

BEHIND the HEADLINES

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Why treaties work
or don't work,
and what to do about them

DR. TREVOR FINDLEY



Contributions on topical foreign policy, international affairs and global issues should be addressed to:

Behind the Headlines, CIIA
205 Richmond Street West, Suite 302
Toronto, Canada M5V 1V3
Telephone: 416-977-9000
Facsimile: 416-977-7521
E-mail: mailbox@ciia.org

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Canada

Why treaties work or don't work, and what to do about them

DR. TREVOR FINDLAY

It's a great pleasure for me to be here among a group that is fascinated by international politics, especially after a general election in which such issues barely rated a mention.

My topic is "Why treaties work or don't work, and what to do about them." Rather inelegant in English, I'm afraid. But the French version more than makes up for it with its mellifluous "Les traités : il y a ceux qui fonctionnent et ceux qui ne fonctionnent pas. Qu'en faire?"

The core treaties that I want to consider deal with so-called weapons of mass destruction (WMD): chemical, biological, nuclear, and radiological. I say "so-called" because lumping them together, when their physical and political effects are actually and potentially so different and so dependent on circumstance, obfuscates rather than enlightens. The term WMD has also become politicized in some quarters to mean weapons of mass destruction in the wrong hands. But, that said, it is a useful shorthand that I'm forced to use, along with everyone else.

In addition to WMD treaties, I'll consider other treaties that I am familiar with, by way of contrast, including those inside and outside the disarmament field.

THE TREATY TRACK RECORD

When Barbara Darling, president of the CIA's National Capital Branch, first approached me about the topic, she suggested that

Trevor Findlay is Director of the Canadian Centre for Treaty Compliance, and Associate Professor, Norman Paterson School of International Affairs at Carleton University. This article is based on his presentation to the National Capital Branch of the CIA on January 25, 2006.

I discuss why treaties don't work and what to do about them. But I felt that would not do justice to the situation: the vast majority of treaties—and hundreds of new ones are negotiated each year—do actually work. They are successfully implemented, the states parties comply fully with their obligations, and no one gives it a second thought. This is as true in the field of arms control, disarmament, and non-proliferation as in any other. In fact, it may be truer of this field than others.

Because disarmament treaties go to the heart of national and international security, states are wary of frivolously embarking on new ones that might constrain their options. When they do agree to negotiate, they do so intensely to ensure that they derive maximum flexibility for themselves and impose maximum constraints on others. Hence the sad litany of treaties that have never made it out of the Conference on Disarmament: the radiological weapons convention, the negative security assurances convention, and the fissile material cut-off agreement, not to mention a nuclear disarmament treaty. Those that do make it out by and large achieve large numbers of signatures and ratifications, sometimes approaching universality. They are, by and large, fully implemented. And the vast majority of states comply fully with their obligations.

But the flip side of the fact that states are so sensitive when it comes to negotiating and signing disarmament treaties is that when they are violated, there is, rightly, a great deal of angst.

While there has only ever been one known major violation of the 1972 Biological Weapons Convention (BWC), it was immensely disturbing. It turned out that the Soviet Union, at the very time it was signing the treaty, was planning a biological weapons research, development, and production program on a massive scale. We are still unsure of the details more than 15 years after the end of the Cold War.

There have now been four notable violations of the 1968 Nuclear Non-Proliferation Treaty (NPT). They are all highly alarming, involving as they do Iraq, North Korea, Iran, and Libya.

WHY DO TREATIES WORK?

So the general question arises: when treaties work, why do they work? The short answer is that they embody a norm, an aspiration,

a settlement that is valued by all of the parties. The treaty has been well constructed to reflect these elements, the states that become party are happy with the outcome, and there are no incentives to defect from the agreement. The best example of this phenomenon that I can think of is the Ottawa Convention on land mines. It embodies the special mix of aspirations of all those who inspired it, notably the International Campaign to Ban Landmines and states parties such as Canada, Belgium, and Norway. It is geared to deal not just with disarmament but with humanitarian and quasi-development issues, such as demining. Its focus on capacity building and technical assistance has given it a constituency among developing countries that other disarmament agreements lack. This has not insulated it entirely from violations—Uganda almost certainly has violated it—but it has surrounded the treaty with a hugely supportive cocoon of states and civil society in genuine partnership.

Another reason why treaties work is that their goals are simply expressed, or at least readily identifiable, and their achievements are measurable. An effective monitoring and verification system can be of enormous help here, providing confidence to all states parties that there are no free riders and that non-compliance will not threaten them.

One of the most successful environmental treaties of our time is the Montreal Protocol, which seeks to close the hole in the ozone layer caused by the release of chlorofluorocarbons (CFCs) into the atmosphere. The ban on CFCs was relatively simple to envisage, it could be technically monitored with relative ease, developed and developing countries were subject to the same requirements, and there would be clear evidence that the treaty was working if the ozone hole started to close. It is.

Compare this with the Kyoto Protocol, which is based on inexact science (although it is getting better all the time), where monitoring and verification is at a pioneering stage and something of a technical nightmare, and where different parties have wildly differing obligations and are choosing different routes to compliance. Hence we have a situation where two of the largest emitters of greenhouse gases—Australia and the United States—have stayed out of the protocol (scandalously, in my view), while others were relieved of any reduction targets (notably China,

India, and Brazil), while still others like Canada are parties but are increasing rather than cutting their emissions. Kyoto has a verification system that is a work-in-progress, that is being constantly adjusted to catch up with the science, and that therefore is not conducive to readily creating confidence.

WHY TREATIES DON'T WORK

Let me turn now to why treaties don't work, much of which is implied by what I have just said.

First, the aspirational argument about treaty success is somewhat glib. In the real world, many states join treaties not because of aspirations for a more orderly, better world or because they have a burning desire to tackle a particular international issue by such means but because universality is expected. For some states it is simply a matter of joining the queue at United Nations headquarters on the day the treaty is opened for signature in order to demonstrate their multilateral bona fides.

Others are enticed into treaties for side benefits that have nothing to do with the core treaty aspirations—indeed, such benefits may even run counter to core treaty aspirations. One of the “side benefits” of the NPT that has come to threaten the treaty itself is its deification of the supposed “inalienable right to the peaceful uses of nuclear energy.” Combined with the short-sightedness of the Atoms for Peace Program and its Soviet equivalent, this provision exposed far more individuals, organizations, and nations to the technologies for producing nuclear weapons than would have been exposed in the natural scheme of things. And it put an official, multilateral stamp on such programs by involving the International Atomic Energy Agency (IAEA) in the process.

Add the NPT provision that allows any state party to withdraw on just three months' notice, without having to return any of the materials or technologies it has received under peaceful assistance programs, and you have a recipe for states to acquire the full nuclear fuel cycle and defect from the treaty by, in essence, declaring themselves to be nuclear-weapons states overnight. This is the route that Iraq, Iran, Libya, and North Korea were all seeking to follow. But for many states this provision was a necessary part of the bargain for joining the NPT

and it has helped ensure the treaty's overall success, and now it is difficult to deny states this "right" retroactively.

Some states are cajoled by their friends or allies into joining treaties. Their hearts aren't really in it. This is probably what happened in the case of North Korea, which joined the NPT late, presumably eventually giving in to pressure from China and Russia. It then proceeded to delay the signing of a comprehensive safeguards agreement with the IAEA. When it finally did sign, its contrived declarations revealed its non-compliance. None of this should have been surprising, given the circumstances of its accession to the treaty. Presumably Iran under the shah was pressured by the United States to join the NPT when its preference, too, would have been to stay out.

A second significant reason for treaty failure is that treaties are badly crafted. They provide wiggle room for states seeking to avoid compliance or to keep their options open. The NPT is a prime example. While treaties are clearly a product of their time and hindsight is a wonderful thing, it was apparent even in 1968, when the NPT was negotiated, that it was storing up trouble for the future.

One problem was the nature of the grand bargains embodied in the instrument. In return for eternally forswearing the right to have nuclear weapons, the non-nuclear-weapons states got a curmudgeonly undertaking from the nuclear-weapons states in article VI to just "pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament." The vagueness and unfairness of this deal have continued to haunt the treaty, to the extent that the last review conference in May 2005 collapsed largely because of it.

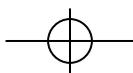
A third reason for the failure of treaties is the absence or weakness of verification provisions. The NPT, even at the time of its drafting, was recognized as having a relatively benign approach toward the possibility that the treaty would be violated—especially given the stakes involved. Hence the verification system established was mechanistic, under-resourced, and relatively trusting of states parties' good intentions. Even perspicacious provisions—such as the possibility of "special inspections," essentially challenge inspections, in case of suspected non-compliance—were not utilized.



Moreover, instead of creating a new, independent verification agency to monitor treaty compliance, the NPT entrusted the job to the International Atomic Energy Agency. This body had been established prior to the NPT not to detect would-be nuclear-weapons states but to promote the global use of atomic energy. One can almost see the split personality leaping from the treaty text. It was not just that the two principal roles of the IAEA were in some respects contradictory, but there emerged a constant battle over resources for the two roles. This ended up with verification spending being pegged to spending on promoting peaceful uses, and with verification being subsidized through voluntary donations by the US and others to get around the intra-agency funding logjam.

Neither the drafters of the NPT nor the members of the IAEA were interested in more intrusive, elaborate, and costly safeguards. This was particularly so as the agency had three members that were to become the three NPT holdouts—India, Pakistan, and Israel—which had no interest in seeing the safeguards role of the agency enhanced, lest it be applied to them. But not even the Soviet Union and the United States, which along with the United Kingdom had produced the initial draft of the NPT, were interested in stronger safeguards at the time. The assumption was, one can imagine, that the Soviets would be expected to keep the Eastern Europeans and the rest of the Communist world away from nuclear acquisition while the US would keep an eye on West Germany and Japan. Together they would monitor the developing world—as they actually did in the case of South Africa, for instance.

A fourth reason for treaty failure is the lulling effect that the absence of exposed non-compliance can have and the natural tendency of bureaucracies to ossify over time if left to their own devices. The IAEA thus came to assume the role of auditors and accountants rather than of verifiers. The agency examined declarations of fissionable materials and related installations, carried out on-site inspections to confirm the veracity of such declarations, and then issued a statement to the effect that there was no evidence of diversion of materials or facilities to non-peaceful purposes. What the agency did not do, despite the fact that it could have, was to look over the wall at the declared facilities to



see what was on the other side. When it finally did so, in Iraq (although this was a berm rather than a wall), it was horrified to see a duplicate nuclear facility dedicated to nuclear weapons purposes on the other side.

A fifth reason for treaty failure is the lack of sturdy compliance mechanisms: that is, arrangements to deal with cases of non-compliance when they are detected. Almost all treaties may be faulted in this respect. Compliance is one of the great under-attended subjects in treaty making. This is presumably because the negotiating states never want to themselves be subject to measures such as sanctions but also because of wishful thinking on the part of treaty-makers who believe that their beautifully crafted document, with its elaborate verification provisions, will automatically be complied with. The reaction to non-compliance thus tends to be ad hoc, rather than systematic. This gives no guide to potential violators about what to expect and therefore robs the system of a certain degree of deterrent power. It also causes confusion among those faced with dealing with non-compliance. (It should be noted, though, that sometimes such uncertainty—or, put in another way, flexibility—may be an advantage, permitting creative solutions to otherwise intractable non-compliance problems.)

Let me take one more specific example of a problematic treaty in the WMD pantheon, the Biological Weapons Convention. At the time it was negotiated, it was felt by the United States, in the person of President Richard Nixon, that biological weapons were militarily unpromising and so morally repugnant that violations of the treaty were unlikely. Thus a verification system was not required; moreover, even if it were, it would be too difficult to negotiate with the secretive Soviets. Better to have a quick and loose treaty and move on to the much more militarily significant problem of chemical weapons. The treaty we ended up with thus has no monitoring or verification system whatsoever, and its compliance provisions consist of the possibility of convening an emergency meeting of states parties to consider an alleged violation. Attempts by the states parties over several decades to establish such a verification system, somewhat along the lines of the Chemical Weapons Convention (CWC) although less elaborate than that for the CWC, were aborted in 2002 by the United States.

The Bush administration argued that the BWC was essentially unverifiable, a view disputed by most other states, notably the Americans' close ally the UK. They also argued that it risked having a negative, rather than positive, impact on US security. The underlying reason, it is surmised, was that the lucrative US biotechnology industry, unlike the US chemical industry, did not want to be burdened with the cost and trouble of verification and the risk, however slight, of espionage, while the US Defense Department did not want international scrutiny of its biodefence programs, which skirt close to the ban on the production of biological weapons agents, if not actually contravening it. Hence we have a treaty that bans one of the three types of WMD, made out in some quarters to be the most heinous of all, without a verification and compliance system.

WHAT TO DO ABOUT IT

So the question arises: What is to be done about treaties in the WMD field that are not working well and that are suffering non-compliance problems or at risk of doing so? Some of the answer is better implementation of existing instruments, some involves amending or adding to existing treaties, always a fraught and slow exercise (except when disaster strikes and political momentum suddenly emerges), and some involves supplementing the system with non-treaty mechanisms and arrangements. I'll focus on the BWC and the NPT.

Repairing the BWC is the easiest improvement to imagine and the hardest to accomplish. The treaty needs a multilateral verification and compliance system. If the almost completed draft verification protocol that was so unceremoniously dumped in 2002 is no longer possible, then a new protocol should at least comprise the following elements:

- 1) A mechanism for verifying allegations of use of biological weapons, involving for instance co-operation with the World Health Organization and utilizing an existing mechanism available to the UN Secretary-General on his own cognizance or at the request of the General Assembly or Security Council, to investigate allegations of chemical and biological weapons use.
- 2) A treaty secretariat to promote the treaty, keep track of

annual voluntary declarations made by states about BW-relevant activities, and act as a clearinghouse for BW non-proliferation information.

3) Annual compulsory state declarations.

4) A treaty compliance forum that meets regularly to assess the state of the treaty.

Fixing the NPT, unlike improvements to the BWC, is well in train. Here it will be more a case of applying the new tools available and pursuing additional steps. Following the discovery after the first Gulf War that Iraq had come closer to the bomb than anyone had imagined, there has been a determined effort to strengthen nuclear safeguards. The IAEA concluded after the Iraq and North Korean cases that it could take significant steps to improve safeguards under its existing legal authority and proceeded to do so, including insisting on more complete information from states about their nuclear activities. As for the steps it felt it could not take, the agency enjoined states to give it extra powers, which they did by negotiating an Additional Protocol to the existing comprehensive nuclear safeguards agreements with the agency.

The Protocol essentially requires states to provide cradle-to-grave information on their nuclear activities to the IAEA, from uranium mining to waste management. It permits the agency to use advanced detection technologies, the value of which was proved in Iraq, such as wide-area environmental sampling. And it gives the agency much more intrusive inspection rights if it suspects nefarious activities anywhere on the territory of a state party.

The catch is—and again we are back to treaties—that such additional protocols are voluntary. The IAEA is applying a great deal of pressure, including through regional conclaves, to push universality of the protocol. It is notable that Iran, under pressure, has agreed to act as if it had an Additional Protocol in force.

In my judgement, if the Additional Protocol had been in force for all NPT parties 20 years ago, we would not have been faced with the surprise violations perpetrated by Iraq, North Korea, Libya, and Iran. Either they would have been detected earlier, or these countries would have been deterred from non-compliance in the first place, or they would have withdrawn from

the treaty. Paradoxically, the current crisis over Iran has arisen in part because the agency has pursued its new powers more assiduously in that case. By agreeing to abide by the Additional Protocol, Iran has been obliged to reveal more information than it would have liked to, which in turn has led to further incriminating questions and more intrusive on-site inspections.

The agency's new powers have also shown up additional non-compliance issues in Egypt, South Korea, and Taiwan. Here is one of the paradoxes of verification: the better it is, the more non-compliance questions will arise, mostly resolvable as inadvertent or technical violations perhaps, but at least initially troublesome.

So what remains to be done to strengthen the NPT and its verification?

- 1) The NPT needs an emergency consultation mechanism of its own outside the IAEA. Currently there is no mechanism to call the treaty parties together. They meet only at review conferences, and the lack of a mechanism devolves responsibility to the IAEA, which contains three anti-NPT states.
- 2) The Additional Protocol should become the gold standard for IAEA safeguards. In other words, the IAEA needs to decide to make it compulsory, not voluntary.
- 3) There should be an immediate ban on all new facilities for enriching uranium or separating plutonium while a system to ensure guaranteed supply of such materials for peaceful purposes to all states in good standing is established. The US and Russia have already offered nuclear material for this "nuclear bank" under IAEA auspices.

Numerous measures outside the formal NPT treaty regime can and should be taken to bolster the chances of success. For too long—and the United States is to be applauded for helping to turn this attitude around—there has been an assumption that worthwhile non-proliferation activity can occur only under the NPT. The US and others have demonstrated that this is far from so.

- 1) Further inducements and assistance should be given to states to help them comply with Security Council Resolution 1540. Adopted in April 2003 under Chapter

VII of the UN Charter, it obliges all states to establish domestic measures to prevent terrorists acquiring WMD or their components. This includes criminalizing such activities. It is amazing that many states until recently had inadequate domestic prohibitions or none at all on their citizens dealing with WMD or their components. This was a great gap in international control that is at last being attended to.

2) Further efforts and funding should be devoted to securing the still vastly unsecured stockpiles of fissionable material, tactical nuclear weapons, and nuclear facilities in Russia. They represent one of the greatest security dangers of our time: terrorists can still, today, gain relatively easy access to the key component of nuclear weapons, fissionable material, from poorly secured nuclear facilities and stockpiles in Russia. Massive funding has gone into the US Cooperative Threat Reduction Program, but it has been hampered by political and legal hurdles on the US side and Soviet-style secrecy and bureaucracy on the Russian side. The G8 countries, Canada included, have belatedly begun contributing to this effort, but more needs to be done, more quickly. Terrorists are not going to wait until the last gram of fissionable material is secured.

3) Further and faster efforts should also be made to repatriate highly enriched uranium (HEU) from research reactors spread around the globe as a result of the Atoms for Peace Program and its Soviet equivalent. This task has been proceeding apace thanks to the US, Russia, and the IAEA. Most recently a significant amount of HEU was airlifted in tight security at night from a university reactor in the middle of Prague, in the Czech Republic, to storage and disposal in Russia. But countries from the Democratic Republic of the Congo to South Vietnam received such reactors and materials.

More generically, a proposal that has recently been developed by my Centre would see the preservation in some form of the human and material capacities and the institutional memory of the UN Monitoring, Verification and Inspection Commission (UNMOVIC). As you may know, this body, which conducted

inspections in Iraq until its withdrawal in March 2003, still exists in New York, it still has a large technical staff, and much of its rostered inspectorate and equipment remains available. It would be a great pity if this international resource, gained at such expense over many years, were allowed to atrophy. Our study recommends that it be preserved in the form of a core standing body at UN headquarters, with additional capacities on call. Notably this would include an inspectorate subject to continuous training, prearranged logistics and analytical laboratories, and arrangements with states to provide specialized resources such as medical teams and transport.

On the compliance issue—and I would say this, wouldn't I—much more work needs to be done on how non-compliance should be handled. Canada has itself floated the idea of developing, in advance, a more sophisticated compliance strategy comprising a menu of various tools and measures. This would include capacity building and assistance to states in inadvertent non-compliance, face-saving measures for states seeking them, and more punitive measures for the holdouts. For instance, the idea of smart sanctions, currently being touted for application to Iran's leaders, merits attention. But it is not clear what they should be or how effective they would be. It would seem much better to study and provide for these outside the context of the immediate crisis rather than wait until it is upon us. To do it so late again robs the measures of their deterrent value.

WHAT CAN AND SHOULD CANADA DO?

Canada is already doing a great deal in this area that is unknown and unheralded, although of course it can always do more.

First, Canada is chairing a panel of experts at the UN that will meet for the first time in February to review the state of verification and the UN role. Canada is determined to promote not just improved verification tools and systems but also improved compliance mechanisms, long the most neglected part of treaty making.

Second, Canada is promoting several of the ideas I have just outlined, including the idea of an NPT secretariat and compulsory annual reporting by all NPT states parties of their treaty-relevant undertakings. Canada has strongly supported and contributed to

the development of the Additional Protocol and now of integrated safeguards. But Canada could be more vocal and supportive of new initiatives, such as those on biological weapons verification and in respect of preserving UNMOVIC.

If I may be allowed to voice a criticism of one Canadian policy, it would be that Canada's recent decision to relax restrictions on nuclear co-operation with India is a mistake. Along with similar decisions by the US and the UK, it gives the impression that a state like India can berate and repeatedly seek to undermine a treaty, as well as violate bilateral nuclear agreements with other states (notably one with Canada), and then be welcomed into the non-proliferation fold with few costs or consequences. While in principle doing a deal with India to bring it into the non-proliferation regime is worthwhile, the price should have been higher, not least having India sign and ratify the Comprehensive Nuclear Test Ban Treaty (CTBT) and support a cut-off of fissionable material for weapons purposes. Washington was in no position to press India on the CTBT, but Canada and the UK, both CTBT parties, were.

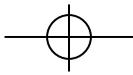
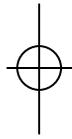
Finally, Canada needs to devote more expertise and more funding to the arms control and non-proliferation areas to retrieve the reputation it used to have. In much the way that it is riding on past glory in respect of peacekeeping, it is also doing so in respect of treaty verification and compliance issues. Foreign Affairs Canada used to have a research and policy-making capacity in this area that was second to none internationally. When it puts its mind to it and devotes the requisite resources, Canada can do wonders, as the Ottawa land mines convention and the human security agenda attest. I'll leave it up to you as Canadians to decide whether the new government of Canada is likely to be interested in pursuing any of these initiatives.

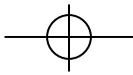
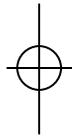
CONCLUSION

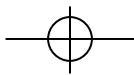
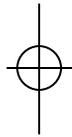
In conclusion, the measures I have proposed—and there are many more where they come from—would strengthen treaty provisions, bolster verification, provide better early warning, and help deter and sanction transgressors. There is a catch to all this, of course. They will not, in the end, work against a determined non-complier like Iran or North Korea. But I would argue that

such egregious cases, and those of Iraq and Libya before them, vastly exceed the capacity of treaties to deal with, however cleverly crafted by foresighted negotiators or patched up by people like me.

Many observers load too many expectations on agreements that are essentially voluntary, mutually advantageous arrangements that last as long as they last. Cases like North Korea and Iran, as we have seen, need to be taken beyond their treaty contexts when treaties can no longer cope: to regional states with leverage and influence in the case of Pyongyang, to the UN Security Council and the wider international community in the case of Tehran. And while Canada has a role to play as a sensible, reasonable partner in such efforts, it needs to leverage this cleverly in a multilateral context and—dare I say it—in collaboration where possible with the United States. It is the role of the United States that is, understandably, the key to success in all of these cases, if success is to be found at all. It is to the remaining superpower that we must look, with trepidation and hope, for fixing treaties and beyond. Perhaps Stephen Harper will do the equivalent of a “Nixon in China” and surprise us all by doing what only conservatives can do: advancing the arms control agenda from the Right.



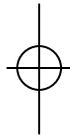






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