

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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Meeting of Experts on Institutional strengthening of the Convention

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Item 4 of the provisional agenda

Consideration of the full range of approaches and options to further strengthen the Convention and its functioning through possible additional legal measures or other measures in the framework of the Convention

Institutional strengthening of the Convention: Reflections on the 2001 Protocol and the verification challenge

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I. Introduction

1. The Chair of the 2018 Meeting of Experts on Institutional Strengthening of the Convention noted in his report to the Meeting of States Parties that we face essentially diametrically opposed views on the 2001 Protocol and on whether States Parties should resume negotiations on such an instrument.¹ Some States Parties argue that the only sustainable method of strengthening the Convention is to negotiate and conclude a non-discriminatory, legally binding agreement, whilst others hold that such an agreement is neither a realistic nor a practicable solution. We might also add that, given the passage of time, there is a tendency to view the 1994 Special Conference and 1995-2001 Ad Hoc Group negotiations through rose — tinted spectacles — a period in the Convention's history that began a quarter of a century ago. As the English author, L.P. Hartley wrote, "The past is a foreign country: they do things differently there."

2. Perhaps now is the time to reflect on the Protocol negotiations, the contentious issues in them and the major differences between delegations that were not resolved following the presentation of the Chairman's text of a Protocol in March 2001, and the relevance or otherwise of these considerations for MX5's future work.

II. The Ad Hoc Group (AHG)

3. Although the first AHG meeting convened in January 1995, it focussed solely on administrative matters. The first meeting on substance took place in July 1995. A major issue in the first and subsequent years was how to allocate meeting time between the four original

¹ BWC/MSP/2018/CRP.6, Meeting of Experts on Institutional Strengthening of the Convention: Reflections and proposals for possible outcomes. Submitted by the Chair of the Meeting of Experts on Institutional Strengthening of the Convention, 4 December 2018.



topics agreed at the 1994 Special Conference – compliance, Article X, CBMs, and definitions and threshold quantities. Further topics came later such as investigations and national implementation, which only made the task harder. Decisions on how many weeks should be devoted to the AHG each year were no less contentious. Some States Parties wanted to focus primarily on compliance, whilst others insisted on greater time for Article X issues, but those same delegations also argued for fewer weeks each year, suggesting that the CD, UNDC and UN First Committee were more pressing occasions. Formal negotiations on a Protocol text only began in 1997 — the first two years witnessed a lot of shadow boxing and a marked reluctance by many to commit on substance. AHG reports were discursive and necessarily exploratory and hedged with caveats; for example, such a measure ‘*could*’ contribute rather than ‘*will*’ contribute to ensuring compliance with the Convention. The first rolling text of a Protocol only appeared in June 1997.² A footnote on the front page made clear that, ‘This rolling text is without prejudice to the position of delegations on the issues under consideration in the Ad Hoc Group and does not imply agreement on the scope or content.’ This footnote remained in all versions up until March 2001 when the Chairman tabled his composite text.³

III. Substance

4. As recognised in VEREX⁴, verification of the BTWC poses unique and substantial challenges given the dual-use nature of the materials, equipment, expertise and knowledge required for an offensive biological weapons programme. This factor is compounded by the diffusion of such things across so many scientific disciplines and sectors such as molecular biology, virology, medicine, veterinary medicine, the pharmaceutical industry and plant science to name but a few. Moreover, biological agents themselves exist in nature and are living organisms. This meant, or at least ought to have meant, that thinking about and developing compliance measures, would need to consider this telling fact. The issue was therefore much more one of transparency, insight and candour, rather than material balances or counting discrete objects such as fermenters: a qualitative approach was required. That at least was the UK view.⁵

5. Despite these factors, many delegations either saw a need for the sort of routine inspections that existed in the CWC and IAEA safeguards, or opposed the levels and scope of transparency needed for a meaningful compliance regime. Many gave a higher priority to minimising the potential burden of compliance measures on their biotechnology, pharmaceutical and biodefence sectors than to the design of effective measures. Others were adamantly opposed to the very concept of on-site activity and remained so throughout the negotiations. For this reason, the scope of declarations and their content, the object and purpose of site visits and the nature of any investigatory regime to address specific non-compliance concerns were bitterly contested and divisive between delegations of all regions.

6. Arguments over what sort of practical measures were needed to implement Article X were no less contentious. Disputes over export controls were highly polarised then as now. A few delegations sought outcomes on Article X measures that would have inverted the object and purpose of the Convention by making promotion of peaceful uses of microorganisms and toxins its primary purpose, rather than the prohibition of biological weapons. For many delegations, such an outcome had to be resisted. A good deal of time was consumed trying to find a scientific and pragmatic way of dealing with the technically questionable demand aired by a few for setting permitted threshold quantities of agents that could be held by declared facilities. Reaching agreement on definitions of terms, especially important in the context of declarations, took time, even where delegations agreed that we

² BWC/AD HOC GROUP/35, 9 June 1997.

³ BWC/AD HOC GROUP/55-1, 1 March 2001.

⁴ Ad Hoc Group of Governmental Experts to Identify and Examine Potential Verification Measures from a Scientific and Technical Standpoint

⁵ See for example BWC/AD HOC GROUP/21, 13 July 1995, The Role and Objectives of Information Visits, Working Paper submitted by the United Kingdom.

needed a definition. For example, finding the right form of words to define what ostensibly seemed a simple term such as ‘vaccine’ proved to be a challenge.

IV. Scientific and technological change

7. As we have seen in recent years during considerations of S&T issues in the 2012-2015 intersessional programme and last August in MX2, a good deal has changed since VEREX met between 1992 and 1993. This will likely affect the assumptions that underpinned the AHG’s work. Concepts and techniques such as synthetic biology, CRISPR technology and additive manufacturing were unheard of in 1992. Whilst some of the Protocol’s elements might still stand up today, such as the general provisions on national implementation in Article 17 or Annex B on Investigations, it is perhaps much less clear whether the activities and facilities declarations’ provisions as laid out in Article 4 and the relevant Appendices are still viable or meaningful in today’s world. Making such an assessment now would not be trivial or quick, even without the political divergences to confound the problem.

V. Relevance today – 2019

8. The Protocol negotiations were highly contentious and divisive throughout their existence. The Chairman’s composite text, despite the herculean and considered efforts that went into balancing the diverging interests and contested views across just about every Article, still fell well short of representing a consensus text. The US rejection of the text and the very idea of a Protocol as an effective means to combat the BW threat only provided the final nail in the coffin. Others had plenty of objections to the Chair’s text and only wanted to water it down further. It was not by any means a done deal. Many of those who lament the demise of the Protocol now were amongst those who did not support the sort of measures necessary for a meaningful verification regime.

9. In BTWC MXs, MSPs and Review Conferences since 2003 there have been diverging views on the relative importance of topics such as science and technology, CBMs, national implementation, export controls, cooperation and assistance, and compliance. These have prevented any meaningful progress on agreeing effective action in the intersessional work programmes. Such divergences echo those of the AHG. They will not magically disappear should States Parties agree to resume negotiations on a legally binding instrument. On the contrary, we should expect the same diametrically opposed views on definitions, lists of agents, scope and extent of declarations, visits, investigations, export controls, measures to implement Article X, and the policy making organs’ decision making powers.

VI. Recommendation

10. For the reasons outlined above, the UK agrees with the 2018 MX5 Chair’s recommendation that the second MX5 in 2019 should elaborate on other options for strengthening of the Convention and not dwell exclusively on the Protocol and the verification question. All or nothing at all is a recipe for indefinite inaction. We must act where we can, when we can. Other options might include:

- (a) Enhancing the role of the ISU to support national implementation and intersessional work programmes;
- (b) Expanding the scope and utility of the CBMs;
- (c) Reinforcing the consultative arrangements created by previous Review Conferences for Article V;
- (d) Looking afresh at how S&T developments since 2001 might impact on the design of possible compliance measures of the sort that were elaborated in Protocol; and
- (e) Considering whether there could be value in strengthening the authorities and functions of an annual meeting of States Parties.