

Strengthening the Biological Weapons Convention

Briefing Paper No 8 (Third Series)

Moving towards Enhanced Assurance of Compliance with the Biological and Toxin Weapons Convention

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**Graham S. Pearson, Nicholas A. Sims,
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MOVING TOWARDS ENHANCED ASSURANCE OF COMPLIANCE WITH THE BIOLOGICAL AND TOXIN WEAPONS CONVENTION

by Graham S. Pearson* & Nicholas A. Sims†

Introduction

1. At the Seventh Review Conference in December 2011 national compliance reports submitted by States Parties were issued in the Background Paper on compliance¹ prepared by the Implementation Support Unit which in its summary notes:

The Preparatory Committee decided to request the Implementation Support Unit (ISU) to prepare a background information document on compliance by States Parties with all their obligations under the Convention, to be compiled from information submitted by States Parties (see BWC/CONF.VII/PC/2, paragraph 24). The ISU duly requested submissions from States Parties, and all submissions provided to the ISU by 31 October 2011 are included in this document. Any further submissions from States Parties will be included in an addendum to this document. The information in this document is reproduced as submitted by States Parties, in some cases with minor editing.

2. This Background Paper on compliance (BWC/CONF.VII/INF.2) included submissions from 33 States Parties: Argentina, Australia, Canada, China, Cuba, Cyprus, Czech Republic, Denmark, Finland, France, Georgia, Germany, Greece, India, Italy, Iran (Islamic Republic of), Ireland, Japan, Kazakhstan, Netherlands, New Zealand, Norway, Pakistan, Poland, Portugal, Qatar, Republic of Moldova, Russian Federation, South Africa, Sweden, Switzerland, Ukraine and the United Kingdom. A further three submissions on compliance were submitted by Brazil, Bulgaria and the United States in BWC/CONF.VII/INF.2/Add.1).

3. In addition, several Working Papers with relevance to compliance were submitted to the Seventh Review Conference. The Working Papers of direct relevance to compliance were the Working Papers by Australia, Japan and New Zealand (WP.11 entitled *Proposal for a working group to address compliance issues.*) and Germany (WP.14 entitled *Confidence building and compliance: two different approaches.*). Reference was also made to a joint Working Paper² by Canada and Switzerland entitled *National Implementation of the*

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¹ Implementation Support Unit, Background Information Document, *Compliance by States Parties with their obligations under the Convention*, BWC/CONF.VII/INF.2, 23 November 2011 and BWC/CONF.VII/INF.2/Add.1, 7 December 2011

² The working paper by Canada and Switzerland entitled *National Implementation of the BTWC: Compliance Assessment* submitted to the Seventh Review Conference was eventually issued as a Working Paper of the Meeting of States Parties as BWC/MSP/2012/MX/WP. 17 with a footnote stating:

1 This document was originally submitted to the Seventh Review Conference of the Biological Weapons Convention. Due to an oversight by the Secretariat, it was never processed and is now appearing as an official document of the 2012 Meeting of Experts

BTWC: Compliance Assessment (an advance copy was available on unog.ch/bwc but due to an oversight of the ISU it failed to be issued as a WP. of the Seventh Review Conference), and the US Working Paper on the intersessional process (WP.23 entitled *The next intersessional process.*). In addition, the Working Paper by France (WP. 28 entitled *A peer review mechanism for the Biological Weapons Convention: enhancing confidence in national implementation and international cooperation.*) was clearly intended to assist the consideration of compliance.

4. Furthermore, the importance of compliance was recognised in the statements made by most States Parties to the General Debate of the Seventh Review Conference.

5. In the outcome of the Seventh Review Conference³, the States Parties in the Preamble to their Final Declaration solemnly declared:

(iv) Their determination to comply with all their obligations undertaken pursuant to the Convention and their recognition that States Parties not in compliance with their Convention obligations pose fundamental challenges to the Convention's viability, as would the use of bacteriological (biological) and toxin weapons by anyone at any time;

This solemn declaration reflected the submission of national compliance reports which were issued in the Background Paper on compliance, the national Working Papers addressing compliance and the importance of compliance recognised by most States Parties in their statements to the General Debate.

6. In addition, the Seventh Review Conference in their *III. Decisions and Recommendations*⁴ agreed that a Standing Agenda Item should address *E. Strengthening national implementation* and stated that:

24. The Conference decides that the following topics will be addressed under the Standing Agenda Item on strengthening national implementation:

- (a) a range of specific measures for the full and comprehensive implementation of the Convention, especially Articles III and IV;*
- (b) ways and means to enhance national implementation, sharing best practices and experiences, including the voluntary exchange of information among States Parties on their national implementation, enforcement of national legislation, strengthening of national institutions and coordination among national law enforcement institutions;*
- (c) regional and sub-regional cooperation that can assist national implementation of the Convention;*

³ United Nations, The Seventh Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Geneva, 5 - 22 December 2011, *Final Document*, BWC/CONF.VII/7, 13 January 2012. Available at <http://unog.ch/bwc> and at <http://www.opbw.org>

⁴ United Nations, The Seventh Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Geneva, 5 - 22 December 2011, *Final Document*, BWC/CONF.VII/7, 13 January 2012. Available at <http://unog.ch/bwc> and at <http://www.opbw.org>

- (d) national, regional and international measures to improve laboratory biosafety and security of pathogens and toxins;
- (e) any potential further measures, as appropriate, relevant for implementation of the Convention.

7. As we noted in our report⁵ on the Seventh Review Conference, this Standing Agenda Item does offer the potential for States Parties to pursue conceptual discussions extending to the nature of BWC compliance and the demonstration of such compliance. It offers this in paragraph 24(b), which includes under *ways and means to enhance national implementation: sharing best practices and experiences, including the voluntary exchange of information among States Parties on their national implementation, enforcement of national legislation, strengthening of national institutions and coordination among national law enforcement institutions*; and in paragraph 24(e) especially: *any potential further measures, as appropriate, relevant for implementation of the Convention*. We added that:

One of the earliest tests of the resolve of States Parties to build up the BWC treaty regime through the new Intersessional Process will be the ingenuity and determination with which they make use of the possibilities which the negotiation of the Standing Agenda item *Strengthening national implementation* now offers. Once again, it will be up to States Parties to prepare and submit substantive Working Papers well in advance of the meetings to be considered under this Standing Agenda item.

8. The Working Paper entitled *We need to talk about compliance* was submitted⁶ to the Meeting of States Parties in December 2012 by Australia, Canada, Japan, New Zealand and Switzerland (BWC/MSP/2012/WP.11 dated 12 December 2012). This recommends

that the Chair of the 2013 Meeting of States Parties provide under sub-item (e) of the standing agenda item on strengthening national implementation for an initial conceptual discussion at the Meeting of Experts in 2013 designed to promote common understanding of what constitutes compliance with the BWC and effective action to enhance assurance of compliance. This discussion can and should be complemented by side-events and workshops.

9. Six questions are posed in the Working Paper to help shape this initial conceptual discussion. The first two questions had originally been proposed in a slightly different context at the Seventh Review Conference, in a Working Paper submitted⁷ by Australia, Japan and New Zealand (BWC/CONF.VII/WP.11), and are:

- (a) *What constitutes compliance with the BWC?*
- (b) *How can States Parties better demonstrate their compliance with the BWC and thereby enhance assurance for other States Parties?*

The other four questions are new and are:

⁵ Graham S. Pearson and Nicholas A. Sims, *The BTWC Seventh Review Conference: A Modest Outcome*, Bradford Review Conference Paper No. 31, University of Bradford, March 2012.

⁶ Australia, Canada, Japan, New Zealand and Switzerland, *We need to talk about compliance*, BWC/MSP/2012/WP.11, 12 December 2012.

⁷ Australia, Japan and New Zealand, *Proposal for a working group to address compliance issues*, BWC/CONF.VII/WP.11, 19 October 2011.

- (a) whether there would be a role for declarations in demonstrating compliance, and if so, whether additional information to that which is already requested in the current CBMs would enhance assurance of compliance;*
- (b) whether the consultation and cooperation mechanisms under Article V require further development, including, for example, consideration of mutually agreed visits to sites of compliance concern;*
- (c) whether mechanisms for the investigation of alleged use of biological weapons (Article VI) require further attention, including the role of the UN Secretary-General's Investigation Mechanism;*
- (d) the potential impact of advances in the life sciences on demonstrating compliance and enhancing assurance of compliance, including, for example, the impact of rapid advances in bio-forensics.*

10. States Parties have been invited to provide their views on these questions by 30 June 2013, to facilitate and focus the discussion. The Implementation Support Unit has been requested to compile and circulate them ahead of the Meeting of Experts in accordance with its mandate to facilitate communication among States Parties.

11. This Briefing Paper sets out four principles around which the discussion could be organised. It continues by applying those principles to each of the six questions in turn. For each question, analysis is followed by a recommendation to the Meeting of Experts in 2013 together with possible text for a common understanding and effective action to be carried forward to the Meeting of States Parties in 2013.

12. It is considered that this systematic treatment of the six questions will be helpful to the States Parties as they engage with the process – which could, and should, prove highly significant for the strengthening of the Convention – initiated by the Working Paper BWC/MSP/2012/WP.11 entitled *We need to talk about compliance*.

Four principles

13. A conceptual discussion of compliance needs to be organised around four principles, each with a significant implication.

Principle 1 Compliance assurance should be seen as a way of strengthening national implementation, thereby justifying its inclusion under sub-item *(e) any potential further measures, as appropriate, relevant for implementation of the Convention* of the Standing Agenda Item on Strengthening National Implementation. This implies that, within the limits of the upcoming discussion, different ways of enhancing compliance assurance will be valued primarily for the contribution they make to the strengthening of national implementation.

Principle 2 The discussion of compliance should be anchored in the consensus achieved at the Seventh Review Conference as noted particularly in the Solemn Declaration where States Parties reaffirmed:

- (iv) Their determination to comply with all their obligations undertaken pursuant to the Convention and their recognition that States Parties not in compliance with their Convention obligations pose fundamental challenges to*

the Convention's viability, as would the use of bacteriological (biological) and toxin weapons by anyone at any time;

and explore possibilities for further expressions of common understanding and effective action rooted in that consensus. This implies proceeding from the language of the 2011 consensus and drawing out extended understandings of the points of agreement recorded there.

Principle 3 The discussion should respect the limits of the intersessional agenda determined by the Seventh Review Conference while recognising that the Eighth Review Conference will be free to decide on any further action such as to determine the agenda of any future intersessional process. This implies accepting that discussion of compliance has its place as part of a sub-item of one Standing Agenda Item in the current intersessional process and will have to be conducted with that, relatively lowly, formal status until 2016, while also being taken forward through side-events in the margins of the Meetings of Experts and Meetings of States Parties, and in other unofficial settings. At the Eighth Review Conference and continuing after 2016 it could, and should, acquire a higher formal status and become a much more central topic in the future than is possible now.

Principle 4 The outcome of the discussion at the Meeting of Experts should be carried forward in text for the Meeting of States Parties, which takes its mandate from the Seventh Review Conference. This implies that textual proposals should be expressed either as *conclusions or results* for the Meeting of States Parties itself to state under paragraph 14 of the Decisions and Recommendations of the Seventh Review Conference, or as recommendations for *further action* to be proposed to the Eighth Review Conference as part of the work and outcome of these meetings under paragraph 15 of the same Decisions and Recommendations.

Question 1: What constitutes compliance with the BWC?

14. A conceptual discussion of compliance may conveniently distinguish between different kinds of obligation, some negative, some positive. What is required for compliance will naturally vary according to the nature of the obligation.

15. The obligations flowing from the Convention start with ten prohibitions. These negative obligations are fundamental because together they express the States Parties' absolute repudiation of biological and toxin weapons (BTW). Five prohibitions are found in Article I: on development, production, stockpiling, acquisition and retention. Four are found in Article III: on transfer, assistance, encouragement and inducement. A State Party which engaged in any of these nine activities as applied to BTW or any of the other objects of prohibition as defined in Article I would clearly not be in compliance with the Convention. A tenth BTW activity – use – has been repeatedly declared by the States Parties at Review Conferences as being effectively prohibited, under all circumstances, by the Convention. Any use of BTW logically implies a prior breach of one or more of the first nine prohibitions.

16. Beyond those ten prohibitions, there are certain positive actions which States Parties are under an obligation to take. These positive actions are integral to a State Party's compliance with the Convention although they cannot be listed as concisely as the prohibitions. They

include, but are not limited to: the obligation to destroy all BTW and other objects of prohibition, or divert them to peaceful purposes, within nine months from entry into force (Article II); the obligation to take any necessary measures to prohibit and prevent the BTW activities prohibited under Article I, an obligation which has repeatedly been defined as including penal legislation among other national implementation measures to be taken in accordance with each State Party's constitutional processes (Article IV); the obligation to consult one another and to cooperate in solving any problems which may arise in relation to the Convention (Article V); the obligation to cooperate in carrying out any investigation which the UN Security Council may initiate after a complaint (Article VI); the obligation to provide or support assistance to any State Party which so requests, if the Security Council decides that it has been exposed to danger as a result of violation of the Convention (Article VII); the obligation to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and information for the use of biological agents and toxins for peaceful purposes (Article X paragraph 1).

17. All these are continuing obligations although the circumstances in which they may be activated have not yet arisen in the cases of Articles VI and VII and there has been no declared BTW disarmament since entry into force under Article II. States Parties have taken positive actions in accordance with their obligations under Articles IV, V and X and continue to do so. This is important evidence of their compliance. Furthermore, the now historic Article IX was fulfilled with the conclusion of the Chemical Weapons Convention, as a unique case of compliance with obligations achieving the stated goal and leaving States Parties to call for the few states remaining outside the Chemical Weapons Convention to join and make it universal.

18. Compliance is harder to define where the obligation is less clearly stated and therefore subject to differing interpretations. Accordingly some positive actions may be regarded as sufficient by some States Parties and insufficient by others, leading to demands for *full and comprehensive* implementation and disagreement over whether this is a meaningful concept and, if it is, how it is to be recognised once achieved and whether a specific mechanism is required for its achievement. This difficulty arises in the case of Article X paragraph 1, summarised above, and most acutely in the case of Article X paragraph 2 where much effort has gone into turning round into a positive obligation the originally negative injunction *to avoid hampering the economic or technological development of States Parties or international cooperation in the field of peaceful bacteriological (biological) activities, including the international exchange of bacteriological (biological) and toxins and equipment ... for peaceful purposes in accordance with the provisions of the Convention.*

19. However, the prominence of Article X in this regard, and the lively debate over its *full and comprehensive* implementation, should not be allowed to obscure the existence of definitional problems elsewhere in the Convention which have a bearing on the question *What constitutes compliance?* Many of them arise from the wording of Article I and in particular the less than clear differentiation of 'offensive' from 'defensive' programmes in terms of permitted development of agents and toxins, the absence of any explicit constraint on research, and other textual ambiguities which over many years now have complicated interpretation⁸ of the Convention's prohibitions in respect of activities, and therefore of what

⁸ Nicholas A. Sims, *Legal constraints on biological weapons* in Mark Wheelis, Lajos Rozsa and Malcolm Dando (eds.), *Deadly Cultures: Biological Weapons since 1945* (Cambridge, Mass. & London: Harvard University Press, 2006) pages 348-354.

constitutes compliance and non-compliance respectively. On the other hand, Article I has not given rise to as many definitional problems as some had expected over the objects of prohibition which fall within its scope, or over new developments in science and technology, because successive Review Conferences in their Final Declarations have taken care to reaffirm *that the Convention is comprehensive in its scope and that all naturally or artificially created or altered microbial and other biological agents and toxins, as well as their components, regardless of the origin and method of production and whether they affect humans, animals or plants, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes, are unequivocally covered by Article I and that Article I applies to all scientific and technological developments in the life sciences and in other fields of science relevant to the Convention* (quotations from paragraphs 1 and 2 of the Final Declaration of the Seventh Review Conference⁹). The regular reaffirmation of this comprehensiveness of scope is a key asset to the Convention and one to which States Parties have rightly attached great importance.

Recommendation

20. The Meeting of Experts having discussed this question might usefully recommend a common understanding and effective action to the Meeting of States Parties, proceeding from the consensus achieved in 2011 by the Seventh Review Conference and looking forward to the Eighth Review Conference.

Common understandings

21. The States Parties note that, in respect of many aspects of the Convention, successive Review Conferences have recorded by consensus their understanding of its obligations and extended understandings regarding the implications flowing from those obligations, and in particular have reaffirmed its comprehensive scope, thereby achieving a large measure of agreement on what constitutes compliance with the Convention expressed most recently in the Final Declaration of the Seventh Review Conference. The States Parties record their common understanding that the Convention is strengthened by a continuing search for agreement on what constitutes compliance with the Convention in respect of all the obligations it contains.

Effective action

22. The States Parties decide that they should continue discussion of what constitutes compliance with a view to achieving a larger measure of agreement over those aspects of the Convention which have given rise to differences of interpretation. Further, they recommend for further action to the Eighth Review Conference that specific provision for such discussion should be included in its own agenda so as to facilitate common understandings and decisions at the Eighth Review Conference such as inclusion in the agenda of the next intersessional process.

⁹ United Nations, The Seventh Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Geneva, 5 - 22 December 2011, *Final Document*, BWC/CONF.VII/7, 13 January 2012. Available at <http://unog.ch/bwc> and at <http://www.opbw.org>

Question 2: How can States Parties better demonstrate their compliance with the BWC and thereby enhance assurance for other States Parties?

23. This question can be broken down into two parts.

24. First, there is a query: what information can a State Party most usefully provide to demonstrate its compliance and thereby enhance assurance for other States Parties? This is re-stated in Question 3 (paragraph 8a of BWC/MSP/2012/WP.11) as *whether there would be a role for declarations in demonstrating compliance, and if so, whether additional information to that which is already requested in the current CBMs would enhance assurance of compliance* and will be addressed there.

25. Then there is a second query, which is explored here, namely: how can what information is provided be assessed by other States Parties, and feedback given? This second question is important because without such assessment and feedback the State Party providing information will not know whether this is the kind of information that others find reassuring or whether they dismiss it as irrelevant to compliance assurance. For the purpose of strengthening its own national implementation, a State Party should be able to benefit from learning how the information it chooses to demonstrate compliance is assessed by others. If it misses its target, it needs to know what additional information, which it has not initially provided, would constitute more convincing evidence of compliance in the eyes of other States Parties.

26. In the absence of a mandatory system of declarations administered by an international organisation, compliance assessment is bound to be an uneven process, as individual States Parties decide for themselves what to declare and who they choose to assess it.

27. For example, do the Canadian, Czech and Swiss providers of their respective compliance assessments (in BWC/MSP/2012/WP.6¹⁰ receive feedback? Is there an expectation that each of the three will comment on the regulatory frameworks of the other two? How open are their governments to receiving constructive comments from one another? Might these three pioneers of a particular concept of compliance assurance which emphasises the assessment of regulatory frameworks find like-minded partners to join them, perhaps from the JACKSNNZ of which Canada and Switzerland form part or from among members of the EU to which the Czech Republic belongs?

28. Peer review in the distinctive sense of a mechanism for review¹¹ of what one State Party has done in regard to compliance with national implementation by its counterparts in another

¹⁰ Canada, Czech Republic and Switzerland, *National implementation of the BTWC: compliance assessment: update*, BWC/MSP/2012/WP.6, 5 December 2012.

¹¹ Peer review has been used by the OECD for forty years for a process which it defines as follows:

In academia, this is widely used to refer to a process of "evaluation of research findings for competence, significance, and originality by qualified experts". However this is not the conceptualization of peer review that is being addressed here. Rather, the term peer review in the context of this study assumes a meaning that is particular to the practice of international organizations and has been defined by the Legal Directorate of the Organisation for Economic Co-operation and Development (OECD) as "the systematic examination and assessment of the performance of a State by other States, with the ultimate goal of helping the reviewed State improve its policy making, adopt best practices, and comply with established standards and principles".

Pagani Peer Review: A Tool for Co-operation and Change—An Analysis of an OECD Working Method, OECD document SG/LEG(2002)1, 11 September 2002, para. 3.

State Party implies review and discussion, so presumably when France finds a partner for its proposed review then that State Party will comment on France's compliance and France on that State Party's compliance, in order to enhance their respective national implementation. Indeed, the French Working Paper¹² for MSP/2012 specifically states:

- *Peer reviews are evaluations carried out by equals that function with the objective of variously identifying deficiencies, showcasing and fostering best practice, sharing experiences, and improving individual and collective performance. They are not inspections or audits.*

The Working Papers and studies which France¹³ and UNIDIR¹⁴ have produced may encourage other pairs of States Parties to engage in a mechanism for review of a State Party's compliance by its counterparts in another State Party.

29. Other pairs or trios of States Parties might want to develop their own initiatives, perhaps along the lines of the *transparency mechanisms* approach introduced at the Third Review Conference in 1991 but largely neglected since then as a method of enhancing compliance assurance. *Transparency mechanisms* as proposed in 1991¹⁵ by Canada are structures bridging government, the scientific profession and institutions of civil society, such as the Biological and Chemical Defence Review Committee set up following the 1988 Barton Report¹⁶ in Canada. Parliamentary scrutiny may in some circumstances also constitute a *transparency mechanism* in States Parties where parliaments or other legislatures are sufficiently independent of government.

30. These approaches are not necessarily incompatible with one another. On the contrary, elements of each might with advantage be combined. The attractions of developing approaches to compliance assurance *in concert* were noted in a United States Working Paper¹⁷ for MX/2012 which stated that:

Constructive proposals have been advanced in this area in recent years, ranging from a BTWC implementation/legislation database to the Canadian/Swiss idea of an "accountability framework" and the French proposal for bilateral "peer review". These ideas appear to have merit, and might even work well in concert. It must remain clear, however, that the purpose of such efforts is not punitive; rather, they

¹² France, *Étude de l'UNIDIR sur la création d'un mécanisme de Revue par les pairs dans le cadre de la Convention d'interdiction des armes biologiques et à toxines*, BWC/MSP/2012/WP.12, 18 December 2012.

¹³ France, *Étude de l'UNIDIR sur la création d'un mécanisme de Revue par les pairs dans le cadre de la Convention d'interdiction des armes biologiques et à toxines*, BWC/MSP/2012/WP.12, 18 December 2012.

¹⁴ James Revill, *A Peer-Review Mechanism for the Biological and Toxin Weapons Convention*, UNIDIR/2013/1. 2013. Available at www.unidir.org/.../a-peer-review-mechanism-for-the-biological-and-toxin-weapons-convention-403.pdf

¹⁵ Canada, Note to the Secretariat of the Third Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction from the Canadian Delegation to the Conference providing the Report entitled: "*Transparency Mechanisms for the Canadian Chemical and Biological Defence Program*", BWC/CONF.III/10, 11 September 1991, together with the report "*Transparency Mechanisms for the Canadian Chemical and Biological Defence Program*". Available at http://www.opbw.org/rev_cons/3rc/3rc_conf.htm

¹⁶ William H. Barton, *Research, Development and Training in Chemical and Biological Defence within the Department of National Defence and the Canadian Forces*, 31 December 1988. Available at <http://www.bcdrc.ca/english/View.asp?x=936>

¹⁷ United States, *National Implementation*, BWC/MSP/2012/MX/WP.5, 16 July 2012.

are a means of reassuring States Parties that everyone's security needs are being met by their treaty partners, and of identifying gaps and needs, and developing means to redress them.

and the practicalities of such combinations need to be explored early on following the initial conceptual discussion of compliance called for at MX/2013.

31. Out of these initiatives there could develop an evolving practice of commenting on one another's compliance in limited networks – initially in pairs or trios – within which mutual confidence is high and close bonds of reciprocity are assured. Such an evolving practice would accord well with the prevailing strategy of gradual improvement, or incrementalism, for strengthening the Convention and its national implementation.

32. There are two further possibilities for offering comment on States Parties' compliance and thereby enhancing the contribution of compliance assessment to strengthening their national implementation of the Convention. These possibilities both involve the creation of a new, dedicated forum and move beyond the pioneering efforts of the limited networks so far considered towards a gradually widening multilateralism. This is notably less ambitious than aiming for a Convention-wide accountability framework designed to involve everyone from the start, which presented advantages in universality of coverage and reciprocity of openness; but it may be more attainable. It relies on encouraging voluntary initiatives by those States Parties which have the confidence to take them so as to enhance compliance assurance, and builds them in to the operation of the Convention as it evolves through successive Review Conferences and intersessional processes.

33. One possibility arises every five years when States Parties have the opportunity to submit national compliance reports, traditionally organised Article by Article, which are then issued as part of the documentation of each Review Conference. Most of these reports are made available by the conference secretariat in a single compilation at or before the opening of the Review Conference; others are issued subsequently as addenda to that compilation or occasionally as separately numbered Working Papers. In theory it has always been possible for States Parties to review and comment on these national compliance reports in the course of Review Conference proceedings, but this has not become an established practice; on the contrary, there is a strong expectation that individual States Parties will not be singled out for comment, and when they have been it has involved high-profile accusations of non-compliance rather than comment on any national compliance reports that may have been submitted. Therefore, in order to develop a practice of exchanging comments on national compliance reports, a new forum needs to be created within the framework of the Review Conference where all national compliance reports – and only these – would be on the agenda and open to discussion. In this specifically-designed forum there would be a clear expectation of offering comment constructively and amicably, not adversarially, and of learning from one another's experiences with a view to each State Party considering for itself where its own national implementation might be strengthened. There could be advantage in having a somewhat informal session with the understanding that the reports of such a session would be procedural indicating how many States Parties participated and which ones presented national compliance reports together with any general non-specific (ie with no specific States Parties being mentioned) conclusions and recommendations.

34. Another possibility – which could well be combined with the first – is that a decision might be agreed by the Eighth Review Conference to insert an invitation to submit national

compliance reports annually, and provide a dedicated forum for their consideration, into the next (2017-2021) intersessional process. There would then be opportunities for questions and learning from one another's experiences on a regular basis. Particular years might be devoted to particular Articles of the Convention or groups of Articles. The existing invitation from the Seventh Review Conference (Final Declaration paragraph 61) to States Parties to submit reports "at least biannually" on their national implementation of Article X could be expanded to enable the scheduling of such a wider programme of reporting on other Articles too. To do this for the Convention as a whole would reaffirm its essential unity and the importance of giving it comprehensive attention.

35. Consideration will need to be given to how best to accommodate additional time so that States Parties which take up this invitation to exchange reports in a new forum – intersessionally as well as at each Review Conference – can see that adequate opportunities are being given for their own reports to be considered as well as for discussion of those submitted by other States Parties. Additional time would be all the more necessary if, in addition to this dedicated forum for consideration of national compliance reports on particular Articles or groups of Articles year by year, a similar opportunity were to be provided in another dedicated forum for consideration of States Parties' CBM returns due every 15 April in respect of the preceding year. A possible solution would be to add a second week to the Meeting of Experts – a practice that was followed throughout the intersessional process between the Fifth and the Sixth Review Conferences.

36. A well-structured programme for the next intersessional process would ensure that so far as possible the particular Article or group of Articles for consideration in national compliance reports each year related to the topics or themes chosen for the Meeting of Experts and Meeting of States Parties that year, or to aspects of Standing Agenda Items which would be highlighted that year. Such a structure would maximise efficiency and promote synergies as between the new forum and the continuing sessions of the Meeting of Experts and the Meeting of States Parties so that the time devoted to the Convention each year would be put to the best possible use.

37. It will be essential to invite, not instruct, States Parties to participate. Nothing mandatory is being suggested. By emphasising the voluntary nature of the new forum it should be possible to counter any accusation that extra obligations are being imposed. They are not.

38. Treaty partners are understandably keen on reciprocity. Nevertheless, it is sometimes worth taking an initiative even without the assurance that it will be reciprocated, and this may well be one such case. Canada and Switzerland, joined in 2012 by the Czech Republic, have taken an initiative in compiling evidence of their own compliance through an analysis of their regulatory frameworks, in accordance with their shared concept of compliance assessment. They have put the results into the public domain without waiting for the other States Parties to do the same. France and its eventual partner in peer review will likewise be taking an initiative without any certainty that others will follow suit. These are examples of good practice to be emulated; but even if emulation is a slow process these initiatives are worth taking for the sake of the Convention's health, specifically through the dissemination of relevant experience in making national implementation more effective, and the States Parties concerned are to be commended.

39. The new forum suggested here, to take place at the Eighth Review Conference and thereafter annually within the intersessional process, relies for its success on the willingness of those responsible for such initiatives and those emulating them to go one step further and put their national compliance reports and assessments into a forum where discussion is expected. Only thus can they know whether the information they are putting forward is the information others need in order to share their assessment of compliance, or whether reassurance could be given in other ways. If well structured over the intersessional years, this forum could also build up a body of experience and good practice, in offering evidence of compliance with different Articles of the Convention, which would contribute significantly towards the strengthening of its national implementation.

Recommendation

40. A possible common understanding to be agreed could be to recognise that the first sentence of paragraph 21 of the Final Declaration of the Seventh Review Conference (*The Conference stresses the need for all States Parties to deal effectively with compliance issues*) extends to the demonstration of compliance as a continuous process which can usefully be enhanced by providing information which gives assurance of compliance to other States Parties. Examples of this could be welcomed, and emulation encouraged. Effective action could take the form of, first, encouraging circulation of information and constructive feedback among States Parties during the present intersessional process, in an extension of the reporting on Article X implementation encouraged by the Seventh Review Conference in paragraph 61 of its Final Declaration; and, second, recommending a new, dedicated forum for consideration of national compliance reports at the Eighth Review Conference itself and thereafter on a continuing basis as an element of the next intersessional process, with systematic discussion of such national compliance reports as States Parties choose to submit being scheduled over the years of the intersessional process under the authority of the Eighth Review Conference, always emphasising the voluntary nature of such reporting.

Common understandings

41. The States Parties reaffirm the statement of the Seventh Review Conference (paragraph 21 of the Final Declaration) which stressed the need for all States Parties to deal effectively with compliance issues, and express their common understanding that demonstration of compliance is a continuous process which can usefully be enhanced by providing information which gives assurance of compliance to other States Parties. They welcome recent initiatives taken by some States Parties to demonstrate their compliance, including by means of such approaches as compliance assessment and peer review, and encourage all States Parties to emulate them or find other ways to give better assurance of compliance to other States Parties. They express their common understanding that for States Parties to enhance their own demonstration of compliance and receive constructive comment in return, always on a voluntary basis, strengthens the Convention and enables each State Party taking part in this process to improve its national implementation.

Effective action

42. The States Parties, noting the statement of the Seventh Review Conference (paragraph 61 of the Final Declaration) which encouraged States Parties to provide at least every two years appropriate information on how they implement Article X and requested the Implementation Support Unit to collate such information for the information of States Parties, conclude that

States Parties may similarly choose to provide appropriate information during the present intersessional process on how they implement other Articles, and that doing this strengthens the Convention. They further conclude that such information should be provided through the Implementation Support Unit, which should be requested to circulate it in accordance with its mandate to facilitate communication among States Parties, and that constructive comment should be invited.

43. The States Parties, in reporting to the Eighth Review Conference on the work and outcome of these intersessional meetings, bring forward the following recommendations for further action to be decided by the Conference:

a. that the Eighth Review Conference should include in its own agenda an item or sub-item enabling those States Parties which so choose to present and receive comment on their respective national compliance reports in a session dedicated to that purpose;

b. that the Eighth Review Conference should include in the structure of the next intersessional process a new forum, distinct from both the Meeting of Experts and the Meeting of States Parties as at present constituted, and dedicated to the consideration of national compliance reports submitted by those States Parties which so choose, on a continuing basis year by year, according to a schedule which arranges for consideration of compliance with different aspects of the Convention in the new forum to be distributed over the intersessional years taking into account the allocation of other agenda items to particular years in the intersessional process;

c. that the new forum and its related arrangements for communication of information on compliance through the Implementation Support Unit, on a continuing basis year by year, should be so structured as to facilitate systematic consideration of national compliance reports and exchange of constructive comment, always on a voluntary basis, in order to enhance compliance assurance and to strengthen the Convention and its national implementation by sharing relevant experience in demonstrating compliance;

d. that this new forum and its related arrangements for communication of information should be so structured as to include the existing provision at least every two years of appropriate information on States Parties' implementation of Article X, which was encouraged by the Seventh Review Conference in paragraph 61 of its Final Declaration, and extended to enable similar provision of appropriate information by those States Parties which so choose on how they implement other Articles;

e. that additional time should be allocated to the Convention each year to enable inclusion of the new forum so as to facilitate full consideration of all national compliance reports submitted and their systematic consideration in the new forum.

f. that the Eighth Review Conference should accord a prominent place in the next intersessional process to the topic of compliance, including the enhanced demonstration of compliance and consideration of compliance issues including compliance assurance.

Question 3: Whether there would be a role for declarations in demonstrating compliance, and if so, whether additional information to that which is already requested in the current CBMs would enhance assurance of compliance;

44. This question also falls into two parts – first, would there be a role for declarations, and secondly, if so, whether additional information to that already required in the current CBMs would enhance assurance of compliance.

45. The first question leads to consideration of what is the current position in regard to the BTWC. It is recalled that before each Review Conference the Preparatory Committee has requested the secretariat to compile a Background Information Paper comprising the submissions made by States Parties. Thus before the Seventh Review Conference:

The Preparatory Committee decided to request the Implementation Support Unit (ISU) to prepare a background information document on compliance by States Parties with all their obligations under the Convention, to be compiled from information submitted by States Parties

and, as noted above, some 36 States Parties provided submissions on their compliance. Although the individual reports submitted by States Parties vary, many of them provide information relating to Articles I, II, III, IV, V, VI, VII, VIII, IX and XII and also have separately provided reports in regard to Article X of the Convention.

46. It is also noted that in the joint Working Paper¹⁸ submitted by Canada and Switzerland to the Seventh Review Conference entitled *National Implementation of the BTWC: Compliance Assessment* and in the subsequent update thereon (BWC/MSP/2012/WP.6¹⁹) together with the Czech Republic submitted to the Meeting of States Parties in 2012, the process is based on each State Party submitting to the ISU as an initial submission, a detailed description of national legislation and regulations supporting the national implementation of the BTWC, including those that cover the oversight of human, animal and plant pathogens. This detailed description could include very specific section-by-section analysis of how the legislation/regulations work, the scope of the legislation/regulations (e.g. any exceptions/exemptions from the law, is the legislation based on lists of organisms or broader categories of risk groups, etc.) and the penalties associated with contraventions.

47. In addition to the analysis of the national implementation legislation, each submitting State Party would also submit a detailed description of how the program was implemented on a national level. This could include process flow diagrams, organizational charts of the implementing program, showing clear lines of reporting, process and standard operating procedure descriptions, as well as clear indications of the inspection program, frequency of inspections and how major and minor non-compliances are handled. The submission could also include the yearly budget associated with running the program.

¹⁸ The working paper by Canada and Switzerland entitled *National Implementation of the BTWC: Compliance Assessment* submitted to the Seventh Review Conference was eventually issued as a Working Paper of the Meeting of States Parties as BWC/MSP/2012/MX/WP. 17 with a footnote stating:

1 This document was originally submitted to the Seventh Review Conference of the Biological Weapons Convention. Due to an oversight by the Secretariat, it was never processed and is now appearing as an official document of the 2012 Meeting of Experts

¹⁹ Canada, Czech Republic and Switzerland, *National implementation of the BTWC: compliance assessment: update*, BWC/MSP/2012/WP.6, 5 December 2012.

48. The Canadian/Switzerland Working Paper²⁰ noted that because this submission would take significant effort on behalf of the State Party to assemble, this level of detail need only be submitted once initially, and then amended when programs are added, updated, or otherwise modified. However, a yearly submission that comprised the number of inspections conducted (on-site and remote verification), what biosafety levels were inspected, number of announced vs. unannounced inspections, number of major non-conformities and number of enforcement activities carried out, among other possible criteria, would be reported.

49. It is thus evident that the answer to the first part of the third question – *would there be a role for declarations in demonstrating compliance* – is undoubtedly yes. Consideration now needs to be given to the second question: *whether additional information to that already required in the current CBMs would enhance assurance of compliance*.

50. The current CBMs require the provision of the following information:

- a. CBM A: Part 1: Exchange of data on research centres and laboratories
- b. CBM A: Part 2: Exchange of information on national biological defence research and development programmes
- c. CBM B: Exchange of information on outbreaks of infectious diseases and similar occurrences caused by toxins
- d. CBM C: Encouragement of publication of results and promotion of use of knowledge
- e. CBM E: Declaration of legislation, regulations and other measures
- f. CBM F: Declaration of past activities in offensive and/or defensive biological research and development programmes
- g. CBM G: Declaration of vaccine production facilities

51. It is evident from the discussions that have taken place prior to and at the Seventh Review Conference as well as subsequently in the intersessional process, that there is a recognition that the current CBMs require clarification and amendment. For example, the Working Paper²¹ submitted by Germany, Norway and Switzerland to the Seventh Review Conference made the proposal that *CBM A: Part 2: Exchange of information on national biological defence research and development programmes* should be amended as follows – amendments shown in bold:

²⁰ The working paper by Canada and Switzerland entitled *National Implementation of the BTWC: Compliance Assessment* submitted to the Seventh Review Conference was eventually issued as a Working Paper of the Meeting of States Parties as BWC/MSP/2012/MX/WP. 17 with a footnote stating:

I This document was originally submitted to the Seventh Review Conference of the Biological Weapons Convention. Due to an oversight by the Secretariat, it was never processed and is now appearing as an official document of the 2012 Meeting of Experts

²¹ Germany, Norway & Switzerland, BTWC Seventh Review Conference, *Review and update of the Confidence-Building Measures*, BWC/CONF.VII/WP.9, 14 October 2011.

Confidence-Building Measure A

Part 1: Exchange of information on national ~~biological-defence~~ research and development programmes (civil and military) for protection of humans, animals or plants against the hostile use of biological agents and toxins

At the [Third] Review Conference it was agreed that States Parties are to implement the following:

In the interest of increasing the transparency of national research and development programmes (civil and military) ~~on biological-defence for the protection of humans, animals and plants against the hostile use of biological agents and toxins~~, the States Parties will declare whether or not they conduct such programmes. States Parties agreed to provide, annually, detailed information on their ~~biological-defence~~ research and development programmes (civil and military) for the protection of humans, animals and plants against the hostile use of biological agents and toxins including summaries of the objectives and costs of effort performed by contractors and in other facilities. If no ~~biological-defence such~~ research and development programme is being conducted, a null report will be provided.

The rationale for these amendments was, correctly, that the purpose of this CBM was to exchange information on national programmes to counter deliberate outbreaks of disease whether in humans, animals or plants.

52. A further example of where the existing CBM's may not provide sufficient information is in regard to *CBM E: Declaration of legislation, regulations and other measures*. which currently requires the following:

Confidence-Building Measure "E"

Declaration of legislation, regulations and other measures

At the Third Review Conference the States parties agreed to implement the following, later amended by the Seventh Review Conference:

As an indication of the measures which they have taken to implement the Convention, States parties shall declare whether they have legislation, regulations or other measures:

- (a) To prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within their territory or anywhere under their jurisdiction or under their control anywhere;*
- (b) In relation to the export or import of micro-organisms pathogenic to man, animals and plants or of toxins in accordance with the Convention;*
- (c) In relation to biosafety and biosecurity.*

States parties shall complete the attached form (Form E) and shall be prepared to submit copies of the legislation or regulations, or written details of other measures on request to the Implementation Support Unit (ISU) within the United Nations Office for Disarmament Affairs or to an individual State party. On an annual basis States parties shall indicate, also on the attached form, whether or not there has been any amendment to their legislation, regulations or other measures.

53. It is to be noted that the ISU website advising on completing the CBMs includes the following advice to States Parties:

CBM E: Declaration of legislation, regulations and other measures

This form requires declarations on any legislation, regulations and other measures relating in particular to Article I (development, production, stockpiling, etc) and Article III (import and export, i.e. transfers). In the interests of transparency, you may also wish to provide information on legislation and regulations governing the security of pathogens, biosafety, licensing of personnel, and anything else relating to national implementation of the Convention.

In addition to completing Form E, it would be helpful if you could provide the ISU with copies of the aforementioned legislation and regulations or, if available, an internet link to the text.

54. It is evident that there would be advantages in States Parties providing *information on legislation and regulations governing the security of pathogens, biosafety, licensing of personnel, and anything else relating to national implementation of the Convention.* as well as providing copies and links to text.

55. There will clearly need to be discussion by the States Parties in regard to the extent to which the current CBMs provide sufficient information to provide assurance of compliance. Clearly the information provided in the current CBMs could provide an initial basis for a declaration to consider compliance but this would only be a starting point as information should be provided on all legislation relating to national implementation of the Convention – as has been shown in the Canada, Switzerland and Czech Republic submissions in their Working Papers on compliance assessment. Information should also be provided on programmes to counter deliberate outbreaks of disease whether in humans, animals or plants.

56. It should be noted that at the Meeting of States Parties in December 2012, a Working Paper²² (BWC/MSP/2012/WP.1) entitled *Next steps on the CBMs: some key questions for 2013*, was submitted by the United Kingdom which proposed that the Meeting of Experts in 2013 should address:

(a) Lessons learned from national compilation of CBM returns; issues and problems encountered and possible solutions. How does the information submitted in annual

²² United Kingdom, BTWC Meeting of States Parties, *Next steps on the CBMs: some key questions for 2013*, BWC/MSP/2012/WP.1, 12 November 2012.

returns contribute to the stated goals of the CBMs? How do we demonstrate the value added?

(b) What assistance do States Parties need to improve the quantity and quality of returns?

(c) What further technical changes are required to help improve returns?

(d) How should the CBM regime evolve? Do we have clarity in the underlying purpose and how does this impact on return rate and on quality of returns?

This Working Paper made the sound observation that:

10. A focus on reducing the occurrence of ambiguities, doubts and suspicions must necessarily and almost by definition have clear implications for overall national assessments of compliance. Clearly the CBMs are not the sole tool for this task, which is a national responsibility of States Parties. However, transparency around capabilities and intentions lies at the heart of assessing compliance and promoting mutual confidence in a BTWC context; CBMs can and do contribute in a modest way to national assessments of compliance with the Convention and confidence between States Parties. If States Parties are able to develop a shared sense of the value that CBMs can play in this process, this recognition alone could well enable fuller participation.

Development of a shared sense of the value that CBMs can play in assessing compliance and thus in enhanced assurance of compliance would be a valuable step forward.

57. In the context of the information submitted in CBMs, it should be recalled that the annual BWPP *BioWeapons Monitor* has the following goal²³:

The BioWeapons Monitor seeks to complement and work with governments in their activities to effectively implement the BWC and to fulfill their obligations to permanently eliminate biological weapons and prevent their re-emergence. A key starting point is the information submitted by the BWC States Parties annually under the BWC confidence building measures (CBMs).

In-country authors collected and analysed relevant information that is distributed through this publication. The authors used open sources and actively sought information from government departments, research institutions, industry, scientific societies and other entities. This wide range of sources helps to ensure that the project is as comprehensive as possible and draws on as many reliable sources as possible.

The *BioWeapons Monitor* which in December 2012 provided country reports for Brazil, Germany, India, Japan, Kenya, Switzerland, United Kingdom and United States shows what is readily possible with a stakeholder in each country working with the respective governments to demonstrate the effective implementation of the Convention.

58. Such consideration of what information should be submitted by States Parties to enhance assurance of compliance could with advantage be carried out by the new forum proposed

²³ BioWeapons Prevention Project, *BioWeapons Monitor 2012*, December 2012. Available at: www.bwpp.org/documents/BWM%202012%20WEB.pdf

earlier in regard to the second question. That new forum would, it is proposed, take place at the Eighth Review Conference and thereafter annually within the intersessional process. It would rely for its success on the willingness of those responsible for such initiatives and those emulating them to go one step further and put their national compliance reports and assessments into a forum where discussion is expected. Only thus can they know whether the information they are putting forward is the information others need in order to share their assessment of compliance, or whether reassurance could be given in other ways. If well structured over the intersessional years, this forum could also build up a body of experience and good practice, in offering evidence of compliance with different Articles of the Convention, which would contribute significantly towards the strengthening of its national implementation. It would also be a logical outcome for such a process to develop an appreciation of what sort of information submitted by States Parties does indeed help to enhance assurance of compliance.

Recommendation

59. A possible common understanding to be agreed could be to recognise that the fourth element of the Solemn Declaration of the Final Declaration of the Seventh Review Conference (*Their determination to comply with all their obligations undertaken pursuant to the Convention and their recognition that States Parties not in compliance with their Convention obligations pose fundamental challenges to the Convention's viability, as would the use of bacteriological (biological) and toxin weapons by anyone at any time;*) extends to the demonstration of their determination to comply with all their obligations undertaken under the Convention in such a way as to meet the legitimate concerns of other States Parties.

60. As already proposed in regard to Question 2 above, another possible common understanding to be agreed could be to recognise that the first sentence of paragraph 21 of the Final Declaration of the Seventh Review Conference (*The Conference stresses the need for all States Parties to deal effectively with compliance issues*) extends to the demonstration of compliance as a continuous process which can usefully be enhanced by providing information which gives assurance of compliance to other States Parties. Examples of this could be welcomed, and emulation encouraged. Effective action could take the form of, first, encouraging circulation of information and constructive feedback among States Parties during the present intersessional process, in an extension of the reporting on Article X implementation encouraged by the Seventh Review Conference in paragraph 61 of its Final Declaration; and, second, recommending a new, dedicated forum for consideration of national compliance reports at the Eighth Review Conference itself and thereafter on a continuing basis as an element of the next intersessional process, with systematic discussion of such national compliance reports as States Parties choose to submit being scheduled over the years of the intersessional process under the authority of the Eighth Review Conference, always emphasising the voluntary nature of such reporting. It would also be a logical outcome for such a process to develop an appreciation of what sort of information submitted by States Parties does indeed help to enhance assurance of compliance.

Common understandings

61. The States Parties recognizing the value of the reports on national compliance made prior to the Review Conferences and of the annual submission of information on the CBMs express their common understanding that enhanced assurance of compliance would be promoted through the submission of relevant information demonstrating their compliance in such a way

as to meet the legitimate concerns of other States Parties as a continuous process. They recognize that as they work together to more effectively demonstrate their compliance they will gain an appreciation of what information is most effective in enhancing assurance of compliance.

Effective action

62. The States Parties, noting the statement of the Seventh Review Conference (paragraph 61 of the Final Declaration) which encouraged States Parties to provide at least every two years appropriate information on how they implement Article X and requested the Implementation Support Unit to collate such information for the information of States Parties, conclude that States Parties may similarly choose to provide appropriate information during the present intersessional process on how they implement other Articles, and that doing this strengthens the Convention. They further conclude that such information should be provided through the Implementation Support Unit, which should be requested to circulate it in accordance with its mandate to facilitate communication among States Parties, and that constructive comment should be invited.

63. The States Parties, in reporting to the Eighth Review Conference on the work and outcome of these intersessional meetings, bring forward the following recommendations for further action to be decided by the Conference:

a. that the Eighth Review Conference should include in the structure of the next intersessional process a new forum, distinct from both the Meeting of Experts and the Meeting of States Parties as at present constituted, and dedicated to the consideration of national compliance reports submitted by those States Parties which so choose, on a continuing basis year by year, according to a schedule which arranges for consideration of compliance with different aspects of the Convention in the new forum to be distributed over the intersessional years taking into account the allocation of other agenda items to particular years in the intersessional process;

b. that the new forum should be structured so as to include consideration of what sort of information submitted annually by States Parties would be most effective in enhancing assurance of compliance.

Question 4: Whether the consultation and cooperation mechanisms under Article V require further development, including, for example, consideration of mutually agreed visits to sites of compliance concern;

64. Article V provides a framework for consultation and cooperation which States Parties could usefully develop. They did so in 1986-87 and 1991 with the agreements on annual exchanges of information which became the Confidence-Building Measures (CBMs). However, there is wide scope for the development of other mechanisms, or procedures, distinct from the CBMs. The inclusion of this Question 4 in the Working Paper *We need to talk about compliance* (BWC/MSP/2012/WP.11, paragraph 8b) is justified by the contribution that further development of Article V, which is now ripe for exploration, could make to enhancing assurance of compliance²⁴.

²⁴ Nicholas A. Sims, *BWC Article V: Under-Reviewed but Ripe for Exploration*, Harvard Sussex Program Occasional Paper, Issue 3, March 2013. Available at <http://www.sussex.ac.uk/Units/spru/hsp/Occ-papers.html>

65. Successive Review Conferences have recorded extended understandings of Article V. The way forward adopted in this Briefing Paper is to take several of those extended understandings, which were reaffirmed by the Seventh Review Conference, and propose further understandings which might be added to them, and corresponding procedures which might be developed.

66. The Seventh Review Conference reaffirmed in paragraph 18 of the Final Declaration²⁵ that Article V

*(a) this article provides an appropriate framework for States Parties to consult and cooperate with one another to resolve any problem **and to make any request for clarification**, which may have arisen in relation to the objective of, or in the application of, the provisions of the Convention; [Emphasis added]*

They also reaffirmed in the same paragraph that:

(b) any State Party which identifies such a problem should, as a rule, use this framework to address and resolve it;

Attention may particularly be drawn to the words in bold in subparagraph (a) as these words, represent an important extended understanding recorded by successive Review Conferences. They show that States Parties regard Article V as an appropriate framework for clarification, in addition to the explicit obligations it contains *to consult and to cooperate*, and that States Parties expect one another to use the Article V framework to address and resolve any problems they may have identified.

67. However, States Parties have not yet put in place any procedure for handling requests for clarification. A request for clarification is **not** the same as an allegation of non-compliance; it need **not** be accusatory. Nor need the procedure be expensive. A small Clarification Panel, politically and geographically balanced in its membership, could be appointed by one Review Conference to serve until the next. Acting on behalf of the States Parties as a whole, this Clarification Panel would oversee the handling of requests for clarification and offer assistance as necessary, to ensure that so far as possible any problems identified are addressed and resolved. Some requests for clarification may on occasion be addressed and resolved directly, by one State Party replying to another. Even in such cases, the Convention as a whole may benefit from the wider assurance which is given by making public the outcomes of such requests for clarification and answers given, and this – with the agreement of the States Parties concerned – could be a useful function of the Clarification Panel even when its services have not otherwise been required. Whether clarification is sought and supplied directly or with the involvement of the Clarification Panel, the importance of clarification needs to be emphasised in the development of understandings and procedures within the framework of Article V. States Parties may thereby be enabled to strengthen their national implementation of the Convention, and to enhance assurance of compliance.

²⁵ United Nations, The Seventh Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Geneva, 5 - 22 December 2011, *Final Document*, BWC/CONF.VII/7, 13 January 2012. Available at <http://unog.ch/bwc> and at <http://www.opbw.org>

68. The Seventh Review Conference also reaffirmed in the same paragraph 18 of the Final Declaration²⁶ that:

(c) States Parties should provide a specific, timely response to any compliance concern alleging a breach of their obligations under the Convention.

It would be a helpful addition to this extended understanding of Article V to agree that States Parties should also provide a specific, timely response to **any request for clarification**. Such a request need not – and preferably should not – allege a breach of obligations under the Convention but simply aim to address and resolve any ambiguities or anomalies that may give rise to concern over compliance-related matters. Requests for clarification may relate to (in the exact words and punctuation of Article V) *any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention*. Since 1987, for example, questions arising from the data exchanged in CBMs have been understood by the Ad Hoc Meeting of Experts which finalised the modalities for these CBM exchanges as coming within this definition.²⁷

69. Lastly, the Seventh Review Conference reaffirmed in paragraph 19 of its Final Declaration²⁸ that:

19. The Conference reaffirms that the consultation procedures agreed at the Second and Third Review Conferences remain valid to be used by States Parties for consultation and cooperation pursuant to this Article. The Conference reaffirms that such consultation and cooperation may also be undertaken bilaterally and multilaterally, or through other appropriate international procedures within the framework of the United Nations and in accordance with its Charter.

The consultation procedures referred to, under which a Formal Consultative Meeting is convened, arise from the identification of an appropriate international procedure by the First Review Conference for the application of Article V in its multilateral mode. This identification, however, does not preclude the identification of other procedures later for applying Article V. The Formal Consultative Meeting procedure, so far invoked only once, in 1997, is not the only option. It is significant that the Seventh Review Conference went on to reaffirm, in the same paragraph, that *such consultation and cooperation may also be undertaken bilaterally and multilaterally, or through other appropriate international procedures within the framework of the United Nations and in accordance with its Charter*.

70. Two helpful additions to this extended understanding of Article V should be agreed. They are:

²⁶ United Nations, The Seventh Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Geneva, 5 - 22 December 2011, *Final Document*, BWC/CONF.VII/7, 13 January 2012. Available at <http://unog.ch/bwc> and at <http://www.opbw.org>

²⁷ Koos van der Bruggen & Barend ter Haar, *The Future of Biological Weapons Revisited*, Netherlands Institute of International Relations, Clingendael, 2011, pp. 58-59.

²⁸ United Nations, The Seventh Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Geneva, 5 - 22 December 2011, *Final Document*, BWC/CONF.VII/7, 13 January 2012. Available at <http://unog.ch/bwc> and at <http://www.opbw.org>

a. that there should be consideration of mutually agreed ‘consultation visits’ to sites of compliance concern, a proposal central to the late Jonathan B. Tucker’s concept for strengthening Article V²⁹ ; and

b. that the Implementation Support Unit should be mandated and resourced to assist or facilitate ‘consultation visits’ to sites of compliance concern and other appropriate international procedures agreed by the States Parties engaged in consultation and cooperation, whether bilaterally or multilaterally.

Recommendation

71. The Meeting of Experts could recommend to the Meeting of States Parties a set of common understandings on Article V which would add to particular extended understandings reaffirmed by the Seventh Review Conference. It would be appropriate for these to be agreed by the Meeting of States Parties as common understandings reached within the intersessional process.

72. Two further recommendations from the Meeting of Experts to the Meeting of States Parties – on the Clarification Panel, and on mandating the Implementation Support Unit to facilitate or assist States Parties engaged in ‘*consultation visits*’ and other Article V procedures – concern effective action and because they are of a procedural nature and have modest resource implications, it would be appropriate for these to be sent forward as recommendations to the Eighth Review Conference for further action.

Common understandings

73. The States Parties recognise that the extended understandings reaffirmed by the Seventh Review Conference in paragraphs 18a and 18b of its Final Declaration include clarification, in addition to consultation and cooperation, and agree that States Parties should engage constructively in clarification to address and resolve any problem arising within the framework of Article V, as an application of Article V which could strengthen the national implementation of the Convention and enhance assurance of compliance.

74. They further recognise the importance of the extended understanding reaffirmed by the Seventh Review Conference in paragraph 18c, that States Parties should provide a specific, timely response to any compliance concern and agree that they should likewise provide a specific, timely response to any request for clarification made within the framework of Article V. Such requests for clarification should aim to address and resolve any ambiguities or anomalies that may give rise to concern over compliance-related matters.

75. They further recognise the importance of the extended understandings reaffirmed by the Seventh Review Conference in paragraph 19, that consultation and cooperation may be undertaken bilaterally and multilaterally and by other appropriate international procedures in addition to the procedure already identified by the First Review Conference and developed by

²⁹ Jonathan B. Tucker, *Strengthening consultative mechanisms under Article V to address BWC compliance concerns*, Harvard Sussex Program Occasional Paper, Issue 1, May 2011. Available at <http://www.sussex.ac.uk/Units/spru/hsp/Occ-papers.html>

the Second and Third Review Conferences. They conclude that States Parties should give consideration to mutually agreed ‘consultation visits’ to sites of compliance concern and other appropriate international procedures agreed by the States Parties engaged in consultation and cooperation, whether undertaken bilaterally or multilaterally. They conclude that such an application of Article V could strengthen the national implementation of the Convention and enhance assurance of compliance.

Effective action

76. The States Parties recommend that the Eighth Review Conference should appoint a small Clarification Panel, politically and geographically balanced in its membership, to serve the States Parties as a whole until the next Review Conference. This Clarification Panel would oversee any clarifications requested under Article V, offering assistance to the States Parties concerned as necessary, and making the outcomes of clarification requests public for the benefit of the Convention as a whole, with a view to strengthening the national implementation of the Convention and enhancing assurance of compliance.

77. The States Parties also recommend that the Eighth Review Conference should mandate and resource the Implementation Support Unit to assist or facilitate ‘consultation visits’ to sites of compliance concern and other appropriate international procedures agreed by the States Parties engaged in consultation and cooperation, whether undertaken bilaterally or multilaterally, in order to strengthen the national implementation of the Convention and enhance assurance of compliance.

Question 5: Whether mechanisms for the investigation of alleged use of biological weapons (Article VI) require further attention, including the role of the UN Secretary-General’s Investigation Mechanism;

78. Whilst the mechanisms for the investigation of alleged use of biological weapons (Article VI) do require further attention, including the role of the UN Secretary-General’s Investigation Mechanism to ensure that they remain fit for purpose in today’s world and also ensure that the investigation of an alleged use of biological weapons remains a powerful deterrent to any who might consider resorting to such use, our view is that the focus in the coming Intersessional Period and beyond the Eighth Review Conference needs to be on enhanced assurance of compliance.

79. The priority is for the States Parties to move forward together in working out how best they can demonstrate nationally and internationally that they are in compliance with the BTWC and that they are effectively implementing all the Articles of the Convention thereby enhancing assurance of compliance.

Recommendation

80. A possible common understanding to be agreed could be that the States Parties should continue to be aware of the developments being made to enhance the Secretary-General’s Investigation Mechanism and to welcome the steps that have been taken to draw up a Memorandum of Understanding between the WHO and the UN Office of Disarmament

Affairs in regard to the investigation of alleged use on 31 January 2011³⁰ and likewise between the OIE and the UNODA on 26 June 2012³¹ and to encourage the early completion of a comparable MOU with the Food & Agriculture Organization (FAO). This common understanding could also encourage the UN Office of Disarmament Affairs to annually update the States Parties to the BTWC on the current status of the Secretary-General's Investigation Mechanism.

Common Understandings

81. The States Parties reaffirm the importance of Article VI of the Convention and welcome the steps that have been taken draw up Memoranda of Understanding between the UN Office of Disarmament Affairs and the World Health Organisation (WHO), and also with the World Organisation for Animal Health (OIE) to enhance the Secretary-General's Investigation Mechanism and urge that a comparable Memorandum of Understanding be completed soon with the Food & Agriculture Organization (FAO).

Effective Action

82. The States Parties invite the United Nations Office for Disarmament Affairs to provide an annual report to the States Parties of the BTWC on the current status of the Secretary-General's Investigation Mechanism.

Question 6: The potential impact of advances in the life sciences on demonstrating compliance and enhancing assurance of compliance, including, for example, the impact of rapid advances in bio-forensics.

83. It is important that States Parties are aware of the advances in the life sciences and in other scientific fields that are of relevance to the BTWC. The establishment at the Seventh Review Conference of a Standing Agenda item for the Intersessional Period entitled *Review of developments in the field of science and technology related to the Convention* is a welcome step forward. The Standing Agenda item on developments in science and technology is required to include consideration of two topics which could include consideration of *advances in the life sciences on demonstrating compliance and enhancing assurance of compliance* – namely:

(b) new science and technology developments that have potential benefits for the Convention, including those of special relevance to disease surveillance, diagnosis and mitigation;

and

³⁰ World Health Organisation, *Memorandum of Understanding between the World Health Organization and the United Nations concerning WHO's support to the Secretary-General's Mechanism for Investigation of the Alleged Use of Chemical, Biological or Toxin Weapons*, 31 January 2011. Available at: www.un.org/.../Secretary-General_Mechanism/UN_WHO_MOU_2011.pdf

³¹ World Organisation for Animal Health (OIE), *Memorandum of Understanding between the World Organisation for Animal Health and the United Nations concerning OIE's Cooperation with the United Nations Secretary-General's Mechanism for Investigation of the Alleged Use of Chemical, Biological or Toxin Weapons*, 26 June 2012. Available at: www.oie.int/fileadmin/Home/eng/About_us/docs/.../UNODA_ANG.pdf

(g) any other science and technology developments of relevance to the Convention.

84. Once again, the priority for those concerned with compliance and enhancing assurance of compliance is to be aware of the relevant advances in science and technology. Whilst rapid advances in bio-forensics will help in the investigation of outbreaks of disease and determining on whether these are natural, accidental or deliberate, this is seen as complementary to the main focus of determining how best to demonstrate compliance and to enhance assurance of compliance. It is recognised that advantages in information technology may provide a tool that can help to demonstrate compliance as such a tool may be able to assist in evaluating the comprehensiveness of national legislation and regulations aimed at demonstrating compliance.

Recommendation

85. A possible common understanding to be agreed could be that the States Parties should recognise that the Standing Agenda item for the Intersessional Period entitled *Review of developments in the field of science and technology related to the Convention* should embrace any advances in science and technology that will facilitate enhancing assurance of compliance whether this be through improved techniques for the analysis of information provided by States Parties or available from the internet.

Common Understandings

86. The States Parties welcome the Standing Agenda item for the Intersessional Period entitled *Review of developments in the field of science and technology related to the Convention* and recognize that a benefit from this Standing Agenda item is the identification of advances in science and technology that will facilitate enhancing assurance of compliance.

Effective Action

87. The States Parties agree in their consideration of the Standing Agenda item for the Intersessional Period entitled *Review of developments in the field of science and technology related to the Convention* to maintain a lookout for advances in science and technology that will facilitate the demonstration of compliance and enhance assurance of compliance.

Conclusions

88. The Seventh Review Conference in their decision that a Standing Agenda Item should address *E. Strengthening national implementation* has enabled the States Parties to pursue conceptual discussions extending to the nature of BWC compliance and the demonstration of such compliance. This is specifically provided for in paragraph 24(b), which includes under *ways and means to enhance national implementation: sharing best practices and experiences, including the voluntary exchange of information among States Parties on their national implementation, enforcement of national legislation, strengthening of national institutions and coordination among national law enforcement institutions*; and in paragraph 24(e) especially: *any potential further measures, as appropriate, relevant for implementation of the Convention*.

89. As we pointed out in our report on the Seventh Review Conference, one of the earliest tests of the resolve of States Parties to build up the BTWC treaty regime through the new

Intersessional Process will be the ingenuity and determination with which they make use of the possibilities which the negotiation of the Standing Agenda item *Strengthening national implementation* offers. We noted that it will be up to States Parties to prepare and submit substantive Working Papers well in advance of the meetings to be considered under this Standing Agenda item.

90. We especially welcome the Working Paper entitled *We need to talk about compliance* submitted³² to the Meeting of States Parties in December 2012 by Australia, Canada, Japan, New Zealand and Switzerland (BWC/MSP/2012/WP.11 dated 12 December 2012) which sets out six questions:

1. *What constitutes compliance with the BWC?*
2. *How can States Parties better demonstrate their compliance with the BWC and thereby enhance assurance for other States Parties?*
3. *Whether there would be a role for declarations in demonstrating compliance, and if so, whether additional information to that which is already requested in the current CBMs would enhance assurance of compliance;*
4. *Whether the consultation and cooperation mechanisms under Article V require further development, including, for example, consideration of mutually agreed visits to sites of compliance concern;*
5. *Whether mechanisms for the investigation of alleged use of biological weapons (Article VI) require further attention, including the role of the UN Secretary-General's Investigation Mechanism;*
6. *The potential impact of advances in the life sciences on demonstrating compliance and enhancing assurance of compliance, including, for example, the impact of rapid advances in bio-forensics.*

States Parties have been encouraged to provide their views on these questions by 30 June 2013, to facilitate and focus the discussion at the Meeting of Experts in 2013 and subsequently..

91. In this Briefing Paper we have considered each of the six questions in turn and have provided recommendations as to the common understandings and effective action for each question that the States Parties should incorporate into the substantive reports of their meetings during this Intersessional Period. We conclude that there are indeed steps that could and should be taken by the States Parties in order to strengthen the national implementation of the Convention and enhance assurance of compliance.

92. It is evident from the statements of many States Parties that there is widespread interest in making progress in enhancing assurance of compliance. The time is ripe now to explore the common understandings and the effective action that will make such progress. All States Parties sharing this objective of enhancing assurance of compliance are urged to put forward

³² Australia, Canada, Japan, New Zealand and Switzerland, *We need to talk about compliance*, BWC/MSP/2012/WP.11, 12 December 2012.

their ideas so that there can be an informed and productive debate and progress achieved in 2013.