Enhancing the effectiveness of the consultative provisions of Article V of the Biological and Toxin Weapons Convention

Submitted by the European Union

Article V

"The States Parties to this Convention undertake to consult one another and to co-operate in solving any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention. Consultation and Cooperation pursuant to this Article may also be undertaken through appropriate international procedures within the framework of the United Nations and in accordance with its Charter."

Introduction

1. Building and sustaining confidence in compliance is one of the priorities of the European Union laid down in its position relating to the Eighth Review Conference of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (BTWC) (BWC/CONF.VIII/PC/WP.5). For this purpose a broad range of specific measures are submitted for consideration by the States Parties. In particular, the European Union supports the review of the consultative procedure set forth in Article V of the BTWC to be addressed during the Review Conference or during the next intersessional programme.

Issues to Consider

2. Article V of the BTWC obligates States Parties to "consult one another and to co-operate in solving any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention". Consultation and cooperation are important in contemporary multilateral agreements, but particularly in the BTWC where the
distinction between peaceful and hostile exploitation of the life sciences may not always be unequivocal. Yet Article V remains underutilised and the existing arrangements under it agreed at previous Review Conferences could be further enhanced. The purpose of this working paper is to examine how the effectiveness of the consultation process catered for by Article V could be developed.

3. Prior to the presentation of options for enhancing the effectiveness of the consultative provisions of Article V, it is worth outlining some issues to consider.

**Why bother?**

4. In signing and ratifying the Convention, States Parties commit themselves to consult one another and to cooperate in solving any problems. If States Parties do not consult and cooperate in solving problems, this could lead to misinterpretations and/or growing lack of confidence or suspicions. Neither of these alternatives is helpful to sustaining the BTWC nor the norm against the use of biological weapons.

**First do no harm**

5. Transparency is important in maintaining confidence in disarmament measures and there remain good reasons why clarification or consultations should be made public at some point, not least of which is to provide greater confidence in compliance with the Convention. However, any effort to enhance the consultation process needs to be careful not to jeopardise the practice of quiet diplomatic resolution of issues behind closed doors; or to deter States Parties from submitting Confidence-Building Measures (CBMs) for fear of public criticism over omissions or administrative errors.

**Institutional Support & Structures**

6. The Implementation Support Unit (ISU) has a limited capacity and mandate, and although it could play a role, for example in facilitated bilateral consultations or helping arrange visits, such as those described below it will need to be suitably resourced and mandated to do so, since the Convention lacks the appropriate institutional structures at present.

**Timing**

7. The imposition of timelines for consultation requests is important, but will need to find a balance between providing a reasonable length of time for the requested State Party to develop an accurate and complete response on the one hand, and minimising the opportunity for delaying and dragging out discussions on the other.

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1 We are grateful to Dr James Revill from the University of Sussex for his contribution to this working paper by means of his research on enhancing the consultative procedures under Article V of the BTWC realised in the framework of the EU Council Decision 2016/51/CFSP.
From Minor to Major issues

8. Not all issues dealt with under Article V necessarily warrant the same procedures; consultation on regulations under CBM Form E is different to consultations over suspicions of the production of biological agents in quantities inconsistent with the provisions of the Convention. As such, States Parties might think of developing a range of options for undertaking Article V consultations commensurate to the gravity of the issue.

Flexibility

9. Related to the above, it is essential to ensure that the consultation provisions maintain a degree of flexibility to encourage their use.

Options for Enhancing the Consultation Provisions of Article V of the BTWC

10. Taking into account the aforementioned points, some bilateral and multilateral options are suggested here for States Parties to consider in order to enhance the effectiveness of the consultative provisions of Article V.

Bilateral

11. **CBM clarification procedures** in which a State Party could contact — in a non-confrontational way — another State Party’s national focal point requesting consultations on ambiguous or seemingly omitted CBM data. The requested State Party would then be expected to provide clarification within a reasonable period of time and, if appropriate, duly revise the CBM, if necessary drawing on offers of CBM assistance in the Assistance and Cooperation database or through a "CBM assistance network". The CBM could then be resubmitted as a revised document.

12. **Procedures for private bilateral consultations** could be developed by reviewing the scope, timelines and informational requirements employed in other treaties and adapting these to develop a system suited to the BTWC. However, without peer scrutiny or independent oversight, there may be limited incentives to respond to requests for private bilateral consultations in a timely manner.

13. **Voluntary bilateral visits.** Visits are a divisive topic of discussion in the BTWC context. Yet there is nothing preventing States Parties arranging a visit or visits by mutual consent to clarify and resolve matters amongst themselves, or indeed a State Party that has been subject to a request for consultation inviting the scrutiny of the requesting State Party and offering the opportunity of a visit. There are issues however with setting out agreed procedures for the conduct of visits and the assessment of any results, especially in cases where the matter is touching on questions of compliance with Article I.

14. **Facilitated bilateral consultations** could be developed. With this option, States Parties could submit a request for clarification via a facilitating body comprised of the ISU.

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and the Chairperson of whatever form of future intersessional meetings might be agreed by
the Eighth Review Conference of the BTWC. This facilitating body would then note and
forward information between the requesting and requested States Parties. It might also
chair/facilitate any bilateral consultative meetings.

Multilateral

15. **Update and reaffirm the procedures for multilateral consultations** developed at
the Third Review Conference. Successive Final Documents have reaffirmed the additional
understandings from 1991. However, the situation has changed considerably since the early
1990s in terms of communication technologies, the establishment of national focal points,
limited experience with the use of Article V consultations, and the development of other
consultative mechanisms in other agreements such as in the CWC and CTBT from which
the BTWC could learn.

16. **Peer review** activities, such as those of Belgium, France, Luxemburg, the
Netherlands, and, more recently Germany, have included a consultative process in some
form or other, in some cases including facility visits. In the case of the Benelux model,
there were two phases of written and then oral consultations.

17. **Voluntary multilateral visits** mutually agreed between multiple States Parties
could also be employed as a means of enhancing consultation and cooperation.

18. **Integrate consultations into future meetings** through the inclusion of Article V
consultations on the agenda. Requesting States Parties would be required to give the
relevant chairperson and the requested State Party advanced notice of their intention to raise
an issue, before both parties would be given an agreed period of time to present their
arguments. At the meeting both the requested and requesting States Parties should be
allowed to speak for a predetermined period of time, before other States Parties are given
the opportunity to present their observations. The requested and requesting States Parties
should then be given a second chance to respond to comments from others. A factual
summary of the consultation could then be prepared as an annex to a report of the annual
meeting.

19. **A Consultative Committee of Experts** could be established to "make appropriate
findings of fact and provide expert views relevant to any problems which may arise in
relation to the objective of, or in the application of the provisions of, the Convention". Such
a model was proposed by Sweden at the First and Second Review Conferences.

20. **Appeal to the UN Secretary-General** to "facilitate the clarification requested".
Such an option would be reserved for the most serious issues, such as allegations of the
development or production of biological weapons.

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3 Working paper submitted by Belgium, France, Luxembourg and Netherlands, "Peer review: an
innovative way to strengthen the BWC" (BWC/CONF.VIII/PC/WP.13)
4 Working paper submitted by Germany and co-sponsored by Switzerland and the United Kingdom of
Great Britain and Northern Ireland, "Confidence in Compliance: Peer review visit exercise at the
Bundeswehr Institute of Microbiology in Munich, Germany" (BWC/CONF.VIII/PC/WP.11)
5 For more details see the working paper submitted by Chile and Spain, "Voluntary visits for the BWC:
a concept paper (unofficial translation in English)" (BWC/CONF.VIII/PC/WP.28)
6 See BWC/CONF.I/C/SR.03 and BWC/CONF.II/09
Recommendations

21. The changing nature of the science and technology of relevance to the BTWC has the potential to generate ever more problems in relation to the "objective of, or in the application of the provisions of the Convention". Therefore consultation and cooperation are particularly important in the BTWC, offering, as they do, a means of resolving ambiguities and doubts promptly and dealing with problems that may arise.

22. The EU and its Member States therefore recommend that States Parties should seize the opportunity of the Eighth BTWC Review Conference in November to consider enhancing the effectiveness of the consultative procedures under Article V. This could be achieved through updating the procedures for multilateral consultations that have been previously agreed, but also reaching agreement on other mechanisms, drawing from the options above. If these were to be adopted, this might allow States Parties to select a method of consultation commensurate to the gravity of the problem identified. In addition to generating greater confidence in compliance with the Convention, such a step might usefully serve to invigorate the BTWC.