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# **BWC ARTICLE V: UNDER-REVIEWED BUT RIPE FOR EXPLORATION**

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## Abstract

*Article V is ripe for exploration of its non-CBM aspects. Through consultation, cooperation and clarification, its latent potential for handling compliance concerns deserves, but seldom receives, review. In HSPOP-1 (May 2011) Jonathan B. Tucker advocated strengthening consultative mechanisms under Article V. He concentrated largely on its bilateral possibilities; this paper complements that emphasis with exploration of Article V in its multilateral mode. One option is the Formal Consultative Meeting procedure, identified in 1980 as an Article V mechanism, developed in 1986-1991 and used uniquely in 1997. It deserves renewed attention to increase its acceptability. Moreover, it might be augmented by other “appropriate international procedures” if any can be devised that are informal, inexpensive and flexible. A consultative committee of experts or a clarification panel under Article V might meet BWC needs. While private demarches and quiet diplomacy have their attractions, options for the use of Article V in its multilateral mode also have advantages. Building a more publicly visible structure of consultation into the weak treaty architecture of the BWC would help restore confidence in the Convention. After noting a tendency to take compliance concerns outside the BWC altogether, the paper concludes with practical options for taking forward this exploration of Article V in (at least) the margins of the intersessional process from 2013 and preparing the way for its fuller review in 2016.*

## **Text of Article V**

The 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. 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.

# BWC ARTICLE V: UNDER-REVIEWED BUT RIPE FOR EXPLORATION<sup>1</sup>

**Nicholas A. Sims<sup>2</sup>**

## **Introduction**

The Seventh Review Conference continued the disappointing practice of the last twenty years of leaving aside the non-CBM aspects of Article V. They were largely ignored, and in consequence, the latent potential of Article V to strengthen the Convention was left unrealised. One of the lessons of the Seventh Review Conference (and its predecessors) is that this latent potential will never be realised until Article V is reviewed as fully as it deserves: which, in turn, will not happen unless an informal partnership or consortium of those interested in exploring the possibilities within Article V prepares the way for its full review. This process of exploration needs to be organised in good time, well before the Eighth Review Conference in 2016.

Article V is a protean text. It can be narrowly interpreted as providing for formal dispute settlement, one step short of bringing a complaint to the Security Council that a breach of the Convention has been found. It can be more broadly interpreted as encouraging private bilateral demarches to defuse compliance issues and public multilateral consultations when bilateral approaches fail. However, it is also permissible to see Article V as enabling cooperative problem-solving efforts to be agreed in any area of the Convention where such forward movement is possible. The programme of ‘measures’ or information exchanges agreed in 1986, and soon renamed Confidence-Building Measures (CBMs), belongs to Article V in this wider sense because it is only loosely linked to the demonstration of compliance and at every BWC meeting some States Parties are particularly insistent that CBMs must not be confused with putative ‘declarations’ under a compliance system still to be invented, or seen as a sufficient substitute for a multilaterally negotiated verification protocol.<sup>3</sup>

In short, Article V is so flexible that it can be used as formally or informally, as publicly or privately, as the parties on any occasion may desire.

## **The scope of Article V**

The scope of Article V, if its first sentence is taken literally, appears to be as wide as the Convention itself: “any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention.” Its scope is wider even than the operative paragraphs of the BWC alone. The addition of the words “in relation to the objective of” towards the close of the 1971 negotiation of the text ensured that the Preamble would be covered too, with its statement of purposes of the Convention rearranged in order to

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<sup>1</sup> This paper has benefited from comments on an earlier draft discussed in the Pugwash Study Group on the Implementation of the Chemical and Biological Weapons Conventions: 34th Workshop (Geneva, 8-9 December 2012).

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<sup>3</sup> See for example: India. *Statement by Amandeep Singh Gill*, 10 December 2012, BWC Meeting of States Parties. [http://www.unog.ch/80256ee600585943.nsf/%28httpPages%29/f837b6e7a401a21cc1257a150050cb2a?OpenDocument&ExpandSection=6%2C1#\\_Section6](http://www.unog.ch/80256ee600585943.nsf/%28httpPages%29/f837b6e7a401a21cc1257a150050cb2a?OpenDocument&ExpandSection=6%2C1#_Section6)

emphasize in the final text the prohibition of use, expressed as the complete exclusion of the possibility of biological agents and toxins being used as weapons.<sup>4</sup> However, a common understanding throughout the BWC's history has been that, within this very wide scope, there has to be a particular focus on the "problems which may arise" from concerns over compliance with the Convention.

## Jonathan B. Tucker

In May 2011, Jonathan B. Tucker in a Harvard Sussex Program Occasional Paper, HSPOP-1,<sup>5</sup> encouraged the States Parties to return to Article V as a particularly promising element of the Convention and make more imaginative use of its provisions to address BWC compliance concerns. He provided food for thought in the shape of examples, mainly using Article V in its bilateral mode but not ignoring its multilateral possibilities either.

Separately, an EU working paper distributed on 13 April 2011 at the Preparatory Committee for the Seventh Review Conference contained a hint of fresh thinking about the possibilities latent in this part of the Convention, to which it "attaches a lot of importance".<sup>6</sup> An example of one such possibility was "formal consultations on CBMs" which it said could take place under the auspices of Article V. Further examples were awaited with interest as the EU's preparations for the BWC review continued through the summer of 2011.

But at the Seventh Review Conference itself (5-22 December 2011) none of this surfaced. The neglect of Article V continued. Looking back over the history of the Convention, it seems to have lost the important place it occupied at the first three Review Conferences (1980, 1986, 1991) and to have received relatively little attention since, except in its CBM aspects; and even CBMs were, for different reasons at different times, given scant attention by most of the Review Conferences subsequent to 1991 (2011 was a partial exception). This neglect deprives the Convention of a valuable channel for the strengthening of its treaty regime in practice, through conceptual advances in the appreciation of Article V. New appreciations and extended understandings should lead to the fuller use of Article V, notably in consultative mechanisms for handling compliance concerns, and possibly also (although this is not the subject of the present paper) in other incremental measures of cooperation on which States Parties can agree.

Jonathan B. Tucker's sudden death, soon after the publication of *Strengthening Consultative Mechanisms*, came as a great shock to his family and friends. It was also a sad loss to the wider BWC community of science writers, policy advocates and scholars to which he had made many distinguished contributions. We shall never know how he would have followed up his ideas for the fuller use of Article V. Instead it is left to others to take up the exploration of Article V's latent potential.

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<sup>4</sup> John R. Walker. *Britain and Disarmament*. Farnham, UK: Ashgate, 2012, p 110.

<sup>5</sup> Jonathan B. Tucker. "Strengthening consultative mechanisms under Article V to address BWC compliance concerns". *Harvard Sussex Program Occasional Paper*, Issue 1, May 2011.

<sup>6</sup> Hungary on behalf of the European Union. *Preparation for the Seventh Review Conference 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*, BWC/CONF.VII/PC/INF.2., 13 April 2011, paragraph 8.

## The 2006 and 2011 Final Declarations: identical paragraphs on the non-CBM aspects of Article V

The failure of the Seventh Review Conference to move forward on the non-CBM aspects of Article V is confirmed by the text of its Final Declaration.<sup>7</sup> Here the paragraphs adopted are identical to those adopted five years earlier. Paragraphs 18, 19 and 21 of the Final Declaration of the Seventh Review Conference reproduce paragraphs 20, 21 and 22 respectively of the Final Declaration of the Sixth Review Conference.<sup>8</sup> The only change is the deletion of the single word 'had' before 'agreed' in the last of the three paragraphs; this deletion is shown by square brackets, below.

The Final Declaration paragraphs on the non-CBM aspects of Article V read (with the 2006 numbering italicised in brackets after the 2011 paragraph number):

18 (20). 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.

19 (21). The Conference 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.

21 (22). The Conference stresses the need for all States Parties to deal effectively with compliance issues. In this connection, the States Parties [had] 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.

Much of this 2006/2011 text is derived from the Third Review Conference in 1991, at which “the Final Declaration of the States Parties gave more attention to Article V on the provisions for consultation and cooperation than to any other Article”.<sup>9</sup> The consultation procedures referred

<sup>7</sup> BWC. *Final Document of the Seventh Review Conference*. BWC/CONF.VII/7, Part II, 2011.

<sup>8</sup> BWC. *Final Document of the Sixth Review Conference*. BWC/CONF.VI/6, Part II, 2006.

<sup>9</sup> Graham S. Pearson. “Article V: Consultation and Cooperation” in Graham S. Pearson & Malcolm R. Dando (eds.), *Strengthening the Biological Weapons Convention: Key Points for the Fourth Review Conference*, Quaker United Nations Office, for University of Bradford Department of Peace Studies, 1996, p 59.

to in these paragraphs as having been agreed at the Second and Third Review Conferences are set out most fully in the Article V section of the Final Declaration of the Third Review Conference, constituting Part II of its Final Document.<sup>10</sup>

## **Additional paragraphs offered but not taken up in 2011**

If some of Jonathan B. Tucker's ideas had been taken up at the Seventh Review Conference, additional paragraphs in the Article V section of the 2011 Final Declaration might have read:

“The Conference notes the right of any two or more States Parties to arrange by mutual consent for inspections or any other procedures among themselves 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.

“The Conference recognises that consultation visits and other appropriate international procedures, agreed by the States Parties engaged in consultation and cooperation whether bilaterally or multilaterally, may be assisted or facilitated as appropriate by the Implementation Support Unit at the request of the States Parties.”<sup>11</sup>

It should be noted that, although Jonathan B. Tucker had proposed both the option of consultation visits and the ISU's “facilitating or mediating role in consultative activities under Article V when specifically requested to do so”<sup>12</sup> as developments of Article V in its bilateral mode, they could with advantage be applied either bilaterally or multilaterally. The draft text above took this into account, and sought wording to maximise the flexibility of both proposals, as well as borrowing appropriate language from Article 9.2 of the Chemical Weapons Convention for the first of the additional paragraphs offered.<sup>13</sup>

However, these additional paragraphs offered to the Seventh Review Conference were not adopted. If they had been adopted, they would have begun the process of extending the States Parties' shared understanding of how Article V can be used and thereby started to realise more fully its latent potential for strengthening the Convention.

## **Possible ways forward on the non-CBM aspects of Article V**

Jonathan B. Tucker's warning against becoming over-prescriptive may serve as a motto for those of us who endeavour to pursue his exploration of Article V:

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<sup>10</sup> BWC. *Final Declaration of the Third Review Conference*, BWC/CONF.III/23, Part II, 1991.

<sup>11</sup> Graham S. Pearson & Nicholas A. Sims. “Article V: Consultation and Cooperation”, in Graham S. Pearson, Nicholas A. Sims & Malcolm R. Dando (eds.), *Strengthening the Biological Weapons Convention: Key Points for the Fourth Review Conference*, Division of Peace Studies University of Bradford, UK, September 2011, pp 145 &150.

<sup>12</sup> Jonathan B. Tucker. “Strengthening consultative mechanisms under Article V to address BWC compliance concerns” *Harvard Sussex Program Occasional Paper*, Issue 1, May 2011, p 13.

<sup>13</sup> See Article 9.2 of the CWC available from the Organisation for the Prohibition of Chemical Weapons: <http://www.opcw.org/chemical-weapons-convention>



“The consultative mechanism should be kept as flexible as possible, because if it is too rigid, states will be less inclined to use it.”<sup>14</sup>

So possible ways forward should be offered as options. That way, we maximise the flexibility of Article V.

These options all involve drawing out some of the latent, non-CBM, possibilities of Article V. The qualification ‘non-CBM’ may require explanation. The options presented here leave aside CBMs, not from any lack of interest in the subject, but simply because the future of the CBM component in the BWC treaty regime is a distinct subject of widely acknowledged importance and frequently discussed in BWC contexts (even if never quite adequately within the Review Conferences themselves subsequent to 1991). Its link to the rest of Article V is in any case a looser one now than it was in 1986. At that time, the agreed ‘measures’ (the first four CBMs although not named as such until an *Ad Hoc* Meeting of Scientific and Technical Experts finalised their modalities in 1987) constituted a vital bridge between Articles V and X. Since then, although still found in the Article V section of successive Final Declarations, the CBM component has long since become a BWC entity in its own right - and one which, as noted at the beginning of this paper, some States Parties are particularly anxious to keep distinct from the subject of compliance. Conceptually, too, CBMs differ from the main thrust of Article V. One way of expressing the difference is to say that CBMs seek to promote confidence by exchanging information (mostly) on normality, and doing so continuously on an annual cycle, whereas the latent possibilities of Article V to be considered here deal with prospective or putative BWC responses to abnormality, arising outside any cycle: they are intended to generate contingency plans for an eventuality which it is hoped will seldom or never arise. The EU working paper of 13 April 2011 presumably had in mind a situation involving some abnormality when it suggested the eventuality of “formal consultations” at some time being needed within the CBM component of the Convention and gave this as an example of an appropriate extended use of Article V.

CBMs exist, and are now a quarter-of-a-century old. The Seventh Review Conference left them largely unchanged, adopting only a few of the many well-considered proposals for their improvement; but it did at least make the agenda item ‘how to enable fuller participation in the CBMs’ a subject for intersessional attention in 2012 and 2013, providing a foothold which should be put to the fullest possible use.<sup>15</sup> It is the rest of Article V that can be summed up as “latent possibilities” which the Seventh Review Conference, like most of its predecessors since 1991, failed to examine - let alone develop.

The possible ways forward may be grouped under three headings. All are optional, not prescriptive, in order to retain the essential flexibility of Article V. They are:

- A. Options for the multilateral mode (1): developing the single “appropriate international procedure” already identified as a contingency mechanism;

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<sup>14</sup> Jonathan B. Tucker. “Strengthening consultative mechanisms under Article V to address BWC compliance concerns” *Harvard Sussex Program Occasional Paper*, Issue 1, May 2011, p 11.

<sup>15</sup> BWC. “Decisions and Recommendations”, *Final Document of the Seventh Review Conference*, BWC/CONF.VII/7, Part III, 2011, paragraphs 9a and 25b.

- B. Options for the multilateral mode (2): developing other forms of “appropriate international procedures”;
- C. Options for the bilateral mode: developing procedures beyond the historic use of Article V bilaterally, such as the unresolved diplomatic demarches of 1980-81 to the Soviet Union over the Sverdlovsk anthrax incident of 2 April 1979.

Jonathan B. Tucker in his May 2011 paper concentrated in effect on the third of these headings -C. Options for the bilateral mode - within which at the very least his proposal for *consultation visits* deserves further consideration among those who have the future of the BWC at heart. Here, however, the remainder of this paper is concerned with the other two headings, in order to complement his emphasis on the bilateral possibilities of Article V with an examination of how it might be developed in its multilateral mode.

### **A. Options for the multilateral mode (1): developing the single “appropriate international procedure” already identified as a contingency mechanism**

The contingency mechanism of a consultative meeting at expert level open to all States Parties was identified as an “appropriate international procedure” in 1980, and fleshed out in 1986 and 1991. It has been used only once.<sup>16</sup> That solitary invocation of Article V in its multilateral mode was initiated by Cuba when it alleged that the United States had caused a *Thrips palmi* infestation of its potato crop, first detected on 18 December 1996, by covertly spraying insects from an aircraft crossing Cuba on a permitted overflight (for drug control purposes) on 21 October 1996. The allegation, hotly denied by the United States, surfaced in a communication Cuba sent first to the UN General Assembly and only later brought into the BWC framework, invoking Article V on 30 June 1997. Cuba’s request through one of the Depositaries (the Russian Federation) led to the holding of an informal and a formal consultative meeting (FCM) on 31 July and 25-27 August 1997 respectively. The FCM was attended by 74 States Parties, which elected a Bureau to pursue further consultations in order “to clarify and resolve any outstanding issues related to the concerns raised by Cuba” and to report to all States Parties by the end of the year 1997 on the outcome of these consultations.<sup>17</sup>

The 15 December 1997 report of the Bureau to the States Parties through the FCM Chairman (Ambassador Ian Soutar of the United Kingdom) concluded that “due *inter alia* to the technical complexity of the subject and to the passage of time, it has not proved possible to reach a definitive conclusion with regard to the concerns raised by the Government of Cuba.”<sup>18</sup>

However, the Bureau also concluded that “there had been general agreement throughout the process that the requirements of Article V of the Convention and of the consultative process established by the Third Review Conference have been fulfilled in an impartial and transparent manner.”<sup>19</sup> These procedural requirements from 1991 included a time-frame (30 days to the informal meeting and 60 days to the formal meeting) but regrettably did not extend to making the report publicly available as BWC/CONS/2 - a designation it still awaits.

<sup>16</sup> Nicholas A. Sims. *The Evolution of Biological Disarmament*, Oxford: Oxford University Press, SIPRI, 2001. pp 36-50.

<sup>17</sup> BWC. *Report of the Formal Consultative Meeting of States Parties to the BWC*. BWC/CONS/1, 27 August 1997.

<sup>18</sup> Report of the Chairman of the BWC Formal Consultative Meeting, contained in a letter to the States Parties from the Permanent Representation of the United Kingdom to the Conference on Disarmament, Geneva, 15 December 1997, paragraph 7.

<sup>19</sup> *Ibid.*, paragraph 8.

At the time, the process initiated by Cuba may have been seen as an inconvenient distraction from the work of the BWC Ad Hoc Group which had been at work since early in 1995 and had just made the transition into full negotiating mode in July 1997, the very month of the informal consultative meeting on *Thrips palmi*. There is a hint of such impatience in a third conclusion of the Bureau: it “agreed that the experience of conducting this process of consultation had shown the importance of establishing as soon as possible an effective Protocol to strengthen the Convention which is being negotiated in the Ad Hoc Group.”<sup>20</sup> The sentence might have continued with the unspoken thought “and then we won’t have the bother of going to all this trouble with an FCM because there will be stronger, firmly established, compliance machinery to deal with this sort of thing properly.”

There are two other possible reasons why States Parties may have wanted to put this episode behind them, and get on with other business, rather than dissect it analytically for lessons to be learned. One possible reason is that the US Government found itself being criticised by some BW specialists even within its own arms control community for engaging in diplomacy so punctiliously when in their view the allegation was so ludicrous that the US Government ought simply to have given its Cuban accusers short shrift and refused to cooperate (although in its defence the US Government could point out that it had described the Cuban allegations as “outrageous charges” and “deliberate disinformation”).

A second possible reason arises from the nature of the allegation. It did not involve alleged attack by bacterial or viral means, or by a toxin, but by an insect pest. Did this fall within the scope of the Convention? Some thought it did and some did not. An insect pest (whatever its origin may have been) that chomps its way through a potato crop is, it may be argued, less clear-cut an instrument of biological warfare than would be an insect vector like ‘plague fleas’ disseminated to infect a human population. Following the deletion of the words “by infection or infestation” from the draft text of the BWC in the course of negotiation, there had long been uncertainty over its scope as regards insects, and several States Parties - Denmark and the Netherlands most explicitly - considered insect infestation to fall outwith the scope of the Convention regardless of how any alleged infestation had been caused.<sup>21</sup> They only went along with the FCM process at all subject to reserving their juridical position.

But the dominant reason was most likely the imminent negotiation of, in the words of the FCM Bureau, “an effective Protocol to strengthen the Convention.” Fifteen years later, and with the Protocol negotiations long halted, it may be timely to revisit the 1997 report and ask what is needed to make this already agreed procedure more acceptable in future contingencies.

How would earlier investigation have helped with resolving the *Thrips palmi* dispute in 1997? Was sufficient use made of international agencies and scientific organisations for technical assistance (an option foreshadowed in the 1986-1991 elaboration of the procedure), as well of interested governments’ own meteorologists and entomologists, to provide specialist advice to the BWC States Parties? Meteorology was relevant because of the argument that the prevailing winds in the Caribbean region in December 1996 could have carried the insects into Cuba naturally from islands where they were endemic; entomology because there was argument over whether to regard the insects as third or fourth generation, which was critical for determining

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<sup>20</sup> *Ibid.*, paragraph 9.

<sup>21</sup> Sims, reference 16, p 45.

the date of infestation and accordingly the relationship between the October and December dates in question if there were a link between the two events, which the United States continued to deny.

What other scenarios might be envisaged - distant from the *Thrips palmi* case - to which this FCM contingency mechanism might be applied? Could BWC Article V scenarios generate precautionary or heuristic exercises, somewhat analogous to the Practice Challenge Inspections of the CWC, and of the BWC Ad Hoc Group in the 1990s, with a view to raising confidence in the feasibility of invoking this contingency mechanism and increasing familiarity with its procedures?

What kind of investigation could the FCM have authorised? In what ways, if at all, was this procedure under Article V limited by 'not being Article VI'? In respect of investigation the Second Review Conference had blurred the distinction between the two Articles, according to Barend ter Haar who represented the Netherlands there: he makes a persuasive case for the existence of investigative powers under Article V after 1986.<sup>22</sup> If despite the 1986 Final Declaration text on Article V there was nevertheless doubt concerning the extent of the FCM's authority in 1997, can it be sorted out for the future before another FCM has to be convened?

In 1980 the FCM could be defined only in outline. The First Review Conference had laid the foundations of a contingency mechanism but was politically unable to do more (and its limitations were highlighted when the US declined to use this mechanism, for want of certainty, in the course of its various non-compliance accusations against the Soviet Union in the 1980s). 1986 filled in some of the gaps left over from 1980, and 1991 some of those left over from 1986. Are there gaps still troubling this contingency mechanism, gaps which could be filled without making the FCM procedure over-prescriptive?

One reason why the FCM procedure has not been invoked since 1997 could be, not dissatisfaction with the procedure itself as used then and available at any time, but rather the absence of any compliance concern of sufficient gravity to warrant invoking it instead of private demarches. According to this line of thinking, invocation of Article V in its multilateral mode is seen to require almost as high a threshold of proof as Article VI, and this is a major political deterrent to its use. So a preference for the bilateral mode whenever possible is compatible with the continued availability of the FCM procedure left as it was put into practice in 1997, still the sole identified Article V mechanism in the multilateral mode.

But does the FCM procedure have to be adversarial and accusatory? Or can it be shifted into a milder, more cooperative mode (rather as envisaged in Article 9.2 of the Chemical Weapons Convention)? What if some States Parties thought other States Parties negligent in their application of Article III (which, contrary to the impression given by the 2011 Final Declaration, is not only about transfers, but also prohibits assistance, encouragement and inducement) and wanted to use Article V to consult and cooperate over the problem of defining negligence or recklessness in relation to the *assistance* prohibition in Article III? Or what if some States Parties wanted to consult over reining in the biological defence R&D programmes of others they suspected of straying unhealthily close to the limits set by Article I? Or what if they wanted to

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<sup>22</sup> Koos van der Bruggen & Barend ter Haar. *The Future of Biological Weapons Revisited*. Netherlands Institute of International Relations, Clingendael, 2011, pp 47-48.

explore ‘questions’ arising from data exchanged in CBMs, a potential use of the Article V FCM which Barend ter Haar from personal experience sees as having been deliberately foreshadowed by the Experts of 1987<sup>23</sup> if not by their States Parties at the *Ad Hoc* Meeting?

These are just hypothetical examples. Such scenarios are unlikely to involve direct accusations of non-compliance, but they touch on compliance ambiguities and illustrate the kind of uncertainty or lack of clarity that tends to erode confidence in the Convention. Everyone might benefit from their multilateralisation in a problem-solving mode, either in an FCM at expert level or in a new procedure such as the clarification panel outlined below, so as neither to delay a solution nor overload the next Review Conference: the question should be “how do we resolve this problem now, for us all, to the benefit of us all?”

## **B. Options for the multilateral mode (2): developing other forms of “appropriate international procedures”**

In 1980 the First Review Conference recorded its consensus understanding of Article V as follows:

1. The Conference notes the importance of Article V which contains the undertaking of States Parties 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.
2. The Conference considers that the flexibility of the provisions concerning consultations and cooperation on any problems which may arise in relation to the objective, or in the application of the provisions of the Convention, enable interested States Parties to use various international procedures which would make it possible to ensure effectively and adequately the implementation of the Convention provisions taking into account the concern expressed by the Conference participants to this effect.
3. These procedures include, *inter alia*, the right of any State Party subsequently to request that a consultative meeting open to all States Parties be convened at expert level.
4. The Conference, noting the concerns and differing views expressed on the adequacy of Article V, believes that this question should be further considered at an appropriate time.<sup>24</sup>

Why have no further “appropriate international procedures” been identified since 1980? Was the impetus towards development of procedures under Article V overtaken, in the 1980s, by the smothering effect of the ‘second cold war’ and its aftermath (somewhat attenuated by 1986 and 1991 when the Second and Third Review Conferences did at least succeed in elaborating the original 1980 procedure) - and then, in the 1990s, by expectations of an altogether more comprehensive strengthening of the BWC just around the corner through the work of VEREX (1992-1993), the Special Conference of 1994 and then (1995-2001) the *Ad Hoc* Group? But those events, and expectations, are far in the past now.

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<sup>23</sup> *Ibid.*, pp 58-59.

<sup>24</sup> BWC. *Final Declaration of the First Review Conference*. BWC/CONF.I/10 (Part II), 1980.

One international procedure is frequently recommended for BWC use: the UN Secretary-General's investigative mechanism. It is so fully "within the framework of the United Nations and in accordance with its Charter" that it enjoys the combined provenance of both the General Assembly and the Security Council, deriving its authority from resolutions of the former in 1982<sup>25</sup> (and subsequently: Resolution 45/57 of 1990 is often cited) and of the latter in 1988.<sup>26</sup> But there are three reasons why this investigative mechanism is unlikely to be seen as "appropriate" in terms of Article V. First, it deals only with allegations of use (of chemical or biological weapons) and not the prior BW activities explicitly covered by the Convention. Second, its acceptability in a BWC context has already proved divisive as between different groups of States Parties, notably at the Sixth Review Conference and the 2010 Meeting of States Parties, which were prevented by China and others from qualifying this "international institutional mechanism" (the barest, most neutral, description) with any commendatory adjective such as *effective* or *impartial*. Third, even if such objections were to disappear, the UN Secretary-General's investigative mechanism would surely be attached to Article VI rather than Article V because of the widely accepted notion that it would be the preferred instrument of the UN Security Council in the unlikely event of the Council ever agreeing to act under Article VI. At both the Sixth and Seventh Review Conferences it was in fact referred to within the Article VI section of the Final Declaration with a close link to Security Council Resolution 620 of 1988 (another reference to it, and to General Assembly Resolution 45/57, having been oddly moved from the Article VI to the Article VIII section in 2011, presumably because of the 1925 Geneva Protocol link), but not within the Article V section at all.

Another international procedure might be, if it were ever created, a BWC standing committee to which export denial decisions could be taken on appeal. Iran has been proposing such a committee as a dispute settlement mechanism at least since 2010 and it enjoys some NAM support. Iran's grievance is that the international trade in biological agents for peaceful purposes such as vaccine manufacture has been improperly restricted in the name of counterproliferation: in terms of the BWC, the complaint is that a wrong application of Article III has trumped the right application of Article X. One difficulty with this proposal is that the export denials in question tend to be justified by reference not to BWC Article III but to the higher legal authority of the UN Security Council and the sanctions against Iran which it has approved. That was certainly Canada's response at the 2010 Meeting of States Parties when it was directly accused by Iran of withholding the export of materials required for vaccine production. Canada replied that it was obeying the relevant resolutions of the Security Council. The Iranian proposal has been implacably opposed by the Western Group. Again, as in the case examined in the preceding paragraph, the relevance to the BWC is by way of provisions other than Article V: in one case, through Article VI (and, at a stretch, Article VIII); in the other, through Article X (and, through alleging its misuse, Article III).

How about the "flexible, objective and non-discriminatory" mechanism of the Swedish Resolution (GA Res 37/98C) adopted by the UN General Assembly on 13 December 1982? This mechanism was to have been established by a Special Conference of BWC States Parties "to deal with issues concerning compliance with the Convention" and it would have had a much closer connection with Article V than either of the preceding international procedures. Sweden

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<sup>25</sup> UN General Assembly. *Resolution 37/98 D*, 1982.

<sup>26</sup> UN Security Council. *Resolution 620*, 1988.

in 1982 was following up the clause it had managed to insert in the Final Declaration of the First Review Conference immediately after the 'British' clause containing the contingency mechanism of a consultative meeting at expert level. This 'Swedish' clause, in the Article V section of the 1980 Final Declaration, read:

“4. The Conference, noting the concerns and differing views expressed on the adequacy of Article V, believes that this question should be further considered at an appropriate time.”

When would that “appropriate time” be? It seemed clear in the early 1980s that “it must be a time when (so far as can be told) no fresh allegation is about to burst upon the scene or suspicious event about to come under investigation. Ideally, it should also be a time when the political climate is fairly good but not so enervating as to make everyone too complacent to bother about the health of Article Five.”<sup>27</sup>

In 1982 these conditions were not present. Operative paragraph 2 of the Swedish Resolution recommended “that the States Parties should hold a special conference as soon as possible to establish a flexible, objective and non-discriminatory procedure to deal with issues concerning compliance with the Convention” (emphasis added) but voting on the Swedish Resolution divided broadly along ‘second cold war’ lines, with Western states and most neutral and nonaligned states backing Sweden, while the Soviet Union and its allies together with a small number of nonaligned states voted against.

The sequel to the Swedish Resolution was predictable. In order to initiate the process of convening the special conference, Sweden followed up its UNGA success with a Note of 17 July 1983 which the UK and US Depositaries formally communicated to all States Parties, but “Further action was deferred indefinitely while Soviet policy appeared to hover tantalisingly between obstructing the convening of the special conference and merely refusing to attend it if convened.”<sup>28</sup> On 24 April 1984, Sweden asked formally for a Second Review Conference to be convened as soon as possible. No second review was required by Article XII, and the 1980 outcome as regards the timing of any such conference had been equivocal. By the end of 1984 it was becoming clear that the special conference would not take place before a Second Review Conference, for which the date of September 1986 had at long last been agreed after much US-Soviet dissension. From then on, the quinquennial review process would take over as the dominant pattern of BWC diplomacy, and the only special conferences of BWC States Parties would be those interspersed under the authority of a review conference (to be specific, one in 1994 to consider the outcome of VEREX, and a second - it had been intended - a few years later to consider the outcome of the [1995-2001] Ad Hoc Group set up by the first special conference).

The special conference proposal of 1982 - despite the backing of a majority vote in the General Assembly - may have long since run into the sands, but nevertheless the central concept in the Swedish Resolution is worth reviving as a criterion against which to measure fresh proposals to develop Article V. There is still no better definition of what is needed to alleviate the alleged

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<sup>27</sup> Nicholas A. Sims. *The Diplomacy of Biological Disarmament: Vicissitudes of a Treaty in Force, 1975-85*. London: Macmillan; New York: St. Martin's Press, 1988, p 207.

<sup>28</sup> *Ibid.*, p 210.

inadequacy of Article V than “a flexible, objective and non-discriminatory procedure to deal with issues concerning compliance with the Convention.” It might usefully be combined with the emphasis on clarification which was already noteworthy at the First Review Conference and was written into the extended understandings of Article V - to join consultation and cooperation - by subsequent review conferences. A request for clarification need not involve accusation. It may also be more acceptable than a dispute settlement mechanism would be. The diplomatic impasse over Iran’s proposal for a dispute settlement mechanism to which export denial decisions could be appealed is likely to jeopardise the chances of agreeing a formal dispute settlement procedure for any other purpose within the Convention, even if such a mechanism were to be thought desirable.

A clarification procedure need not involve the convocation of all States Parties as in the FCM procedure. It could be run more informally and (a point that should appeal to cash-strapped foreign ministries) more cheaply. It might, for example, be a small ‘consultative committee of experts’ (the favourite terminology of the late 1970s) on call in case of need who would have been elected by one Review Conference to serve until the next. Alternatively the function might be entrusted to a politically and geographically balanced ‘clarification panel’ of States Parties acting on behalf of the States Parties as a whole. The important thing is that, whatever form it takes, the clarification procedure should be “flexible, objective and non-discriminatory” as mandated in 1982. It should also have no difficulty in matching the requirement of Article V in its multilateral mode that as an appropriate international procedure it sits within the framework of the United Nations and in accordance with its Charter.

A consultative committee of experts or a clarification panel, adaptable to the need of particular compliance concerns to be handled in different ways, would fit well with Jonathan B. Tucker’s watchword of flexibility: “The consultative mechanism should be kept as flexible as possible, because if it is too rigid, states will be less inclined to use it.”

To sum up this part of the discussion, any multilateral procedure introduced as an alternative to the FCM should be informal, inexpensive and flexible. Even then it may not be the chosen option if governments prefer to use Article V in its bilateral mode. Why should they?

Granted, there are advantages in quiet diplomacy. The political costs may be fewer and the accompanying risks attenuated. But the bilateral mode also has its disadvantages. If a private demarche is kept private after the event, other governments and the attentive public in wider civil society are not reassured. Building a more publicly visible structure of consultation into the weak treaty architecture of the BWC is therefore desirable, to restore confidence in a Convention chronically short of it; and that is where the multilateral mode, whether in the shape of the FCM alone or with the addition of an alternative procedure, has a distinct advantage over the bilateral.

The “adequacy of Article V”, questioned in 1980 and referred for further consideration “at an appropriate time”, would be easier to confirm if an informal, inexpensive and flexible procedure were to be devised as an alternative to the FCM when Article V is invoked and applied in its multilateral mode. But how should this be done?



The “appropriate time” for reviving the search for such a procedure was thought, back in the early 1980s, to be (as noted above) a time when certain conditions would obtain - a time we may indeed have reached now - when so far as can be told no fresh allegation is about to burst upon the scene nor any suspicious event about to come under investigation. The other necessary condition stated above, if adapted to a lack of complacency about the state of the BWC, is also present: there is a continuing interest in finding ways to strengthen the Convention, even if no full consensus on how that can best be done, and no one is complacent about how well its treaty regime is working. The undeveloped potential of Article V may not, however, be as close to the centre of BWC debates as might be wished. Evidently it was not at the Seventh Review Conference. This is the gap that needs to be closed. How might we set about closing it, and raising the profile of Article V with its latent possibilities? In the final section of this paper, an informal consortium or partnership is proposed for undertaking this task.

## **Going outside the Convention - or bringing compliance concerns back inside?**

But first it is necessary to remember that the Convention is not the only device available to governments anxious about the biological weapons of others. Jez Littlewood has been foremost in reminding all students of the Convention that it has no monopoly of action when serious compliance concerns arise. In 1991-92, notably “For both Iraq and Russia, the compliance issue was taken outside the BWC”.<sup>29</sup> Since then there has been a tendency to elevate this to a general principle: when serious concerns over compliance arise, governments prefer not to use the Convention. They invent something else. If this general principle is correct, and history certainly seems to have been on its side through the Convention’s first forty years, certain questions are raised. Why do governments in those circumstances not trust to the Convention? What changes would enable them to do so? Stuck with an Article VI which looks as unusable as ever (because of the structure of the UN Security Council and the veto power of its five permanent members), can the States Parties to the Convention compensate by developing Article V?

Writing soon after 1991-92, Brad Roberts had seen the Iraq and Russia alternatives of UNSCOM and the Trilateral Process respectively as examples of “*ad hoc* mechanisms [which] will also be helpful in resolving compliance concerns in instances in which circumstances permit measures beyond those in a multilateral treaty”.<sup>30</sup> Admittedly the Moscow Declaration of 11 September 1992, which formalised the Trilateral Process then already in progress unofficially as between the Russian, US and UK governments, did open with the three governments confirming “their commitment to full compliance with the Biological Weapons Convention” - but that was the limit of it. It would have been more clearly a process within Article V if it had been completed and fully reported to the next review conference as such; but because it ran into deadlock well before 1996 there was no completion to be reported. One view is that it was nevertheless an application of Article V. Another is that it represented at most the spirit, not the letter, of Article V and it is understandable that Jez Littlewood sees it as taking the compliance issue outside the BWC altogether. The same thing, according to Brad Roberts, would happen

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<sup>29</sup> Jez Littlewood. *The Biological Weapons Convention: A Failed Revolution*. Aldershot, UK: Ashgate, 2005, p 230.

<sup>30</sup> Brad Roberts. *Biological Weapons: Weapons of the Future?*. Washington, D. C.: Center for Strategic and International Studies, Washington, D.C. 1993, p 93.

on an *ad hoc* basis when “circumstances permit measures beyond those in a multilateral treaty” (whatever such measures might be). So where does this leave the Convention?

It remains the case that the sturdier the Convention’s reputation the more likely it is to be used in the future, even though it has been sidelined in the past. There is also the logical consideration that States Parties to the Convention while acting in that capacity can only improve the BWC’s treaty regime, not invent alternatives to the Convention: which has implications for those friends of the Convention who proffer ideas for their consideration. So while conscious of the past record, and fully aware of the tendency to take serious matters outside the Convention altogether, it is not illogical to pursue the development of Article V to make it more likely to be used. Then compliance concerns might more confidently be brought back inside the Convention.

## **An informal consortium or partnership to prepare the ground for 2016**

The BWC’s next Final Declaration will be that of the Eighth Review Conference in 2016. What recommendations will it receive for its review of the non-CBM aspects of Article V? Regrettably, Article V is not represented in the current intersessional agenda, except in the biennial agenda item for the years 2012 and 2013 on “How to enable fuller participation in the CBMs”.<sup>31</sup>

This almost total absence of Article V from the current intersessional agenda is unsurprising given the paucity of attention paid to Article V at the Seventh Review Conference and the disappointingly ‘status quo’ content of the corresponding section in the Final Declaration of 22 December 2011. So it will be important somehow to find a way of developing and channelling interest in Article V, in order to generate the impetus needed for the States Parties at the Eighth Review Conference to agree a much fuller text within its Final Declaration embodying their extended understandings of Article V and setting out a range of options for using it bilaterally and multilaterally from then on, and to find a place for further work on Article V within the next intersessional process, assuming there will be a fourth intersessional process stretching from 2017 to 2020.

Anything that is done to move the BWC community forward on Article V before 2016 will have to be done mostly in the margins of the official meetings of 2012-2015 and with care not to appear to be taking time or energy away from them. One might look to a group of sympathetic governments, academic institutions and NGOs, who share the same concern to move forward on the non-CBM aspects of Article V, to form an informal consortium or partnership. As in the mid-1980s, *mutatis mutandis*, such “friends of the Convention...could make a major informal contribution to governmental preparations for the formal Review or Special Conference, particularly by feeding in ideas and encouraging imaginative policies”.<sup>32</sup> These ideas and policies should develop the bilateral possibilities of Article V, building on Jonathan B. Tucker’s “consultation visits” and related concepts, as well as such of the multilateral possibilities discussed in this paper as are thought to have merit.

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<sup>31</sup> BWC. “Decisions and Recommendations”, *Final Document of the Seventh Review Conference*, BWC/CONF.VII/7, Part III, 2011, paragraph 9a.

<sup>32</sup> Sims, reference 27, p 307.

Such an informal consortium or partnership of States Parties and others interested in drawing out the latent potential of Article V to reinforce the treaty regime could work to prepare the ground for the Eighth Review Conference in 2016, operating at minimal expenditure.

This proposed informal consortium or partnership would evidently have to be sponsored and funded from sources outside the BWC intersessional budget (which includes the ISU) so it cannot be accused of competing for those scarce resources. It might operate mainly as an e-platform, or a seminar-type meeting held just before the MX or MSP weeks in 2013-2015, or in the margins within those weeks each year if necessary. Given that time in the margins of BWC meetings is scarce and opportunities for side-events are limited, workshops or seminars on Article V may need to be held in conjunction with any that are organised on such subjects as CBMs, compliance assurance and peer review. Is there a role here for UNIDIR, or the Geneva Forum or a comparable grouping, to bring interested people together?

There is now an encouraging possibility that such exploration of Article V may even be enabled to migrate from the margins 'across the hallway' into the proceedings of the Meeting of Experts itself, in August 2013.

Although (as noted above) Article V does not feature in the 2012-2015 intersessional agenda, except for the biennial agenda item on *How to enable fuller participation in the CBMs*, there may still be space for it within the work programme. The agenda item under which this is most likely is *Strengthening national implementation*, through its sub-item (e): "any potential further measures, as appropriate, relevant for implementation of the Convention".<sup>33</sup>

It is under that sub-item (e) that Australia, Canada, Japan, New Zealand and Switzerland, in their 12 December 2012 working paper 'We need to talk about compliance',<sup>34</sup> have recommended to the BWC Chair for 2013 that she should provide "for an initial conceptual discussion at the Meeting of Experts in 2013 designed to promote common understanding of what constitutes compliance with the BWC and effective action to enhance assurance of compliance." They repeat the fundamental questions which three of them had proposed at the Seventh Review Conference<sup>35</sup>

- What constitutes compliance with the BWC?
- How can States Parties better demonstrate their compliance with the BWC and thereby enhance assurance for other States Parties?

and add four more, including:

- 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.<sup>36</sup>

To "facilitate and focus this discussion" all States Parties are invited to provide their views on the questions posed to the ISU by 30 June 2013, and the ISU is requested to compile and

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<sup>33</sup> BWC. "Decisions and Recommendations", *Final Document of the Seventh Review Conference*, BWC/CONF.VII/7, Part III, 2011, paragraph 24.

<sup>34</sup> Australia, Canada, Japan, New Zealand and Switzerland. *We need to talk about compliance*. BWC/MSP/2012/WP.11, 2012.

<sup>35</sup> Australia, Japan and New Zealand. *Proposal for a working group to address compliance issues*. BWC/CONF.VII/WP.11, 2011.

<sup>36</sup> Australia, Canada, Japan, New Zealand and Switzerland. *We need to talk about compliance*. BWC/MSP/2012/WP.11, 2012.

circulate those views in advance of the Meeting of Experts. This accords with the ISU's mandate, from the Sixth Review Conference and renewed by the Seventh, to facilitate communication among States Parties.<sup>37</sup>

Before the 30 June 2013 deadline it is to be hoped that States Parties sharing their views through the ISU will find time at least to offer their latest thinking on Article V as well as on the other questions posed. The five co-sponsors of 'We need to talk about compliance' go on to say that "This discussion can and should be complemented by side-events and workshops".<sup>38</sup> A side-event or workshop on Article V would evidently fit well with their plans for an "initial conceptual discussion" in August 2013 'across the hallway' in the Meeting of Experts itself.

Subsequent side-events or workshops after August 2013 could seek to keep up interest, maintain momentum and feed ideas into the continuing intersessional discussion of compliance whatever form that discussion may take within the programme of work adopted for successive Meetings of Experts and Meetings of States Parties. Working Paper 11 'We need to talk about compliance' provides the most explicit reference to further development of Article V mechanisms. But it is encouraging to find certain other working papers of 2011 and 2012 also complementing this reference, in so far as they seek to introduce innovative practices in compliance assessment<sup>39</sup> and peer review (one approach to which includes provision for a "a safe space for clarification and consultation").<sup>40</sup> The former has already been backed up by pilot projects<sup>41</sup> and a pilot exercise has been proposed for the latter.<sup>42</sup>

Likewise the proposals from Poland for feeding in the crucial role of life scientists in the effective implementation of the Convention,<sup>43</sup> from South Africa for making better use of the Meeting of Experts each year by emphasising its technical function and differentiating it more distinctly from the Meeting of States Parties,<sup>44</sup> and from the United Kingdom for adding value to the biennial item on CBMs through a sharply focused set of key questions,<sup>45</sup> all help to shape the best use of time and level of discussion within the intersessional process. They do so, moreover, in ways which should render the intersessional process more open to the exploration of Article V and of the unrealised contribution of its latent potential to strengthening the Convention.

All this, it must be stressed, concerns only the programme of work within the intersessional process and its individual Meetings of Experts and Meetings of States Parties: one week apiece each year. It does not call into question the agenda items and sub-items which constitute the

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<sup>37</sup> See BWC. *Final Document of the Sixth Review Conference*. BWC/CONF.VI/6, Part III, 2006 paragraph 5; and BWC. "Decisions and Recommendations", *Final Document of the Seventh Review Conference*. BWC/CONF.VII/7, Part III, 2011, paragraph 31.

<sup>38</sup> Australia, Canada, Japan, New Zealand and Switzerland. *We need to talk about compliance*. BWC/MSP/2012/WP.11, 2012, paragraph 6.

<sup>39</sup> Canada, the Czech Republic and Switzerland. *National implementation of the BTWC: compliance assessment: update*. BWC/MSP/2012/WP.6, 2012.

<sup>40</sup> James Revill. *A Peer-Review Mechanism for the Biological and Toxin Weapons Convention*. United Nations Institute for Disarmament Research (UNIDIR), January 2013, p. xviii. See also: France. *A peer review mechanism for the Biological Weapons Convention: enhancing confidence in national implementation and international cooperation*. BWC/CONF.VII/WP.28, 2011; France. *Etude de l'UNIDIR sur la création d'un mécanisme de revue par les pairs dans le cadre de la Convention d'interdiction des armes biologiques et à toxines*. BWC/MSP/2012/WP.12, 2012.

<sup>41</sup> Canada, the Czech Republic and Switzerland. *National implementation of the BTWC: compliance assessment: update*. BWC/MSP/2012/WP.6, 2012.

<sup>42</sup> France. *Statement by Jean-Hugues Simon-Michel*, 12 December 2012, BWC Meeting of States Parties. [http://www.delegfrance-cd-geneve.org/IMG/pdf/Declaration\\_CIAB\\_JHSM\\_Mise\\_en\\_oeuvre\\_nationale\\_12122012.pdf](http://www.delegfrance-cd-geneve.org/IMG/pdf/Declaration_CIAB_JHSM_Mise_en_oeuvre_nationale_12122012.pdf)

<sup>43</sup> Poland. *The crucial role of life scientists in the effective implementation of the BTWC*. BWC/MSP/2012/WP.2, 2012.

<sup>44</sup> South Africa. *The intersessional process: comments and proposals*. BWC /MSP/2012/WP.7, 2012.

<sup>45</sup> UK. *Next steps on the CBMs: some key questions for 2013*. BWC/MSP/2012/WP.1, 2012.

current intersessional process. It poses no challenge to the authority of the Seventh Review Conference, because it is entirely consistent with the decisions of that conference.

The Eighth Review Conference is less than four years away. Exploring further options under Article V could make a substantial contribution to laying the foundations for its success. As so often in the history of the BWC (and of the disarmament enterprise more generally) three things are needed: creative imagination, diplomatic ingenuity and quality of ideas.

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