

Organizing successful negotiations for the FCTC: Options and lessons from other conventions

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8 October 2001

Introduction

This note responds to a request from London-based Action on Smoking and Health (ASH) for advice on possible negotiating tools and devices that have been found helpful in recent multilateral negotiations, and that could be applied to the negotiations on a framework convention on tobacco control (FCTC).

The note has been prepared in light of the status of the FCTC negotiations, that is, roughly mid-way through the process, with a Chair's text having been presented and heavily amended by delegates to produce a set of unwieldy, extremely complex Co-Chairs' working papers for the third session of the Intergovernmental Negotiating Body (INB). In this context, expectations for INB 3 should not be high. It should be seen as a "get back on track" session, rather than one where substantive progress will be made on key issues. INB 3 will have succeeded if it:

- Produces a more manageable negotiating text;
- Goes some way to resolving less controversial issues;
- Makes progress in developing a more sophisticated negotiation process (e.g. convening informal groups, establishing a "Friends of the Chair" group, deciding on a timetable leading up to a firm deadline).

The note explores both specific strategies for INB 3, and tools and devices for the negotiation process as a whole. It first considers issues relating to *timing*, as these set the overall framework for the negotiations. It then turns to possible strategies for producing a manageable *negotiating text*, before considering *negotiating forums* and "*behind the scenes*" activity. It concludes by outlining *how the session could work*, using the various tools and devices discussed.

Timing

- ***Set a firm deadline:*** A key element of a successful negotiation is a deadline that is accepted as final by delegates. An aspirational "if possible" deadline – such as 2002 in the FCTC process – is usually unhelpful. If a deadline is not seen as final it will almost inevitably be missed, eroding confidence in the process. It is best to focus on the final deadline – May 2003 in the FCTC process – and for the Chair/Secretariat to "talk up" that deadline to increase pressure on delegates.
- ***Establish a timetable:*** Once a final deadline has been identified and confirmed, it is critical to establish as soon as possible how many negotiating sessions there will be before that deadline, especially in such a political negotiation where progress is dictated more by political will than time consuming technical work. Knowing the timetable in advance helps the Chair/Secretariat to plan the negotiation, counting back to see where the process needs to be at what session. A clear timetable also gives certainty and predictability to Parties, enabling them to plan their negotiating strategies.

Negotiating texts

Possible approaches for INB 3

Working on a manageable text is a prerequisite to a successful negotiation. However, preparing such a text – one that is not too long or complex and clearly shows the main areas of disagreement – is not easy. Almost all negotiations are faced with an unwieldy text at some point in the process, and the FCTC negotiations are clearly at that stage. The key is to get beyond this point and progress to something more manageable. Some strategies for achieving this are presented below.

- **Have a “clean up” session:** INB 3 could focus on preparing a consolidated, streamlined negotiating text from the current unwieldy Co-Chairs’ Working Papers. Such a consolidated text could aim to clearly highlight (but not resolve) the main political issues and options facing Parties, merging text where similar ideas are expressed in different ways and eliminating duplication. Talk of “narrowing down options” can raise anxiety among delegates, but if such an exercise is presented as “streamlining” and “consolidation”, it is likely to enjoy more support. To achieve this, the Working Group Co-Chairs could invite delegates to consider each Working Paper section by section, and to identify, for each section, the 3-4 main options that are on the table, as well as areas of overlap that could be deleted. Based on this discussion, the Secretariat could be asked to prepare a streamlined text that captures the main differences of opinions, but without the complexities and duplications of the current Working Papers. This consolidated text could be presented back to the Working Groups for delegates to approve (possibly with amendments) as a basis for further work at the next session. This strategy should result in a more manageable negotiating text, which enjoys acceptability and ownership among delegates.
- **Compile a list of key questions/options:** Another possibility would be for INB 3 to prepare a paper listing key questions (e.g. should there be control on tobacco advertising) and 3-4 main options for each question, based on the Co-Chairs’ Working Papers. The paper could also identify those less controversial issues on which there is broad agreement. This would help to clearly identify the main political issues on the table and to focus on the main options, hopefully narrowing these down. As such an exercise does not involve working with legal text and formulating legal language, it should not be controversial and could be used as a fallback if delegates find it difficult, or are unwilling, to consolidate the existing Co-Chairs Working Papers.
- **Combine the two:** The two strategies outlined above could be combined, so that INB 3 would first compile a “questions/options” paper (e.g. in the first two days), and then, based on that compilation, it would focus on streamlining the existing Co-Chairs’ Working Papers into a consolidated negotiating text. While the Co-Chairs could produce their own “questions/options” paper prior to the session, preparing it during INB 3 with the participation of all delegates would have important advantages in terms of ownership and legitimacy.
- **Focus on the “easy” questions:** As part of the above strategies, INB 3 could focus its attention on resolving, as far as possible, the less contentious issues (e.g. procedural and some institutional clauses) and drafting clean (unbracketed) text on these. Achieving preliminary agreement on even a few straightforward clauses would help to build confidence in the process and enable delegates to focus their time and attention on the key political issues at later sessions.

Looking ahead to INB 4

The strategy adopted for INB 3 needs to be thought through according to expectations for the next session, which itself must be considered in light of the

number of sessions remaining before the deadline. This highlights the importance of knowing your timetable in advance. The section below considers possible strategies for INB 4. An underlying assumption is that, even if a more manageable consolidated negotiating text does emerge at INB 3, it will probably still be necessary for the INB Chair to present a new Chair's text at some point. It would be risky to do so, however, at the final negotiating session as it may be rejected. It is usually more advisable to present such a text at the penultimate session, so that delegates have time to become familiar with it and gain a sense of ownership of it before the final session.

- ***Work on the consolidated text prepared at INB 3:*** If the outcome of INB 3 is a consolidated negotiating text (with or without a preceding questions/options paper), then it could be used as the basis for negotiation at INB 4. This would enable delegates to take the text back to their capitals immediately after INB 3 and work on it in the inter-sessional period. It would also ensure that there was an accepted basis for work at INB 4. The aim would then be for the Chair to obtain a mandate at the close of INB 4 to prepare a Chair's text for INB 5. This scenario would be particularly attractive if there is at least one more negotiating session left to go after INB 5.
- ***Prepare a consolidated text inter-sessionally to work on at INB 4:*** If the outcome of INB 3 is a questions/options paper, then the Chair, working with the Secretariat, should seek a mandate to prepare a consolidated text for INB 4 based on that paper. This approach could also be used if INB 3 does try to prepare a consolidated negotiating text, but the outcome is still too long, complex and unwieldy. The Secretariat could then be asked to streamline it further for INB 4.
- ***Present a new Chair's text for INB 4:*** If INB 5 (or indeed 4) will be the final negotiating session, then it may be necessary to present a new Chair's text at INB 4, based on the consolidated text or questions/answers paper prepared at INB 3. If this is the chosen route, the key issue will be how far the Chair should go in presenting clean text. This will depend on developments at INB 3 and should be considered after the session.

General strategies for working on texts

This section highlights some general strategies for working on texts that might be useful both at INB 3 and at future sessions.

- ***Use informal papers:*** It is not necessary to issue all text under discussion in a formal document and in all UN languages. "Non-papers", issued on a plain piece of paper without a logo or document symbol and in the original language only, can be very helpful for the Chairs/Secretariat/delegates to float ideas and possible textual formulations informally. They can also be circulated more quickly and cheaply.
- ***Use screen projections:*** Another recent technique, already in use in the FCTC, is to project text onto a large screen. The Secretariat then types changes on a computer hooked up to that screen during the negotiations themselves, so that all delegates can see the changes and drafting becomes a transparent, collective exercise. This could be especially helpful with a complex text that is difficult to refer to.

- ***Secure understanding and support:*** Whatever the chosen approach to the development of text at INB 3, the Chair should clearly explain it at the start of the session so that all delegates know what is expected of them. The Chair should also consult with key delegations in advance of the session to secure their support for how he plans to work on the text.
- ***Advance preparation:*** The Chairs/Secretariat need to be ready with a draft consolidated text and/or a draft questions/options paper (or whatever the expected textual outcome is) before the session. This helps the Chairs to guide the discussions in a constructive manner and the Secretariat to quickly produce revised text if asked to do so. In particular, at INB 3, the Chairs/Secretariat should have clearly identified before the session those less contentious issues where preliminary agreement might be possible, and have prepared clean text on those.
- ***Do not invite written amendments:*** Written amendments should not be solicited. Doing so gives delegates space and time to think about what is wrong with a text rather than working with it. Delegates should be encouraged to circulate any proposed textual changes or comments that cannot be dealt with orally in non-papers.

Negotiating forums

The INB plenary and the three Working Groups seem to provide a good basic structure for the negotiations. They could be supplemented, however, by convening informal groups, such as contact groups, informal consultations and a “Friends of the Chair” group, where discussion is freer and more efficient. Such informal groups could be convened already at INB 3 or at a future session; as negotiations advance, it will become increasingly important to have recourse to a variety of negotiating forums to respond to different circumstances.

Working Groups

- ***Parallel and evening meetings:*** The time appears ripe for INB 3 to hold meetings of the Working Groups in parallel, along with some evening meetings to accelerate the pace of negotiations and start to create a sense of urgency (assuming this does not raise objections in the context of Ramadan). No more than two meetings, however, should be held simultaneously, in accordance with UN practice.
- ***Ensure coordination:*** The Working Group Co-Chairs, along with the INB Chair, should ensure that they meet regularly during the session to ensure coordination between the work of their Groups and to take stock of developments.
- ***Ensure sufficient Secretariat capacity:*** It is important to ensure that there is sufficient capacity within the Secretariat to provide adequate support to parallel Working Group meetings and informal groups.

Contact groups

- ***Smaller groups:*** As negotiations proceed, it is useful to shift the focus away from plenary or plenary-type meetings into smaller groups. Such smaller groups are known by a variety of names, such as “contact groups”, “drafting groups” or just “informal groups”. The name will depend on the particular political sensitivities at stake.

- **More informal procedures:** Contact groups (as we will term them here) are more efficient and facilitate more open negotiation because they are not restricted by formal procedures. They are usually held without interpretation and are not confined to standard UN working hours. They are typically closed to observers, but are almost always open-ended for government delegates. They would be chaired (or co-chaired) by delegates appointed by the Working Group Co-Chairs. There are no standard rules, however, and their mode of work should be adapted to fit the particular negotiating context.
- **Purpose:** In the case of the FCTC negotiations, such contact groups could be convened by the larger Working Groups to work on specific issues and report back to them. In the context of INB 3, a contact group would be particularly appropriate as a forum for trying to draft clean text on the less contentious issues on which it might be possible to reach preliminary agreement already at this session. Contact groups could also be mandated to work on a particular section of consolidated text, or a particular set of questions/options, that faced difficulties when considered in the Working Group. The outcome of their work could be a non-paper or conference room paper that would be considered by the full Working Group.
- **Not too many:** While contact groups are useful, it is important not to convene too many, as this causes problems for small and non-Anglophone delegations. It is difficult to suggest an appropriate number, but more than six on-going contact groups would probably be unacceptable. No more than two contact groups, or a contact group and a Working Group, should meet at any one time.

Informal consultations

- **Consulting informally:** Another strategy is to invite a delegate to “consult informally” on a particular issue and report back. No group meeting is held, but the delegate simply talks to key delegations individually on the margins of the meeting to try to forge an agreement. Such informal consultations are therefore more low-key than convening a contact group. In the case of the FCTC negotiations, such informal consultations would usually be launched by the Working Groups, although a contact group could do so too if it ran into difficulties. There are no fixed rules.
- **Purpose:** Informal consultations can be useful to address both the most and the least controversial of issues. If an issue is particularly contentious, the chances of agreement may be greater if it is dealt with discretely behind the scenes. Conversely, if the issue is a relatively minor one where reaching agreement is more a question of finding the right words than striking a substantive deal, then it may not be worth convening a contact group and informal consultations may suffice.

Friends of the Chair

- **Get the right name:** The “Friends of the Chair” is a small group of delegates representing the main interest groups and key delegations that meets privately with the Chair. Almost all multilateral negotiations establish such a group at some point. It may be known by different names, depending on political sensitivities, but “Friends of the Chair” is usually acceptable as no one can deny the right of the Chair to have “friends”, and the Chair can argue the case in this way.

- **Get the right membership:** The Friends of the Chair should be small enough to enable participants to talk openly and efficiently, but large enough to include the main players. As a general guide, 12-30 delegates is probably about right. It is very important that the membership of the Friends of the Chair be acceptable to delegates as a whole. The President would be advised to consult widely before setting up a Friends of the Chair to ensure that it does not meet with objections.
- **Different to the Bureau:** A Friends of the Chair group does not replace the official Bureau, which retains its administrative functions.
- **For advice, not negotiation:** The purpose of the Friends of the Chair will depend on the particular negotiating context. It is usually very difficult, and therefore inadvisable, to convene such a group as a negotiating forum. This is rarely accepted by the broader group of delegates. Instead, the most successful Friends of the Chair are convened in an advisory capacity, that is, to provide advice to the Chair on how to promote success in the negotiations. This is much more likely to be acceptable to other delegates. For example, if a Friends of the Chair group were already in place, the President could have used it to consult on his proposed approach to INB 3 and how best to move on from the existing Co-Chairs Working Papers. A Friends of the Chair group can also provide a forum to start a substantive conversation on possible future compromises in the negotiations, but in a purely exploratory manner.
- **Meet once or twice a session:** Initially, a Friends of the Chair group could meet once or twice during a negotiating session. It can sometimes help to convene the first meeting as a social occasion (e.g. a dinner) but the key is to manage the political sensitivities in the particular context.
- **Consider an inter-sessional meeting:** Given the relatively long time lag between sessions of the INB, it might be helpful to convene an inter-sessional meeting of the Friends of the Chair to discuss expectations for the next INB, the planned negotiation process at that session and expected outcomes, as well as to consider substantive issues, without entering into negotiations. If an inter-sessional meeting is difficult for budgetary reasons, it could be held on the eve of the INB.
- **Consider an inter-sessional meeting to review a draft Chair's text:** Looking ahead, an inter-sessional meeting of the Friends of the Chair could be helpful to discuss a draft of a new Chair's text before it is finalized. By consulting a representative group of delegates on a draft in this way, the Chair can help to ensure that it is accepted when presented to the INB.

Behind the scenes

A crucial ingredient of a successful negotiation is the informal contacts and relationships built up by the Chairs and delegates behind the scenes. The more talk there is informally, the more the negotiation is likely to succeed. In addition, if the Chair consults actively behind the scenes on the negotiation process, his chosen approach is more likely to be accepted.

- **Private consultations with the Chair.** The INB Chair should hold private consultations, at least once during the session, with groups of Parties and individual key players. He should use these consultations to build support for his

approach to the negotiation process, as well as to start to explore possible compromise options on key political issues. The Working Group Co-Chairs should also be proactive in consulting widely with Parties on an informal basis on issues under their responsibility.

- ***Keep in touch between sessions:*** It would also be helpful for the INB Chair (and Working Group Co-Chairs, as appropriate) to keep in touch with key delegations inter-sessionally, by e-mail for example. The proposed Friends of the Chair inter-sessional meeting would help, but wider contacts would also be necessary.
- ***Encourage delegates to consult:*** Similarly, delegates should be strongly encouraged to consult among themselves, bilaterally and among groups, both during the session and inter-sessionally, to try to bridge their differences. The Chair should urge them to do this, both from the podium and during his private consultations.

How the session could work

This section brings all the previous sections together to consider how INB 3 might proceed, using the various strategies and tools outlined above and assuming that the goal of the session is to prepare a consolidated negotiating text.

- The INB could meet first in formal plenary to hear opening statements and decide on the organization of work. At this point, the Chair should clearly announce the goals of the session (on which he would hopefully have consulted beforehand) and the mode of work.
- The Working Groups could then meet, two in parallel, to discuss the Co-Chairs' Working Papers. The Co-Chairs could invite delegates to consider each Working Paper section by section (or whatever is most appropriate) and identify: the key issues and options at stake that need to be brought out; areas of overlap and duplication that could be merged; and issues on which broad agreement is already emerging.
- After an initial discussion, the Secretariat could be asked to prepare consolidated text reflecting the discussions and bring this back to the Working Group. This consolidated text would "clean up" the Working Papers so that they clearly reveal the main substantive differences between country positions and are easier to read and work with. On issues where delegates do not want the Secretariat to draft consolidated text or where Secretariat text has been rejected, a contact group could be formed to draft text and report back to the Working Group Plenary. If there are issues that just involve a small number of interested delegates or a question of terminology, or that are highly politically sensitive, then a delegate could be invited to consult informally and report back to the Working Group. Using contact groups/informal consultations may be particularly helpful to reach preliminary agreement on less contentious issues and to draft clean text on these.
- Non-papers could be issued to facilitate the drafting and redrafting of text in the Working Groups or contact groups, or text could be projected on a screen.

- Meanwhile, the Working Group Co-Chairs would meet regularly to ensure coordination and take stock; the INB Chair would consult informally with key delegations and interest groups; a Friends of the Chair group could be formed and meet at least once; and delegates could be encouraged to consult among themselves.
- At the close of the meeting, each Working Group would issue the text it has consolidated as a non-paper or conference room paper for consideration by the INB plenary. All being well, the INB plenary would approve the paper. It could then be translated into all languages post-session for use as the basis for negotiation at INB 4. At the closing plenary, the Chair should outline his expectations for the next session.

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8 October 2001

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