

NON-COMPLIANCE CONCERN INVESTIGATIONS: INITIATION PROCEDURES

By Ian R Kenyon*

Introduction

1. The Ad Hoc Group (AHG) of the States Parties to the Biological and Toxin Weapons Convention (BTWC) has the following mandate¹:

"The objective of this Ad Hoc Group shall be to consider appropriate measures, including possible verification measures, and draft proposals to strengthen the Convention, to be included, as appropriate, in a legally binding instrument, to be submitted for the consideration of the States Parties."

The mandate includes also the requirement that:

"Measures should be formulated and implemented in a manner designed to protect sensitive commercial proprietary information and legitimate national security needs."

2. The negotiations successfully transitioned in July 1997 to consideration of a rolling text of the future Protocol to strengthen the BTWC. Although the negotiators of the Chemical Weapons Convention (CWC) faced many similar if not identical problems to those being faced by the AHG, it has been recognised that the provisions adopted in the CWC may need to be tailored in the strengthened BTWC Protocol to reflect the particular nature of biological agents. Nevertheless, the CWC is the arms control treaty of the greatest relevance to the strengthened BTWC Protocol.

3. There is a wide appreciation that the strengthened BTWC needs three pillars comprising declarations, non-challenge visits and compliance concern investigations^{2 3}. Language for all three pillars is in the current draft of the BTWC Protocol⁴.

4. Negotiation of international legal instruments which provide for non-compliance concern investigations, or any other form of verification, require the creation of a careful balance between two seemingly incompatible imperatives for each State involved. On the one hand, States accepting obligations which impact directly on national security must achieve confidence that other States which accept the same obligations are fulfilling them. On the other hand there is a necessity to protect legitimate State secrets and to provide protection for national industry

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¹United Nations, *Special 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*, BWC/SPCONF/1, Geneva, 19 - 30 September 1994.

²Graham S Pearson, *The Strengthened BTWC Protocol: An Integrated Regime*, Briefing Paper No. 10, University of Bradford, July 1998. Available on <http://www.brad.ac.uk/acad/sbtwc>

³Douglas J MacEachin, *Routine and Challenge: Two Pillars of Verification*, CBW Conventions Bulletin, Issue No 39, March 1998.

⁴United Nations, *Ad Hoc Group 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*, BWC/AD HOC GROUP/41, Geneva, 16 July 1998.

regarding commercially valuable business information. The first requires a progressive series of procedures to address non-compliance concerns leading ultimately, if necessary, to a sufficiently rigorous on-site investigation to provide complete confidence that the relevant facts have been established. The second requires, not only properly defined investigation procedures such as managed access and carefully designed confidentiality provisions but also political mechanisms to deal with frivolous or abusive requests for such investigations.

5. This Briefing Paper first considers the provisions in the current version of the draft Protocol to strengthen the BTWC before examining the political processes involved in decision taking by an Executive Council. It is concluded that there is a strong case for an Executive Council to have the power to stop and investigation but not be required to approve its initiation.

Ad Hoc Group Progress

6. The Ad Hoc Group successfully transitioned in July 1997 to consideration of a rolling text of the draft Protocol. Following the June/July 1998 meeting, the fifth version of the draft Protocol was attached to the procedural report⁵. This contains language relating to consultation, cooperation and clarification, to decisions on investigations and to safeguards against requests for investigations which are frivolous, abusive or clearly beyond the scope of the Convention.

7. **Consultation, Clarification and Cooperation.** This is addressed both in Article III Compliance measures Section E "*Consultation, Clarification and Cooperation*" which outlines a series of steps to be followed in seeking clarification and resolution of any concerns about possible non-compliance which includes the language:

3. *[Without prejudice to the right of any State Party to request an investigation,] States Parties [should][shall][, whenever possible,][, as a rule,] first make every effort to clarify and resolve, among themselves or with or through [the Organization], any matter which may cause concern about possible non-compliance with the obligations of this Protocol or the Convention, or which gives rise to concerns about [a related matter which may be considered ambiguous][the implementation of the provisions of this Protocol].*

....

[5. Nothing in this protocol shall effect the right of any two or more States Parties to arrange by mutual consent for investigations, visits or any other procedures among themselves to clarify and resolve any matter which may concern about possible non-compliance with the obligations of this Protocol or the Convention or gives rise to a concern about [a related matter which may be considered ambiguous][the implementation of the provisions of this Protocol]. [Such arrangements shall not affect the rights and obligations of any State Party under other provisions of this Protocol.]]

⁵United Nations, *Ad Hoc Group 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*, BWC/AD HOC GROUP/41, Geneva, 16 July 1998.

as well as in Article III Compliance Measures Section F III Investigations which in Section (C) thereof addresses "*Consultation, Clarification and Cooperation*" using the following language:

11. States Parties [shall][may][first] make [every effort][full][use[where possible and as appropriate] of opportunities] for bilateral and multilateral clarification and consultation [through the Organization][in accordance with Article V of the BTWC][and established procedures under the Protocol] to resolve a concern about non-compliance with the Convention [[prior to][or][in parallel to] a request]].

8. Decisions on Investigations. The current draft of the Protocol contains language in Article III Compliance Measures Section F III Investigations which in Section (E) "*Follow-up after Submission of an Investigation Request and [Executive][Consultative][Council] Decision-making*" addresses the action to be taken should a request be received for an investigation into a compliance concern. The current language is as follows:

21. The Director General, after receiving an investigation request, shall acknowledge receipt of it to the requesting State Party within [two] hours and shall communicate the request to the State Party sought to be investigated within [six] hours and to all other States Parties within [24] hours.

...

25. The [Executive][Consultative][Council] shall begin its consideration of an investigation request immediately upon its receipt and shall [take a decision on it][conclude its consideration of it] no later than [12] hours after [its receipt][receipt of the original request][approving of the request by the Technical [Secretariat][Body]].

26. [Providing [the Director-General determines that] the request [satisfied agreed requirements][met the requirements set out in paragraphs... of this Article],] the investigation [shall][would] proceed [if formally approved by [at least a two-thirds majority][a three-quarters majority][present and voting] of][unless] the [Executive][Consultative][Council][decides by a three-quarters majority of all of its members against carrying out the investigation][where it considers the investigation request to be frivolous, abusive or clearly beyond the scope of the Convention].

9. Frivolous or abusive investigations. Insofar as safeguards against the mounting of investigations that are frivolous, abusive or clearly beyond the scope of the Convention are concerned, the current Protocol text in Article III Compliance Measures Section F III Investigations contains the requirement in Section (D) "*Information to be submitted with a request for an investigation to address a concern of non-compliance with the Convention*" that:

"[18. To avoid abusive or frivolous requests, in addition to the requirements set forth in paragraph 16, requests for a field investigation based upon an outbreak of disease or intoxication of concern shall contain information indicating that such outbreak is potentially connected to activities prohibited under the Convention. The State Party on whose territory the field investigation is proposed to occur or any other State Party may provide any information that indicates such outbreak of disease or

intoxification is naturally occurring or unrelated to activities prohibited by the Convention. This information shall also be taken into account by the [Executive][Consultative][Council] in its consideration of the investigation request in accordance with the request procedures of paragraph ... of this Article.]

10. Section (G) *[Access and Measures to guard against abuse during the][conduct of investigations]* sets out both the requirement that:

“33. The investigated State Party shall make every reasonable effort to demonstrate its compliance with [the Convention][and this Protocol] and to this end to enable the investigation to fulfil its mandate.”

and provisions enabling the investigated State Party to protect sensitive national security or commercial proprietary information not related to activities prohibited by the Convention:

“34. ...The investigated State Party shall have the right [under managed access] to take such measures [as are][it deems] necessary to protect sensitive national security or commercial proprietary information not related to activities prohibited by the Convention [, or to comply with its constitutional obligations with regard to proprietary rights or searches and seizures].

This may include restricting access to any particularly sensitive [facility], area or information [unrelated to the prohibitions of the BTWC][not related to activities prohibited by the Convention][unrelated to the contents of the request].

11. Other language in the same Section refers to:

42. In carrying out the investigation in accordance with the investigation mandate, the investigation team shall use only those methods necessary to provide sufficient relevant facts to clarify the concern about possible non-compliance with the provisions of the Convention by the investigated State Party, but shall neither seek nor document information which is clearly not related thereto, unless the investigated State Party expressly requests it to do so. Any material collected and subsequently found not to be relevant shall not be retained.

43. The investigation team shall be guided by the principle of conducting the investigation in the least intrusive manner possible, consistent with the effective and timely accomplishment of its mission. Wherever possible, it shall begin with the least intrusive procedures it deems acceptable and proceed to more intrusive procedures only as it deems necessary.

....

46. The investigation team shall conduct its investigation in the least intrusive manner possible consistent with its effective and timely implementation of its mandate, and shall collect only relevant information necessary to clarify the specific non-compliance concerns.

12. In Section (J) *[Adoption of a decision on the basis][consideration]* of the findings of the Investigation, there is further language relating to whether the right to request an investigation has been abused. This states that:

63. *The [Executive][Consultative][Council][politically representative body of States parties] shall, in accordance with its powers and functions, review the final report of the investigation team as soon as it is presented, and [address][decide on] any concern as to]:*

- (a) Whether non-compliance has occurred;*
- (b) Whether the request had been in accordance with the provisions of this Protocol;*
- (c) Whether the right to request an investigation has been abused.*

64. *With respect to any concerns raised under paragraph 63 (c), one or more of the following factors could be taken into account, where relevant:*

- (a) Information relating to the investigated site available prior to the investigation request (the authenticity and reliability of any information would need to be carefully assessed);*
- (b) Whether any of the information submitted as part of the investigation request was shown to be false;*
- (c) Information from and/or outcome or results of [any] prior consultations/clarifications relevant to the request;*
- (d) Whether any investigation(s) (including any instituted under Article VI of the Convention) had previously been requested by the same State Party vis-à-vis the same investigated site, and if so, their number, frequency and outcome (including any follow-up action);*
- (e) Whether the same requesting State Party had launched any prior requests for investigation which had been deemed by the [Executive][Consultative] [Council] [politically representative body] to be frivolous, abusive or beyond the scope of the Convention.*

...

66. *In the case of abuse, the [Executive][Consultative][Council][politically representative body] shall examine whether the requesting State Party should bear any of the financial implications of the investigation. The [Executive][Consultative] [Council][politically representative body] States Parties [United Nations Security Council] [may][shall] consider appropriate actions, including [possible] sanctions, in accordance with applicable international law, [by the BTWC Organization] if they decide that a request has been frivolous, abusive or beyond the scope of the [Protocol][Convention].*

The Chemical Weapons Convention

13. The negotiators of the Chemical Weapons Convention⁶ faced the same problems as those being faced by the Ad Hoc Group. The answers they found are enshrined in Article IX

⁶Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. Entered into force 29 April 1997. Available on the web at <http://www.opcw.nl/cwcdoc.htm>

Consultations, Cooperation and Fact-Finding. This Article emphasises consultation and cooperation. States Parties are required to "first make every effort to clarify and resolve ... among themselves, any matter which may cause doubt about compliance..." in paragraph 2 which states that:

Without prejudice to the right of any State Party to request a challenge inspection, States Parties should, whenever possible, first make every effort to clarify and resolve, through exchange of information and consultations among themselves, any matter which may cause doubt about compliance with this Convention, or which gives rise to concerns about a related matter which may be considered ambiguous. A State Party which receives a request from another State Party for clarification of any matter which the requesting State Party believes causes such a doubt or concern shall provide the requesting State Party as soon as possible, but in any case not later than 10 days after the request, with information sufficient to answer the doubt or concern raised along with an explanation of how the information provided resolves the matter. Nothing in this Convention shall affect the right of any two or more States Parties to arrange by mutual consent for inspections or any other procedures among themselves to clarify and resolve any matter which may cause doubt about compliance or gives rise to a concern about a related matter which may be considered ambiguous. Such arrangements shall not affect the rights and obligations of any State Party under other provisions of this Convention.

14. The Article then provides for the involvement of the Executive Council in assisting in the clarification process:

Procedure for requesting clarification

3. *A State Party shall have the right to request the Executive Council to assist in clarifying any situation which may be considered ambiguous or which gives rise to a concern about the possible non-compliance of another State Party with this Convention. The Executive Council shall provide appropriate information in its possession relevant to such a concern.*

4. *A State Party shall have the right to request the Executive Council to obtain clarification from another State Party on any situation which may be considered ambiguous or which gives rise to a concern about its possible non-compliance with this Convention. In such a case, the following shall apply:*

(a)The Executive Council shall forward the request for clarification to the State Party concerned through the Director-General not later than 24 hours after its receipt;

(b)The requested State Party shall provide the clarification to the Executive Council as soon as possible, but in any case not later than 10 days after the receipt of the request;

(c)The Executive Council shall take note of the clarification and forward it to the requesting State Party not later than 24 hours after its receipt;

(d) If the requesting State Party deems the clarification to be inadequate, it shall have the right to request the Executive Council to obtain from the requested State Party further clarification;

(e) For the purpose of obtaining further clarification requested under subparagraph (d), the Executive Council may call on the Director-General to establish a group of experts from the Technical Secretariat, or if appropriate staff are not available in the Technical Secretariat, from elsewhere, to examine all available information and data relevant to the situation causing the concern. The group of experts shall submit a factual report to the Executive Council on its findings;

(f) If the requesting State Party considers the clarification obtained under subparagraphs (d) and (e) to be unsatisfactory, it shall have the right to request a special session of the Executive Council in which States Parties involved that are not members of the Executive Council shall be entitled to take part. In such a special session, the Executive Council shall consider the matter and may recommend any measure it deems appropriate to resolve the situation.

5. A State Party shall also have the right to request the Executive Council to clarify any situation which has been considered ambiguous or has given rise to a concern about its possible non-compliance with this Convention. The Executive Council shall respond by providing such assistance as appropriate.

6. The Executive Council shall inform the States Parties about any request for clarification provided in this Article.

7. If the doubt or concern of a State Party about a possible non-compliance has not been resolved within 60 days after the submission of the request for clarification to the Executive Council, or it believes its doubts warrant urgent consideration, notwithstanding its right to request a challenge inspection, it may request a special session of the Conference in accordance with Article VIII, paragraph 12 (c). At such a special session, the Conference shall consider the matter and may recommend any measure it deems appropriate to resolve the situation.

15. Only as a final resort is each State Party given the right to request an on-site challenge inspection:

Procedures for Challenge Inspections

8. Each State Party has the right to request an on-site challenge inspection of any facility or location in the territory or in any other place under the jurisdiction or control of any other State Party for the sole purpose of clarifying and resolving any questions concerning possible non-compliance with the provisions of this Convention, and to have this inspection conducted anywhere without delay by an inspection team designated by the Director-General and in accordance with the Verification Annex.

Before going on to describe the procedures for challenge inspections, the Article emphasises the obligation of each State Party to keep the inspection request within the scope of the Convention and to refrain from unfounded requests, "care being taken avoid abuse" :

9. *Each State Party is under the obligation to keep the inspection request within the scope of this Convention and to provide in the inspection request all appropriate information on the basis of which a concern has arisen regarding possible non-compliance with this Convention as specified in the Verification Annex. Each State Party shall refrain from unfounded inspection requests, care being taken to avoid abuse. The challenge inspection shall be carried out for the sole purpose of determining facts relating to the possible non-compliance.*

16. All of the foregoing did not satisfy some of the negotiators, who were still concerned that some States might use the challenge inspection provisions as a tool for intelligence gathering targeted on non-related military objectives, for commercial espionage against industry, or simply as a means of causing political embarrassment. The Article was therefore extended to give the Executive Council (within the very tight time constraint of twelve hours) the right to consider the inspection request before it is carried out and, if it considers the inspection request to be *"frivolous, abusive or clearly beyond the scope of [the] Convention"* to decide to stop the inspection:

17. *The Executive Council may, not later than 12 hours after having received the inspection request, decide by a three-quarter majority of all its members against carrying out the challenge inspection, if it considers the inspection request to be frivolous, abusive or clearly beyond the scope of this Convention as described in paragraph 8. Neither the requesting nor the inspected State Party shall participate in such a decision. If the Executive Council decides against the challenge inspection, preparations shall be stopped, no further action on the inspection request shall be taken, and the States Parties concerned shall be informed accordingly.*

17. The final protection for the challenged State is in paragraph 22 in which the Executive Council, in reviewing the report of the inspection team, not only considers *"whether any non-compliance has occurred"* but also *"whether the request had been within the scope of [the] Convention"* and *"whether the right to request a challenge inspection had been abused"* :

22. *The Executive Council shall, in accordance with its powers and functions, review the final report of the inspection team as soon as it is presented, and address any concerns as to:*

(a) Whether any non-compliance has occurred;

(b) Whether the request had been within the scope of this Convention; and

(c) Whether the right to request a challenge inspection had been abused.

In order to stop a challenge inspection the Executive Council must decide by a three-quarter majority of all its members (red-light screening mechanism). This precise format was the result of long and difficult negotiation. In the end it was agreed that the assumption should be that a challenge inspection request would normally be implemented. In other words, no decision of the Executive Council should be necessary to allow the inspection to proceed. Only if there is a clear wish to prevent it is a decision required.

18. The requirement for a three quarter majority of all the members of the Council, not simply those present and voting, was deliberately set high. The reason for this was an understanding of the **political** processes involved in the operation of a body such as the

Executive Council. In the **judicial** processes of most States it is possible for a group of independent judges to be tasked to find whether there is a case to be answered in particular circumstances. These judges are chosen for their impartiality and should not participate if they have any direct personal interest in the outcome. The Executive Council, however, is composed of State representatives who are obliged to take account of their Government's interests. Most Governments will have an interest in the proper operation of the Convention but they will also be obliged to consider their relations with both the challenging and challenged States. Even if the evidence for concern about compliance with the Convention is strong it could be difficult for a Government to instruct its representative to vote positively in favour of an investigation. An instruction to abstain on a vote to stop an investigation would, however, be much easier to issue and would still have the effect of permitting the investigation to proceed.

19. The level of three quarters majority rather than simple majority was felt to be important because of the tendency in international bodies for States to vote in blocs. This construction meant that a group of States which commanded at least one quarter of the votes available could ensure that the inspection went ahead and no single group could prevent it without support from at least some members of other groups. Although the bloc structure has become much less rigid since the end of the Cold War, it still cannot be discounted entirely.

Analysis

20. It is evident that the draft text for the Protocol contains closely similar provisions to those within the CWC which achieve a careful balance between the requirement, on the one hand, for a progressive series of measures to address non-compliance concerns leading ultimately, if necessary, to a sufficiently rigorous on-site investigation to provide complete confidence that the relevant facts have been established and the other requirement for a regime comprising not only properly defined investigation procedures such as managed access and carefully designed confidentiality provisions but also political mechanisms to deal with frivolous or abusive requests for such investigations.

Conclusion

21. The provisions in the draft Protocol for a series of measures to address non-compliance measures coupled with those for the protection of sensitive commercial proprietary information and legitimate national security needs are such that the screening of requests for investigations can confidently be dealt with by a process requiring a three-quarters majority of the Executive Council to vote to stop an investigation (the so-called red-light procedure). Any green-light process, requiring formal approval before an investigation could begin (green-light), would, for the reasons outlined above, be ineffective and would have the result of effectively removing the underpinning and essential investigation pillar of the strengthened BTWC regime. The Protocol language needs to provide for the Executive Council to have the power to stop an investigation but not be required to approve its initiation.