TABLE OF CONTENTS

NEWS AND ANNOUNCEMENTS................................................................. 1

Young Lawyers Division Upcoming Events........................................... 1

ARTICLES

‘Judicial Courts Can Give No Redress”: The Marshall Islands, the United States, and the Ninth Circuit’s View of the NPT, by Daniel Cooper.................................................................2-6

NEWS AND ANNOUNCEMENTS

Young Lawyers Division Upcoming Events

YLD Spring Conference 2018, May 10-12, 2018, Louisville, Kentucky: Louisville will be the host of this Spring’s conference for the Division. Registration and hotel information can be found here:

https://www.americanbar.org/groups/young_lawyers/events_cle/2018-spring-conference.html

Look out for our monthly calls!: If you are interested in participating in the goings on of the YLD International Law Committee, we would love to have you! Be sure to join the Committee and let us know you’d like to get involved and we will certainly plug you in.

Write for our newsletter!: The newsletter you see before you is always looking for articles, practice pointers, news or announcements, and writing for any publication is a great way to get yourself known to the Division, the wider ABA, and, of course, prospective clients! A call for submissions for our Spring issue will be coming out shortly, but in the meantime please direct any questions to aba.yldilc@gmail.com
ARTICLES

Judicial Courts Can Give No Redress':
The Marshall Islands, the United States, and the Ninth Circuit’s View of the NPT
By Daniel Cooper

This past July, the Ninth Circuit considered a case brought in 2014 by the Republic of the Marshall Islands seeking injunctive and declaratory relief as to the alleged failure of the United States government to pursue good faith negotiations on establishing measures to achieve global nuclear disarmament pursuant to Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (hereinafter, “the NPT”). The suit brought by the Marshall Islands in U.S. courts was instituted alongside claims that the Pacific nation brought against several other nuclear powers in the International Court of Justice for similar declaratory and injunctive relief. All of these suits, both in the United States and at the ICJ, were dismissed on jurisdictional grounds. This Article will focus on the Marshall Islands suit in U.S. courts, by providing a case update on the legal claims brought by the Marshall Islands, while at the same time situating the case within that Pacific nation’s larger legal strategy of seeking redress for the consequences of nuclear proliferation—consequences it has had to bare firsthand—and prospective mitigation of the threat of nuclear proliferation going forward. The Marshall Islands case in the Ninth Circuit is perhaps most intriguing in that it was an attempt by the Marshall Islands to seek compel a State to abide by its treaty obligations via a judicial order issued by that State’s own courts. The Marshall Islands based its suit on Article VI of the NPT, which mandates that the nuclear-armed states of the world enter into good faith negotiations and put forth best efforts to achieve international nuclear disarmament. The Marshall Islands alleged that the United States—and the other nuclear powers it sued in the ICJ—had a legal duty under Article VI to pursue such good faith negotiations and failed to do so. While the Ninth Circuit ruled correctly that the Marshall Islands could not establish that US courts had jurisdiction over an NPT Article VI controversy, the Ninth Circuit seems to have conflated several different jurisdictional or prudential bars to the Marshall Islands’ case. At the end of the day, however, the outcome of the case would have been the same; but the Marshall Islands’ suit presents an interesting case of a country suing another in its own courts. This phenomenon could, and should, be considered to hold states accountable for failure to adhere to their international obligations.

I. BACKGROUND

The Marshall Islands knows better than most the consequences of the proliferation and testing of nuclear weapons. On March 1, 1954, the United States conducted the first of several subsequent nuclear tests by detonating a hydrogen bomb in Bikini Atoll, a group of islands and coral reefs in what is now the

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1 David Brunnstrom, Former U.S. test site sues nuclear nations for disarmament failure, Reuters, Apr. 24, 2014 (describing suit against the United States and legal action against other nuclear powers).

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Republic of the Marshall Islands. The Republic and many of its citizens have been dealing with the aftermath of these tests to this day. Naturally, the Marshall Islands’ unique history and perspective on the issue gives the Republic somewhat of a national interest in bringing about the end of the nuclear weapons era.

The Marshall Islands acceded to the NPT in 1995, which entered into force on March 5, 1970. (The United States ratified the NPT in 1969 and deposited its ratification on the date of the NPT entering into force.) At the time of this writing, one-hundred-and-ninety states are parties to the NPT. The NPT itself is a delicate bargain struck between the (at the time) five nuclear weapons states and those countries that did not possess those weapons, some of whom would have liked to procure those weapons and the security and status possessing those weapons provided.

Under that bargain, the then-nuclear powers would ensure that the spread of nuclear weapons would be controlled and that only those powers would possess such weapons (with the other nations of the world foreswearing such ambitions). In return, the nuclear powers would share nuclear technology with non-nuclear states, especially those states seeking to develop their domestic energy capacities, to enable those states to develop nuclear technology for peaceful energy and research purposes.

Article VI seeks to further “level the playing field” between nuclear and non-nuclear weapons states by placing an obligation upon all states, including nuclear powers, 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 under strict and effective international control.” While the NPT is, like all treaties, legally binding on the state parties to it, there does not seem to be an enforceable legal mechanism to remedy violations of the NPT at the international level.

II. THE MARSHALL ISLANDS SUIT IN US COURTS

In April 2014, the Republic of the Marshall Islands filed suit against the United States government in federal district court for the Northern District of California, seeking a declaratory judgment that NPT Article VI imposes a duty on the United States to “pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date” and to “bring to a conclusion negotiations leading to nuclear disarmament.” It further requested a declaration that the United States was in “continuing breach” of these obligations. Finally, the Marshall Islands sought an injunction ordering the United States to “take all steps necessary” to comply with its Article VI obligations “including by calling for and convening negotiations for nuclear disarmament in all its aspects” within one year of the injunction.

7 NPT, Article VI
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The district court granted the United States government’s motion to dismiss the complaint on the ground that the Marshall Islands lacked standing because a U.S. court had no power to bind third parties to such negotiations and that the injury complained-of, i.e. that negotiations on nuclear disarmament had not meaningfully been undertaken by NPT state parties, “cannot be redressed by compelling specific performance by only one nation to the Treaty.” As an alternative holding, the district court concluded that the case was not justiciable as it raised political questions for which the courts could not provide relief. The district court sidestepped questions as to whether the NPT (and especially Article VI) is a self-executing treaty.

III. THE NINTH CIRCUIT OPINES—ENFORCEMENT OF ARTICLE VI IS A POLITICAL QUESTION AND ARTICLE VI IS NON-SELF EXECUTING

In affirming the district court’s decision dismissing the Marshall Islands complaint, the Ninth Circuit opinion went into a lengthy discourse on the doctrine of self-execution/non-self-execution in U.S. treaty law. However, at various points in this analysis, the court seems to conflate the non-self-execution doctrine with the political question doctrine by focusing on the understandably central question of whether U.S. courts are empowered to provide relief to plaintiffs making a treaty-based claim in a given case.

Though these two doctrines share similarities, and even though a holding that either of these doctrines applies ends a case, the political question doctrine and the non-self-execution doctrine are not one and the same. This is because while the non-self-execution doctrine, at least as it has been interpreted by the Supreme Court, purports to examine the ability of a court to provide the requested relief, the political question doctrine focuses more on the propriety of a court providing the requested relief. The Ninth Circuit conflates these two ideas in a way that would make it more difficult for future litigants, whether nation states or persons, to pursue treaty-based claims in US courts. At bottom, however, the vague nature of the obligations under Article VI make the Ninth Circuit’s ultimate conclusion that the Marshall Islands case should not go forward the correct one. The central question surrounding whether a treaty is self-executing or not is whether the treaty or a provision thereof is “directly enforceable” in U.S. courts. In keeping with the idea that the self-execution doctrine and the political question doctrine are cousins, the Supreme Court has said that the focus is whether the treaty “addresses itself to the political, not the judicial department.” Though there is no preeminent legal standard for what constitutes a self-executing treaty, Supreme Court decisions since the early nineteenth century have provided clues as to what types of treaty provisions would be self-executing, and enforceable, and what sorts of treaty provisions would not be. For example, treaty provisions expressly calling for judicial enforcement, like the Warsaw Convention, would be self-

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9 From here onward and for convenience, we will refer to this doctrine as the “self-execution doctrine.”
10 See generally, Medellin v. Texas, 552 U.S. 491, 504-506 (2008) (explaining that treaties with provisions that are automatically implemented or can operate without legislative implementation are directly enforceable in U.S. courts); Accord, Restatement (Fourth) of Foreign Relations Law of the United States § 110, cmt. b (explaining that self-executing treaties are directly enforceable in U.S. courts).
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executing. However, more relevant here, provisions calling for future action by the executive or legislative branches (or both), without any mandatory treaty-based domestic judicial enforcement mechanism, would be non-self-executing.

The Ninth Circuit held that with its vague requirement of states to undertake “negotiations in good faith,” towards a future regime of complete nuclear disarmament, Article VI of the NPT had “all the trappings of a non-self-executing treaty provision.” The Court noted that the obligation to undertake unspecified future negotiations toward future disarmament at a later date is an example of a vague future obligation that courts usually can give no redress to enforce. More importantly, the obligation to negotiate with other nations is a responsibility of foreign relations only the executive can undertake, the Court held. Finally, the court held that the vagueness of Article VI was fatal to a court’s ability to provide a litigant—even a nation-state litigant—relief under that provision because the “indeterminate” language of Article VI does not, the Court held, provide “a rule of decision for courts” to enforce.

Likewise, the Ninth Circuit also held that enforcement of Article VI fails under the political question doctrine using the factors for determining political questions outlined in Baker v. Carr. Specifically, the Court held that the Marshall Islands’ claims—that there is an obligation on the part of the US to negotiate on disarmament—implies a “textually demonstrable…commitment of the issue to a coordinate political department,” because negotiation of treaties is demonstrably committed to the executive branch. The Court also affirmed the lower court’s conclusion that the second Baker political question factor—whether there is a lack of judicially manageable standards for enforcing the provision—was also present in Article VI due to its vagueness. As such, the Court affirmed the lower court and “demurred” from enforcing Article VI against the US government and requiring it begin multilateral nuclear disarmament negotiations.

IV. CONCLUSION

As a matter of law, the Ninth Circuit’s conclusions in this case are eminently correct, because the weight of Supreme Court precedent and rules of decision for determination of which treaties are self-executing and which ones are not make clear that NPT Article VI is a non-self-executing provision owing to its unspecified commitment to future negotiations and, ultimately, a more complete, but nevertheless additional and superseding treaty on nuclear disarmament. However, the Ninth Circuit’s collapsing the political question doctrine and the self-execution doctrine into one overarching doctrine militating against enforcement of future-oriented treaty obligations muddies both doctrines and, more importantly, reads out future-oriented provisions as contractual obligations between nation states.

The fact that Article VI’s obligation to undertake future good faith negotiations toward complete nuclear disarmament is, admittedly, vague, does not take away from the fact that it is a binding obligation of an international compact that even a U.S. domestic court should not permit to go permanently unheeded. In this case, there was nothing in the record that the United States would not pursue

13 Republic of the Marshall Islands v. United States, 865 F.3d 1187, 1195 (9th Cir. 2017).
14 Id.
15 Id., at 1194.
16 Id., at 1200-1201 (citing Baker, 369 U.S 186, 217 (1962)).
17 Id., at 1201.
18 Id.
multilateral negotiations at a later date on the issue of global nuclear disarmament, but there also did not seem to be any demonstrable commitment in fact by the US government to pursue those negotiations.

Thus, in theory, the Article VI obligation, in the Ninth Circuit’s view, is stuck in a legal purgatory, forever waiting to be executed. While perhaps the crafting of Article VI by the negotiators of the NPT deliberately made this outcome the case, the Ninth Circuit holding—and the Supreme Court’s political question and non-self-execution jurisprudence more generally—makes all future-oriented provisions in US-ratified treaties subject to similar dismissal in U.S. courts even when some future-oriented treaty obligations are much more clear, direct and executory.

Finally, the notion underlying the Ninth Circuit’s holding—that the judicial branch has little, if any, ability to direct the federal government to carry out foreign relations obligations under US-ratified international law instruments—carries with it a disturbing implication that international legal instruments cannot be enforceable in domestic courts due to the Ninth Circuit’s (and by extension, the Supreme Court’s) conflation of the political question doctrine and non-self-execution doctrine. As a result, the Marshall Islands may find it has little legal or political recourse against a great power whose maintenance of nuclear weapons has directly affected it for so long.