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STRENGTHENING CONSULTATIVE MECHANISMS UNDER ARTICLE V TO ADDRESS BWC COMPLIANCE CONCERNS

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CONTENTS

Strengthening Consultative Mechanisms under Article V to Address BWC Compliance Concerns

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Given the range of dual-use biotechnologies that could potentially be exploited for biological warfare purposes and the rapid expansion of national biodefense programs that could serve as a cover for offensive activities, there is an urgent need to develop new strategies for promoting compliance with the Biological and Toxin Weapons Convention (BWC) before the Seventh Review Conference convenes in December 2011. The administration of U.S. President Barack Obama has made clear its opposition to reviving the negotiation of a BWC verification protocol, which the George W. Bush administration rejected back in 2001, taking that option off the table for the foreseeable future. Accordingly, alternative approaches are needed to address BWC compliance concerns, such as those raised in a recent U.S. government report.[2] Because strengthening existing provisions of the Convention is politically easier than creating new measures, a good option for promoting BWC compliance and deterring violations is to enhance the mechanisms for consultation and fact-finding.

Background

Despite the BWC's lack of formal verification measures, it includes two articles that aim to address suspicions of noncompliance by other means. Article V encourages member states to resolve ambiguities and concerns in a cooperative manner through bilateral consultations and, when necessary, exchanges of information. Consultations may also be conducted on a multilateral basis "through appropriate international procedures within the framework of the United Nations and in accordance with its Charter." In addition, Article VI provides that a member state can bring a compliance concern to the attention of the United Nations Security Council, which may then decide to launch an investigation. Ever since the BWC entered into force in 1975, however, no country has made a request under Article VI because the five

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[2] U.S. Department of State, *Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments* (Washington, DC, July 2010), pp. 10-26.

permanent members of the Security Council have the power to veto an investigation into their own compliance or that of an ally. This flaw has rendered Article VI effectively inoperative, leaving Article V as the primary vehicle within the BWC framework for addressing compliance concerns. The Seventh Review Conference should therefore consider ways of improving the implementation of Article V on both a bilateral and a multilateral basis.

Lessons from the CWC

One can derive some useful lessons from the implementation of the Chemical Weapons Convention (CWC), which entered into force more than 20 years after the BWC and includes extensive mechanisms for monitoring and verification by a dedicated international body, the Organization for the Prohibition of Chemical Weapons (OPCW) in The Hague. Arms control advocates often point to the CWC as an example of a disarmament treaty that, in contrast to the BWC, is effectively verifiable. In fact, the truth is more complex. The CWC verification regime includes detailed provisions for the declaration and routine international inspection of chemical-weapons-related facilities, as well as industrial plants producing "dual-use" chemicals that have legitimate applications but could potentially be diverted for the manufacture of chemical warfare agents. Because routine inspections apply only to sites that have been declared voluntarily, the CWC also empowers member states to request the international inspectorate to conduct a short-notice "challenge" inspection of any facility on the territory of a state party that is suspected of a violation, regardless of whether the site in question has been declared or not. The negotiators of the CWC viewed the challenge-inspection mechanism as a vital "safety net" to capture clandestine chemical-weapons facilities that a cheater has deliberately not declared in order to avoid subjecting them to routine inspection.

Ever since the CWC entered into force in April 1997, however, no member state has requested a challenge inspection, despite allegations that certain countries are violating the treaty at undeclared sites. The main reason for the non-use of the challenge inspection option is that it requires one state party to accuse another of an outright violation, a confrontational approach that entails major political risks. For example, if a CWC member state were to request a challenge inspection of a facility on the territory of another state party and the international inspection team failed to uncover convincing evidence of a breach, this outcome would discredit the accuser and let the violator off the hook. Launching a challenge inspection could also expose the accusing state to a "retaliatory" challenge of a sensitive facility on its own

territory. Finally, the foreign-policy and military interests of the United States, Britain, France, Germany, and others vis-à-vis countries of CWC compliance concern, such as China, Russia, and Iran, have so far trumped considerations of requesting a challenge inspection.

Because of the political drawbacks of challenge inspections, CWC member states have increasingly sought to address compliance concerns through the "softer" bilateral consultative measures provided under Article IX on "Consultations, Cooperation and Fact-Finding." The second paragraph of this Article states in part,

> 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.

Article IX also includes a multilateral consultative mechanism, in which a member state can request the OPCW Executive Council to obtain clarification from another state party on any situation that may be considered ambiguous or gives rise to a concern about possible noncompliance. To date, however, this provision has not been used and all consultations under Article IX have occurred on a bilateral basis. During the late 1990s, for example, the United States engaged in extensive bilateral consultations with several former members of the Warsaw Pact over their legacy chemical warfare capabilities, including visits to relevant sites. Because many of these East European states wished to join NATO, they had a strong incentive to cooperate in resolving the U.S. concerns. The main drawback of bilateral consultations is that they are not transparent to other countries.

In sum, the persistent non-use of the CWC challenge inspection mechanism, despite lingering doubts over the compliance of certain member states, suggests that the chemical disarmament regime is placing greater emphasis on voluntary clarification and transparency measures. This cooperative approach to compliance monitoring is even more relevant in the BWC context, where the dual-use nature of biotechnology materials and equipment and the

large number of facilities potentially capable of biological weapons production make traditional approaches to verification extremely difficult, if not impractical, to carry out.

The Two Dimensions of Article V

Much like Article IX of the CWC, Article V of the BWC authorizes the use of bilateral or multilateral consultations and fact-finding measures to address compliance concerns. To date, however, the full potential of these provisions has not been realized. Since the entry into force of the BWC in 1975, the member states have failed to use Article V to probe several well-publicized allegations involving biological weapons. Examples include the U.S. contention in September 1981 that the Soviet Union and its allies were using mycotoxin agents ("yellow rain") against rebel forces in Southeast Asia and Afghanistan; Cuba's claim in 1981 that the U.S. Central Intelligence Agency or a proxy group had deliberately spread a hemorrhagic strain of dengue fever on the island; and the U.S. assertion in 2002 that Saddam Hussein's Iraq was engaged in illicit bioweapons development and production.[3] Each of these cases differed as to the reason why consultations under Article V did not take place, but the common result was that the allegation was left to fester, undermining confidence in the BWC.

Moreover, whereas the CWC requires the declaration of treaty-relevant government and chemical industry facilities, providing a set of factual data that can serve as the basis for consultations under Article IX, the BWC has no mandatory source of information on which to base clarification requests under Article V. In 1986 and 1991, the Second and Third BWC Review Conferences sought to increase confidence in compliance by urging member states to exchange data on topics relevant to the Convention, such as unusual outbreaks of infectious disease, maximum-containment laboratories, facilities producing human vaccines, and biodefense programs. Nevertheless, because the obligation to submit annual Confidence-Building Measure (CBM) data declarations is politically but not legally binding, less than half of the BWC member states have participated on a regular basis. (In 2010, only 72 of the 163 states parties, or 44 percent, submitted CBM declarations.) Moreover, the CBM forms have not

[3] For more information on these cases, see Anne L. Clunan, Peter R. Lavoy, and Susan B. Martin, eds., *Terrorism, War, or Disease?: Unraveling the Use of Biological Weapons* (Stanford, CA: Stanford University Press, 2008).

been updated since 1991 despite dramatic advances in biological science and technology, rendering them increasingly obsolete.[4]

The following sections analyze the bilateral and multilateral dimensions of Article V and suggest ways in which their implementation could be enhanced.

The Bilateral Dimension

Any member state of the BWC may initiate bilateral consultations under Article V by contacting another state party through diplomatic channels and asking it to cooperate in clarifying a compliance concern. The state receiving the request is expected to make a reasonable effort to resolve any ambiguities, and in principle the consultations should continue until the requesting state's questions have been answered to its satisfaction. Ideally, the bilateral discussions should proceed in a non-confrontational, problem-solving mode because if they become adversarial, the process will almost certainly fail.[5]

One problem in implementing bilateral consultations under Article V has been that the BWC does not specify the extent to which the state receiving a clarification request must cooperate with the process. Although individual states parties may differ on what constitutes an adequate response to a request for information, no set of guidelines or procedures exists to resolve such disputes, making compliance overly subjective. In 1979, for example, a suspicious outbreak of human anthrax occurred in the Soviet city of Sverdlovsk, now Yekaterinberg. Over the next two years, the United States sent three bilateral *démarches* (formal diplomatic messages) to Moscow seeking to clarify the cause of the incident. The Soviet authorities responded by providing scientific data suggesting that the outbreak had resulted from the consumption of contaminated meat sold illegally on the black market, resulting in fatal cases of intestinal anthrax. U.S. intelligence analysts regarded this explanation as implausible, however, because evidence from clandestine sources indicated that the anthrax outbreak had involved the pulmonary form of the disease, which results from the inhalation of anthrax bacterial spores but not their ingestion.

When Soviet officials claimed that their explanation of the Sverdlovsk incident had fulfilled their obligation to consult under Article V of the BWC, Washington called the Soviet

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[4] Jez Littlewood, "Confidence-building measures and the Biological Weapons Convention: Where to from here?" *Compliance Chronicles*, No. 6 (Ottawa, Canada: Canadian Centre for Treaty Compliance, July 2008).

[5] Nicholas A. Sims, *The Evolution of Biological Disarmament*, SIPRI Chemical & Biological Warfare Studies No. 19 (Oxford, UK: Oxford University Press for the Stockholm International Peace Research Institute, 2001), p. 50.

response unsatisfactory, but Moscow continued to dissemble and was never held to account.[6] Not until May 1992 did Russian President Boris Yeltsin state in a newspaper interview that "the KGB admitted that our military development was the cause" of the 1979 anthrax outbreak.[7] Subsequently, a team of U.S. and Russian scientists obtained permission in 1993 to conduct a retrospective field investigation. These researchers determined that the KGB had destroyed evidence and fabricated medical data in an effort to conceal the real source of the outbreak: the accidental release of a cloud of anthrax spores from a Soviet biological weapons production facility in Sverdlovsk.[8]

In the late 1980s and early 1990s, Soviet defectors to the West revealed that during and after the Cold War, Moscow had systematically violated the BWC by conducting a clandestine bioweapons program on a massive scale. In addition to several facilities controlled by the Soviet Ministry of Defense, tens of thousands of scientists and technicians had conducted offensive research and development under the cover of an ostensibly civilian pharmaceutical complex called Biopreparat, preparing for the large-scale production of biological agents in wartime. In 1992 the United States, the United Kingdom, and Russia signed a Trilateral Agreement authorizing a series of inspections at Biopreparat facilities to build confidence that they were no longer engaged in illicit activities. Although the intention at the political level was to resolve concerns and ease tensions, the implementation of the site visits at the technical level had the unfortunate effect of increasing mutual suspicions and acrimony between the two countries. According to the late British government scientist David Kelly, who participated in the process, "The Trilateral Agreement failed dramatically, as Russia proved unwilling to acknowledge and fully account for either the former Soviet program or the [biological warfare] activities that it had inherited and continued to engage in. This included refusing access by American and British inspectors to its military biological sites."[9]

Another problem with the Trilateral Agreement was that Russia demanded the right to conduct reciprocal inspections of biological facilities in the United States and Britain, both to save face and to address its putative concerns over Western BWC compliance. Moscow's

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[6] Nicholas A. Sims, "Four Decades of Missed Opportunities to Strengthen the BWC: 2001 Too?" *Disarmament Diplomacy*, No. 58 (June 2001), available online at: http://www.acronym.org.uk/dd/dd58/58sims.htm.

[7] Interview with Boris Yeltsin, *Komsomolskaya Pravda*, May 27, 1992, p. 2.

[8] Matthew Meselson, et al., "The Sverdlovsk Anthrax Outbreak of 1979," *Science*, vol. 266, no. 5188 (November 18, 1994), pp. 1202-1208.

[9] David C. Kelly, "The Trilateral Agreement: lessons for biological weapons verification," in Trevor Findlay and Oliver Meier, eds., *Verification Yearbook 2002* (London: VERTIC, 2002), pp. 93-109.

insistence on reciprocity, Kelly argues, was "the first step in the erosion of American and British confidence in the process, since it served to deflect the emphasis of the inquiry away from Russia and enabled it to make counter-allegations about Western activities."[10] Accordingly, reciprocal inspections should be avoided because they provide a determined cheater with an opportunity for mischief and blame-shifting. Because Article V does not require that mutual compliance concerns be addressed simultaneously, it is preferable to resolve them sequentially.

The experience with the Soviet Union and Saddam Hussein's Iraq suggests that consultations under Article V are unlikely to be effective with respect to the small number of BWC member states that are determined to violate the Convention in a clandestine manner. Prospects of success are better, however, for the larger number of "borderline" states that possess ambiguous biological facilities but have an interest in demonstrating their compliance with the BWC and are prepared to cooperate voluntarily in doing so. Because diplomatic communications are classified, it is hard to identify examples of successful bilateral consultations under Article V, and the few cases that have been made public are fragmentary at best. For example, the State Department's 2010 arms control compliance report notes that during a meeting in 2006 of the U.S.-China Economic and Security Review Commission, a U.S. official raised the issue of Chinese BWC compliance and "expressed reservations... regarding China's research activities and dual-use capabilities."[11] The report does not indicate if Beijing responded to this expression of concern in a constructive manner.

The Multilateral Dimension

Although the BWC does not specify how multilateral consultations under Article V are to be carried out, over a series of review conferences the member states developed detailed procedures for convening a formal consultative meeting to address a specific allegation of noncompliance. At the First BWC Review Conference in 1980, Sweden proposed to institutionalize multilateral consultations under Article V by creating a Consultative Committee of Experts. According to a similar provision in the 1977 Environmental Modification (ENMOD) Convention, this multilateral forum was intended "to make appropriate findings of fact and

[10] Ibid., pp. 103-104.

[11] U.S. Department of State, *Adherence to and Compliance with Arms Control, Nonproliferation, and Disarmament Agreements and Commitments*, p. 12.

provide expert views relevant to any problem raised... by the State Party requesting the convening of the Committee."[12] In the case of a serious compliance concern, the UN Secretary-General would activate the Consultative Committee and each BWC state party would designate an expert to participate in the deliberations. The Swedish proposal went nowhere, however, because the Soviet Union and its allies opposed it. Instead, the 1980 Review Conference merely approved "the right of any State Party... to request that a consultative meeting open to all States Parties be convened at the expert level," without specifying procedures for launching and conducting such a meeting.

The Second BWC Review Conference in 1986 further developed the multilateral dimension of Article V by agreeing that a formal consultative meeting should have broad terms of reference and occur promptly at the request of a member state, although no consensus could be reached on how to convene and chair such a meeting.[13] The Third Review Conference in 1991 agreed that requests for a formal consultative meeting should be addressed to one of the three BWC depositaries (the United Kingdom, the United States, and the Soviet Union) and developed decision-making procedures. In addition, the Third Review Conference gave the consultative meeting an explicit fact-finding mandate, stressed the obligation on BWC member states to cooperate in resolving compliance concerns, and agreed that once the mechanism was triggered, a procedural meeting should be held within 30 days and the formal consultative meeting within 60 days.[14] Because the multilateral consultative mechanism is governed by rules and expectations adopted by a consensus of BWC member states, a state party that fails to follow these procedures is more likely to be judged noncompliant than if it refuses to cooperate with a bilateral request for information.

To date, the multilateral dimension of Article V has been used only once. In 1997 the Cuban government requested a formal consultative meeting to address its charge that a U.S. government crop-dusting aircraft overflying Cuba in October 1996 had released a devastating insect pest called *Thrips palmi* in a deliberate effort to harm the island's agricultural economy. During the BWC consultative meeting, which was held in Geneva in August 1997, the Cuban government presented evidence to support its allegation that the *Thrips* infestation had resulted from a covert biological attack, while the U.S. government argued that the infestation had

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[12] *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*, signed in Geneva May 18, 1977 and entered into force on October 5, 1978, "Annex to the Convention: Consultative Committee of Experts."

[13] Sims, *Evolution of Biological Disarmament*, p. 33.

[14] Ibid., pp. 34-35.

spread naturally from nearby countries. Two factors complicated the fact-finding process: Cuba's six-month delay in requesting the formal consultative meeting, and the inherent difficulty of proving or disproving an allegation of biological warfare involving an agent endemic to the region—in this case, an insect pest.

To assess the information presented by the two sides, the participating BWC member states established a Bureau of the Formal Consultative Meeting made up of geographically representative vice-chairmen. This Bureau set a one-month deadline for interested countries to submit written observations on the Cuban allegation and the U.S. rebuttal, and then gave Cuba and the United States an opportunity to respond.[15] Of the BWC member states that submitted observations, eight countries—Australia, Canada, Denmark, Germany, Hungary, Japan, the Netherlands, and New Zealand—saw no causal link between the U.S. overflight of Cuba and the *Thrips* infestation, China and Vietnam found it impossible to make a determination, and only North Korea concluded that the United States had been responsible. If Havana had expected more BWC member countries to support its case out of a sense of political solidarity, it was sorely disappointed. Russia, for example, did not endorse the Cuban allegations, perhaps because it was afraid of creating a precedent that could potentially expose it to a similar investigative process in the event of a future Sverdlovsk-like incident.

Since the 1997 formal consultative meeting was subject to the consensus rule, the overall "finding of fact" was officially inconclusive. Nevertheless, the meeting was a modest success because it sought to clarify a BWC compliance concern by bringing evidence to the table without degenerating into a political shouting match. Even though the process ended up largely debunking the Cuban allegations, Havana appeared satisfied with having aired its concerns and did not pursue the issue further. In the opinion of BWC expert Nicholas Sims, "The contingency mechanism emerged strengthened from its first test. Useful precedents were established which can serve if it is used again. Although the 'finding of fact' was indeterminate, there was general satisfaction that the requirements of Article V had been fulfilled."[16]

[15] Ibid., p. 48.
[16] Ibid., p. 49.

Policy Recommendations

Despite the checkered history of bilateral and multilateral consultations under Article V, such efforts can provide a useful avenue for enhancing compliance with the BWC. In a speech to the annual meeting of member states in Geneva in December 2009, U.S. Undersecretary of State for International Security and Arms Control Ellen Tauscher observed, "[W]e believe that confidence in BWC compliance should be promoted by enhanced transparency about activities and pursuing compliance diplomacy to address concerns."[17] Tauscher also noted that the Obama administration seeks to "invigorate the Biological Weapons Convention as the premier forum for global outreach and coordination," suggesting that U.S. compliance diplomacy will proceed under Article V rather than outside the treaty framework.[18] For voluntary clarification measures to be effective, a country that receives an information request must have the political will to cooperate in resolving the compliance concern, either to clear its name or to ingratiate itself with the requesting country.

Although current U.S. policy is to focus on bilateral consultations for addressing BWC compliance concerns, convening a formal consultative meeting would be more consistent with the multilateral nature of the Convention. Having a multilateral body serve as an intermediary would also facilitate the clarification process between countries that have strained or adversarial relations.

The following recommendations are designed to strengthen the bilateral and the multilateral dimensions of Article V.

The Bilateral Dimension

Develop agreed procedures for conducting bilateral consultations under Article V in order to regularize the process and make it less open to interpretation by BWC member states. Article IX of the CWC provides specific guidelines for bilateral consultations: upon receipt of a request for clarification, the receiving state must 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 concern." The 10-day limit was invoked by Iran in 2010 when it made a request

[17] Under Secretary of State Ellen Tauscher, "Address to the Annual Meeting of the States Parties to the Biological Weapons Convention," December 9, 2009, Geneva, Switzerland, p. 4.
[18] Ibid., p. 3.

under Article IX to the United States and the United Kingdom for information concerning the destruction by U.S. and British forces of Iraqi chemical munitions discovered after the 2003 invasion of Iraq.[19] In the case of the BWC, it would be desirable to develop a similar timeline for bilateral consultations under Article V. At the same time, the consultative mechanism should be kept as flexible as possible because if it is too rigid, states will be less inclined to use it. Another issue that warrants discussion is whether there should be some type of "filter" to exclude spurious or abusive requests for information.

Establish a procedure by which a BWC member state can request additional information about a particular facility or activity listed in another state party's annual Confidence-Building Measure (CBM) data declaration. Questions raised by gaps or ambiguities in the CBM declarations could serve as a basis for initiating bilateral consultations under Article V. For example, one member country might compare another's declaration with open-source information in order to identify discrepancies. In the case of BWC member states that do not submit CBM declarations, clarification requests could be made on the basis of other types of information. Requesting details about declared or undeclared facilities or activities in a non-accusatory manner would establish a channel between BWC member states for ongoing dialogue and clarification. In the interest of transparency, it would be desirable for each state party that engages in bilateral consultations under Article V to report this fact to the other member states, along with the resulting information. Nevertheless, there may be a tradeoff between the openness of the consultative process and the willingness of states to use it.

Develop guidelines for the conduct under Article V of voluntary "consultative visits" to particular facilities on the territory of BWC member states that raise ambiguities or compliance concerns. A consultative visit under Article V would be launched at the request of a BWC member state with the agreement of the requested state party and would be conducted by technical experts from the requesting country, escorted by representatives from the host government. It would therefore be similar to the procedure set out in Article IX of the CWC, which notes that two or more states parties have the right "to arrange by mutual consent for

[19] For a description of the Iranian request for information under Article IX, see: Iran, "The Islamic Republic of Iran's View and Concern Over the Discovery and Destruction of Chemical Weapons by the United States and the United Kingdom in Iraq," OPCW Conference of the States Parties, Fifteenth Session, C-15/NAT.1, 29 November 2010, p. 2. For the U.S. and British responses to the Iranian request, see: United States of America, "Statement by Ambassador Robert P. Mikulak, United States Permanent Representative at the Fifteenth Session of the Conference of the States Parties," C-15/NAT.3, 29 November 2010, p. 5, and United Kingdom, "Response by the United Kingdom to a Request for Clarification Submitted Under Article IX, Paragraph 2, of the Chemical Weapons Convention," C-15/NAT.11, 30 November 2010, pp. 1-6.

inspections or any other procedures among themselves to clarify and resolve any matter which may cause doubt about compliance." A BWC consultative visit under Article V might involve a briefing by the facility director, a walk-through of the site, and perhaps the opportunity to take samples for on-site or off-site analysis. The host country would be expected to cooperate with efforts to resolve the compliance concern but would be allowed to manage access to the site in order to protect proprietary trade secrets and national-security information unrelated to the BWC. A country that received a request for a consultative visit under Article V could decide to refuse access entirely, although it would probably pay a political price for doing so.

The option to request a consultative visit under Article V, if adopted, would apply to all BWC member states. For this reason, advanced industrialized countries such as Germany, Japan, and the United States should seek the cooperation of their biotechnology and biopharmaceutical industries before moving forward with this measure. In the United States, the Fourth Amendment of the Constitution protects citizens and corporations against "unreasonable searches and seizures," so that most searches conducted by law enforcement officers require a warrant issued by a magistrate based on "probable cause" of wrongdoing. In the case of routine CWC inspections of chemical plants, a search warrant is not necessary because the facilities in question are "pervasively regulated" by U.S. federal agencies such as the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Food and Drug Administration.[20] In the biotechnology industry, however, most firms outside the pharmaceutical sector are not subject to pervasive regulation, so a consultative visit under Article V of the BWC would require voluntary consent. A company that was the subject of a request for a consultative visit could therefore find itself in an uncomfortable position: allowing foreign inspectors in could put valuable trade secrets at risk, yet denying access might be perceived as evidence of culpability. Because of these pitfalls, developing a system of voluntary consultative visits under Article V will require close coordination between BWC member states and their national biotechnology industries.

Examine a possible role for the BWC Implementation Support Unit (ISU) in helping member states carry out consultations under Article V. Assuming that the 2011 BWC Review

[20] Other "pervasively regulated" businesses include mining, firearms dealing, and alcoholic beverages. According to the U.S. Supreme Court, a warrantless inspection may be permitted in a pervasively regulated industry if the circumstances satisfy a three-part test: (1) there must be a "substantial" government interest; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the certainty and regularity of the inspection program must provide a constitutionally adequate substitute for a search warrant.

Conference agrees to expand the staff and responsibilities of the ISU, the unit could play a facilitating or mediating role in consultative activities under Article V when specifically requested to do so.

The Multilateral Dimension

Establish a Consultative Committee of Experts for multilateral consultations under Article V, as Sweden proposed in 1980. In creating such a mechanism, it would be essential to limit the mandate of the Consultative Committee to resolving concerns about compliance with Article I of the BWC, which bans the development, production, acquisition, and stockpiling of biological and toxin agents for prohibited purposes, along with munitions specifically designed for their delivery. The committee should *not* be authorized to address compliance with other provisions of the BWC, such as Article X, which deals with international cooperation and trade in the peaceful uses of biotechnology. Without such a clearly defined scope, the Consultative Committee might become a political football that member states could exploit for their own purposes.

Establish a multilateral consultative mechanism for clarifying ambiguous or missing items in the CBM declarations. At BWC review conferences or during intersessional meetings, member states would have the opportunity to question one another about specific elements in their CBM declarations, either with respect to declared facilities and activities or those that should have been declared but were not. Such discussions would help to increase transparency and build confidence in BWC compliance.

Use the multilateral consultative process under Article V in conjunction with UN investigations of alleged biological weapons use or suspicious outbreaks of disease. The 1979 Sverdlovsk incident suggests that an active biological warfare program may lead to the accidental release of dangerous pathogens into the environment, triggering a suspicious outbreak of infectious disease that can then be investigated. Pursuant to a series of General Assembly and Security Council resolutions adopted during the 1980s, a UN member state may request the Secretary-General to launch a field investigation of an alleged use of a biological or toxin weapon or a suspicious outbreak of disease. Between 1980 and 1992, teams of UN experts investigated several incidents of alleged chemical or toxin weapons use, and some of

those missions yielded clear-cut positive or negative findings.[21] Because the Secretary-General's mechanism applies to all UN member states, it is legally distinct from the BWC, which has a much smaller number of states parties. Even so, if the results of a UN field investigation were strongly indicative of a biological attack, the BWC member states could convene a formal consultative meeting under Article V to discuss the findings and their implications for the Convention.

Conclusions

Over the past decade since the collapse of the BWC protocol negotiations in 2001, the clarification mechanisms under Article V have remained the only politically viable measures within the treaty for addressing compliance concerns. Because strengthening the existing provisions of the BWC is politically easier than devising new ones, the Seventh Review Conference should consider various ways of making bilateral and multilateral consultations under Article V more effective.

[21] Jonathan B. Tucker, "Multilateral Approaches to the Investigation and Attribution of Biological and Toxin Weapons Use," in Clunan, Lavoy, and Martin, eds., *Terrorism, War, or Disease?*, pp. 269-292

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HSP is an inter-university collaboration for research, communication and training in support of informed public policy towards chemical and biological weapons. The Program links research groups at Harvard University in the United States and the University of Sussex in the United Kingdom. It began formally in 1990, building on two decades of earlier collaboration between its co-directors.

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