
**Meeting 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**

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Standing agenda item: strengthening national implementation

**We need to talk about compliance: A response to
BWC/MSP/2012/WP.11**

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I. Introduction

1. In their Working Paper submitted to the 2012 Meeting of States Parties, Australia, Canada, Japan, New Zealand and Switzerland recommended that there should be an initial conceptual discussion in 2013 ‘designed to promote common understanding of what constitutes compliance with the BWC and effective action to enhance assurance of compliance’. States Parties were invited to submit their views to the Implementation Support Unit with specific references to six questions set out in the 2012 Working Paper. This document outlines the United Kingdom’s response. We have focussed on compliance with Articles I to VI as these relate to the Convention’s core prohibitions.

2. Despite the setbacks in strengthening the Convention over the years, the UK believes it is important to continue to sustain the most pragmatic ways of keeping the Convention relevant to the security challenges it faces in a changing world. A key element in UK thinking on the long term future of the BTWC involves making incremental progress across a range of issues, such as those being addressed in the current intersessional process. We believe this will help move us towards a position where more ambitious and synergistic approaches to compliance can be contemplated and realised with practical effect. Thus it is timely to review the fundamental questions on compliance raised in Working Paper 11.

**II. WP.11 Question 3 (a): What constitutes compliance with the
BWC?**

3. Compliance can be conceptualised as having two dimensions: the presence of certain activities and attitudes and the absence of artefacts, activities and attitudes, which when

combined may give a reasonable indication of a State Party's intent and compliance status over time. We also need to take a broader view of compliance. It is not just about Article I: Articles III, IV, V and VI are the most relevant in considering compliance with the prohibitions of the Convention, which is the central focus of this paper.

4. However, there are critical caveats that must be kept in mind before embarking on any discussion of compliance in the BTWC. It may not always be a simple case where assumptions about a State Party's intent can be easily drawn based solely on the presence or absence of single or multiple factors of the sort described below in paragraphs five and six. If we see a complete absence of the factors highlighted in paragraph five below, but many of those in paragraph six, then concerns about a State Party's compliance may inevitably begin to form and solidify as time passes. There is no automatic correlation between presence and absence of these factors. The picture presented is much more nuanced with multiple shades of grey; it is not black and white, or one-dimensional. Absolute certainty either on full compliance or non-compliance with the Convention's Article I is likely to be a rare commodity. Making judgments about BTWC compliance is an unavoidably complex task and rarely straightforward; the dual-use nature of relevant science and technology makes it much more challenging still. And this is becoming even more acute given rapid developments in the life sciences and the increasing globalisation of biotechnology. However, we would suggest that the following are some examples that could be considered when assessing compliance.

5. What we might expect to see in a State Part: some actions and activities indicative of compliance:

- (a) Existence and implementation of a broad range of effective national measures under Article IV, such as penal legislation translating the Convention's prohibitions into domestic law along with provisions and appropriate regulatory structures for biosafety and biosecurity;
- (b) Effective enforcement of penal and other associated legislation;
- (c) Comprehensive national export control legislation and the means to enforce it effectively;
- (d) Transparency in national biodefence programmes taking account of legitimate national security interests, including the application of oversight mechanisms and indicators such as the presence of nationals from other States Parties working in the same facilities;
- (e) Generally open publication policy on research at biodefence facilities, and other relevant facilities such as those handling pathogens and toxins and other relevant biological materials;
- (f) General commitment to candour and transparency, including full and consistent participation in the CBM process;
- (g) A readiness to respond promptly and comprehensively to any questions raised under Article V;
- (h) Sustained measures to promote awareness of the Convention and its requirements in the scientific community and to promote a culture of responsibility;
- (i) Effective oversight processes for relevant dual-use research and development programmes;
- (j) Active, regular and constructive participation in BTWC meetings reporting on national implementation steps;

(k) Regular engagement with academia and civil society on issues related to the Convention.

6. What we should not see: some artefacts, actions and activities that may raise questions on a State Party's comprehensive compliance:

(a) Hostile and belligerent attitudes to the international community and a general disregard for international law and institutions;

(b) Existence of biological weapons, or doctrine and training for their use;

(c) Closed and/or unduly secretive military or civil biological facilities and absence of scientific publications from such places;

(d) Research, development and testing activities, involving pathogens and toxins, that do not have clear justification for prophylactic, protective or other peaceful purposes; and activities that are related to weapons, equipment or means of delivery designed to use agents and toxins for hostile purposes or in armed conflict;

(e) Persistent failure to be candid and transparent about past offensive BW programmes and current or past biological defence programmes;

(f) Clandestine procurement of dual-use equipment and materials;

(g) Recurring refusal to respond to clarification requests under Article V;

(h) Absence of candour and transparency in dealings with other States Parties;

(i) Reluctance to enact and enforce national legislation despite repeated offers of assistance;

(j) Persistent failure to submit CBMs, or a pattern of submitting them intermittently and/or partially.

7. The significance of the presence or absence of the factors in paragraphs five and six is likely to vary in light of such circumstances as the scale of activities in any State Party in relevant areas of microbiology, pharmaceuticals, biodefence and other related disciplines. For many small States Parties the absence of factors in paragraph five may simply reflect the absence of relevant activity and the associated low priority of meeting the Convention's obligations. Thus we need to be realistic about the level of burden that such states can cope with in meeting their obligations rather than automatically assume non-compliance with Article I.

8. One should also make a distinction between compliance with Articles I and II on the one hand and Articles III and IV on the other. Failure to enact comprehensive implementing legislation places a State Party formally in non-compliance with its Article IV obligations. However, this is not in the same category as non-compliance with Article I's core prohibitions on developing, producing, stockpiling or otherwise acquiring or retaining biological weapons. The same applies for implementing appropriate measures related to Article III, to ensure that transfers relevant to the Convention are controlled. In some cases there may be a link between the two types of non-compliance i.e. the absence of legislation is deliberate as an offensive BW programme is underway. In other cases, limited bureaucratic resources or conflicting priorities may explain the absence of legislation.

9. A failure by a State Party to respond to a clarification request raised under Article V places it in non-compliance with its obligation 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. Such non-cooperation may well indicate that the State Party could be failing to comply with Article I, but then again it might not. As noted above, assessing compliance is not straightforward.

III. WP.11 Question 3 (b): How can States Parties better demonstrate their compliance with the BWC and thereby enhance assurance for other States Parties?

10. 'Enhance Assurance' is an important concept. It recognises that single actions taken by a State Party may rarely be definitive; it suggests steps taken across a broad front, with some deliberate and others flowing from related considerations or requirements such as biosafety. These are not all single steps. Some are also necessarily recurring and adaptive to scientific and technological and other changes. If States Parties continue to demonstrate the attributes outlined in paragraph five above, then they are providing assurance of their compliance for other States Parties and to civil society at home and abroad.

11. States Parties could take a number of individual or collective steps to help demonstrate their compliance with the Convention; these would be designed to give reassurance that activities and facilities are being conducted and used solely for permitted purposes as specified in Article I. These could include, but are not limited to:

- (a) Providing detailed annual or periodic reporting on how they go about implementing the Convention domestically;
- (b) Providing and updating information on the ISU's National Implementation database and elsewhere, most notably to the UNSCR 1540 Committee;
- (c) Submitting annual detailed CBMs, including additional declassified details on any past offensive and defensive programmes;
- (d) Submitting detailed national compliance reports to the BTWC Review Conferences;
- (e) Participating in a peer review process on national implementation along the lines suggested by France and UNIDIR,¹ or the compliance assessment concept demonstrated by Canada, the Czech Republic and Switzerland²;
- (f) Hosting visits to biodefence or other facilities in order to build an environment of openness and collaboration in national biodefence along the lines suggested by the US³;
- (g) Conducting national biodefence conferences with open access to representatives of all States Parties as proposed by Germany.⁴

IV. WP.11's additional questions: paragraph 8

12. WP.11 also invites States Parties to consider four additional questions.

¹ BWC/MSP/2012/WP.12, 18 December 2012, *A Peer-Review Mechanism for the Biological and Toxin Weapons Convention*; and James Revill, *A Peer-Review Mechanism for the Biological and Toxin Weapons Convention*, UNIDIR, Geneva, 2013.

² BWC/MSP/2012/WP.6, 5 December 2012. *National implementation of the BTWC: compliance assessment: update*.

³ BWC/MSP/2012/WP.3, 3 December 2012, *The United States Government's Bio-transparency and Openness Initiative*.

⁴ BWC/CONF.VII/WP.14, 19 October 2011, *Confidence building and compliance: two different approaches*, page 2.

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

13. Declarations were one of the central elements in the failed 2001 BTWC Protocol. If there were ever to be new negotiations on a legally binding instrument, then declarations would form a critical component. Whether all the activities and facilities identified in the draft Protocol are still relevant today is an open question. The UK does not have a firm view on this matter as there has been no need to address the requirement. However, the Protocol declarations, along with some of the other suggestions for revised CBMs that have been made over the years, need to be taken into account in any discussion on whether additional information might help enhance assurance of compliance. As we note in the UK Working Paper on CBMs submitted at this session, we do need to revisit the CBMs and in so doing think about the sorts of activities that could be subject to greater transparency measures.

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

14. The proposals made by France for a peer review mechanism offer a promising avenue to explore in the near term as a means to enhance cooperation mechanisms under Article V. We hope that further practical work will be undertaken to test the concept. In 1997 the UK chaired the only set of meetings requested so far under the revised Consultative Meeting arrangements agreed at the Third Review Conference in 1991. We found that the procedure worked satisfactorily and think that the precedents offer useful guidance should any Consultative Meeting be convened in future. Nevertheless, the arrangements for the Consultative Meeting process could be revisited to discuss means to strengthen the bilateral and multilateral aspects of Article V along the lines suggested by the late Dr Jonathan Tucker.⁵ His recommendations included inter alia developing agreed procedures for conducting bilateral consultations in order to regularize the process and make it less open to interpretation by BTWC member states; establishing a procedure by which a BTWC member state can request additional information about a particular facility or activity listed in another State Party's annual CBM declaration; and establishing a Consultative Committee of Experts for multilateral consultations. Proposals building on these ideas are outlined further by Nicholas Sims in Harvard Sussex Program Occasional Paper Issue 3.⁶

15. Mutually agreed visits to sites of compliance concern or where further clarification of intentions is requested would in principle be useful in certain circumstances, but there are likely to be considerable problems over agreeing the parameters of such visits. Diverging views are likely over a range of topics including which on-site activities could be carried out, the rules for agreed activities such as sampling and interviews, and the proper

⁵ Harvard Sussex Program Occasional Paper Issue 1, Jonathan B. Tucker, *Strengthening Consultative Mechanisms under Article V to Address BWC Compliance Concerns*, May 2011.
http://www.sussex.ac.uk/Units/spru/hsp/occasional%20papers/HSPOP_1.pdf

⁶ Harvard Sussex Program Occasional Paper Issue 3, Nicholas A. Sims, *BWC Article V: Under-Reviewed but R for Exploration*, March 2013
http://www.sussex.ac.uk/Units/spru/hsp/occasional%20papers/HSPOP_3.pdf

interpretation of these parameters once on site. Obtaining agreement from non-state entities to permit access to their facilities and under what conditions may also be problematic. Other questions can provoke discord too: what types of inspection equipment could be used? How would the parties assess the results of such visits? Such arrangements are only likely to prosper in a mutually cooperative environment.

3. Whether mechanisms for the investigation of alleged use of biological weapons (Article VI) require further attention, including the role of the UN Secretary-General's Investigation Mechanism.

16. Further action to strengthen the UNSG investigation of alleged use (IAU) mechanism is essential. UN Member States should:

- (a) Provide experts to ensure that skill gaps and shortfalls in staffing are addressed;
- (b) Nominate analytical laboratories and address proficiency issues;
- (c) Help with further development of concepts of operations and standard operating procedures – including elaboration of a clearer organisation for the effective command and control of an investigation;
- (d) Provide training assistance in key areas for nominated experts and offer to host table-top and field exercises; and,
- (e) Help to identify equipment requirements, including certification and security aspects.

17. We do not think there is any need to duplicate the UNSG IAU mechanism for the BTWC as the Seventh Review Conference accepted that it provides a capability that should be used for any Article VI investigation.⁷

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

18. The UK believes that there are considerable possibilities created by advances in the life sciences and other enabling technologies in this context. The UK paper on scientific and technological developments submitted for the Seventh Review Conference noted, inter alia, that applications in the field of forensic epidemiology, where isolates from outbreaks or incidents can be pinpointed to a specific origin by use of comparative genomics, would be of great utility in investigation of complaints relating to violation of the Convention.⁸ The UK submission also noted that the application of advances in technologies, particularly in bioforensics, would be highly relevant in the support of investigations under Article VI.⁹ Identification of the origin of a biological agent used in a BW attack could help significantly with attribution.

⁷ BWC/CONF.VII/7 Final Declaration paragraph 29 (b).

⁸ BWC/CONF.VII/INF.3/Add.1 paragraph 99 page 24.

⁹ BWC/CONF.VII/INF.3/Add.1 paragraph 142 page 35.

V. Conclusion

19. The UK believes that a conceptual discussion on compliance at the Meetings of Experts and States Parties under the National Implementation Standing Agenda Item is desirable and timely, and not just in 2013. We think that such discussions will help pave the way for a fuller debate, and some common understandings, on how we might develop this fundamental aspect of the Convention at the Eighth Review Conference in 2016 and beyond.
