barred by §2401(a)).

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subject to public notice, was last renewed and water program "remained unchanged"); *Gros Ventre Tribe v. U.S.*, 344 F.Supp.2d 1221 (D. Mont. 2004) (last implemented final agency action was outside limitations period); *Hall v. Regional Transp.*, 362 F. App'x. 694, 695 (9th Cir. 2010) (plaintiff pled no *new* federal acts *subsequent* to published notice).

Laches. Laches requires a factual finding that Plaintiff had knowledge, lacked diligence and delayed bringing suit, and that the delay prejudiced Defendants. *See Apache Survival v. U.S.*, 21 F.3d 895 (9th Cir. 1994) (affidavits proved plaintiff (i) was expressly invited but declined to participate in process complained of, and engaged in "inexcusable tardiness," and (ii) caused prejudice to the U.S.). Defendants, with the burden of proof, proffer no facts that would support such findings.

Public Interest. Defendants' final "public interest" argument is an amalgam of justiciability, addressed *supra*, and a contention that the relief sought would result in an "inequity" and be "contrary to the public interest." The "inequity" argument is misplaced. *See, e.g., Rollins v. Dignity Health*, --- F.Supp.2d ---, 2014 WL 3613096 (N.D. Cal. July 22, 2014) (argument appears to confuse "the term equitable insofar as it distinguishes remedies available at law from remedies available in equity, and the meaning of the term as it relates to fairness."), *citing Guidry v. Sheet Metal Workers*, 493 U.S. 365, 376 (1990) ("Courts should be loath to announce equitable exceptions . . . that are unqualified by the text."). Neither do the facts pled prove that declaratory relief is contrary to the public interest or unfair. *Contra* MTD p. 13, *citing Eccles v. Peoples Bank*, 333 U.S. 426, 430-32 (1948) (declaratory judgment on anticipatory breach held contrary to public interest on extended evidentiary record). Finally, Defendants cite no court that dismissed a declaratory claim at the pleading stage, on discretionary reasons alone, with a current legal breach and no other legal venue for resolution. *Cf., e.g., Wilton v. Seven Falls*, 515 U.S. 277, 288 (1995) (affirming stay of declaratory action where parallel state court suit exists or "declaratory judgment will serve no useful purpose," but not delineating discretion in "cases raising issues of federal law or in cases in which there are no parallel state proceedings").

V. CONCLUSION.

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' motion.

DATED August 21, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2014, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system, which shall send notification of such filing to all CM/ECF participants.

/s/ Laurie B. Ashton
Laurie B. Ashton

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

THE REPUBLIC OF THE MARSHALL ISLANDS, A NON-NUCLEAR-WEAPON STATE PARTY TO THE TREATY ON THE NON-PROLIFERATION OF NUCLEAR WEAPONS,

Plaintiff,

v.

THE UNITED STATES OF AMERICA, *et al.*,

Defendants.

No. 14-CV-01885-JSW

(PROPOSED) ORDER DENYING DEFENDANTS MOTION TO DISMISS

Upon consideration of Defendants' Motion to Dismiss (the "Motion"), Plaintiff's Opposition, and Defendants' Reply, the Court hereby denies the Motion, and finds as follows:

1. *Standing.* "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion dismiss, [courts] presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Def. of Wildlife*, 504 U.S. 555, 561 (1992) (internal citations, quotation marks, and alterations omitted). As a party to the Treaty on the Non-Proliferation of Nuclear Weapons ("NPT"), Plaintiff has sufficiently pled standing to assert a breach of that treaty. *See, e.g., Jamaica v. U.S.*, 770 F. Supp. 627 (M.D. Fla. 1991) (as a party, a foreign country has standing to assert a treaty breach).

2. *Political Question Doctrine.* On a Rule 12(b)(6) motion, the Court must construe the Complaint in favor of Plaintiff and assume all well pled facts are true. *See, e.g., Leite v. Crane*, 749 F.3d 1117, 1121 (9th Cir. 2014); *Aschroft v. Iqbal*, 556 U.S. 662 (2009). The political question doctrine does not bar this case. *See, e.g., Japan Whaling v. Am. Cetacean*, 478 U.S. 221, 230 (1986) (court interprets law even where even where "[a] decision may have significant political overtones"); *Zivotofsky v. Clinton*, 132 S.Ct. 1421, 1428 (2012) (if a law is valid, the U.S. "must be ordered to compl[y] . . .

political question doctrine is not implicated."); *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006) (Executive breached the Geneva Conventions); *Jewel v. NSA*, 673 F.3d 902, 912 (9th Cir. 2011) (reversing political question holding in warrantless eavesdropping case: even where "claims arise from political conduct and in a context that has been highly politicized, they present straightforward claims of [legal] rights, not political questions."); *EEOC v. Peabody*, 400 F.3d 774, 784 (9th Cir. 2005) (courts "regularly review the actions of federal agencies to determine whether they comport with applicable law"); *Ala. v. U.S.*, 84 F.3d 410 (11th Cir. 1996) (court determines whether Executive breached obligation to negotiate in good faith with state). None of the six factors identified in *Baker v. Carr*, 369 U.S. 186, 217 (1962) require this Court's abstention in this case. *Earth Island Inst. v. Christopher*, 6 F.3d 648 (9th Cir. 1993) is not to the contrary. *Earth Island* concerned the constitutionality of statutory directives to the President, which is not the issue here. In this case, Defendants have never claimed the NPT is unconstitutional. Article VI, moreover, reflects a commitment made by the Executive itself. Thus, there is no dispute over "whether Congress or the Executive is 'aggrandizing its power at the expense of another branch.'" *Zivotofsky*, 132. S.Ct. at 1428 (citation omitted). *Cf. also id., with Earth Island*, 6 F.3d at 653. Whether the Executive must comply with the law is plainly a justiciable question. *See, e.g., Zivotofsky*, 132. S.Ct. at 1430.

3. *Self-Execution.* Plaintiff is a party to the NPT. In this action, NPT Article VI is self-executing and Plaintiff may maintain this suit. The Article VI obligation runs from the Executive to other NPT parties. No legislation is required to make that obligation effective. *See Cook v. U.S.*, 288 U.S. 102, 119 (1933); Restatement (3d) Foreign Relations § 111(4). The Article VI pre-ratification history and the post-ratification practice of the NPT parties also support this conclusion. Defendants' cases concerning third party treaty rights, or where treaty parties expressly reserved noncompliance options, do not bar this case.

4. *Venue.* On a Rule 12(b)(3) motion, "the trial court is obligated to draw all reasonable inferences in favor of the nonmoving party and resolve all factual conflicts in favor of the non-moving party." *Murphy v. Schneider Nat'l*, 362 F.3d 1133, 1138 (9th Cir. 2003). Venue is pled sufficiently under 28 USC §1391. Under the plain language of § 1391(c), the entity defendants are deemed to reside here. "The preeminent canon of statutory interpretation requires us to presume that the legislature says in

a statute what it means and means in a statute what it says there." *BedRoc Ltd. v. U.S.*, 541 U.S. 176, 183 (2004) (internal quotation marks omitted). Defendants' construction of 28 USC § 1391 would require the Court to disregard that language. In addition, venue is also proper here pursuant to 28 U.S.C. § 1391(e)(1)(B) because the Complaint alleges that a substantial part of the events giving rise to the claims occurred in this district because U.S. nuclear vertical proliferation occurs at the Livermore Lab, one of only three such facilities in the U.S.

5. *Statute of Limitations and Laches.* On a statute of limitations or laches defense, Defendants have the burden of proof. *See, e.g.*, *Kingman Reef v. U.S.*, 541 F.3d 1189, 1197 (9th Cir. 2008); *Cedars-Sinai v. Shalala*, 125 F.3d 765 (9th Cir. 1997) (§ 2401(a) is not jurisdictional). In addition, laches requires a factual finding that Plaintiff had knowledge, lacked diligence and delayed bringing suit, *and* that the delay prejudiced Defendants. *See Apache Survival v. U.S.*, 21 F.3d 895 (9th Cir. 1994). Defendants have not proven this suit untimely. *Cf, e.g.*, *Citizens Legal Enforcement v. Connor*, 540 F.App'x 587, 588 (9th Cir. 2013) (affirming district court decision on which Defendants rely, but emphasizing that although a challenge to the original [action] was time-barred, to the extent plaintiff challenges the "failure to . . . operate on an ongoing basis in accordance with applicable law, and seeks prospective relief to correct such failures, its claims are not time-barred.").

6. *Public Interest.* Finally, the facts pled, which are assumed true at this pleading stage, do not prove that declaratory relief is contrary to the public interest. Moreover, Defendants cite no court that dismissed a declaratory claim at the pleading stage, on discretionary reasons alone, with a current legal breach and no other legal venue for resolution. This Court declines to do so. *Cf., e.g.*, *Wilton v. Seven Falls*, 515 U.S. 277, 288 (1995) (affirming stay of declaratory action where parallel state court suit exists or "declaratory judgment will serve no useful purpose," but not delineating discretion in "cases raising issues of federal law or in cases in which there are no parallel state proceedings").

IT IS SO ORDERED.

Dated: _____, 2014

_____
JEFFREY S. WHITE
United States District Judge