

Unfinished Business: From the CTBT to the FM(C)T: lessons for the Conference on Disarmament

Rebecca Johnson

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Thanks, appreciation etc, ref to hope that CD work will now commence

Once a negotiating mandate was agreed in 1993, it took just three years for the Comprehensive Test Ban Treaty to be finalised before it was adopted by the UN General Assembly on 24 September 2009. But as my book “Unfinished Business” details, some outcomes – the zero yield scope, for example – were more or better than anticipated, while some were less or worse than hoped for.

The fact that the CTBT has not yet entered into force, despite having some 180 signatories and 148 ratifications, is a legacy that contains lessons about how *not* to clinch the endgame. At least the CTBT experience suggests that entry into force should not be left to last and needs to be made more flexible next time around. In the CTBT case, some states sought to use the EIF provision as a lever on reluctant states, which India in particular viewed as coercive; whereas experience suggests that if a treaty enters into force sooner rather than later, then the **process** of embedding the norms, rules and institutional benefits of the new regime is more likely to draw the hold-outs in – political persuasion, in other words, works better than legal coercion to bring governments into international agreements.

There are parallels here in the emphasis some states put on delineating the parameters in the pre-negotiations phase before allowing negotiations to go ahead. It is a mistake either to create too narrow a mandate or to go the other way and try to pre-negotiate agreements on controversial issues. The process of negotiations at its best can reveal or create new solutions to contested issues, such as scope.

Like the CTBT, there are fundamental differences of view among some CD members about the objectives and purposes of the fissile material treaty on your table for negotiating. Unlike the CTBT, a key difference of view is reflected even in the preferred term for a fissile materials production treaty.

Some, notably the nuclear weapon states and India, prioritise the objective of non-proliferation, and emphasise that only a ban on future production is to be addressed. They and their allies intentionally use the acronym FMCT to demonstrate that they are primarily – or solely – interested only in negotiating a cut-off treaty. Others, particularly non-aligned states in the CD, argue that the treaty should explicitly contribute to disarmament as well as non-proliferation, and for this, stocks need to be included. Their preferred acronym is FMT for ‘Fissile Material Treaty’ or – my preference – fissan. Such terms do not prejudge the scope in the way that FMCT appears to rule out past production, but are (unsurprisingly) used most often by those who want stocks to be addressed. It is important to recall that CD/1299 (the Shannon report) provides for stocks to be raised as part of the negotiations although they are not mentioned in the narrower mandate contained within the report.

While there are many general lessons from the history of how the CTBT was achieved, and my book contains analysis and insights applicable to multilateral negotiations, in

this talk I want to concentrate on lessons for the Conference on Disarmament, with particular reference to the fissban.

1) The CD as negotiating forum

I think most would agree that if we were designing a negotiating forum for multilateral disarmament treaties now, it would look somewhat different from this CD, which emerged in phases through the cold war, with basic mandate and rules formed through the crucible of the first UN Special Session on Disarmament in 1978.

At that time, the US and Soviet Union insisted that the CD make all its decisions by consensus, including all procedural decisions which also have to be adopted every year. That might have been cold war realpolitik in the 1970s, but it has overburdened the CD in the 21st century. It is debilitating and counterproductive for governments to know that any decision they take can be blocked or renegotiated the following year. If everyone were keen and eager for disarmament negotiations, we wouldn't need them (and they wouldn't be so tough). Negotiations are needed precisely because some states want to hold on to weapons or practices that the majority of governments and civil society deem inconsistent with wider security or humanitarian exigencies or values. So handing everyone a de facto veto on starting those negotiations is a recipe for paralysis.

The CD was developed at a time when national security was regarded as paramount, and every government got to determine its own definition of national security, whether this included developing tens of thousands of nuclear weapons, pursuing armed conflict for oil, minerals or territory, or even torturing and executing civilians with opposing or dissident views. In the past 30 years such notions of the sacrosanctness of governments' determination of national security have come under question, particularly if they undermine international security and objectives or result in indiscriminate harm to civilians. Inevitably, therefore, the CD needs to be restructured as a forum where processes of challenge and change can take place, and where governments are encouraged – and also persuaded – to reframe their understandings of national security to become consistent with – or at least responsive towards – international and human security imperatives. No-one is arguing that the CD rules should enable treaty decisions to be imposed by riding roughshod over governments' concerns. This may be the spectre raised by objectors to CD reform, but it is not what anyone is suggesting. But at present the rules prevent the CD getting started and so deny all states participation in the process of reaching convergence, which is what negotiations should be about. The CD has almost used up the international community's patience. Without reform this forum will not survive much longer.

As the CTBT experience demonstrated, through the process of negotiations, many governments do indeed come to change or recast their perceptions of their state's interests and security, recognising that harmonising with the security needs and interests of the wider international community will enhance rather than diminish their own security environment.

In the past, it was assumed that security negotiations were a zero sum game, and that for at least some states it would be necessary to 'give up' or 'surrender' some national interests. Now that we understand security to be interdependent and interlinked, we recognise that one country cannot obtain security at the expense of others.

My book considers the differences between integrative bargaining – the strategies and tactics for reaching positive sum convergence – and traditional, distributive bargaining, which assumes winners and losers. Though the CTBT contained examples and elements of both distributive and integrative convergence, it is clear that better and more sustainable decisions arise through integrative convergence than through the concealing, obstructing and manipulative tactics traditionally employed by practitioners of zero sum negotiating. On pages 54-55 you can see where I used my observations of delegations' CTBT strategies and tactics to build on work by Dutch and Canadian academics. But rather than focus mainly on the tactics used for blocking and delaying negotiations, as others have done, I sought to identify the tactics that are – or could be -- also used for facilitating agreements.

2) Start negotiations without preconditions and employ the rules constructively to facilitate rather than obstruct.

Rules are supposed to facilitate communication and convergence. If, on the contrary, they facilitate obstruction and impasse, they need to be adapted. If they cannot be changed formally, because consensus would require the agreement of those who have a vested interest in hanging on to rules that can be abused and manipulated, then ways can be found to reinterpret or bypass with the creative application of alternative approaches. So, for example, after getting off to a flying start with CTBT negotiations in 1994 as part of a package that included ad hoc committees also on PAROS, TIA and, if I recall correctly, NSA, the package got unravelled as the workload was stretching some delegations to breaking point. Most delegations in 1995 wanted to drop the other committees and focus full time on the CTBT negotiations, but for symbolic and political reasons, some states did not want to be seen to advocate this, and so the CD failed to agree an agenda. That could have led to paralysis, but the commitment to negotiating the CTBT was by that time sufficiently high that the first CD President of 1995 got agreement to continue CTBT negotiations as if there was an agenda. This was quietly formalised much later in the year and readopted in 1996 to enable the negotiations to carry on until the treaty was concluded.

There are further examples I could evoke, but let's move on and look at the treaty itself.

3) Structuring the Negotiations

The CTBT mandate contained instructions to establish two working groups, on verification and on legal and institutional issues. So the Chair of the negotiations, which rotated among the groups, had a ready-made bureau comprising the Chairs of the two working groups, which also rotated, so that all 3 groups were – in theory at least – represented. All three chairs could choose Friends of the Chair for specific tasks, and there could be further subdivisions from that.

The Fissban mandate gives no such instructions, and I think that is a good thing. Though a lot of technical and educational work could be done in the first year of the CTBT's verification working group, nothing much could get pinned down until the breakthrough decisions on the zero yield scope in the second year.

As Ambassador Brassack noted in his thoughtful parting statement, the Fissban has three core issues which are interdependent: scope, definitions and verification. To which I would add a fourth – legal and institutional: i.e. entry into force and the standard treaty requirements. Many of these may be standard and able to be imported from other treaties, but as the CTBT experience taught us, some may be more political

than might at first sight appear – not only EIF, but also issues such as withdrawal and procedures for review and amendments and so on.

Like the CTBT, the fissban has three basic interest groups: the NPT-recognised NWS (the P-5); the NW possessors outside the NPT (the D-3 or, if North Korea is not addressed diplomatically, D-4); and NPT non-nuclear weapon states. These groups are not, however, internally cohesive, but have both shared and conflicting perceptions of interests and objectives. In the CTBT, the **P-5 formed a minilateral negotiating forum** that tried to reconcile their own differences and present common positions, largely unsuccessfully. The P-5 are likely to coordinate private, minilateral sidebar negotiations again, but I think they need to think far more carefully than before about how such minilateral talks interface with the multilateral negotiations.

One legitimate grounds for P-5 minilaterals is that they can discuss certain technical issues that can't be fully shared with NNWS without violating the NPT. But such minilateral negotiations can also cause resentment and may undermine the multilateral principles and benefits of the negotiations. And **where would this leave the D-3 (or 4)?** Excluded from privileged P-5 talks that have a bearing on their fissile material production technologies or, alternatively, invited in, which could be politically unacceptable for the NNWS?

Also, it is sometimes assumed that because the treaty will directly affect facilities in the P-5 and D-4, these countries have a more **direct interest** in what goes into the treaty. Looking at it from a different angle – they have vested interests, yes, but so do the other 180-plus nations that voluntarily renounced the right to make nuclear weapons and who, therefore, have an overwhelming – and equally direct – security interest in preventing further horizontal and vertical proliferation and moving everyone towards nuclear disarmament.

So, since the mandate neither lights your structural way nor ties your hands, how **should** the fissban negotiations be structured? I don't have any easy answers, and Tim will also address this fundamental question.

Let me make some suggestions, however:

i) Under the authority of the overall Chair, it will be necessary to delegate some issues to **working groups or other subsidiary bodies**, convened by Friends of the Chair; it might also be useful to consider designating **coordinators** for some issues. In both cases there will need to be ways to report back regularly to the CD as a whole as part of an open and accountable process.

Two warnings:

i.a) Decisions on these groups and chairs should not be made subject to consensus. That would be a recipe for disaster. Choose the Chair of the negotiations wisely each year, and give her or him your confidence, assistance and advice. (I think rotation of the Chair among the groups was no problem for the CTBT and is, I know, an important political principle. However, for the sake of coherence and continuity, the Chair of the negotiations should be appointed for the full year.

Of course, when appointing Friends of the Chair and coordinators, the Chairs should take into account geographical and gender representation as well as skills and experience, but these should be guiding principles and not a rotational straitjacket. Any groups or delegations that feel they are being overlooked or unfairly treated can

always raise such concerns in the CD context and a Chair that fails to share the tasks around would make her or his job much harder (and so, probably, not be a very effective Chair).

i.b) As the negotiations progress, some issues will get resolved, and new challenges will come to the fore. So the structure should provide sufficient continuity to see negotiations through, but also some flexibility to allow for moving forward. Beware of instituting working groups or coordinators with the requirement that they continue throughout the negotiations. That kind of gesture politics will just create bureaucracy and may get in the way – remember the proverb that too many cooks spoil the broth.

ii) On **verification**, the task for the head treaty should – consistent with the scope and obligations decided upon – identify the core principles and requirements of monitoring and verification, including issues such as monitoring of declared sites, required declarations, routine and ‘random’ (what used to be called ‘challenge’) inspections, inspection of undeclared sites (rights, responsibilities and protections for the inspected party as well as for the inspectors) and so on.

ii.a) It should also decide on the **Implementing Organization** – its structure and decision-making procedures and relationship with the IAEA, for example. It should not, however, try to negotiate the technical details, procedures or technologies to be used for verification. Hindsight shows that this was done to excess in the CWC and CTBT. As studies such as the International Panel on Fissile Materials (IPFM) demonstrates, the fissban – whether a basic FMCT or more complex FMT – is verifiable, but the CD negotiations do not have to dot every i and cross every t of what this entails. This would be extraordinarily time-consuming and, I would argue, self-defeating. Technologies and skills are advancing all the time, and it would make for a more sustainable and effective treaty if this were factored in from the beginning. Though principles, powers and protections can be negotiated as part of the treaty, the detail is best left to the IO, which, after all, will be governed by states parties to the treaty.

(examples from CTBT: noble gases; satellites...)

ii.a) That said, the principles cannot be determined without a sound understanding of the technologies of fissile material production and the techniques and technologies available for verification. Some kind of Group of Scientific Experts drawn from scientists with these kinds of knowledge and expertise could meet in parallel to the diplomatic negotiations, with individually reporting conduits to their delegations and groups as well as periodic presentations to the Fissban Committee, allowing for questions and exchanges of views and information relating the technical understandings to the policy negotiations and decision-making.

iii) timetable

iv) relationship with civil society

Concluding remarks about the importance of kind of treaty, about aiming for regime enhancing integrative solutions and not settling for management compromises that split the difference between positions (but can store up problems for the future).....