

## CHAPTER 4

### A COMPARISON BETWEEN ARMS CONTROL AND OTHER MULTILATERAL NEGOTIATION PROCESSES

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#### INTRODUCTION

Success in multilateral disarmament and arms control has been elusive in recent years.<sup>1</sup> The Geneva-based Conference on Disarmament (CD)—traditionally described as the “sole multilateral forum” for the negotiation of disarmament treaties—has been deadlocked since 1999.<sup>2</sup> The Ad Hoc Group process to develop a regime to the Bacteriological (Biological) and Toxin Weapons Convention (BTWC), intended to improve confidence in compliance, collapsed in early 2001 as it neared completion.<sup>3</sup> Crisis in the context of the BTWC five-yearly review process ensued. The protocol negotiations were succeeded from the end of 2002 by a “new process” with a deliberative mandate—a step backwards in norm-building terms from a negotiation on legally binding measures. Of Geneva-based disarmament and arms control processes only the Convention on Certain Conventional Weapons (CCW)<sup>4</sup> has achieved a new legally binding instrument recently with the conclusion of the Protocol V on Explosive Remnants of War (ERW) in November 2003. As of writing, however, this legally binding instrument has not yet achieved the requisite 20 ratifications to enter into force internationally. Negotiations on other priority issues in the CCW context, such as alleviating the humanitarian impact of mines other than anti-personnel mines, remain elusive.

There is growing concern that the multilateral disarmament endeavour in general may be faltering. Perhaps part of this is perceptual, in the wake of early negotiating successes such as the Chemical Weapons Convention (CWC), the Comprehensive Nuclear-Test-Ban Treaty (CTBT) and Antipersonnel Mine Ban Convention following the end of the Cold War.<sup>5</sup> These seemed to promise further multilateral successes to come.

Certainly, the disarmament and arms control record prior to 1989 was anything but striking. A study published that year entitled *Success and Failure in Arms Control Negotiations* observed that "despite many complex and lengthy negotiations, and despite a number of specific agreements, the result of these efforts to curb arms has been decidedly meagre to date"—referring not only to multilateral efforts and comprehensive nuclear-test-ban discussions but to Soviet-United States nuclear arms control processes and the Mutual and Balanced Force Reductions (MBFR) Talks in Europe.<sup>6</sup> It foretold not a hint of the rapid transformation of multilateralism's fortunes in the post-bipolar world that would shortly follow.

Fifteen years later the multilateral disarmament endeavour appears, at first glance, largely to have stalled. There is also concern over new features of the contemporary environment including retreat from certain existing norms such as the United States' withdrawal from the Anti-Ballistic Missile (ABM) Treaty in 2001 and North Korean statements of withdrawal from the Nuclear Non-Proliferation Treaty (NPT). Signs that multilateral arrangements are perceived as a troublesome burden more often than they are regarded as routes to enhanced collective security in certain governments, have accompanied it. In December 2001, for example, the United States Under-Secretary of State for Arms Control, John Bolton, explained his country's reasons for rejecting a draft compliance protocol to the BTWC in uncompromising terms: "We will continue to reject flawed texts like the BWC draft Protocol recommended to us simply because they are the product of lengthy negotiations or arbitrary deadlines, if such texts are not in the best interests of the United States and many other countries represented here today."<sup>7</sup>

One of the assumptions implicit in such a statement is that, like *cordon bleu* cuisine in a fine restaurant, negotiating products are uncovered before expectant dining governments after lengthy preparation behind closed kitchen doors. In reality, of course, the diners in this metaphor are intimately involved in the preparation and cooking of those products. Indeed, they help to write the recipes and choose the ingredients. In other words, by rejecting the BTWC draft protocol, the United States was also rejecting a product of its own making.

This suggests that difficulties experienced in disarmament and arms control negotiations are rather more complex than sometimes portrayed. Though governments may differ in their final judgements about the quality

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of an outcome, they each bear a share of the responsibility for their unsuccessful experiments as well as for their triumphs. If, as Mr Bolton implied, the final proof of the pudding is in the eating then it follows that attention should be paid to improving what goes on in the kitchen to make sure it is of a high standard, rather than simply on whether the diner accepts or rejects it. A better preparation and cooking process might ensure that a negotiation outcome meets with more satisfaction next time.

From the perspective of the UNIDIR Disarmament as Humanitarian Action project it begs the question: to what extent do the working practices, rules and techniques applied in multilateral disarmament and arms control negotiations contribute to (or alleviate) difficulties in achieving successful outcomes?

Looking for answers requires looking deeper for patterns than relying on explanations couched in terms of “political will”, which is a term beloved by diplomats to describe the dynamics that infuse each international negotiating process. Political will is problematic because it does little to explain actual reasons for negotiating momentum or resistance. Nor does it facilitate comparison between negotiating processes. Moreover, it is not clear that political will—usually deployed as a concept external to a negotiation at the working level to describe pressure (or lack of it) from capitals, domestic constituencies, international public opinion, specific governmental friends and allies—is actually wholly distinct. Political will is instead better thought of as a shorthand term that should not be confused with substantive explanation because lack of it fails to answer questions about *why* a negotiation succeeds or fails satisfactorily. It merely indicates deeper, more specific explanations to be uncovered.<sup>8</sup>

Six examples of multilateral negotiating processes are examined below in order to identify factors that help—or hinder—the successful achievement of multilateral negotiating outcomes: three in the disarmament and arms control domain and three outside it.

In the next section the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, the Framework Convention on Climate Change (FCCC) and the World Health Organization (WHO) Framework Convention on Tobacco Control (FCTC) are compared. These three processes were chosen because, although highly politically sensitive and differing in nature, they were,

nevertheless, successful. In short, the authors felt it more important to learn from examples of success rather than failure. Furthermore, it was appreciated that official texts and secondary sources from these negotiations alone would not provide the insights necessary for a proper understanding of them for the purposes of comparative analysis. Our three choices reflect access to key participants in these processes, who were able to provide first-hand views that supplemented and extended our understanding of the negotiating dynamics involved.

Three Geneva-based arms control processes are then examined—the Conference on Disarmament, the protocol negotiations to the BTWC and the negotiations on the ERW Protocol to the Convention on Certain Conventional Weapons.

Chronologically this study is concerned primarily with the active negotiating phase of each of these six negotiations, although we set out aspects of the pre-negotiation of each process to provide context. In general, a basic distinction is observed between multilateral *pre-negotiation* (relating to issue definition, by whatever means), *negotiation* (relating to the drafting of commonly-agreed text) and *post-negotiation* (including signature, ratification, accession and implementation of the agreement).

Of particular interest are the individual dynamics of each negotiation: what these were, why they came about and how they can be compared. The substance of each of the six examples differs. Climate change negotiations do not share much in common in terms of subject matter with ERW, for instance. But they take place within broadly comparable, even similar, multilateral contexts and episodes in time. This paper examines whether negotiators in the disarmament and arms control field (and probably more broadly in the diplomatic community) share a *community of practice*. Such a community entails “a group of people who over a period of time share in some set of social practices geared toward some common social purpose”.<sup>9</sup>

Although each negotiation process has its own unique properties, multilateral negotiating dynamics appear to be inherently iterative. That is, they represent fairly complex feedback mechanisms evolving dynamically on a continual basis at the human behavioural level. This “human factor” stems not only from actions of leaders or opinion shapers in each

negotiation. It also stems from the ways and extent to which their views are accepted by the other negotiators within that domain.

It appears likely that these mechanisms are recursive across different negotiations, especially in hothouse multilateral environments like Geneva and New York. Multilateral negotiations stripped down to their bare bones are, after all, concerned with finding common agreement among a set of diverse participants, each with differing concerns and aims. There appear to be similarities in structure, procedure and lexicography, as we shall see. And each phase in such processes, however defined, presents challenges that may be characterized or grouped in common ways. This is not least because individual negotiators tend to accumulate their experience over time in a finite set of different multilateral areas. And negotiation structures and rules of procedure tend to be largely inherited, especially within the United Nations domain. Such diplomatic precedent is a double-edged sword.

Let us now turn to examining the negotiation of the United Nations Migrant Workers' Convention, the FCCC and the WHO FCTC.

## MULTILATERAL NEGOTIATIONS IN THE FIELD OF MIGRATION, CLIMATE CHANGE AND PUBLIC HEALTH

### CASE STUDIES

#### **Migration: The United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families<sup>10</sup>**

##### Aim

The United Nations Convention on the Rights of Migrant Workers and Their Families is a legally binding document providing for the protection of migrant workers and their family members in the areas of civil, political, legal, economic, social and cultural rights.<sup>11</sup>

##### The process

The 1990 United Nations Migrant Workers Convention was not the first legal instrument pertaining to the rights of migrant workers. Previously the International Labour Organization (ILO) had concluded the Contracts

of Employment (Indigenous Workers) Convention (No. 86) in 1947 and the *Migration for Employment Convention* (No. 97) in 1949. Moreover, in 1975 the ILO completed negotiations on a Convention concerning Migrants in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (No. 143). But this agreement, like the others that preceded it, did not receive wide international support. This was because these conventions were primarily concerned with the economic rights of migrant workers in keeping with the ILO mandate.<sup>12</sup> As a result, they failed to address other important rights such as social, religious and linguistic rights, which limited their appeal.

Shortly after the adoption of the 1975 ILO Convention a report was submitted to the Economic and Social Council (ECOSOC) of the United Nations on the Exploitation of Labour Through Illicit and Clandestine Trafficking.<sup>13</sup> The report drew attention to the "precarious positions of migrant workers around the world" and so marked the beginnings of the United Nations Convention on Migrant Workers and Their Families.<sup>14</sup>

The process leading to this Convention formally commenced on 17 December 1979 when United Nations General Assembly resolution 43/172 was agreed. The resolution created an open-ended working group to elaborate a treaty on the rights of migrant workers and their families. Given that the working group was open-ended, it was decided that all of its decisions would be made by consensus. This practice meant that larger groups like the Group of 77 developing states would not dominate majority decision-making by means of their superior numbers, as compared with developed nations.<sup>15</sup> Ambassador Gonzales de Leon of Mexico was elected Chairman of the Working Group.

The Working Group mainly comprised delegates of three kinds. First, there were experts on migration sent from capitals. Secondly, there were delegates from capitals or from the United Nations permanent delegations sent as experts on international law in the field of human rights. Lastly, there were representatives from the permanent delegations versed in United Nations politics and broader diplomacy.<sup>16</sup>

Ambassador de Leon was tasked with the development of the Convention text. In May 1981 he presented his first draft to the Working Group. However many Western European governments in particular were under the impression that the text condoned continued illegal immigration.

Consequently, Ambassador de Leon's text did not garner support from states that were experiencing net inflows of illegal migration. It was at this juncture that a coalition of experts from four Mediterranean and three Scandinavian states joined forces.<sup>17</sup> The MESCA group, as it came to be known, effectively assumed responsibility for the drafting of the Convention after 1981. Negotiations on the text continued until 18 December 1990, when work on the Convention was completed and the text adopted by the United Nations General Assembly.<sup>18</sup>

#### Difficulties in the process

The Migrant Workers Convention took almost 11 years to complete. During this period changes in global political and economic dynamics transformed patterns of worldwide movement of migrant workers. For instance, at the beginning of the process, the distinction between states that "sent" migrant workers and those that "received" them was well delineated. In the former category were mainly developing states and in the latter were industrialized states. However, over time the changing self-perceptions of some states increasingly blurred these distinctions. Changing attitudes towards migrant workers in individual countries due to changes in demographics also influenced delegates' behaviour in the negotiations. It was common for the negotiating positions of some states to shift over the duration of the drafting process. This made the process of consensus-building harder.<sup>19</sup>

The sheer length of the negotiations also introduced problems of a more practical nature. The Working Group saw a high turnover of delegates over the span of more than a decade. New delegates in the Working Group had to be frequently "educated" on the issues under discussion. This ultimately represented time taken away from substantive negotiations. Under these circumstances, maintaining focus on common objectives and goals for the Convention was challenging for states in the process.

#### Factors underpinning success

As outlined above, MESCA played an integral role in furthering momentum in negotiations after the first reading of the draft Convention in 1981. MESCA was comprised of experts from the seven states whose governments had a "decidedly socialist flavouring" in the early and middle years of the 1980s.<sup>20</sup> MESCA members were especially influential in laying down the structures of the draft, which thereafter formed the basis for future negotiations. This structure was based on the principle that the

agreement should “discourage employers from seeking and hiring workers who are undocumented or in an irregular situation”,<sup>21</sup> while recognizing that certain fundamental rights must be accorded irrespective of whether migrants were in a lawful or unlawful status.<sup>22</sup> Overall, MESCA proved beneficial in terms of providing momentum to the process and in shaping the final Convention text.

The negotiation’s general parameters appear to have been another significant factor in the successful (albeit belated) completion of the Convention. Had the negotiations taken place in the ILO context, as migration issues at the multilateral level had previously, the Convention would probably have been confined to considering the economic rights of workers, rather than the broader scope to which it extended under a United Nations mandate. It appears that placed in a fresh context (the United Nations), a process that had increasingly failed to satisfy expectations in one forum (the ILO), had a positive effect on the ability of participating states to frame the issues. However the ILO was not left out in the cold entirely as the MESCA group approached the specialized agency at a later stage of the drafting process for their technical advisory services. In approaching the ILO in this manner negotiations profited from the experience and know-how of this specialized agency.

### Climate change: United Nations Framework Convention on Climate Change and the Kyoto Protocol<sup>23</sup>

#### Aim

Negotiations on a legally binding framework convention relating to climate change were aimed at helping to stabilize levels of carbon dioxide and other greenhouse gas (GHG) concentrations in the atmosphere, in order to minimize the risk of dangerous human-induced interference with the climate system.<sup>24</sup>

#### The process

Scientists began to devote more attention to the possibility of climate change from the mid-1980s as evidence for its existence due to human activities accumulated. These issues moved into the political limelight in 1988 at the Toronto Conference on the Changing Atmosphere: Implications for Global Security. Following on from this, the government of Malta introduced a resolution in the United Nations General Assembly in December 1988 formally requesting the United Nations Environment

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Programme (UNEP) and the World Meteorological Organization (WMO) to take steps towards the creation of a global convention on climate change. An Intergovernmental Panel on Climate Change (IPCC) was set up later that year, organized by UNEP and WMO. The three working groups of IPCC dealt with scientific and technical assessment of atmospheric changes; the social and economic impact of climate change and possible response strategies to the climate change problem.

The IPCC preliminary report, though controversial, was tabled at the Second World Climate Conference in Geneva in 1990. By that meeting's conclusion conference participants were able to agree that negotiations on FCCC should begin and that all negotiations should take place under United Nations auspices. This resulted in the United Nations General Assembly establishing the Intergovernmental Negotiating Committee (INC) for the purposes of fashioning the Framework Convention, as well as any related legal instruments it deemed necessary. The upcoming United Nations Conference on Environment and Development in Rio de Janeiro in June 1992 provided the target deadline for signature.

The INC held five sessions from February 1991: one near Washington, DC (in Chantilly, Virginia), two in Geneva with INC 3 in Nairobi in between, and the final negotiating session in New York from February to May 1992.<sup>25</sup> Decision 1/1 of the INC Plenary prohibited holding more than two meetings at any one time during a session or any intersessional meetings.<sup>26</sup> This promoted transparency in the proceedings because smaller delegations were not split between meetings in different chambers.

At the first session of the INC a bureau was elected and Jean Ripert of France appointed as Chairman.<sup>27</sup> According to the INC rules of procedure all substantive decisions were to be taken by consensus, although voting would be permitted when all efforts at consensus had been exhausted. The INC established two working groups: Working Group 1 dealing with the substantive issues of the FCCC; and Working Group 2 concerned mainly with procedural issues.

However, by February 1992 at INC 5 in New York there was still no resolution of some issues—particularly GHG reduction targets. The INC therefore decided to continue its work in April that year. Between the two INC 5 sessions Ripert convened an “extended bureau” meeting in Paris.<sup>28</sup>

At this meeting he was urged to develop his own “composite text” in order to simplify the heavily bracketed negotiating text that had developed.

A composite text under Ripert’s name duly appeared before INC 5 when it resumed in April 1992. Many participants believed that this move was critical to the success of the negotiations.<sup>29</sup> At INC 5 it was decided to abandon the established working group structure and work instead in three groups in order to consider clusters of articles. These three groups were as follows:

- Commitments (Article 4), financial mechanisms (Article 11) and reporting chaired by Jean Ripert;
- Preamble, objectives and principles (Articles 2 and 3) chaired by Dr Ahmed Djoghlaif of Algeria;
- Institutions, dispute settlement and final clauses chaired by Ambassador Raoul Estrada of Argentina. Towards the end of the meeting this group also served as a legal drafting group and considered articles from the other clusters.<sup>30</sup>

After all interested delegations had been offered the opportunity to have their say on the outstanding issues, Ripert reconvened the Extended Bureau and compromises were worked out. Thanks to this deal-making, negotiations on the Framework Convention achieved completion in time for adoption at the Rio Conference on Environment and Development in 1992. Moreover, a Conference of the Parties (COP) was created, in accordance with Article 7 of the FCCC.<sup>31</sup> The COP meets annually and is supported by a secretariat established under Article 8 of the FCCC. Moreover, the Convention established a series of institutions to govern, manage and support continuing negotiations on protocols within its framework.<sup>32</sup>

The first COP to the FCCC met in Berlin in March 1995. At this meeting it was decided that negotiations should begin on a protocol or other legal instruments that would strengthen commitments under the Convention and address emission reduction beyond the year 2000.<sup>33</sup> This Protocol was duly negotiated and adopted by the third COP in Kyoto, Japan, in December 1997 and is known as the Kyoto Protocol.<sup>34</sup>

### Difficulties in the negotiation of the Framework Convention

The FCCC negotiating process had to reconcile a myriad of negotiating positions among participating states. Developing countries were divided into three main groups. The first group, of small island states and some African nations, wanted the developed world to bear the brunt of responsibility for the climate change problem. The second group, including Brazil, China and India, pushed for financial and technical assistance to reduce their GHG emissions. The third group, made up of Saudi Arabia and other fossil fuel exporting countries, was concerned about the economic aspects of cutting GHGs because of potential implications for its economies. Among the developed nations the United Kingdom, for instance, was opposed to using certain fiscal measures such as carbon taxes to reduce GHG emissions while France (and, similarly, Japan) espoused carbon cuts on the basis of per capita calculations. Austria and Switzerland advocated strong commitments to reducing carbon dioxide, a position the United States did not support.<sup>35</sup>

### Factors underpinning success

The INC Chairman played an integral role in the successful completion of the FCCC process. Ripert skilfully aided the building of consensus, most visibly through presentation of his compromise text at the end of INC 5, a contribution that has been widely acknowledged.<sup>36</sup> Moreover, his chairmanship appeared to provide an important sense of continuity to the negotiating process. This was especially significant because the "formal rotation of the co-chairs between working group sessions tended to limit the continuity and to obstruct the global vision needed for the success of these complex negotiations".<sup>37</sup>

Ripert also allowed non-governmental organizations (NGOs) access to the plenary meetings.<sup>38</sup> The ability of NGOs to monitor and influence the FCCC negotiating process was "enhanced by cooperation within the Climate Action Network (CAN), a network organized and run by regional groups of NGOs".<sup>39</sup> These NGOs worked effectively with governments and were also important in voicing the concerns of smaller island states that would be more prone to the effects of climate change. A powerful weapon in the CAN coalition's arsenal was a widely circulated newsletter it produced entitled *ECO*.<sup>40</sup> This publication helped CAN to coordinate information exchange on climate change at the national, regional and international levels. It also drew further attention to policy options and

position papers on issues related to climate change and coordinated activities that the CAN NGO members produced.<sup>41</sup>

Consensus-building among the negotiating states may also have been helped by the high frequency of informal meetings and workshops held during and between the five INC sessions. The time line provided for by the Rio Conference, coupled with the frequency of these informal meetings and information sessions, created momentum for progress through to a successful conclusion.

### **Public health: the Framework Convention on Tobacco Control<sup>42</sup>**

#### **Aim**

The objective of the WHO FCTC and its future protocols is to protect present and future generations from the health, social, environmental and economic consequences of tobacco consumption and exposure to tobacco smoke. The framework for tobacco control measures is to be implemented by states parties at the national, regional and international levels in order to reduce progressively and substantially the prevalence of tobacco use and exposure to tobacco smoke. The treaty has provisions for issues such as tobacco advertising and promotion, agricultural diversification, smuggling, taxes, and subsidies.

#### **The process**

The governing body of the WHO is the World Health Assembly (WHA). On 24 May 1999 the WHA backed a resolution (WHA 52.18) calling for work to begin on a framework convention on tobacco control. The resolution contained a detailed negotiating timetable.<sup>43</sup> A record 50 countries including China, France, the Russian Federation, the United Kingdom and the United States pledged their financial and political support for the prospective convention. Support was also forthcoming from countries with "major tobacco growers and exporters, as well as several developing and developed countries that face the brunt of the tobacco industry's marketing and promotion".<sup>44</sup>

The WHA resolution contained an annex detailing the two-stage process that would govern the development of the WHO FCTC. The first stage involved a working group open to all WHO member states. In the second stage an Intergovernmental Negotiating Body (INB) would be

responsible for the drafting of the Convention and possible related protocols.

The first meeting of the Working Group took place in Geneva in October 1999; the second from 27 to 29 March 2000. The two Working Group sessions delivered a draft catalogue of possible substantive and procedural elements for the Framework Convention. A final report on the Working Group's outcome was delivered to the 53rd WHA in Geneva in May 2000. Another resolution (WHA 53.16) was unanimously adopted at that meeting: it called for negotiations to commence on the WHO FCTC. In March 2000, the WHO Director-General, Gro Harlem Brundtland, called for public hearings on issues surrounding the Framework Convention, which were held on 12 and 13 October 2000 just prior to the commencement of formal negotiations.<sup>45</sup>

The first of six INB sessions began in October 2000 in Geneva. The INB was open to participation by all WHO member states, regional economic integration organizations and observers. NGOs were also allowed to participate in the formal plenary sessions of the INB. The informal working group, contact group sessions and the intersessional meetings were generally closed to NGOs. However, NGOs were occasionally invited by the Chairman (with the agreement of member states) to make presentations in order to clarify issues of relevance to the discussion.<sup>46</sup> When the INB was in session, NGOs were also allowed time at the end of every morning and afternoon meeting to make statements. The NGO community worldwide organized themselves into the Framework Convention Alliance of which NGOs including Infact, Action on Smoking and Health (ASH) and the Campaign for Tobacco-Free Kids were prominent members.<sup>47</sup>

The WHO FCTC negotiations functioned largely on the basis of the six WHO regional divisions—Africa, Europe, the Eastern Mediterranean region (which encompassed the Middle East), the Western Pacific region (covering Australia, China, Japan, and most Pacific Islands), South-East Asia and the Pan-American region. The WHO sponsored regional conferences before each of the INB sessions.<sup>48</sup> “Regional” negotiating positions were often established at these meetings.<sup>49</sup>

INB 1 began its work in 2000 by reviewing the documents of the two WHO FCTC “pre-negotiation” working groups. All decisions were made by consensus and there was no voting on any matter. Three working groups

were then established at the first session of the INB in Geneva and assigned with the following tasks:

- **Working Group 1:** Research; elimination of sales to and by young persons; regulation of tobacco product disclosures; packaging and labelling; demand reduction measures concerning tobacco dependence and cessation; education; training and public awareness; passive smoking and regulation of the contents of tobacco.
- **Working Group 2:** surveillance; exchange of information; price and tax measures to reduce demand for tobacco; government support for tobacco manufacturing and agriculture; illicit trade in tobacco products; licensing; guiding principles; general obligations; and definitions.
- **Working Group 3:** COP; secretariat; support by the WHO; reporting and implementation; settlement of disputes; compensation and liability; development of the convention; final clauses; financial resources; scientific; technical and legal cooperation; guiding principles; general obligations; and definitions.<sup>50</sup>

At INB 1 it was agreed that the Chair, Ambassador Celso Amorim of Brazil, should prepare a draft text based on member states' interventions and written submissions made at that session. Although significant progress was made on developing this text between INB 1 and INB 3, INB 4 encountered a serious hurdle. Negotiation on the text, which was by now heavily bracketed, came grinding to a halt as some delegations could not achieve compromise on provisions concerning advertising and funding.

In March 2002, during the fourth round of negotiations, it was decided that a new "Chair's text" would be developed. By now Amorim had been succeeded as INB Chair of the negotiations by Ambassador Luiz Felipe de Seixas Correa, the new Permanent Representative of Brazil in Geneva.<sup>51</sup> Correa's document, released in July 2002, was subsequently examined by participating states during the fifth INB session in October 2002. On the basis of these discussions Correa released a revised text on 15 January 2003 for consideration at the sixth session of the INB. In February 2003 member states agreed to transmit the final draft of the Convention to the WHA for consideration, and it was adopted on 21 May 2003.

### Difficulties in the negotiation of the Framework Convention

The negotiating positions in the WHO FCTC were polarized due to the competing economic and commercial interests of various stakeholders in the process. Powerful multinational corporations including Philip Morris, Japan Tobacco and British American Tobacco (BAT) worked hard to undermine negotiations on provisions concerning tobacco advertising, promotion and sponsorship. For their part, states with large tobacco industries including Germany and the United States were initially opposed to stringent provisions on tobacco advertising, promotion and sponsorship. But some developing states and industrialized countries like Norway insisted on a tougher treaty with particular emphasis on financial aid for poorer states in implementing the pact.<sup>52</sup>

The system of WHO regional groups did not prove helpful in narrowing down the differences in negotiating positions among governments. While the intersessional regional meetings strengthened regional negotiating positions, the downside was that their inflexibility proved to be counter-productive at some stages of the negotiation process.

Intensive lobbying by the NGO community in the negotiations had a tendency to impede forward momentum towards completion.<sup>53</sup> Though well organized, NGOs were sometimes perceived, through their practice of “naming names”, as lacking professionalism and political astuteness by government representatives. One example of this was a report produced by Infact entitled “Cowboy Diplomacy: How the US undermines International Environmental, Human Rights, Disarmament and Health Agreements”.<sup>54</sup> The report was a scathing attack on the multilateral treaty record of the United States and pinpointed key individuals in the Bush Administration for their links with large tobacco corporations. Tactics such as these—however gutsy they were perceived by some—affronted the United States and other countries, making consensus-building harder.

Delegations were predominantly comprised of individuals from national ministries of health. This meant that these individuals were well versed with the subject matter under consideration. But in some cases they lacked the experience and knowledge to negotiate an international legal instrument. One delegate in the negotiations even suggested that “Many of the delegates had never heard of a ‘no reservations’ clause, did not know whether economic hardship constitutes a legitimate excuse under international law for non-performance of treaty obligations, and were

unfamiliar with how a 'framework' convention with attached protocols is supposed to be structured".<sup>55</sup> Precious conference time was spent educating delegates on terminology and other legal aspects involved in multilateral negotiations.

The autonomy of some delegates participating in the negotiations also proved to be counter-productive in the long term. Delegations sometimes comprised only one or two representatives who advocated strongly for a public health agreement with detailed provisions on advertising and sponsorship. Consultation between the delegates and their ministries could be less than extensive. While this proved to be a good catalyst for progress within the negotiating process, many of these representatives subsequently encountered difficulties in obtaining domestic support for the treaty after it was completed. Arguably this has slowed down entry into force of the Convention in some countries.<sup>56</sup>

#### Factors that aided the successful conclusion of negotiations

There were a number of key factors that helped the negotiating process to a successful conclusion.

First, although they operated as individuals in the early days of the negotiations, a coalition of African, South-East Asian and Middle Eastern states, along with Caribbean and Pacific Islands, had coalesced by the last negotiating session. Together they held firm in favour of a comprehensive ban on tobacco advertising, promotion and sponsorship against powerful counteracting diplomatic pressure.<sup>57</sup> Moreover, this coalition was able to exact pressure on the United States and other key reluctant states to join consensus on the treaty in the last stages of the negotiations.

Secondly, there was an unprecedented amount of transparency in the proceedings. Written communications from the secretariat of the negotiation were plentiful. The secretariat regularly briefed NGOs on the substantive issues under discussion in the informal meetings, which were usually closed to NGO participation. The process also attracted much public and media attention. With the significant level of domestic public interest that the WHO FCTC process encountered, many governments came under significant pressure domestically to push for the successful conclusion of the WHO FCTC. There was also pressure from the WHO, especially Director-General Brundtland. Indeed Brundtland played an active role in the process by using her good offices to press Heads of State

and heads of delegations towards completing negotiations successfully, in line with the WHO public health mandate.

Finally, when momentum in the negotiating process started to falter in INB 4 the Chairman's composite text helped to rejuvenate the process. The text that resulted from the INB 1 to INB 3 sessions (though arrived at through very transparent means) was so heavily bracketed that delegations needed guidance in reading and understanding it. The composite text produced by Chairman Correa, helped to make the text more accessible to the negotiators. This was a significant step in view of the fact that many did not have applicable legal drafting experience. Crucially the Chair achieved the authority (through his personal style and building upon the trust invested in his predecessor, Amorim) to develop a text without brackets through patient and skilled diplomacy, and brought along the vast majority of participating countries despite the contentious issues involved.

#### EVALUATING THE FACTORS THAT CONTRIBUTED TO SUCCESS IN THESE MULTILATERAL NEGOTIATIONS

Each of the three multilateral negotiations discussed above was racked with political difficulties. But each appeared to benefit at least from some of the following:

- **Leadership** was important. A patient, diplomatic and knowledgeable chairperson can significantly propel negotiations as Jean Ripert aptly demonstrated in the FCCC process. A sense of timing is also a critical attribute for an effective chair especially when having to convene a "Friends of the Chair" (or in the case of the FCCC an "Extended Bureau") type of group of an executive decision-making character, as well as being a forum for private advice and views. But because they are by necessity closed (and sometimes confidential) gatherings, there paradoxically needs to be an implicit level of trust by other delegations not directly represented in the room—or at least grudging acceptance of the situation. Otherwise, solutions arrived at this way by small groups may easily unravel in the main chamber at a negotiation's conclusion. An effective leader needs to have the ability to gauge when to convene this group and whom to invite. As Seixas Correa demonstrated in the WHO FCTC process it is also important for a chairperson to understand the difficulties and needs of participants

in the process and to find ways of alleviating them through judicious consultation.

On a more practical level, the chair of the negotiating body is important in providing continuity to the process. As the FCCC and the WHO FCTC process has shown it is not uncommon for the chairpersons of working groups to change from one session to another. Although this sometimes allows for more equitable state representation in the process, the chair still has to ensure that interruptions are kept to the minimum and has to have time to build sufficient credibility and knowledge to lead effectively. Another important quality for the chairperson of a negotiating body is to maintain (or least appear to maintain) a sense of autonomy from their national position. As we have seen from the United Nations Migrant Workers process, Ambassador de Leon's text did not garner support from Western states that were on the receiving end of illegal immigration. As one participant commented, "the Western European government representatives had the impression that it was basically designed to write a blank check for continued illegal migration".<sup>58</sup>

But leadership is not limited to the chair, as the Migrant Workers Convention process demonstrated. The MESCA group there showed that groups of individuals can transcend influence to provide collectively an element of leadership to the process.

- **Opportunities for coalition-building** among different constituents in these multilateral negotiating processes sometimes enabled weaker parties to maximize their influence and thereby better defend their interests. This was demonstrated well by the coalition of developing countries in the final stages of the WHO FCTC process. Other coalition-building efforts improved the lobbying capabilities of NGOs in processes like the FCCC. But coalition-building can also hinder consensus-building in a process—as NGO activities in the WHO FCTC process showed. This example serves to show that effective coalition-building rests not only on the sheer number or size of a coalition's members, but also on their ability to operate sensitively in a politically charged environment.

- **Informal meetings** and “non-official” contacts between negotiators were useful in the evolution of these processes. In general, informal plenary sessions abandon any structured seating plan and communication is less guarded given that these sessions are in most negotiations closed to public participation and formal records are not kept. These meetings often provided good opportunities for straight talking and clarification among negotiators, which (in principle at least) should have assisted in problem-solving. However, the WHO FCTC negotiations showed that informal meeting processes needed to be managed with care. The informal regional group meetings, between INB sessions of the WHO FCTC, hardened group positions, which compounded inflexibility back at the formal negotiating table.
- **A clear end goal, including a time frame**, appears to have been important in all three negotiations. While a quick result is not necessarily superior to a long process when complex issues need to be understood and incorporated into a realistic outcome, it may be that some degree of psychological pressure on negotiators is useful in focusing minds on facilitating agreement, as well as those of government authorities at home. The FCCC was negotiated with the Rio Conference as its deadline while the WHO FCTC process worked to a well-defined (although not immutable) timetable. In contrast the United Nations Working Group on the Convention on Migrant Workers and Their Families was not bound to any deadlines or schedules. Of course, this in itself is not sufficient: political attention and willingness to compromise in good faith at a senior level are crucial, as discussion of BTWC in the following section will show. It is probably significant that both the FCCC and the international tobacco control negotiations received considerable attention from NGOs and the wider public. By contrast, negotiation on migrant worker issues, which tended to be perceived in cross-cutting ways by differing domestic constituencies of various negotiating states, took longer.

## THE CONFERENCE ON DISARMAMENT, THE BACTERIOLOGICAL (BIOLOGICAL) AND TOXIN WEAPONS CONVENTION AND THE CONVENTION ON CERTAIN CONVENTIONAL WEAPONS SINCE THE 1990S

### CASE STUDIES

#### The Conference on Disarmament

##### Aim

The Conference on Disarmament (CD) has a mandate to negotiate arms control and disarmament measures in any major area of interest to the international community.<sup>59</sup> The CD's agenda for negotiations draws from the recommendations made to it by the General Assembly, the proposals presented by member states of the Conference and the decisions of the Conference.<sup>60</sup>

##### The process

The Conference on Disarmament is a standing body and is not purely oriented towards completion of a specific negotiation unlike the processes discussed previously in this article. In accordance with Rule 18 of its rules of procedure the Conference conducts "its work and adopts its decisions by consensus".<sup>61</sup>

The Conference on Disarmament meets each year in Geneva in a session divided into three parts.<sup>62</sup> Although the CD is regarded as a body autonomous from the United Nations, the two inevitably have a close relationship in view of the CD's physical location (in the United Nations Palais des Nations), because United Nations personnel service it and because even its budget is included within the United Nations budgetary framework. In addition the Secretary-General of the CD is appointed directly by the United Nations Secretary-General in consultation with the CD and acts as his personal representative.<sup>63</sup> Moreover, the majority of personnel from diplomatic missions in Geneva participating in the CD also have responsibilities for servicing other disarmament or arms control-related activities there, including negotiations within United Nations frameworks.

The Presidency of the Conference on Disarmament rotates among all its members based on the English alphabetical list of membership. Each President presides over the Conference for a four-working-week period.<sup>64</sup> An informal “troika” system, comprising the past, present and future presidents of the Conference, exists outside the rules of procedure, intended by the Conference’s membership to ensure some degree of continuity in leadership in view of the rotational process.

Members of the Conference on Disarmament operate a group system consisting of the Western European and Others Group (WEOG) of states, the Group of Eastern European States and Others, the Non-Aligned Movement as well as China. China stands outside the group system by choice, and represents itself at presidential consultations. These groups usually meet on a weekly basis when the CD is in session and appoint coordinators and special representatives occasionally on specific issues. Correspondingly, the presidential troika meets with the regional group coordinators on a weekly basis when the Conference is in session. The existence of the regional groupings assists with procedural aspects like the rotation of chairpersons in the ad hoc committees.

The Conference on Disarmament is not universal in its membership. Nor does it necessarily have the broadest active participation amongst its members in practice.<sup>65</sup> At present these number 66 countries, and new members may only be admitted through a consensus decision by the Conference.<sup>66</sup> Specialized agencies, the International Atomic Energy Agency (IAEA) and other organs of the United Nations may also be invited to participate in the work of the conference under rule 41, although the CD has never offered such an invitation. Moreover, the Conference is notable for the especially limited degree of access it affords NGOs interested in observing or contributing to its work. NGOs may attend formal plenary in the public gallery, but in effect are able to contribute little else.<sup>67</sup>

At the First Special Session on Disarmament in 1978 the United Nations General Assembly mandated the Conference to deal with disarmament in the following areas:

1. Nuclear weapons in all aspects;
2. Chemical weapons;
3. Other weapons of mass destruction;
4. Conventional weapons;

5. Reduction of military budgets;
6. Reduction of armed forces;
7. Disarmament and development;
8. Disarmament and international security;
9. Collateral measures, confidence building measures, and effective verification methods in relation to appropriate disarmament measures; and
10. A comprehensive programme of disarmament leading to general and complete disarmament under effective international control.<sup>68</sup>

As part of its rules of procedure the Conference on Disarmament adopts an agenda for each annual session in which these priorities are incorporated. At the 2004 session its agenda was as follows:

1. Cessation of the nuclear arms race and nuclear disarmament;
2. Prevention of nuclear war, including all related matters;
3. Prevention of an arms race in outer space (PAROS);
4. Effective international arrangements to assure non-nuclear-weapon states against the use or threat of use of nuclear weapons;
5. New types of weapons of mass destruction and new systems of such weapons; radiological weapons;
6. A comprehensive programme of disarmament;
7. Transparency in armaments; and
8. Consideration and adoption of the annual report and any other report, as appropriate, to the United Nations General Assembly.<sup>69</sup>

The crucial difficulty for the CD in undertaking substantive work, however, has been in agreeing its annual programme of work, rather than its agenda, since the conclusion of the CTBT negotiations in the mid-1990s. The programme of work comprises a schedule of the Conference's activities for the annual session taking into account the recommendations, proposals and decisions of member states of the Conference, based on the agenda.<sup>70</sup> A "provisional agenda and the programme of work is drawn up by the president of the Conference with the assistance of its Secretary General and presented to the Conference for consideration and adoption".<sup>71</sup>

The CD gathers in formal and informal plenary meetings.<sup>72</sup> Historically, however, most substantive work has been carried out in subsidiary bodies established by formal decision in plenary, including ad hoc committees, working groups, technical groups and groups of

governmental experts.<sup>73</sup> Although not subsidiary bodies, “special coordinators” have also been appointed by the Presidency to look at substantive and procedural aspects of the Conference’s work and have sometimes convened consultations with regional groups or the collective membership.

Rule 23 of the CD’s rules of procedure states that the “Conference shall define the mandate for each of such subsidiary bodies and provide appropriate support for their work”. For example, in the case of the CTBT negotiations, its mandate directed an ad hoc committee to “negotiate intensively on a universal and multilaterally and effectively verifiable comprehensive nuclear-test-ban treaty”.<sup>74</sup> Document CD/1238 also outlined how work for this negotiation should be organized in requesting the ad hoc committee to “establish the necessary working groups” to include “one on verification and one on legal and institutional issues which should be established in the initial stage of the negotiations, and any other which the Committee may subsequently decide upon”. In practice, the mandates of these committees have to be renewed annually by consensus of the Conference, with the chairing of these committees usually rotating yearly among the regional groups.

The CD annually transmits a report of its work to the United Nations General Assembly in line with its rules of procedure (rule 43). Additionally, when negotiations on legally binding instruments have been concluded in the CD (and though it is not formally obligated to do so), it has transmitted the text of these treaties to the United Nations General Assembly for endorsement along with a request for signature and ratification by United Nations Member States.

#### Difficulties in the process

The CD has been unable to agree on a programme of work since 1998, which means it has not undertaken substantive negotiation on any subject. The crux of the problem hinges on disagreement over the mandates to be given to subsidiary bodies to deal with PAROS and fissile material.<sup>75</sup> While China wanted negotiations to begin on PAROS the United States only wanted negotiations on a fissile material treaty. As consensus is needed for agreement on a programme of work, the CD became deadlocked, and remains so at the beginning of 2005.

A succession of CD Presidents—although by no means all—have tried to broker a solution in order to break this deadlock. They include efforts by Ambassadors Saleh Dembri of Algeria in 1999, as well as Jean Lint of Belgium and subsequently Celso Amorim in 2000. Although Brazil came particularly close in August 2000, Amorim’s proposals could not ultimately achieve final consensus on the Conference floor.

Since then the most significant attempt to try to bring the Conference to consensus on a programme of work was a so-called “five ambassadors” (or “A5”) proposal at the end of the 2002 session.<sup>76</sup> This proposal tabled as CD/1692 proposed the establishment of four ad hoc committees dealing with Fissile Material, Negative Security Assurances (NSA), Nuclear Disarmament and PAROS. It was also proposed that “special coordinators” on Comprehensive Disarmament, Transparency in Armaments and Radiological Weapons be appointed. However, only the Ad Hoc Committee on Fissile Material would have a negotiating mandate in accordance with the Shannon Report of 24 March 1995 (CD/1299).<sup>77</sup> With regard to PAROS, CD/1692 proposed that the committee should “deal with” the issue of PAROS and “identify and examine, without limitation and without prejudice, any specific topics or proposals, which could include confidence-building or transparency measures, general principles, treaty commitments and the elaboration of a regime capable of preventing an arms race in outer space”. However China maintained that the language contained in the PAROS mandate was too weak. The issue boiled down ultimately to whether the word “negotiate” should or should not be included.

China belatedly submitted its own revision to the A5 proposal on 7 August 2003 stating that it was willing to accept an ad hoc committee on PAROS with “the *possibility of negotiating* a relevant international legal instrument”. Many CD delegations hoped this concession would help bring an end to the impasse and that substantive work could begin. However, in a move that surprised many, the United States announced that it had decided to conduct an inter-agency process to review its policy on the negotiation of a treaty to ban the production of plutonium and highly-enriched uranium for nuclear weapons, which would delay its agreement to commence any negotiations in the CD.

United States Ambassador Jackie Sanders informed the Conference of the results of this review on 29 July 2004. Although the United States would

be willing to begin negotiations on a fissile material treaty, she said, the review had concluded that effective verification of the treaty “was not achievable”, promising that experts from Washington would brief the Conference on the reasons why in more detail later.<sup>78</sup>

#### Reasons for difficulties in the CD

Difficulties in finding agreement on a programme of work in the Conference on Disarmament primarily reflect the divergence in negotiating priorities that now exist among a handful of key member states, among which security threat perceptions and priorities increasingly diverge. For instance, while most delegations in the CD have expressed willingness to commence negotiations on fissile materials, other states like China believe that in the light of United States plans to build a national missile defence system, a PAROS treaty is also necessary. At root, these reflect wider geo-strategic and political calculations by these states. For instance, it has been speculated that lack of action in the Conference provides a longer window for China, which has smaller fissile material stocks for weapons than the United States or the Russian Federation, to produce and modernize its nuclear arsenal.<sup>79</sup> The United States, for its part, does not want to be constrained in the testing and deployment phases of its ballistic missile defence system—as demonstrated by its withdrawal from the ABM Treaty.

In other words, deadlock on substantive work in the Conference on Disarmament is not so painful for either the United States or China that they appear inclined to compromise on their opposing positions further. The structure of the Conference’s procedures—particularly the consensus rule and its comparative lack of transparency—facilitates this blockage.

#### The Bacteriological (Biological) and Toxin Weapons Convention Protocol negotiations

##### Aim

The Convention bans biological weapons and the equipment and means of delivery by which such weapons can be deployed.<sup>80</sup> But the enforcement of the BTWC is weak and so there have followed efforts to strengthen confidence in compliance.

##### The process

Towards the end of the 1960s an internal review in the Nixon Administration of the United States concluded that its massive biological

weapons programme should be abolished, as it was recognized that a biological arms race was not in the United States' strategic interests. Although customary international law and the 1925 Geneva Protocol banning the use of asphyxiating gases also place taboos on germ warfare, the United States, backed by other countries including the United Kingdom, felt a specific agreement banning biological weapons was necessary.<sup>81</sup> In 1972 negotiation of the Convention was completed, with the United States, the United Kingdom and the Soviet Union as treaty depositories. It entered into force in 1975 after 22 ratifications had been achieved. Despite its prohibitions, the Convention did not include any mechanisms to ensure confidence in compliance. Clandestine biological weapons programmes continued in some states, including in the Soviet Union, in South Africa and elsewhere.<sup>82</sup>

The need to strengthen the BTWC regime was acknowledged by its members at an early stage in the treaty's review process.<sup>83</sup> The BTWC Second Review Conference in 1986 developed a series of politically binding confidence-building measures, which were adopted and further expanded upon at the next review meeting in 1991. Also at that 1991 meeting states parties agreed to annual exchanges of selected information on facilities and activities considered relevant to BTWC compliance, including unusual outbreaks of infectious disease, vaccine production facilities, and biodefence programmes. These were effectively voluntary, however, and such reporting has always been patchy.

The 1991 Gulf war between Coalition forces (led by the United States) and Iraq as well as information leaking from the former Soviet Union about clandestine biological warfare activities there exacerbated concern in the international community that the Convention lacked means of ensuring compliance with its prohibitions. Therefore the Third Review Conference set up a group of verification experts, (known as the VEREX group) to examine potential BTWC verification measures from a scientific and technical standpoint as well as the feasibility of a compliance regime. In September 1993 VEREX issued a report concluding that certain combinations of verification measures could increase transparency, enhance confidence in compliance, and deter violations.<sup>84</sup> Consequently, a Special Session of BTWC in 1994 set up a further governmental group mandated to develop further the potential verification measures listed by the VEREX group and to explore the possibility of creating a legally binding instrument to strengthen the BTWC.<sup>85</sup>

The BTWC Ad Hoc Group negotiations were set up to achieve a legally binding protocol “as soon as possible”, based on a mandate from the Fourth BTWC Review Conference in 1996.<sup>86</sup> According to its mandate, all Ad Hoc Group decisions were to be made by consensus. The Group negotiated from 1995 to 2001, at first on working papers submitted by national governments and later on the basis of a “rolling text” of the emerging draft protocol. Overall around three Ad Hoc Group sessions were held each year, each lasting two to three weeks. There were 24 sessions held in all, with work most intensive in 1999 and 2000 by which time the rolling text and associated documents totalled nearly 600 pages of square-bracketed or provisionally agreed language.

#### Difficulties in negotiating the BTWC Protocol

From the beginning of the Ad Hoc Group negotiations certain key states in the BTWC context were ambivalent about the prospect of a verification instrument. Trilateral biological weapons inspections involving the United States, the United Kingdom and the Russian Federation in the early 1990s following Russian President Yeltsin’s admission that his new country had inherited the former Soviet Union’s biological warfare programme had mixed consequences. In particular, the mishandling of a visit to a Pfizer biological facility in the United States had turned some of the American life science sector against compliance activities they regarded as intrusive—a description that became increasingly encompassing as the decade wore on. Investigation of Iraq’s biological warfare activities by United Nations Special Commission (UNSCOM) inspectors was also encountering many difficulties.<sup>87</sup>

The United States’ ambivalence about the value of a protocol handicapped the prospects of a robust instrument from the start. It meant that the United States failed to provide the leadership it had demonstrated elsewhere, for instance in the CWC negotiations, that could help overcome resistance from hardliners in the Non-Aligned Movement such as China, Cuba, India, Iran and Pakistan. Moreover, as the draft protocol text was fleshed out and efforts intensified towards completion by the beginning of this decade, there were growing signs of the United States officials’ concerns that a compliance regime could interfere with the United States’ national security activities. The United States government’s reservations in public primarily hinged on the draft protocol not being sufficiently robust, and on creating risks of loss of proprietary commercial information for industry. Behind closed doors its positions on aspects of the prospective

regime such as routine-type visits to check declarations, investigations and declarations contributed manifestly to the draft regime's dilution as well as undermining Western Group political unity. Moreover, hardline United States rhetoric on export controls and assistance and cooperation measures in the Ad Hoc Group exacerbated ideological polarization between developed and developing countries and was eagerly seized upon by so-called hardliners on the far end of the spectrum (many of which the United States suspected of offensive biological activities) who were no keener on a protocol than Washington appeared to be.<sup>88</sup>

The Russians remained largely silent in the negotiations, except on issues concerning basic definitions and "objective criteria" in which they appeared to have an interest in creating quantity thresholds for biological weapons. This would have completely undermined the object and purpose of the Convention had it been agreed because it would have undermined the treaty's basic prohibitions. The British delegation, for its part, found itself in the thankless—and increasingly impossible—position of trying to bridge the Atlantic amid growing suspicions by France, Germany and other Europeans about the posture of an increasingly exasperated United States. In sum, as the negotiations wore on, moderate countries both in the Western Group and the Non-Aligned Group who thought they had joined a process tasked with negotiating a verification regime found themselves increasingly marginalized.

Amidst all of this the Chairman of the negotiations, Ambassador Tibor Tóth of Hungary tried to edge negotiations towards completion of a final product in time for the next BTWC Review Conference in December 2001. By late 2000, however, there were ominous signs that the "endgame" process was unravelling as some delegations indicated their unwillingness to compromise on key issues in order to bring negotiations to a successful conclusion. Tóth unveiled a "composite text", based on his assessment of what the market would bear in terms of an agreement, in early 2001. In July 2001, however, the United States announced that it rejected the rolling text, the Chairman's composite text and further efforts to continue Ad Hoc Group negotiations. Ad Hoc Group collapse ensued.

### Reasons for the failure of legally binding efforts to strengthen the Convention

On 25 July 2001, in a statement to the Ad Hoc Group, Ambassador Donald Mahley of the United States delegation outlined the ostensible reasons for the United States' rejection:

The draft protocol will not improve our ability to verify BWC compliance. It will not enhance our confidence in compliance and will do little to deter those countries seeking to develop biological weapons. In our assessment, the draft Protocol would put national security and confidential business information at risk.<sup>89</sup>

At the Fifth Review Conference that followed in November 2001, the United States Under-Secretary of State for International Security Arms Control, John Bolton, called for the termination of the Ad Hoc Group's mandate and instead pressed for voluntary national measures to strengthen the Convention as sufficient. Bolton said it was necessary to "look beyond traditional arms control measures to deal with the complex and dangerous threats posed by biological weapons".<sup>90</sup>

However, while it is true that the United States was responsible for formal rejection of the draft protocol it would be a misrepresentation to claim that this explained the failure of efforts to strengthen the Convention through legally binding measures. In theory the protocol negotiations could have continued beyond July 2001 until at least the November Review Conference without the participation of the United States. And even then, had the bulk of other states parties to the Convention agreed to continue developing the protocol or other legally binding measures, procedural mechanisms existed in the rules of procedure of the Review Conference for this to have been put to a vote.<sup>91</sup>

None of this transpired for many reasons. One reason was because other countries with sizeable life-science sectors were reluctant to accept an inspection and declaration burden the United States (the country with the largest sector of all) would not assume. The United States' reservations and delays in implementing CWC during the late 1990s had created significant resentment, especially among European countries otherwise generally in favour of robust compliance measures. Additionally, although many countries still believed the draft protocol would be of some use in monitoring compliance if agreed, few or none held the conviction that it

was very robust after years of dilution of its contents during the Ad Hoc Group's work. Political polarization in the later stages of the negotiations, as described above, also mitigated against the possibility of a strong international front materializing, especially between developed and developing countries. Perhaps most of all, however, the United States' rejection of the protocol and its negotiation process suited the so-called hardliners in the Non-Aligned Movement: failure to agree on an instrument they did not want (and may have rejected down the track) could be blamed upon the United States.

### **Negotiations on a protocol to the Convention on Certain Conventional Weapons on explosive remnants of war**

#### **Aim**

This United Nations Convention regulates the use of certain conventional weapons in armed conflict, in order to prevent unnecessary suffering to combatants and indiscriminate harm to civilians. The CCW is a framework instrument with specific additional rules set out in subsidiary protocols.<sup>92</sup> Efforts since the Second CCW Review Conference have focused on minimizing the effects of explosive remnants of war (ERW), "mines other than anti-personnel mines" and enhancing compliance with the Convention, which led to agreement on a legally binding treaty on ERW in November 2003.

#### **The process**

To examine the ERW protocol negotiations, further background about the shape of the wider CCW treaty process is necessary. Negotiated in 1979 and 1980, the Convention built upon established customary rules regulating the conduct of hostilities and the provisions of the 1949 Geneva Protocol.<sup>93</sup> When the Convention entered into force in 1983 (three years after its adoption) it contained three protocols prohibiting the use of weapons that employ fragments undetectable in the human body by X-ray (Protocol I), regulations on the use of landmines, booby traps and similar devices (Protocol II) as well as rules limiting the use of incendiary weapons (Protocol III).

A fourth protocol was developed in 1995 that prohibits the use and transfer of blinding laser weapons.<sup>94</sup> At the first CCW Review Conference meeting in 1996 various changes were made to Protocol II—including expanding its scope to internal armed conflicts, as well as inter-state

conflict. The Review Conference also decided that an annual meeting of state parties to Amended Protocol II would be held once sufficient ratifications had been achieved.

Momentum for a new protocol to the Convention on “explosive remnants of war” was initially generated due to efforts by the International Committee of the Red Cross (ICRC).<sup>95</sup> In September 2000 the ICRC organized a workshop with diplomats and military experts in Nyon, Switzerland, at which it proposed that negotiations on an ERW protocol commence at the earliest possible date within the CCW framework. This influential meeting underscored the humanitarian problems caused by ERW in recent conflicts in Kosovo, Afghanistan and Iraq (after the first Gulf war).<sup>96</sup>

Preparatory meetings of CCW member states were convened in December 2000 and in April 2001 to prepare for the Second Review Conference held in December 2001 and chaired by Ambassador Les Luck of Australia.<sup>97</sup> This was a successful meeting, including achievement of agreement to modify the scope of the CCW to encompass internal armed conflicts in addition to international conflicts.<sup>98</sup> The Review Conference decided to establish a “Governmental Group of Experts” to examine the possibility of a new ERW protocol. This group was to “consider all factors, appropriate measures and proposals, in particular:

- Factors and types of munitions that could cause humanitarian problems after a conflict;
- Technical improvements and other measures for relevant types of munitions, including submunitions, which could reduce the risk of such munitions becoming ERW;
- The adequacy of existing international humanitarian law in minimising post-conflict risks of ERW, both to civilians and to the military;
- Warning to the civilian population, in or close to, ERW-affected areas, clearance of ERW, the rapid provision of information to facilitate early and safe clearance of ERW, and associated issues and responsibilities; and
- Assistance and cooperation.”<sup>99</sup>

The Group of Governmental Experts met three times in 2002. Following these discussions CCW member states decided in December of

that year that the work of the Group should continue through 2003 with a mandate to negotiate. The ERW negotiation, coordinated by Geneva-based Netherlands Ambassador Chris Sanders, quickly fleshed out a draft instrument in time for agreement for adoption at the 2003 meeting of state parties the following November.<sup>100</sup>

The Group's discussions encompassed other issues. France (and later the European Union) put forward proposals to improve the weak compliance regime of the CCW. The ICRC concerns about the humanitarian impacts of "mines other than anti-personnel mines"—that is, anti-tank or anti-vehicle mines—in post-conflict situations were taken up in discussions. Switzerland (with ICRC support) called for further work on examining the implications of small calibre ammunition that could have so-called "dum-dum" effects. Switzerland's proposal found little resonance in the Group despite its ballistic testing that indicated some forms of military ammunition such as explosive .50 calibre bullets, apparently intended for use as anti-materiel tasks, could have dum-dum type effects in the human body (prohibited by the 1868 St. Petersburg and 1899 Hague Declarations).<sup>101</sup> These issues encountered different levels of acceptance amongst the majority of CCW states parties. ERW is the only item to have been negotiated upon to date.

#### Difficulties in the process

Earlier in the history of CCW there had been some disappointment about the outcome of negotiations on Amended Protocol II, completed in 1996, among some states and transnational civil society groups, especially in the humanitarian field. Some countries, as well as the ICRC and the International Campaign to Ban Landmines (ICBL), felt that humanitarian imperatives had been subordinated to orthodox arguments of national security and "military utility". This dissatisfaction contributed to international momentum for negotiation of the 1997 Mine Ban Convention banning antipersonnel mines, rather than merely restricting aspects of their design and use as CCW Amended Protocol II had done. A perception developed among some in the humanitarian community, as well as some core countries in the Mine Ban Convention process, that the CCW was increasingly outmoded and lacking in credibility.

Hence, there were uneven expectations about the ability of the CCW to make much progress in confronting challenges considered to be of contemporary relevance by the international community in the lead-up to

the 2001 Review Conference. However, low-key but highly effective chairing by Australia created a sense at this Conference that achievement of a positive outcome would be a crucial litmus test for the CCW regime. It ultimately translated into mandates for further work in several areas.

The success of the Second CCW Review Conference formed the foundation for success in the ERW Protocol negotiation process, which nevertheless encountered difficulties in three main areas. First, there were political differences of opinion concerning its scope. Some states and NGOs felt a protocol should incorporate specific technical measures to improve the reliability of munitions (and hence lower the risk of them becoming ERW). These proposals were unable to achieve consensus in the two-year time frame of discussion and negotiation. Others felt the protocol should be only concerned with generic post-conflict remedial measures such as warnings to civilians, general undertakings to clear contaminated areas and information exchange, which seemed more broadly acceptable. Secondly, there was the issue of whether existing ERW problems would be dealt with in the instrument. Thirdly, and of particular concern to key military states such as the United States, was the principle of user-responsibility and how this might play out in terms of legal liability for users of munitions that failed to function as intended with deleterious humanitarian consequences. There was also debate over the final status of the document—that is, whether it would be legally or politically binding in nature (an option preferred by the United States). However, this was tactical rather than substantive, and hinged upon the nature of the substantive provisions on the issues outlined above.

In the end, although the majority of CCW member states held firm to their preference for a legally binding protocol, a more limited scope prevailed, which excluded firm undertakings on existing ERW (although voluntary undertakings were not excluded) and strong provisions on user-responsibility. The legal commitments agreed in CCW Protocol V are also quite qualified in many places with phrases such as “where possible” and “where feasible”. So far there has been slow uptake of accessions to the Protocol: as of writing this more than a year later only a handful of countries have joined, and no states yet with major military forces such as China, the Russian Federation, the United States, the United Kingdom or France.<sup>102</sup>

### Factors in success

In view of the paucity of positive developments in the creation of new multilateral norms in the field of disarmament and arms control in recent years the achievements of the CCW process have helped to move it from its position near the margins of the diplomatic wilderness in the 1990s closer to centre stage. There is reason to assume also that those countries unwilling to join the Mine Ban Convention, like the United States, view the CCW as a forum to show they can play a positive role on conventional weapons issues.

The preparatory process leading up to the Second Review Conference functioned as a pre-negotiation phase through its technical and diplomatic discussions and development of mandates establishing the basic parameters for work from 2001. Aiding it in this case was the modular nature of the mandate structure—a multi-lane highway rather than a one-lane road—enabling some work (amendment of the CCW to include internal armed conflict, ERW) to move faster than other traffic. However, ultimately all of this depended upon sufficient flexibility from states in the diplomatic context to avoid deadlock, as occurred in the Conference on Disarmament. The influence of key office holders at the Review Conference in this respect—Ambassador Luck of Australia and, later, Ambassador Rakesh Sood of India, in particular—was significant here in generating good will. Had a key state in the CCW had major issues with priorities or the elements of further work, this “multi-lane” system could easily have worked against the CCW making progress because of the opportunity for political linkages to be established.

An important factor in the success of the ERW protocol negotiations was the involvement of the humanitarian community including United Nations agencies, the ICRC and NGOs such as Human Rights Watch, Handicap International and Landmine Action (UK). Many of these actors were more experienced than they had been before owing to the political experience they had obtained in processes such as the Antipersonnel Mine Ban Convention. Consequently, while NGO coordination and influence never equalled that of the Mine Ban Convention process, civil society actors nevertheless interacted effectively with government representatives at the negotiations in adding both field perspectives to discussions of the effects of ERW as well as an additional sense of urgency and purpose to the negotiations. Military and diplomatic practitioners in the CCW process were also by now more accustomed to the presence of civil society actors

because of the educative influence of other multilateral processes in which they had been involved like the Mine Ban Convention. The role of the Netherlands, which coordinated the ERW negotiation, was significant in this regard as a country with both military credentials (as a member of the North Atlantic Treaty Organisation (NATO) and good lines of communication with civil society.

The humanitarian influence in the ERW protocol process was especially important because it contributed to the sense among those states unhappy with aspects of the draft protocol that they should nonetheless avoid creating linkages that would prevent a successful negotiation. Negotiations took place against the backdrop of the war and opening months of Coalition occupation of Iraq, from which mounting evidence was accumulating in the media of the humanitarian consequences of ERW. Moreover, the broader CCW working structure allowed those issues unable to achieve consensus to be deferred by means of further discussion, including technical measures, specific regulations with concern to the use of cluster submunitions and discussions on the adequacy of international humanitarian law principles in this domain. This created a sense of there being a continuum of options that can avoid, or postpone, outright rejection of an issue, rather than a one-shot deal.

### COMPARING DISARMAMENT AND ARMS CONTROL PROCESSES

In the next section we shall compare the six processes discussed in this article directly. However, before doing so it is worth briefly comparing and contrasting the Conference on Disarmament, BTWC and CCW Protocol V negotiation processes.

These three processes possess quite different negotiating structures. Although set up as an adjunct to a broader political process in the form of the five-yearly Review Conferences and preparatory meeting cycle, the BTWC protocol negotiations were (throughout the late 1990s until 2001 when they collapsed) the only game in town for strengthening of the norm against biological weapons. BTWC states parties were focused on one process—the Ad Hoc Group—and on one outcome. That goal was intended to be a regime designed to verify, or at least enhance confidence in, compliance with the prohibitions of the BTWC. Although broadly a *unitary* goal, the complexity of devising a comprehensive and effective

regime that would be simultaneously politically acceptable proved too difficult.

By contrast, the Conference on Disarmament and the CCW process represent broader frameworks for negotiation. Such frameworks have their pluses and minuses, as shown by their contrasting experiences. In the CCW process the smorgasbord of options for substantive work, such as the post-conflict remedial effects of ERW, compliance, mines other than anti-personnel mines and the regulation of the design or use of weapons that may cause a particular humanitarian problem (like submunitions), opened up negotiating space. The process called for initial prioritization of work (post-conflict remedial measures on ERW) without foreclosing the option of revisiting other priorities later through an annual CCW meeting process established at the 2001 review meeting.

This has helped to enable negotiating actors in the CCW process to recognize the incremental nature of the process and to accept that there will be other, further opportunities to shape the achievement of their national goals. At the same time, the mandates of the Group of Governmental Experts throughout the development of the ERW negotiation process provided useful targets—both for those participants eager to achieve a positive negotiating outcome and for those with other priorities waiting in the queue, such as mines other than anti-personnel mines. Nevertheless, the ERW protocol process did not guide itself: it required deft steering and leadership to achieve completion, from the Second CCW Review Conference preparatory process onwards.

At first glance, the Conference on Disarmament—as a broad framework for negotiating on disarmament and arms control issues of importance to the international community—should possess similar advantages in terms of its annual setting of priorities and opportunities for give-and-take across its agenda and work programme. In fact, the opposite has turned out to be the case. Linkages created in the CD over differing issues (fissile negotiations and PAROS) have stymied substantive work on any of the agenda items before the Conference.

The CD and the BTWC Ad Hoc Group process share a common failing. In both cases their working structures made it difficult for their mandates to adapt to changing circumstances. The Ad Hoc Group mandate in 1996 and the CD's "decatalogue" (originating from the first United Nations Special

Session on Disarmament [UNSSOD I] in 1978), with fissile material negotiations confirmed as the next negotiating step by the Shannon mandate in 1995, lost consensus support over time. The Ad Hoc Group, receiving mixed signals as it was from the United States throughout the protocol negotiation, was unable to change its trajectory before the Fifth Review Conference, especially as no clear alternative was presented in the midst of increasing political polarization in that process by the turn of the new century. The CD's difficulties have been compounded by its outmoded agenda, and inflexible procedural rules, which have so far prevented the majority of its membership from agreeing on resuming its work for fear of exacerbating differences further and inviting sabotage of their substance. At the same time, the CD's regional group structure and opaque system of consultation have prevented the development of external pressure on those members in deadlock to be more flexible in their positions. In the CD, a rotational chair every four working weeks has been an added handicap because it is an insufficient period in which a new president might reasonably be expected to build understanding and foster compromise on complex or contentious issues.

The CCW process has also enjoyed a greater degree of involvement from non-state actors such as United Nations agencies, other international organizations such as the ICRC and NGOs, than either the BTWC processes or the CD. This has not been for want of interest by transnational civil society. Rather, it is because of the traditional manner in which international security issues at the multilateral level are conceptualized by many states participating in them in terms of "state threats" and "national security". However, the input of humanitarian actors and the greater transparency brought to the CCW process by civil society appears to have benefited it in terms of generating momentum and support from domestic authorities, who were also lobbied by the ICRC, Red Cross and Red Crescent Societies and members of the NGO community. Such constituencies do not operate in the CD context, and did not exist in the BTWC protocol contexts, because they have not been nourished by governments or permitted access within the terms of their processes.

## COMPARING ARMS CONTROL PROCESSES WITH THE UNITED NATIONS MIGRANT WORKERS CONVENTION, FCCC AND THE WHO FCTC

In the preceding sections the CD, the BTWC and the CCW protocol negotiations on ERW were outlined along with three multilateral negotiations on climate change, migration and tobacco control. What do they indicate about the extent to which working practices and rules applied in multilateral disarmament and arms control negotiations contribute to—or alleviate—difficulties in achieving successful outcomes?

At the outset it is apparent that the six processes share much in common in the types of negotiating mechanisms used and the *modus operandi* of their participants (not to mention some participants, such as Celso Amorim of Brazil) despite the different substantive tasks for which they were devised. Commonalities ranging from consensus decision-making, the structure of negotiating mandates and rules of procedure largely generated by means of diplomatic precedent, constitute examples of *formal* elements of a recognizable community of practice. This is reinforced by many common *informal* elements in these negotiations. But there are also some significant differences. These are as follows:

### STATE PARTICIPATION

Negotiations on the ERW and biological weapons protocols were limited to states parties to the CCW and the BTWC. That is, to negotiate in these processes a country had to be a member of its parent treaty. Despite this being a limitation in theory it appeared to impose few limits in reality because of the ability of non-member states to participate as observers. These states would not be entitled to vote if the situation arose or, indeed, be counted formally in a consensus decision. In practice, however, it ensured they had a say and could influence the process through their statements and informal interaction with other delegations. A more telling guide was the overall number of states participating actively, whether member countries or not. In this respect, few observers participated in the biological protocol drafting process and only roughly 45 member countries—about a third of the BTWC membership—turned up on a regular basis to attend the Ad Hoc Group sessions and participate in drafting.

This proportion was significantly higher in the CCW context, partly because its overall membership was much smaller (92 countries in November 2003, for instance, of which 66 participated in the 2003 meeting of states parties, which agreed the ERW protocol).<sup>103</sup> Nevertheless, there was considerable interest in negotiations to tackle ERW from developing countries (many of whom are ERW-affected). Despite not having acceded to the CCW, countries like the Libyan Arab Jamahiriya (an observer) and Egypt (a signatory) were active in the talks.

Disparities in state participation are most evident in comparing negotiations in the Conference on Disarmament with the United Nations Migrant Workers Convention, the FCCC and the WHO FCTC processes. Negotiation of the FCCC and the United Nations Migrant Workers Convention were open to all governments belonging to the United Nations. Similarly the WHO FCTC process was open to the entire membership of the World Health Organization.<sup>104</sup> By contrast, the rate of observership to the Conference on Disarmament (which has a restricted membership of 66 member states) is telling. The CD's rules of procedure effectively require non-member states to apply to the Conference for observer status on an annual basis in order to attend plenary sessions.<sup>105</sup> Over the last few years, since deadlock in the CD began and it has become clear that this will also prevent a widening of membership to further countries, interest in CD observership has steadily fallen.<sup>106</sup> This appears to be mirrored within the membership of the Conference, as member governments have, in many cases, downsized their delegations and withdrawn ambassadors for disarmament in some instances and the number of countries actively engaged in ongoing consultations has dipped.

### CORE GROUPS

Results in the successful processes we have examined were characterized by core groups of like-minded delegates who:

- Provided an expert input (they were knowledgeable about the technical subject, beyond career diplomacy);
- Ensured continuity and an institutional memory, since their delegates followed the process from the beginning to the end;
- Were sufficiently small in number to be able to meet and draft between the plenary sessions; and

- Did not have preoccupying vested interests in order to remain credible.

Informal core groups helped to build up “trust” in these processes among broader participants.

#### NON-GOVERNMENTAL ORGANIZATION PARTICIPATION

The rules of procedure in the Conference on Disarmament place the strictest limits on NGO attendance and participation, followed by the BTWC process. NGOs attend *only* formal plenary meetings. These are usually set-piece affairs for formal statements or the gavelling in of reports in each case. There is no provision in the CD for civil society statements. NGOs may only communicate with member states through the CD secretariat.<sup>107</sup> On one occasion annually, on International Women’s Day a joint NGO statement is delivered to the CD but must be read by the Deputy Secretary General of the Conference instead of an NGO representative.<sup>108</sup>

The FCCC, the WHO FCTC and the ERW protocol negotiations, in contrast, have been more open to NGO participation. The proceedings of the CCW discussions and negotiations on ERW were largely attended by NGO delegates and had the active participation also of international organizations such as the ICRC and the Mine Action Service of the United Nations. Collectively these entities made a substantial contribution. NGO participation in the WHO FCTC process was unprecedented in that NGOs were frequently (and openly) invited to informal meetings to lend their expertise and knowledge on issues under discussion.

#### APPOINTMENT OF OFFICE-HOLDERS

Appointment of office-holders varied in the six processes examined. For instance, Ambassador Amorim of Brazil’s experience is instructive. Amorim was Chairperson of the INB in the WHO FCTC negotiations and also presided over the Conference on Disarmament during the 2000 session. In the WHO FCTC process, Ambassador Amorim was *elected* to chair the INB process. By contrast his presidency in the Conference on Disarmament was a consequence of the four-week rotational policy that is dictated by rule 9 of the CD’s rules of procedure and, as noted above, allowed little time as President to foster the compromises necessary to reignite fissile negotiations through achievement of a work programme.

Although it is not uncommon for the working group chairs to rotate on the basis of regional groupings to ensure equality of representation, the chair of the Conference on Disarmament rotates every four weeks on the basis of alphabetical order. This custom is significantly different from the other five processes under consideration and would appear to make little sense beyond theoretical egalitarianism (theoretical because the body is not universal in membership). The WHO FCTC, the FCCC, the United Nations Migrant Workers Convention, the biological weapons process and ERW Protocol processes all had elected chairs. They undoubtedly benefited from this in that tenure depended to a greater extent upon merit or influence than to alphabetical geography.

#### DECISION-MAKING PROCEDURES

In all six negotiating processes it was intended that all substantive decisions be made on the basis of consensus although some—like the FCCC, WHO FCTC processes and BTWC review meetings (although not the Ad Hoc Group)—contain procedures for voting in extreme cases. Orthodox preference for consensus is for a variety of reasons: precedent, the awareness that in most cases it is important to move with the broadest possible support of the international community and, because majority voting would have been advantageous to large groups like the Group of 77 and disadvantageous to others for instance in the case of the United Nations Migrant Workers Convention.

In the security domain an argument is sometimes heard that because issues of national security (and potentially of national survival) are concerned, consensus decision-making is essential. However, history demonstrates otherwise. India and Pakistan's decisions, for example, not to join a consensus on the Comprehensive Nuclear-Test-Ban Treaty in the CD in 1996 could have scuppered a treaty widely thought to be of broader international security value at the time. A group of states took this draft instrument to the United Nations General Assembly and voted it in, belying the claim that new treaties must have international consensus before they can be agreed—at least in the CD context.

It is unlikely that mixed rules of procedure (that is, provision for voting if consensus is impossible to achieve) really have had a positive effect in promoting consensus decision-making on their own. One participant in the FCCC process noted that "the possibility of recourse to voting procedures

tended to act as a restraint on influential parties and this obviated the need for actually employing the procedure".<sup>109</sup> But this depends on the assessments of states about whether such resort to voting will succeed. Recourse to voting was not pursued in the biological weapons process in 2001 after the United States' rejection in part because there was little appetite for agreeing a new norm in this field without that country on board.

Recourse to voting rather than consensus for decision-making carries particular risks for the birth of new disarmament and arms control multilateral norms. It is an act of political choice with serious potential consequences. Unfortunately, so is the alternative: in the CD, rule 18 of its rules of procedure has been interpreted to mean that consensus applies to all facets of the Conference's work—substantial *and* procedural. In practice member states have also taken this to mean inferring the power of veto on each of them.

#### GROUP INTERACTION

The presence of regional groupings in multilateral negotiations is common. Regional groups were a feature of the biological weapons and WHO FCTC processes. They meet on a regular basis in the Conference on Disarmament. Regional groups facilitate procedures such as the selection of office-holders in negotiations. They also assist in information exchange between governments and, sometimes, in the development of common positions or postures in broader multilateral settings. Moreover, regional groups constituted a mechanism for improved cohesion in the tobacco control negotiations among small states.

However, our examination has shown that regional groups can also play a spoiling role in negotiations. For instance, group cohesion became tighter in the BTWC protocol process as political polarization in the BTWC Ad Hoc Group grew from 1998, which made cross-group initiatives to build support for a robust final product more difficult. Countries supportive of robust compliance measures such as New Zealand, the Netherlands and Norway were subjected to intense pressure to cease supporting routine visit measures within the Western Group in the name of group cohesion—especially from the United States and the United Kingdom—despite this weakening the compliance goal of the negotiations. While the advantages of group cohesion in the WHO FCTC negotiations have been noted above,

at the same time it sometimes led to hardening of positions, which at times stalled progress.

Regional group politics may also obscure transparency by concealing—both from members of the regional groups and from the domestic constituencies of delegations—the real nature of states' positions. This also occurred in the BTWC protocol negotiations. The United States, for instance, told other Western Group members that it opposed routine type visits to ensure confidence in compliance to relevant biological facilities (as is done under the CWC with relevant chemical facilities) because its domestic industry would not accept it and sought instead to dilute the compliance regime in later stages of drafting. However, as quoted earlier, the United States phrased this as a subsidiary argument in its public reasons for opposing a protocol on the draft instrument. In August 2001, after Ad Hoc Group negotiations began to collapse, the regional groups (including the Western Group) operated as caucuses and issued respective group statements at the conclusion of the Ad Hoc Group's last session in the hope of a successful Review Conference later that year. But on the last day of that review meeting the United States insisted on amendments concerning non-compliance and blocking a follow-on process of BTWC consultations that it could be confident would not be acceptable by consensus—amendments it did not inform its Western Group partners of beforehand.

Lack of transparency is also a factor in continuing CD deadlock because group interaction through weekly presidential consultations has become largely ritualistic and lacking in substantive engagement. The proactive ability of these CD regional groups is very limited because of cross cutting differences along alliance and nuclear-possessing versus non-nuclear-weapon states, which calls into question their utility in developing sustained and meaningful common positions.<sup>110</sup> By contrast, while regional groups existed in some form in the FCCC, CCW and Migrant Workers Convention settings in order to fill procedural positions and exchange information, they do not appear to have played a caucusing role.

## CONCLUSIONS

This paper began by using the metaphor of cordon bleu cooking to describe the skilful process of multilateral negotiation in disarmament and arms control. In particular, this metaphor illustrates the contention central

to the topic discussed; that to understand what is involved in the preparation of a fine and expensive meal it is necessary to look beyond simply the diner's expectations and examine what goes on in the kitchen. The coherency of our metaphor begins to break down as we realize that the national governments dining in this restaurant are also instrumental in that culinary preparation process. But it also illustrates that the relationship between government multilateral negotiators and their eventual products is dynamic, iterative and interactive.

Our exploration of this relationship stems from the following question: to what extent do the working practices, rules and techniques applied in multilateral disarmament and arms control contribute to or impair successful outcomes in developing or consolidating international norms? In our analysis it is apparent that, just like in a restaurant kitchen, many different dishes are prepared by a team of chefs and many supporting actors in roughly recursive—yet always at least slightly unique—operations. In other words, it is clear that a *community of practice* exists in multilateral disarmament and arms control negotiation that lends a consistency of attitude and approach between different subjects. Moreover, by comparing the CD, the BTWC process and the CCW ERW negotiations with multilateral processes outside this domain, it is clear that many, if not most, of these elements of a gradually evolving community of practice are shared more broadly, or at least have their functional equivalents.

To offer a second metaphor, it is possible to think of the community of practice in multilateral disarmament and arms control as a riverbed. The shape and course of this riverbed affects the dynamic flow of the water—the negotiating activity—within it in particular ways governed by many different factors. However, while we do not usually see it over short time frames, the water in the river gradually adjusts the shape and course of the riverbed itself by the process of erosion and so forth. The relationship between negotiating activities and their underlying community of practice is similarly dynamic.

Crucially, only part of this multilateral disarmament and arms control community of practice is “designed” in any conscious sense. Some of its manifestations are “non-designed”, having developed as iterative phenomena by means of diplomatic precedent; that is, doing something again because that has been the established mode of tackling similar problems in the past. Of course, there are a number of assumptions in

this—not least the perception that two problems separated in time in the real world do meaningfully lend themselves to solution by the same methods. However, at its most bare, natural scientists often strike this phenomenon—about what is functional adaptation in response to circumstances and what is not:

Darwin himself recognized the possibility of *preadaptation*, whereby an attribute comes to serve a function which is not the reason why it was originally selected. In other words, evolution has wrought a change in function. The result may be a less than perfect instance of functional design, but evolution the tinkerer makes do. *Exaptation*, which refers to an adaptation that has recruited to some functional need a trait that either did not have any adaptive function originally or evolved for some other use, is a more recent, if not similar, formulation.<sup>111</sup>

There are also useful ideas here which are applicable to the processes we have analysed. The multilateral disarmament and arms control community of practice is necessarily a cautious and conservative one, as states' national security or survival may be at stake. Consequently this community of practice tends to evolve slowly. Precedent plays a major role, not least because the known practices of the past sometimes appear to provide more certainty than new and untried ones. Consensus decision-making is the ultimate comfort that a negotiating process will not move too fast or too far beyond the expectations of individual states. Because of this, some features of specific multilateral processes come about not because they were consciously and coherently designed in. Instead, they may be artefacts: features that are by-products of some other designed-in feature of an earlier or similar process, or features that have changed function through changes in patterns of usage.

Examples abound of preadaptations or exaptations in the multilateral environment. In this paper we have focused in particular on features that have pronounced consequences for the success of negotiating processes, as illustrated by our six examples. They include formal rules of procedure, the character and roles of regional groupings in different negotiations and, indeed, decision-making procedures such as the rule of consensus. As shown in the previous section, for instance, regional groupings in the BTWC and CD settings, which originated decades ago as a means of information exchange and the selection of functionaries under their formal rules of procedure, have taken on different roles for which they were not originally

intended. This has been to the detriment of these processes compared with other negotiating processes, such as the CCW, climate change negotiations or the Migrant Workers Convention, in which formal regional groupings have either not existed, played a minimal role (like in the CCW) or have corresponded much more closely to the interests of their members because of the youth of these processes (the tobacco-control negotiations).

If many features of communities of practice in multilateral negotiation are not designed, but evolved through preadaptations or exaptation, it creates a number of implications invisible to orthodox explanations of political will. As explained earlier in this article and in this volume's introduction, one important reason political will is limited in its explanatory power is because it does not allow for difficulties arising in negotiations that are not products of deliberate cause. Will either exists in sufficient amounts or it does not. But as shown, this does not do justice to reality—not least to structural problems in negotiations brought about through unquestioning yielding to precedent rather than to design.

One of these implications is that the multilateral negotiating community of practice in disarmament and arms control is, at best, only partially adapted to changing realities. This is for two reasons. First, its evolution is gradual, constrained by precedent and diplomatic, political and military caution among other things. Secondly, much of its DNA is “junk DNA”, consisting of features for which there is no purpose, for which a purpose has been forgotten, or which performs some function for which it was not originally developed.

In a sense, this analysis is a first, tentative attempt to sequence some of this DNA and analyse its functions. This alone is insufficient, however, without application of equivalent approaches by practitioners themselves in multilateral negotiation to their corpus of practices, attitudes and mechanisms for work. This is essential because without these insights multilateral disarmament and arms control may become doomed, by its slow rate of evolution to rapidly changing realities, to irrelevance.

Many of the elements of these new realities are intimately bound up with one another. In the introduction to this volume various facets of growing complexity were discussed, along with their implications for traditional “national security” approaches to addressing international security problems. Accompanying globalization, increased inter-

connectedness and new emergent problems of complexity for diplomats and national policymakers, however, has been a rise in public interest in these problems and commitment to dealing with them. As David Atwood has pointed out, “while NGO involvement in disarmament affairs is longstanding, its current manifestations are part of a broader reality of transnational civil society engagement on issues of broader concern”.<sup>112</sup> This is also demonstrated by our three examples of climate change, migrant workers and tobacco control, in which non-governmental actors have played significant roles. In disarmament and arms control, elements of this transnational civil society, particularly the humanitarian community and its subset the humanitarian mine-action community, have performed similar roles in the context of the Antipersonnel Mine Ban Convention and the CCW. NGO engagement in small arms and light weapons issues has also been high.

Although the sample is small, the evidence suggests that multilateral negotiations not considered so intimately bound to national security imperatives—and which have been more open to civil society’s involvement—have generally benefited from the expert input and energy of NGOs and other entities such as the Red Cross and Red Crescent Movement. It would be simplistic to claim that lack of progress in the CD and BTWC is due to their greater exclusion of non-governmental entities as their problems are more complex. But the coincidence is striking, as is the fact that “the official relationship between multilateral disarmament institutions and NGOs is badly out of tune with current realities in international relations and with current needs. New approaches are necessary”.<sup>113</sup>

A number of participants from the Mine Ban Convention negotiations, including governmental representatives involved, have argued that it benefited from greater civil society involvement.<sup>114</sup> If one were to sum up the many different specific roles such entities can play, it could be described as making a negotiating environment more information rich, which benefits governmental negotiators directly in their decision-making.<sup>115</sup> With outmoded group structures, lack of trust and lack of public transparency and no substantive negotiation completed since the CTBT in the mid-1990s it would be difficult to describe the CD as information rich.

Overall, there is no simple answer to what extent working practices, rules and techniques applied in multilateral disarmament and arms control

contribute to or alleviate successful negotiating outcomes. But of the three processes discussed in detail here (the CD, BTWC and CCW) alongside the three multilateral comparisons further afield (climate change, migrant workers and tobacco control) there is much food for thought. In our view:

- Multilateral disarmament and arms control negotiating processes would benefit from less emphasis on diplomatic precedent and more from focus on object-oriented processes—the object in question being security or some specific aspect thereof.
- Doing so may best entail enlisting the assistance of dedicated professionals (such as management theorists and organizational psychologists) to help in designing the architecture of their negotiating processes.
- Negotiators need to ask, individually and collectively, the following questions on a regular basis: was this feature of our community of practice designed for a good reason? Does that good reason still apply or has it changed or lost currency?
- The imposition of a rule of consensus at all stages of a process—for instance on agreeing a programme of work or to begin a negotiation that will later need consensus for agreement—as well as the value of current regional groupings need particular scrutiny in this regard.
- Experience indicates that disarmament and arms control processes flounder if they lack clear goals and objectives. Clear goals and objectives are an aid to effective leadership. To this end, opportunities for course correction are advisable (for instance, by means of changes to mandates, changing of elected office-holders, review of procedural rules) at regular intervals. The CCW ERW protocol process was a positive example in this regard. It is possible that the BTWC protocol drafting process might have been salvaged had there been a review of its mandate and progress that led to an adapted process better reflecting international realities at an earlier stage in its negotiation, for instance through a Special Conference in the late 1990s.

The challenge for multilateral disarmament and arms control is to remain relevant to solving international security problems effectively. To do so, it will need to learn to adapt quickly enough to changing circumstances. Increasing global interconnectivity, blurring distinctions in sovereignty with

attendant implications for “national security” and complexity, mean that this rate of change is not going to slow any time soon.

An important step in the process of learning to adapt better to new disarmament and arms control challenges for negotiating practitioners will mean cultivating a greater willingness to try new methods and approaches they have not deployed before. Honest self-reflection of the contents of their current toolbox should demonstrate that many of its elements are not right for the job. New partners and perspectives, from transnational civil society, for instance, as well as broader recognition of the interrelationship of national security with other dimensions of human welfare (human security) can help here.

### Notes

- 1 The term “disarmament” traditionally refers to the elimination, as well as the limitation or reduction (through negotiation of an international agreement) of the means by which nations wage war. The term “arms control” was coined in the 1950s to denote an international agreement to limit the arms race, in particular the nuclear arms race between the United States and the Soviet Union, following recognition that general and complete nuclear disarmament would not be readily achieved. Arms control originally was meant to denote internationally agreed rules limiting the arms competition rather than reversing it; it had a connotation distinct from the reduction or elimination of armaments (i.e. disarmament). See Robert H. Mathews and Timothy L. H. McCormack, “The Influence of Humanitarian Principles in the Negotiations of Arms Control Treaties”, *International Review of the Red Cross*, No. 834, 1999, pp. 331-352.  
The term “non-proliferation” refers to containing of the spread of weapons from states that possess them to states that do not.
- 2 The Conference on Disarmament briefly began negotiations on a fissile material treaty at the end of 1998. However the mandate for the ad hoc committee was not renewed the following year.
- 3 Also known as the Biological Weapons Convention (BWC).
- 4 The full title of the treaty is the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May

- Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (1980).
- 5 The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997). The Antipersonnel Mine Ban Convention is sometimes referred to as the Ottawa treaty, where it was signed. Final negotiations for the treaty were held in Oslo in July of that year.
- 6 A. Carter, *Success and Failure in Arms Control Negotiations*, Stockholm International Peace Research Institute, New York: Oxford University Press, 1989, p. 2.
- 7 United States Under-Secretary of State for Arms Control and International Security, John Bolton, *Statement to the Fifth Review Conference of the Biological Weapons Convention*, Geneva, December 2001, p. 2, [www.opbw.org](http://www.opbw.org).
- 8 Issues related to political will are discussed in more detail earlier in this volume in the paper by John Borrie entitled "An Introduction to Disarmament as Humanitarian Action".
- 9 Ron Scollon, *Mediated Discourse as Social Interaction: A Study of News Discourse*, Boston: Addison Wesley, 1998, pp. 12-13.
- 10 The authors wish to thank Mr Juhanni Lönnroth, currently the Director General of the European Commission Directorate General for Translation, for his assistance. Mr Lönnroth was actively involved in the negotiations of the United Nations International Convention on Migrant Workers and Their Families—first as a participant and later as vice-chairman of the Working Group. Mr Lönnroth was also spokesman for the MESCA group.
- 11 See S. Hune and J. Niessen, "The First UN Convention on Migrant Workers", *Netherlands Quarterly of Human Rights*, Vol. 9, 1991, No. 2, p. 132 for a more detailed commentary.
- 12 The ILO is a specialized agency of the United Nations. It has a unique tripartite structure in which employers' and workers' representatives are on an equal footing with governments. The ILO sets minimum labour standards. The broad policies of the ILO are set by the International Labour Conference, which meets annually.
- 13 United Nations Economic and Social Council, Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities, Twenty-eighth session, Item 8 of the provisional agenda, "Exploitation of Labour Through Illicit and Clandestine Trafficking", E/CN.4/Sub.2/L.629, 4 July 1975.
- 14 Hune and Niessen, *op. cit.*

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- 15 Vanessa Martin Randin's interview with Juhanni Lönnroth, 27 August 2004.
- 16 J. Lönnroth, "United Nations Convention: An Analysis of Ten Years of Negotiations", *International Migration Review*, Vol. 25, No. 96, Winter 1991, p. 724.
- 17 The four Mediterranean states were Greece, Italy, Portugal and Spain and the three Scandinavian states were Finland, Sweden and Norway.
- 18 United Nations General Assembly resolution A/RES/45/158.
- 19 For a more in-depth discussion see Lönnroth, *op. cit.*, pp. 716-721.
- 20 R. Böhning, "The ILO and the New UN Convention on Migrant Workers", *International Migration Review*, Vol. 25, No. 96, Winter 1991, p. 702.
- 21 Taken from the report of the Economic and Social Council, 1981b, pp. 2-3, which outlines the philosophy and approach underpinning the MESCA proposals.
- 22 Böhning, *op. cit.*, p. 702.
- 23 The authors thank Dr Brook Boyer of the United Nations Institute for Training and Research (UNITAR) and Ambassador Bo Kjellèn of Sweden for their assistance.
- 24 P. S. Chasek, *Earth Negotiations: Analyzing Thirty Years of Environmental Diplomacy*, United Nations University, 2001, p. 124.
- 25 INC 1 in Chantilly VA, near Washington, DC in February 1991; INC 2 in Geneva, Switzerland from 19 to 28 June 1991; INC 3 in Nairobi from 9 to 20 September 1991; INC 4 in Geneva from 9 to 20 December 1991; INC 5 in New York from February to May 1992.
- 26 D. Bodansky, "Prologue to the Climate Convention" in I. Minter and J. A. Leonard (eds), *Negotiating Climate Change: The Inside Story of the Rio Convention*, Cambridge: Cambridge University Press, 1994, p. 63.
- 27 Prior to his election to the post of Chairman of the FCCC INC negotiations in 1991 Ripert was Director General of Economic Affairs at the United Nations in New York.
- 28 The Extended Bureau contained office-holders in the negotiations (members of its formal, elected General Committee) and other "Friends of the Chair". Many multilateral negotiations establish this general type of group at some point. It may be known by different names, depending on political sensitivities. The "Friends of the Chair" (or the extended bureau in the case of the FCCC) was a small group of delegates representing the main interest groups and key delegations that met privately with the Chair to provide views and advice.

See J. Delpedge, *Organizing Successful Negotiations for the FCTC: Options and Lessons From Other Conventions*, London: Action on Smoking and Health (ASH), 8 October 2001, <http://www.ash.org.uk/html/international/html/negotiatingprocess.html>.

The FCCC Extended Bureau comprised the chair of the Group of 77, the President of the European Union and key players like the United States, China, India, Brazil, Japan and the Russian Federation.

<sup>29</sup> D. Bodansky, "The United Nations Framework Convention on Climate Change: A Commentary", *The Yale Journal of International Law*, Vol. 18, Summer 1993, p. 491.

<sup>30</sup> D. Bodansky, "Prologue to the Climate Convention", p. 69.

<sup>31</sup> Under Article 7(2) of the FCCC the "Conference of Parties as the supreme body of the Convention shall keep under regular review, the implementation of the Convention and any related legal instruments that the Conference of Parties may adopt, and shall move, within its mandate, the decisions necessary to promote the effective improvement of the Convention".

<sup>32</sup> Article 9 of the FCCC established a subsidiary body for scientific and technological advice. Article 10 established a subsidiary body for implementation.

<sup>33</sup> Chasek, *op. cit.*, p. 132.

<sup>34</sup> The entry into force of the Kyoto Protocol had been dependent on the Russian Federation since the United States had withdrawn its signature in 2001. The ratification procedure required the signature of at least 55 parties to the Convention. This needed to include enough Annex 1 parties (industrialized nations) to account for at least 55% of total CO<sub>2</sub> emissions from industrialized countries in 1990. The Russian Federation ratified the Kyoto Protocol on 22 October 2004. The entry into force provision of the Protocol was triggered when the Russian Federation deposited its instrument of ratification with the treaty's depository—the Secretary-General of the United Nations—on 19 November 2004. The Protocol officially enters into force after 90 days, i.e. on 19 February 2005.

<sup>35</sup> Chasek, *op. cit.*, p. 127.

<sup>36</sup> In a personal assessment of the FCCC negotiations, Bo Kjellen described Ripert's approach: "I believe that style certainly plays an important role for a chairman—and Jean Ripert's style certainly fit the challenges of this negotiation. Most of the time he acted with an almost palpable slowness: but this was on the surface. While explaining technical or legal details pertaining to the negotiation in painstaking

(some would say irritating) detail, his mind was searching out solutions and anticipating ways to avoid blocked solutions. It became clear that this was his method of work. The overall effect inspired broad confidence in his leadership. In the final stages, when heads of key delegations were invited by the chairman to negotiate the final texts and thrash out the last difficulties, we were all impressed by the sharpness of the picture he laid out before us. Ripert's leadership style did not exclude the human touch. He was able to remind the negotiators of the real issues beyond the drafting and of their responsibility to the international community without sounding condescending or offensive." B. Kjellen, "A Personal Assessment", in I. Minter and J. A. Leonard (eds), *Negotiating Climate Change: The Inside Story of the Rio Convention*, Cambridge: Cambridge University Press, 1994, p. 153.

<sup>37</sup> A. Djoghlaif, "The Beginnings of International Climate Law", in I. Minter and J. A. Leonard (eds), *Negotiating Climate Change: The Inside Story of the Rio Convention*, Cambridge: Cambridge University Press, 1994, p. 103.

<sup>38</sup> NGO participation in the FCCC plenary meetings extended to their participation as observers in the actual negotiations of the FCCC text.

<sup>39</sup> A. Rahman and A. Ronceral, "A View from the Ground Up", I. Minter and J. A. Leonard (eds), *Negotiating Climate Change: The Inside Story of the Rio Convention*, Cambridge: Cambridge University Press, 1994, p. 240.

<sup>40</sup> CAN exploited the influence of *ECO* particularly effectively in INC 2, in which technology cooperation and transfer was the main topic of discussion. Discussions at this meeting focused specifically on a non-paper on this topic by the United States. A series of other non-papers circulated by the United Kingdom, France, Japan, Sweden, Australia and New Zealand explored the topic of "pledge and review", whereby states would pledge their commitment to greenhouse gas reductions without undertaking specific legal obligations. However there was no consensus on whether or not the pledge would include global targets, commitments or minimum actions. India rejected the "pledge and review" idea on grounds that it would give countries an excuse not to make solid commitments to reduce greenhouse gas emissions and therefore would be ineffective. This position received publicity and vociferous support from members of CAN, via *ECO* (labelling the "pledge and review" approach "hedge and retreat"), and also by

various developing countries. As a result the “pledge and review” concept was eventually seen off.

- 41 S. Mori, *What is the Missing Link? Multilateral Environmental Governance, Regimes, Structural Integration and the Possibility of a World Environment Organization*, International Environmental Governance, Gaps and Weaknesses/Proposals for Reform, Working Paper, Tokyo, UNU/IAS, 2002.
- 42 The authors are grateful to the Framework Convention Team for the Tobacco-Free Initiative at the WHO, particularly Dr Douglas Bettcher, Ms Marta Seoane and Ms Gemma Vestal for their time and assistance.
- 43 Intergovernmental Negotiating Body on the WHO Framework Convention on Tobacco Control (First session, Provisional agenda item 4), *Secretariat Update: Provisional timetable for the negotiating process and provisional costs*, A/FCTC/INB1/3, 5 September 2000.
- 44 A. L. Taylor and D. W. Bettcher, “WHO Framework Convention on Tobacco Control: A Global ‘Good’ for Public Health”, *Bulletin of the World Health Organization*, No. 78 (7), 2000, p. 923.
- 45 These public hearing were attended by academics, NGOs and others in the FCTC process. Although the summary records of the hearings were not official, the NGO community used the information to develop their platform for lobbying governments at later stages of the process.
- 46 “Participation of Non-Governmental Organizations in Official or Provisional Official Relations with WHO in the Open-Ended Intergovernmental Working Group on the WHO Framework Convention on Tobacco Control”, 20 May 2000, Open-ended Intergovernmental Working Group on the WHO Framework Convention on Tobacco Control, A/FCTC/IGWG/1/DIV/3.
- 47 The Framework Convention Alliance claims it drew inspiration from the NGO coalition-building experiences of the International Campaign to Ban Landmines (ICBL). For further discussion of the NGO mobilization in the FCTC experience see: Infact, “Mobilizing NGOs and the Media Behind the International Framework Convention on Tobacco Control”, Technical Briefing Series, Paper 3, 1999, Tobacco Free Initiative and World Health Organization, WHO/NCD/TFI/99.3. This is available online at [http://whqlibdoc.who.int/hq/1999/WHO\\_NCD\\_TFI\\_99.3.pdf](http://whqlibdoc.who.int/hq/1999/WHO_NCD_TFI_99.3.pdf).
- 48 **After the first negotiating session**, intersessional consultations were hosted by South Africa (African region) and by Indonesia (South-East Asian region); **after the second negotiating session**, intersessional

meetings were hosted by Algeria (African region), Bhutan (South-East Asian region), Estonia (Baltic states), Iran (Eastern Mediterranean region), New Zealand (Pacific Island) and the Russian Federation (Commonwealth of Independent States (CIS)); **after the third negotiating session**, intersessional consultations were hosted by India (South-East Asian region), Côte d'Ivoire (African region), Egypt (Eastern Mediterranean region), Peru (Latin American and Caribbean Group (GRULAC) and Malaysia (Association of South-East Asian Nations (ASEAN). Additionally an Interministerial Conference was held in Warsaw; **after the fourth negotiating session**, intersessional meetings were hosted by New Caledonia (Pacific Island region), Myanmar (South-East Asian region), Bulgaria (South-Eastern European countries), Thailand (ASEAN), Malawi (African region), Russian Federation (CIS), Estonia (Baltic states), Mexico (GRULAC), Bahrain (Eastern Mediterranean region) and Denmark (European region). Additionally an international conference on illicit tobacco trade was held at United Nations Headquarters in New York from 30 July to 1 August 2002).

49 G. Jacob, "Perspectives: Without Reservation", *Chicago Journal of International Law*, No. 281, Summer 2004, pp. 287-302.

50 World Health Organization, *The Framework Convention on Tobacco Control: A Primer*, A/FCTC/INB2/2 of 2003, pp. 8-9.

51 Amorim was posted to London as Ambassador in November 2001. Since then he has become Brazil's Foreign Minister.

52 BBC World News, "Key Anti-Smoking Treaty adopted" (available online at <<http://news.bbc.co.uk/1/hi/health/3046223.stm>> (21 May 2003).

53 Jacob, op. cit. Gregory F. Jacob described some of the tactics he alleged that certain NGOs present at the FCTC negotiations resorted to: "Much of the information distributed by the NGOs was valuable and accurate, but some NGOs were not above stooping to underhanded and manipulative tactics. For example, during INB5 I had to file a complaint with the WHO Secretariat when I caught members of Infact deliberately attempting to listen in on a private cell phone conversation I was having with the White House. I received the call while I was in the main negotiation chamber and left the room so that I could talk freely without disturbing others and without being overheard. As I left the room with the phone to my ear, however, a member of Infact began to tail me, forcing me to move into a narrow corridor where it would be difficult to follow me inconspicuously. I finished my conversation from an alcove just off the corridor, only to

find as I emerged at the end of my call that another Infact member had been sent through the corridor from the opposite direction and was kneeling down around the corner, studiously taking notes.”

<sup>54</sup> Infact, *Cowboy Diplomacy: How the US undermines International Environmental, Human Rights, Disarmament and Health Agreements*, <http://www.infact.org/cowboyd.html>.

<sup>55</sup> Jacob, op. cit.

<sup>56</sup> The FCTC entered into force on 27 February 2005 less than two years after it opened for signature.

<sup>57</sup> *NGOs Applaud Commitment of Developing Nations to Comprehensive Advertising Ban in Final Round of Treaty Talks*, Network of Accountability of Tobacco Transnationals (NATT), 21 February 2003.

<sup>58</sup> Böhning, op. cit., p. 701.

<sup>59</sup> See S. Tulliu and T. Schmalberger, *Coming to Terms With Security: A Lexicon for Arms Control, Disarmament and Confidence-Building*, UNIDIR, Geneva: United Nations, 2001, pp.177-178. The Conference on Disarmament succeeded the Ten-Nation Committee on Disarmament (1959-1960), the Eighteen-Nation Committee on Disarmament (1962-1969), the Conference of the Committee on Disarmament (1969-1978) and the Committee on Disarmament (1979-1983).

<sup>60</sup> New Zealand Ministry of Foreign Affairs and Trade, *United Nations Handbook 2002*, Wellington, New Zealand: PrintLink, p. 33.

<sup>61</sup> Rules of procedure of the Conference on Disarmament, CD/8/Rev.8, 17 August 1999.

<sup>62</sup> The division of the annual session is outlined in Rule 7 of the CD rules of procedure: “The Conference shall have an annual session divided into three parts of 10 weeks, 7 weeks and 7 weeks respectively. The first part shall begin the penultimate week of the month of January. The Conference shall decide the actual dates of the three parts of its annual session at the close of the previous year’s session. The President of the Conference, in full consultation with and with the agreement of all its members, may convene the Conference in special session.”

<sup>63</sup> Rule 13 of the CD’s rules of procedure states: “At the request of the Conference the Secretary-General of the United Nations, following consultations with the Conference, will appoint the Secretary-General of the Conference, who shall also act as his personal representative, to assist the Conference and its president in organizing the business and timetables of the Conference.” Rules 14-17 of the CD’s rules of procedure outline the duties of the Secretary-General of the CD.

Sergei Ordzhonikidze of the Russian Federation has been the Secretary-General of the CD since 20 March 2002.

- <sup>64</sup> This derives from rule 9 of the CD rules of procedure. It is not unknown for states to stand aside from the Presidency, however. Iran decided to forgo its turn at the Presidency at the beginning of 2003, for instance. The next country alphabetically, Iraq, notified the CD that it would do the same on 3 February 2003.
- <sup>65</sup> The CD membership increased from 31 to 40 states in 1978. After Germany's reunification in 1990 this number fell to 39 and then to 38 with the break-up of Czechoslovakia. In 1996 the CD decided to admit 23 new members. However since this number included Iraq, a state under United Nations sanctions for its act of aggression against Kuwait, a caveat was applied to their admittance. In a joint letter to the President of the Conference the 23 had to commit not to obstruct any action of the Conference by resorting to the rule of consensus. "This commitment would cease to apply if a consensus decision were reached in the CD that the 'circumstance' which had given rise to the situation requiring it no longer existed. For any of the new members not subject to comprehensive enforcement measures under Chapter VII of the United Nations Charter, the above commitment would cease to apply two years after the decision to enlarge the CD had been adopted." See J. Goldblat, *Arms Control: The New Guide to Negotiations and Agreements*, International Peace Research Institute (PRIO), Oslo: Sage Publications, 2002, p. 14.
- <sup>66</sup> The 66 members of the CD are: Algeria, Argentina, Australia, Austria, Bangladesh, Belarus, Belgium, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Columbia, Cuba, Democratic People's Republic of Korea, Democratic Republic of the Congo, Ecuador, Egypt, Ethiopia, Finland, France, Germany, Hungary, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Japan, Kazakhstan, Kenya, Malaysia, Mexico, Mongolia, Morocco, Myanmar, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Peru, Poland, Republic of Korea, Romania, Russian Federation, Senegal, Slovakia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Tunisia, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Vietnam, Zimbabwe.
- <sup>67</sup> Under rule 42, "All communications from non-governmental organizations to the Conference, to the President or to the Secretariat, shall be retained by the Secretariat and be made available to

delegations upon request. A list of all such communication shall be circulated to the Conference.”

- 68 J. Goldblat, “The Conference on Disarmament at the Crossroads: To Revitalize or Dissolve?”, *The Non-proliferation Review*, Summer 2000, Vol. 2, No. 9, pp. 104-107, p. 105.
- 69 Document CD/WP.533.
- 70 Rule 28 of the CD rules of procedure. (CD/8/Rev.8).
- 71 Ibid., Rule 29.
- 72 Ibid., Rule 19. The rules of procedure are vague on whether informal and subsidiary body meetings may be open to non-state actors. Historically they have been closed.
- 73 This is in line with Rule 23 of the CD rules of procedure (CD/8/Rev.8).
- 74 “Mandate for an Ad Hoc Committee under Agenda Item 1: “Nuclear Test Ban”, document CD/1238, 25 January 1994.
- 75 No definition of fissile material has yet been drawn up for fissile negotiations. However, fissile material is commonly considered to include plutonium (Pu) and highly-enriched uranium (HEU)—that is, uranium containing 20% or more of the fissile isotope uranium-235. At least three other types of fissile material are relevant to fissile negotiations : uranium-232 (which arises from the irradiation of thorium-232 in a nuclear reactor, neptunium-237 (produced by neutron capture when uranium-235 is irradiated) and americium-241 (a decay product of plutonium-241). Tritium, an isotope of hydrogen sometimes utilized by nuclear-weapon designers to boost the explosive yield of fissile weapons, is not a fissile material. See William Walker and Frans Berkhout, *Fissile Material Stocks: Characteristics, Measures and Policy Options*, UNIDIR, Geneva: United Nations, 1999.
- 76 The five Ambassadors were Mohamed Salah Dembri of Algeria, Jean Lint of Belgium, Camilo Reyes of Colombia, Henrik Salander of Sweden and Juan Enrique Vega of Chile.
- 77 The Shannon Report called for the negotiation of a non-discriminatory, multilateral and internationally and effectively verifiable treaty banning the production of fissile material for nuclear weapons or other nuclear explosive devices.
- 78 The expert briefings took place within the context of the regional group meetings and other ad hoc informal gatherings. Only member states of the CD were permitted to attend the presentation given by the experts.
- 79 See Clifford E. Singer and Amy Sands, *Keys to Unblocking Multilateral Nuclear Arms Control*, ACDIS Occasional Paper, University of Illinois at Urbana-Champaign: ACDIS, July 2002, p. 3.

- <sup>80</sup> Article I of the BTWC states that, “ Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain: (1) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; (2) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.” Moreover, Article III states that “Each State Party to this Convention undertakes not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in Article I of the Convention.”
- <sup>81</sup> Arms Control and Disarmament Research Unit, *Chemical Weapons Convention Negotiations 1972-92*, Foreign Policy Document No. 243, Foreign and Commonwealth Office, England: C.W. Print Group, 1993, pp. 4-6.
- <sup>82</sup> For a more in-depth discussion of the Biological Weapons Programmes of South Africa, see C. Gould and P. Folb, *Project Coast: Apartheid's Chemical and Biological Warfare Programme*, UNIDIR, Geneva: United Nations, 2002.
- <sup>83</sup> Review meetings are convened roughly every five years. The last, in December 2001, was suspended and reconvened in December 2002. Under the BTWC Review Conference rules of procedure (BWC/CONF.V/17) signatories to the Convention are allowed to participate in proceedings but cannot take part in the adoption of decisions. Participation of NGOs in the review process is limited; NGOs can only receive documents from the Conference by request, although they have usually been allowed access to plenary meetings at the commencement and conclusion of Review Conferences.
- <sup>84</sup> Ad Hoc Group of Governmental Experts to Identify and Examine Potential Verification Measures from a Scientific and Technical Standpoint, summary report, (BWC/CONF.III/VEREX/9) (Geneva, 24 September 1993).
- <sup>85</sup> J. P. Zanders et al., *Chemical and Biological Weapon Developments and Arms Control*, *SIPRI Yearbook*, 2002, Oxford: Oxford University Press, 2002, p. 667.
- <sup>86</sup> Final Declaration of the Final Document of the Fourth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin

Weapons and their Destruction (BWC/CONF.IV/9), Geneva, 1996, p. 29, [http://www.opbw.org/rev\\_cons/4rc/docs/final\\_dec/4RC\\_final\\_dec.pdf](http://www.opbw.org/rev_cons/4rc/docs/final_dec/4RC_final_dec.pdf).

- <sup>87</sup> For a useful perspective on this from an individual who had seen both UNSCOM inspection service in Iraq, had experience of the Trilateral Inspections as well as the Ad Hoc Group negotiations, see David C. Kelly, "Verification of Compliance with the Biological Weapons Convention" in *Changing Threats to Global Security: Peace or Turmoil*, Proceedings of the XV International Amaldi Conference, 2003, Helsinki, Delegation of the Finnish Academies of Science and Letters, 2003, pp. 227-242. This article was authorized by his widow and is based on a presentation he delivered at the Amaldi Conference not long before his tragic death.
- <sup>88</sup> This was always a perceived group with a fluid membership over time. It usually included Iran, the Libyan Arab Jamahiriya, Cuba, India, Pakistan and China.
- <sup>89</sup> Ambassador Donald Mahley, (United States Special Negotiator for Chemical and Biological Arms Control Issues), statement by the United States to the Ad Hoc Group of Biological Weapons Convention States Parties, Geneva, 25 July 2001.
- <sup>90</sup> Statement of the Honourable John R. Bolton, Under-Secretary of State for Arms Control and International Security, United States Department of States to the Fifth Review Conference of the Biological Weapons Convention, Geneva, 19 November 2001, <http://www.us-mission.ch/press2001/1911bolton.htm>.
- <sup>91</sup> Rule 28 of the Review Conference rules of procedure states that a two-thirds majority vote can be taken on an issue of substance if all efforts at consensus have been exhausted. See also Nicholas A. Sims, "Biological Disarmament Diplomacy in the Doldrums: Reflections After the BWC Fifth Review Conference", *Disarmament Diplomacy*, No. 70, April- May 2003.
- <sup>92</sup> The CCW scope operates differently from some other treaties in the arms control or humanitarian spheres. To become a state party to the CCW a state must ratify the framework Convention and a minimum of two of its Protocols. However, a state party is not compelled to ratify new (that is, more than two) Protocols to remain a member of the treaty under its current rules.
- <sup>93</sup> These include: (1) the requirement that a distinction be made at all times between civilians and combatants; and (2) the prohibition of the use of weapons which inflict excessive injury or suffering on

combatants or render their death inevitable. “While these general principles apply to all weapons used in armed conflict, the Convention imposes specific prohibitions or restrictions on the use of conventional weapons about which there is widespread concern”, International Committee of the Red Cross, *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, ICRC, June 2004, p. 6.

<sup>94</sup> Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995.

<sup>95</sup> When these discussions began, no consensus definition existed of “explosive remnants of war”. Over the course of CCW work a general working understanding developed that this term covered munitions that had failed to function as intended in conflict and abandoned munitions but not anti-personnel mines or “mines other than anti-personnel mines”. In the final text of the ERW protocol “Explosive remnants of war means unexploded ordnance and abandoned explosive ordnance”.

<sup>96</sup> See the International Committee of the Red Cross report, *Expert Meeting on Explosive Remnants of War : A Summary Report*, Nyon, Switzerland, 18-19 September 2002. This meeting was organized around four main subjects: (1) the humanitarian impact of submunitions and other unexploded ordnance in various contexts ; (2) related technical issues ; (3) the use and military utility of cluster bomb submunitions ; and (4) possible measures to address the problem of explosive remnants of war.

<sup>97</sup> The United Nations General Assembly had passed resolution 55/37 at its fifty-fifth session on 20 November 2000, calling on states parties to convene the next Review Conference not later than 2001.

<sup>98</sup> “In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.” See the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980. Amendment to Article 1, 21 December 2001.

<sup>99</sup> See the draft report of the meeting of the states parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively

- Injurious or to Have Indiscriminate effects, CCW/MSP/2002/CRP.1, Geneva, 12-13 December 2002.
- <sup>100</sup> Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003.
- <sup>101</sup> Report of the Second Review Conference of the States Parties to the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, Geneva, 21 December 2001, <http://www.ccw-treaty.com/report.htm>.
- <sup>102</sup> CCW Protocol V will enter into force for states that have acceded to that legal instrument when 20 countries have acceded.
- <sup>103</sup> See the report of the states parties to the *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, CCW/MSP/2003/3, Geneva, 16 February 2004.
- <sup>104</sup> The United Nations has a membership of 191 members while the World Health Organization's membership stands at 192 states.
- <sup>105</sup> Rule 32 of the CD rules of procedure (CD/8/Rev.8) states: "Representatives of non-member states shall have reserved seats in the conference room during plenary meeting and, if the Conference so decides, at other meetings." Application of non-member countries to attend must then be adopted by consensus by the member states of the Conference. Rule 33 of the rules of procedure does, however, allow for "non-member states to submit written proposals or working documents on measures of disarmament that are the subject of negotiation in the Conference". According to Rule 34 non-member states may also be invited to express their views to the Conference upon request.
- <sup>106</sup> Between 1998 and 2004, for instance, the list of countries with observer status in the CD fell from 47 to 38. (This actually reflects a slight rise from 2002 and 2003 when it fell to a low of 37.)
- <sup>107</sup> Rule 42 of the CD rules of procedure (CD/8/Rev.8).
- <sup>108</sup> See, for instance, the 2003 Joint NGO statement to the Conference on Disarmament read by the Deputy-Secretary General of the Conference on Disarmament, Enrique Roman-Morey, <http://www.wilpf.int.ch/disarmament/cd2003.htm>.
- <sup>109</sup> C. Dasgupta, "Prologue to the Climate Convention", in I. Minter and J. A. Leonard (eds), *Negotiating Climate Change: The Inside Story of the Rio Convention*, Cambridge: Cambridge University Press, 1994, p. 132.

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- <sup>110</sup> Of the 22 members of the Western Group three states (France, United Kingdom and United States) are nuclear-weapon states and also members of the North Atlantic Treaty Organisation (NATO). Israel is believed to possess nuclear weapons also. Ten of the 22 (Belgium, Canada, Germany, Hungary, Italy, Netherlands, Norway, Poland, Spain and Turkey) are also members of NATO). Only Austria, Australia, Ireland, Israel, Japan, New Zealand, the Republic of Korea and Sweden are not NATO members in the Western Group, although some have bilateral defence treaties with at least one nuclear-weapon state. Out of the 31 states that officially comprise the Non-Aligned Movement in the CD, India and Pakistan possess nuclear weapons and the Democratic People's Republic of Korea and Iran may be—or may be on the road to being—nuclear capable. Of the states that comprise the Group of Eastern States in the CD one, the Russian Federation, is a nuclear-weapon state, while Bulgaria and Romania are members of NATO. Only Belarus and Ukraine are non-NATO members. As mentioned, China stands outside the group system by choice and is also a nuclear-weapon state.
- <sup>111</sup> Henry Plotkin, *The Imagined World Made Real: Towards a Natural Science of Culture*, London: Penguin, 2002, p. 34. Italics inserted by the authors.
- <sup>112</sup> David C. Atwood, "NGOs and Disarmament: Views from the Coal Face", *Disarmament Forum*, UNIDIR, Geneva: United Nations, No. 1, 2002, pp. 5-14, p. 6.
- <sup>113</sup> *Ibid.*, p. 9.
- <sup>114</sup> See Don Hubert, *The Landmine Ban: A Case Study in Humanitarian Advocacy*, Occasional Paper No. 42, Thomas J. Watson Jr. Institute for International Studies, 2000.
- <sup>115</sup> These roles include generating public awareness, constituency-building and campaigning at the national and transnational levels, "reframing" issues, policy-agenda building and policy development, developing and changing norms, lobby/advocacy, exchanging and targeting of information, researching and expert policy advising, monitoring and evaluating actor behaviour, developing "track II" initiatives and implementing policy.