INFORMAL CONSULTATIVE MEETING – February 16th, 2018

DEBRIEF ON THE WORK OF THE PREPARATORY GROUP

LEGAL & INSTITUTIONAL

BY HEIDI HULAN, CHAIR OF THE HIGH-LEVEL FMCT EXPERT PREPARATORY GROUP

Back in 2015, the GGE agreed that the legal and institutional arrangements of a future treaty will play an important role in ensuring its credibility within the international community.

The GGE felt that that treaty’s institutions would need to remain credible, including by being politically impartial and technically able and by applying resource-efficient techniques.

The GGE also considered that legal and institutional arrangements of a future treaty should be designed to facilitate its effective implementation.

Based on those assumptions, and taking into account the current and evolving experience of other international treaties and institutions, the Preparatory Group reflected on the various governance structure models in order to better visualize the structure of the treaty.

Experts presentations and working papers that were submitted to the group significantly contributed to make progress on this issue.

The group discussed in detail the tasks that could be carried out by the various governance and decision-making bodies, including a conference of state parties, an executive council, a verification body, and an administrative secretariat.

I am so pleased that Olli is here to speak to you a bit more on that aspect later this morning.

We also analyzed the different ways these governance and verification bodies would interact with one another.

In fact, the Preparatory Group succeeded in fleshing out four detailed governance structure combinations for an FMCT, and the implications of each.

This is, in my view, significant progress for the future of an FMCT.

I have been clear that the group’s mandate is not to narrow the range of options. However, this was one area where convergence on a set of options occurred naturally after a thorough debate.
Later this morning we will benefit from a presentation on these options from the Netherlands – based on an excellent working paper they submitted to the Preparatory Group -- so I will not go into great detail here. Suffice it to say that we discussed options that range from a fully standalone FMCT and verification body, to a governance structure embedded within the International Atomic Energy Agency (IAEA).

While significant work was carried out in the Preparatory Group on this issue, the extent to which each of these models interlinks with other existing institutions, and in particular with the IAEA, merits further consideration.

In addition, it became apparent that further analysis will be required to assess the resource implications for the various models.

Taking off my Chair’s hat for a moment, I can tell you that from a Canadian perspective, we would not be in a position to obtain negotiation instructions for an FMCT without knowing the cost implications for the treaty.

Not only did the preparatory group succeed in laying out succinct treaty institutional structure models, they also explored a number of potential legal elements for a future treaty.

This discussion had two facets. The first was to enable a substantive discussion on some of the legal aspects that the previous GGE indicated that it did not have time to address, and which would benefit from further analysis. The second was to design possible treaty elements for these and other legal elements set out in the GGE report.

The Preparatory Group therefore engaged in a substantive discussion on treaty accession, reservations, treaty depositories and dispute settlement mechanisms.

On the issue of accession, the Preparatory Group recognized that a future treaty could be opened to all States after the entry into force of the treaty and that a treaty provision on accession would be relatively straightforward.

Experts also tackled the issue of treaty reservations, conjointly with a reflection on interpretative declarations. The Preparatory Group Expert from Mexico, who is unfortunately not here today, submitted an excellent working paper to the Preparatory Group in this respect.

Options for treaty elements related to the potential depository for a future treaty were also unpacked, for example whether it would be the UN Secretary General or other specified states identified in the treaty itself.

There was a robust discussion on potential dispute settlement mechanisms, which underscored the linkages with the treaty’s institutional structure.
In this area, the possibility for the treaty to have a menu of options on dispute resolution and/or an escalation scheme was raised by the Group.

The Preparatory Group also built on the GGE’s work in the area of compliance.

The Group found benefit in first reflecting on potential principles that would underpin the compliance regime of a future treaty; in particular the fact that it should be state-driven, transparent, and fact-based.

The Group also concurred with the conclusion in the GGE report that whatever the mechanism, it was important to take steps to reduce the possibility of frivolous or abusive non-compliance complaints.

Building on the work started in the GGE, the Preparatory Group reflected on the actual mechanism that would be initiated in the event of an allegation of potential non-compliance and the process that would ensue.

The Group recognized that non-compliance mechanisms would ultimately depend on the governance structure that is established for the treaty.

Inspired by existing compliance provisions in multilateral arms control and disarmament treaties, the group consequently undertook a detailed review of compliance in the context of possible governance bodies’ tasks and responsibilities.

That is to say, how, and by whom, formal findings must be addressed, as well as the potential punitive measures that could be applied.

On this matter, I am glad that the Preparatory Group’s Polish expert has agreed to make a presentation on this issue later this morning.

I believe this is an area that could still benefit from further reflection.

The Preparatory Group also discussed the different mechanisms for making amendments to a future treaty.

Rather than repeat the discussion held on this issue in the GGE, the Preparatory Group attempted to frame the various amendment scenarios as possible treaty elements.

These included both substantive treaty amendments and the possibility of a dedicated and expedited for technical updates.

There was also interesting discussion on the ways entry into force could be laid out in a future treaty.

In order to balance the range of options between overly restrictive entry into force provisions that could block a future treaty’s effective implementation, and more
permissive provisions that could undermine its credibility, the Preparatory Group examined various possible treaty elements.

These ranged from an entry into force dependent on a certain number of ratifications, for example, or the ratification of a certain number of states on the basis of identified criteria.

Experts discussed the question of provisional application of the treaty, and how that might be implemented in practice.

Similarly, the idea of a phased entry into force was also raised, as well as the conditions upon which such an approach might depend.

As was the case in the GGE, the Preparatory Group discussed the duration of a future treaty.

In line with what has been agreed on by the previous GGE, the Preparatory Group recognized that parties should have the right to withdraw, but felt that conditions for withdrawal should be restrictive. This fostered an interesting discussion on the types of withdrawal provisions that could be included in the treaty.

Overall, I think the Group has a much better idea of how legal and institutional provisions could be set out in a treaty and identified some of the considerations that will need to be taken into account by future negotiators.

In the GGE, experts understood the interrelationship between the institutional structure of a treaty, and certain legal provisions including those related to compliance and dispute resolution.

I am hopeful that the Preparatory Group’s success in clearly articulating a set of specific institutional models will help us clarify the options for treaty elements in the final report.

That concludes my debrief on the legal and institutional elements discussed in the Preparatory Group report.