Strengthening confidence-building and consultative mechanisms under the Biological Weapons Convention

Submitted by the United States of America

Introduction

1. The Biological and Toxin Weapons Convention (BWC) codifies the global norm against the use of biological and toxin weapons and commits States Parties to ensure that biology is only used for the benefit of humankind. The United States attaches great importance to compliance with the BWC by all States Parties. Maintaining and promoting confidence that States Parties are abiding by their commitments is essential to ensuring the stability and integrity of the treaty regime. Because the dual-use nature of biological materials, equipment, and technology makes it very difficult to verify compliance with the BWC, it is even more important to take practical steps to strengthen implementation, enhance transparency, build confidence in compliance, reduce doubts or concerns about States Parties’ actions or intentions, and to constructively address questions when they arise.

2. BWC States Parties have long recognized the need for such steps. The Second BWC Review Conference established a system of annual confidence-building measures (CBMs) and a multilateral consultative process as tools that could be used to address questions or concerns. Both mechanisms were further refined by the Third Review Conference. The Sixth Review Conference endorsed a move to an electronic CBM system and the publication of CBMs on a password-protected website. The Seventh Review Conference made the first substantive changes to the CBM forms in two decades, including streamlining some reporting requirements to encourage participation. Other refinements have been adopted by individual States Parties and have gradually spread; for example, more than one-third of all States Parties submitting CBMs now make their returns accessible to the general public. Despite this progress, the United States believes States Parties should consider further steps to strengthen both the confidence-building and consultative mechanisms.
3. Further steps to strengthen CBMs could provide for both easier access to, and analysis of, relevant information, as well as expanding participation. As the United States noted in a 2012 working paper, "not only should States Parties consider how to increase submission of CBM reports, but also how to make the data they contain more readily accessible and how to encourage States Parties to make constructive use of them. Without these steps, submission of CBMs – even on a universal basis – will be a hollow, ceremonial accomplishment, and do little to achieve the goals for which the CBMs were created."1

4. To facilitate use of the consultative provisions of the Convention, a broader range of options and tools for consultation and cooperation under Article V could be developed to assist States Parties to resolve questions and concerns in a cooperative manner. The purpose of these tools would be to further operationalize the flexibility to States Parties inherent in Article V, and thereby make clear that a State Party could invoke Article V in order to clarify a concern through consultations without implying non-compliance with the BWC on the part of another State Party. A wide range of options should make it easier to select the approach most suitable to the circumstances, while not precluding States Parties from escalating a concern quickly if deemed necessary. These tools should facilitate the provision of information that addresses questions a State Party might have. These tools could assist in providing assurance of compliance to States Parties with questions and concerns.

5. With these goals in mind, the United States has identified a number of specific measures that could be considered and agreed to by the Eighth Review Conference or that could be further developed during the next intersessional process. The United States welcomes comments and suggestions on the ideas and recommendations proposed below.

**Consultation and Cooperation**

6. Article V of the BWC provides that "States Parties to this Convention undertake to consult one another and to cooperate in solving any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention…" and that such consultation and cooperation "may also be undertaken through appropriate international procedures within the framework of the United Nations and in accordance with its Charter." Subsequent Review Conferences have elaborated understandings and procedures designed to provide more detail than is provided in the Article, while preserving its flexibility to States Parties seeking clarification. While this flexibility should be maintained, a wider array of tools to facilitate bilateral and multilateral consultation could empower and encourage States Parties to engage more proactively in consultation and cooperation. Importantly, Article V of the Convention can and should be used not only for concerns about compliance, but also more broadly to resolve questions, clarify concerns, and/or address shared challenges. To facilitate and encourage more widespread use of Article V to address "any problems which may arise…," it can be strengthened in a number of ways. The United States proposes developing potential tools to facilitate consultations, either during the Eighth Review Conference itself or as tasks for the next intersessional period. These potential tools include:

(a) Developing more detailed options for bilateral consultations, including some basic procedures, with timelines, that could be invoked by a State Party when raising a concern. The Second and Third Review Conference documents set out specific procedures for multilateral consultative meetings and also envisaged bilateral engagements. These options for bilateral consultations could be adapted from the relevant provisions in

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1 BWC/MSP/2012/MX/WP.4
Article IX of the Chemical Weapons Convention (CWC); similar provisions are also found in the Comprehensive Nuclear-Test-Ban Treaty (CTBT). This would then provide a range of tools for States Parties seeking clarification, from an informal request for information, to a more formal procedure that, properly framed, would require a response by a certain period of time.

(b) Developing separate, informal procedures to ask questions about another State Party’s CBM submission bilaterally, or perhaps through the ISU. Because CBMs occasionally contain information that is unclear, inconsistent, or conflicts with other information, such questions should be welcomed as an opportunity to educate, and not be a rare occurrence. Seeking clarification of such issues would not carry any implication of suspicion of wrongdoing.

(c) Developing illustrative options or non-binding guidelines for suggested procedures to address concerns. These examples could increase the interest and willingness of States Parties to engage in such consultative procedures.

7. In addition to elaborating upon bilateral and multilateral options available to States Parties seeking to clarify concerns through consultations, the United States proposes that this Review Conference establish an understanding that, where bilateral or multilateral consultations are unsuccessful, a State Party could request the UN Secretary-General to use his or her "good offices" to seek clarification, coupled with a call on all States Parties to cooperate with any such effort. Such an understanding would essentially serve as an "appeal" function, effectively escalating concern to a higher level if initial consultations are unsuccessful. It should serve to reassure States Parties that there are additional options available if their initial attempts to clarify a concern through consultations are unsuccessful.

Confidence-Building Measures

8. CBMs were established in 1986 as a politically binding commitment "to strengthen the authority of the Convention and to enhance confidence in the implementation of its provisions." Submission of annual CBMs is an effective way for States Parties to demonstrate their implementation of the BWC and enhances confidence among States Parties that others are fulfilling their treaty obligations. The CBMs are also one of the BWC’s few available tools to exchange information and facilitate discussions among States Parties. For these reasons, among others, we encourage all States Parties to fulfil their commitments by submitting yearly CBM reports.

9. There is cause for optimism regarding CBM participation. While the average yearly CBM participation rate is 36 per-cent, the rate for the years 2012 through 2016 is 41 per-cent – a full five percentage points higher than the overall rate. And by April 2016, the Implementation Support Unit (ISU) had already received a record-breaking 74 CBM returns. We applaud the increased participation in the CBMs and the increased commitment it demonstrates.

10. At the Eighth Review Conference, the United States seeks to enhance not only participation in BWC CBMs, but also their quality and utility to States Parties. With these objectives in mind, we suggest States Parties explore proposals that would:

(a) Reinforce the decision of the Sixth Review Conference to establish a CBM assistance network, coordinated by the Implementation Support Unit (ISU), to provide expert advice and assistance for States Parties upon request, and urge States Parties in a
position to do so to offer and to coordinate assistance, training, translations, and workshops in support of tasks such as compiling and submitting CBMs;

(b) Provide for the further development and ongoing operation and maintenance of the CBM electronic platform, following through on the decision of the Sixth Review Conference. Completing the transition to a fully electronic CBM system would simplify both reporting and analysis, and make the data more useful; and

(c) Further technical refinement of the type and range of information requested in select CBM forms with a view to generating more useful information. For example:

(i) Revising CBM Form A, part 2 (i), which calls for information on national biodefense research programs, to clarify that the request for information includes both military and civilian programs. At present, roughly one-third of the States Parties declaring national biodefense research programs report civilian biodefense research. For the remaining two-thirds of States Parties, it is not clear whether they have construed the request for information to apply only to military programs, or whether they do not have biodefense research programs conducted by civilians aimed at protecting the civilian population.

(ii) Expanding CBM Form E on national implementation measures to provide more information, for example, by adding a request for short descriptions of implementation measures. The current requests consist of a handful of yes/no questions with boxes to be checked, and do not provide sufficient information to make informed judgements regarding the status of BWC implementation by States Parties. Such national implementation measures are fundamental steps to upholding and strengthening the norm against the misuse of biological materials, and critical to guarding against the acquisition and use of biological weapons by both State and non-State actors.

Recommendations

Consultation and Cooperation

11. The Review Conference should agree on an informal procedure, conducted bilaterally or through the ISU, by which any State Party could seek to clarify details of another State Party’s CBM submission.

12. In addition to the procedures already understood to be available to States Parties, as well as the informal procedure specified above, States Parties should also consider incorporating language into the Final Document of the Eighth Review Conference establishing a specific bilateral consultation process that may be used by States Parties. The United States proposes that States Parties include a timeline, taking into account the relevant provisions of the CWC (which provides for the requested State Party to respond to a bilateral request from another State Party or to a request conveyed by the Executive Council within ten days), or the CTBT, which provides for the requested State Party to respond to a bilateral request from another State Party or to a request conveyed by the Executive Council within 48 hours. (Please see footnotes for references to original text; proposed new text appears in bold font.)

(a) The Conference notes the importance of Article V and reaffirms the obligation of States Parties to consult and cooperate with one another in solving any problems which might arise in relation to the objective of, or in the application of the provisions of, the Convention. The Conference reaffirms that: (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; (b) any State Party which identifies such a problem should, as a rule, use this framework to address and resolve it; (c) States Parties should provide a specific, timely response to any compliance concern alleging a breach of their obligations under the Convention.³

(b) The Conference affirms that States Parties should make every effort to clarify and resolve, through exchange of information and consultations, 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. The Conference also 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.⁴

(c) The Conference decides that any State Party, when seeking to clarify and resolve, through exchange of information and consultations, from another State Party of any matter which the requesting State Party considers to cause doubt or concern about compliance with the Convention, may invoke the following timelines: an initial response to be provided as soon as possible, but in any case not later than X days after the request; and provision of information sufficient to answer the doubt or concern raised, along with an explanation of how the information provided resolves the matter, not later than Y days after receipt of the request.

(d) The Conference reaffirms the right of any two or more States Parties to arrange by mutual consent appropriate procedures 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. States Parties decided to develop illustrative options or non-binding guidelines for States Parties to draw upon in seeking clarification, in order to facilitate the process.

(e) The Conference agrees on an informal procedure, conducted bilaterally or through the ISU, by which any State Party could seek to clarify details of another State Party’s CBM submission.

(f) The Conference stresses the need for all States Parties to deal effectively with compliance issues. In this connection, the States Parties agreed to provide a specific, timely response to any compliance concern alleging a breach of their obligations under the Convention. Such responses should be submitted in accordance with the procedures agreed upon by the Second Review Conference and further developed by the Third Review Conference. The Conference reiterates its request that information on such efforts be provided to the Review Conferences.⁵

13. States Parties should agree to note the potential role of the UN Secretary-General in clarification. Following is suggested language:

The Conference notes that, where bilateral or multilateral consultations are unsuccessful in addressing a concern, a State Party may request the UN Secretary-
General to use his or her good offices to clarify a concern through further consultations, and calls upon all States Parties to cooperate with any such effort.

Confidence-Building Measures

14. With a view to enhancing utility and actual use of CBMs by States Parties, we suggest consideration of two examples for technical refinement of select CBM forms:

(a) Revising CBM Form A, part 2 (i) to clarify that the request for information includes both military and civilian biodefense research and development programs.

(b) Revising CBM Form E to include a request for short descriptions of national implementation measures.

15. We suggest States Parties consider the following elements for possible incorporation in the Final Document of the Eighth Review Conference. (Please see footnotes for references to original text; proposed new text appears in bold font.)

(a) The Conference recognizes the continuing need to increase the number of States Parties participating in the CBMs and calls upon all States Parties to participate annually. The Conference notes that since the Seventh Review Conference, there has been an encouraging increase in the percentage of States Parties submitting their CBMs; however, fewer than half of all States Parties submit reports. The Conference emphasizes the importance of all States Parties meeting this important political commitment, which was established in order to reduce the occurrence of doubts and ambiguities.

(b) The Conference recognizes the technical difficulties experienced by some States Parties in completing full and timely CBM submissions. The Conference urges those States Parties in a position to do so to provide technical assistance and support, through training or workshops for instance, to those States Parties requesting it to assist them to complete their annual CBM submissions; reaffirms the decision of the Sixth Review Conference directing the ISU to centralize requests and offers of assistance regarding the submission of CBMs; and encourages States Parties to participate in this CBM assistance network.

(c) The Conference notes the desirability of making the CBMs more user-friendly and stresses the need to ensure they provide relevant and appropriate information to States Parties. Recalling the decision of the Sixth Review Conference to develop an electronic format for CBMs, the Conference emphasizes the importance of completing this task, and decides to provide resources to support the further development and ongoing operation and maintenance of the CBM electronic platform.

(d) The Conference recalls that the Third Review Conference agreed, "that the exchange of information and data, using the revised forms, be sent to the United Nations Department for Disarmament Affairs no later than 15 April on an annual basis." The Conference reaffirms that the data submitted in the framework of the annual exchange of information should be provided to the Implementation Support Unit within the United Nations Office for Disarmament Affairs and promptly made available electronically by it to all States Parties according to the updated modalities and forms in Annex I. The Conference

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6 This text is a proposed update to part II, paragraph 23 of the Seventh Review Conference Final Document (BWC/CONF.VII/7)
7 This text is a proposed update to part II, paragraph 24 of the Seventh Review Conference Final Document (BWC/CONF.VII/7)
8 This text is a proposed update to part II, paragraph 25 of the Seventh Review Conference Final Document (BWC/CONF.VII/7)
recalls that information supplied by a State Party must not be further circulated or made available without the express permission of that State Party. The Conference notes the fact that certain States Parties made the information they provide publicly available.\footnote{Verbatim text: part II, paragraph 26 of the Seventh Review Conference Final Document (BWC/CONF.VII/7)}