

Sixth session  
Geneva, 3-21 March 1997

Working paper submitted by the Friend of the Chair  
on Compliance Measures

## II. INVESTIGATIONS TO ADDRESS A NON-COMPLIANCE CONCERN <sup>1</sup>

[Investigations to address a non-compliance concern could be of two types:

- (i) Facility Investigations where there is concern that a particular facility(ies) is involved in activities prohibited by Article I and will be conducted inside the perimeter of the facility.
- (ii) Field Investigations where there is an event(s) of release of, or exposure of humans, animals or plants to microbial or other biological agents and toxins [that cause a specific concern about non-compliance with Article I of the BWC by any other State Party]. These investigations would take place in affected geographic areas.

A State Party requesting an Investigation to address a non-compliance concern could specify whether it was seeking a Facility or Field investigation.]

[Investigation of possible violations of international agreements on biological weapons could be of two types:

- (i) Investigation of alleged breach of obligations under the provisions of the Convention.

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<sup>1</sup> Where this term appears it is understood that there is no agreement on terminology. Another possible term is "challenge inspection (under Article VI)".

- (ii) Investigation of the alleged use of biological weapons.]

[All] Natural outbreaks of disease [may be] [are] of no concern under the Convention.]

[Investigations where there is a concern that a transfer has taken place which is in violation of Article III of the Convention.]

#### **(A) INITIATION**

1. Right of any State Party [to the Protocol] to request an investigation into a specific concern about non-compliance with Article I and [Article III] of the BWC by any other State Party [to the Protocol].

2. Requests for investigations could be submitted to [a future BWC organization] [the States Parties] [the United Nations Security Council, in accordance with Article VI of the Biological Weapons Convention].

3. Investigations to be conducted on the territory of any State Party or in any other place under the jurisdiction or control of the State Party regardless of the form of ownership of the facility or affected geographic area.

4. Investigations should have a clear and specific mandate.

5. Obligation on a State Party to provide in its investigation request specific information about the particular [and demonstrable] non-compliance concern.

6. Obligation to keep requests within the scope of the Convention and to refrain from unfounded requests.

7. Other States Parties could undertake to assist, to the

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The term "Protocol" is used without prejudice to a decision on the form of the legally binding instrument.

Further consideration is required in each case of whether specific references to "a State Party" mean "a State Party to the Protocol" or "a State Party to the Convention".

extent they may be capable or are requested, in clarifying or resolving matters related to a concern about non-compliance.

8. States Parties [should] [could] make [full] use [where possible and as appropriate] of opportunities for bilateral and multilateral clarification and consultation [through the Organization] [in accordance with Article V of the BTWC] to resolve these concerns [prior to and/or in parallel to a request].

9. A State Party may make a request for a [field investigation] [investigation of alleged use] about a situation either on its own territory, or on the territory of another State Party.

[In the case of a non-compliance concern involving a State Party to the Convention but which is not Party to the Protocol, the future Organization and/or States Parties where appropriate should use the relevant provisions of the Convention to seek to resolve the concern. The provisions and rights with regard to access and conduct of investigations foreseen under the Protocol could be applied to such investigations as agreed and appropriate.]

[In the case of a State Party requesting a field investigation on the territory of a non-State Party to the Convention, another State Party would need to be named as the alleged perpetrator. Consultations would need to be undertaken with the non-State Party with a view to securing access to the relevant area(s) of concern on its territory. The provisions and rights with regard to access and conduct of investigations foreseen for States Parties under the Protocol could be applied to investigations on the territory of a non-State Party as agreed and appropriate.]

Where appropriate, the future Organization and/or States Parties could have recourse to the Secretary-General and/or Security Council of the United Nations. If so requested, the future Organization could put its resources at the disposal of the Secretary-General of the United Nations.]

**(B) INFORMATION TO BE SUBMITTED WITH A REQUEST FOR AN INVESTIGATION TO ADDRESS A NON-COMPLIANCE CONCERN**

10. [Information in support of a request should include] [A

State Party requesting an investigation should provide all relevant available information, to the extent possible, including] [location, how the concern arose, the type of non-compliant activity, the specific event or activities which gave rise to the concern, the date and place of any such event, any other information indicating a non-compliance concern.] All information should be as precise as possible.

11. [There should be a requirement [for the requesting State Party] to affirm [establish] [prove] [demonstrate] that the source of the information was [reliable] [impartial], non-discriminatory, well-founded [and open to multilateral scrutiny].] [The requesting State Party should provide relevant information about the source [confirming its reliability and impartiality].] [Certain sources of information might not always be reliable.]

12. In respect of requests for investigation of a specific non-compliance concern at a facility ["facility investigation"] [challenge inspection under Article VI]], the following types of information should be included:

- (i) Information, [to the extent possible,] on the [research], development, production, stockpiling, acquisition or retention of
  - (a) microbial or other biological agents or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
  - (b) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.
- (ii) The place where the non-compliant activity is alleged to have taken place. This should include as much detail as possible [about any facility concerned,] including a description, [its] location,

boundaries and geographic co-ordinates.

- (iii) The approximate period during which the non-compliant activity is alleged to have taken place.
- [(iv) The specific events, or series of events, which gave rise to a non-compliance concern.]
- [(v) Information from and/or the outcome or results of [any] prior consultations/clarifications [or prior field investigation] relevant to the request.]

The following other types of information would also be important:

- (vi) Whether any facility concerned has been declared under the Protocol; and any information included in or absent from the declaration return relevant to the allegations.
- (vii) If not, any information to suggest that the facility concerned should have been declared under the Protocol.
- (viii) Any additional relevant information, eg. on extent and nature of the alleged non-compliant activity.

13. In respect of a request for a [Field Investigation] [investigation into alleged use] the types and quantity of information provided would vary with each request, but the requesting State Party should provide enough information to support a prima facie case of non-compliance concern, of as many of the types indicated below as possible.

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It is likely that information supporting a request will be lacking many precise details regarding the essential elements described above. This should not be allowed to prevent an allegation receiving serious consideration. It may be that one single item of evidence will be sufficient to be decisive. The burden of proof must not be placed unreasonably on to the complainant State. Further consideration needs to be given to

The following types of information should be included:

- (i) Date and time of the alleged event;
- (ii) The location, geographic coordinates and the characteristics of the area(s) involved, [whether the area is on the territory of the requesting State Party, and if not, the name of the State who controls that territory as well as the status of that State];
- (iii) A description of the circumstances under which the event took place, a description of the event itself as well as an indication of whether it was a single event or a series of events. An indication of the suspected cause and/or perpetrator of the event;
- [(iv) Reports of any internal investigation including results of any laboratory investigations;]
- [(v) The victims (human, animals or plants), the effects on them and the number affected. Symptoms and signs of the disease should be described;]
- [(vi) The alleged agent/s used and method of delivery;]
- [(vii) Affidavits of eye witness accounts, photographs, samples or other physical evidence;]
- [(viii) Epidemiological data substantiating an allegation why the event should not be considered to be a natural outbreak of disease.]

The following other types of information would also be important:

- (ix) Data on natural disease profiles and occurrences in the area affected, as well as demographic data;
- (x) Other corroborative information.

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whether or how these requirements might be modified in respect of a request for an investigation on the territory of another State Party or a non-State Party.

**(C) SCREENING (TO GUARD AGAINST ABUSIVE REQUESTS)**

14. [Requests for an investigation into a non-compliance concern [could] [should] be submitted to the United Nations Security Council for decision on whether to initiate an investigation.] [Requests for an investigation into a non-compliance concern [could] [should] be submitted to a political representative body of States Parties. Providing the request satisfied agreed requirements, the investigation would proceed [if formally approved by this representative body] [unless this body intervened to overrule the request and recall the investigation team.]]

15. [The consideration of investigation requests [could] [should] be assisted by technical advice from an appropriate body of experts [and by advice from relevant international organizations including WHO where appropriate]. [The consideration of investigation requests could be assisted by consultation with experts of States Parties to the Protocol.]

[16. In considering whether an investigation request should proceed, the political representative body of the States Parties and/or its technical advisers could also consider whether to request more information; whether to implement bi- or multilateral consultations to resolve the issue; whether to reject the request pending further information or, whether to request the WHO/FAO/IOE to conduct an investigation of an unusual outbreak of disease. The decision to proceed with any of these activities could be determined, in part, by the information submitted with the investigation request.]

**(D) MEASURES TO GUARD AGAINST ABUSE DURING INVESTIGATIONS**

17. Investigation teams should be obliged to conduct an investigation in the least intrusive manner possible consistent with its effective and timely implementation, and to collect only relevant information necessary to clarify the specific non-compliance concern.

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Further detailed consideration of this concept and these alternative options is required.

18. Right of the investigated State Party to take measures to protect sensitive installations and to prevent disclosure of commercial proprietary, scientific and national security information not related to its obligations under the Convention. These could include managed access techniques such as, inter alia: shrouding displays and equipment; switching off computer screens; granting selective access to buildings, laboratories and documentation; limiting the numbers of investigators permitted in any area at one time; controlling the time spent in particular areas.

**[(E) PRE\_INVESTIGATION PROCEDURES**

19. Designation of Site of Investigation

Obligation on requesting State Party to designate as precisely as possible the facility/site/area for investigation.

20. Issue of Investigation Mandate

Obligation to ensure the investigation mandate corresponds to the investigation request submitted by requesting State Party.

21. Appointment of Investigation Team

Obligation to ensure size and composition of investigation team correspond to requirements of specific investigation request.

22. Notification

Obligation to notify the investigated State Party of the investigation request within a specified time period [after the completion of prior mandatory consultation/clarification procedures].

23. Time frame for an Investigation

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It is understood that the obligation would fall on any organization/body to be established which is responsible for the conduct of investigations.

Ibid.

Ibid.

A State Party in which the investigation has been requested should be required to respond rapidly. Investigations into a non\_compliance concern to be conducted as soon as possible consistent with agreed procedures after the submission of the investigation request.

Requirement for investigation to conclude within an agreed period, unless there is agreement to extend it.

24. Despatch/Arrival of Investigation Team

Requirement for investigation team to be despatched and arrive in investigated State Party as soon as possible after receipt/approval of request.

Right of investigated State Party to receive a copy of the investigation mandate, on arrival of the investigation team.

Requirement for investigated State Party to transport the investigation team to site/area concerned as soon as possible.

25. Monitoring of Site

Right of investigation team to monitor all exit activity at site during course of investigation.

26. Pre Investigation Briefing

Obligation on investigated State Party to brief investigating team on facility/site/area before access begins.

27. Investigation Plan

Obligation on investigation team to inform investigated State Party of its plan of investigation activities.]

**(F) ACCESS/CONDUCT OF INVESTIGATIONS**

28. The investigated State Party [should be obliged to provide access to the investigation team, but] should have the right to restrict [or deny] access to any particularly sensitive site, area or information unrelated to the BWC.

29. If an investigated State Party were to provide less than full access to the investigation team, it [should] [be obliged to] make [every attempt to provide [reliable] alternative means of demonstrating] [all reasonable efforts to demonstrate] compliance.

30. [Access could be governed by multilaterally agreed procedures or principles.] [Extent and nature of access to a particular place or places to be negotiated between the investigation team and the investigated State Party [while enabling the investigation team to fulfil its mandate].]

**(G) IMPLEMENTATION BY THE INVESTIGATION TEAM OF SPECIFIC ON-SITE ACTIVITIES**

[31. The investigation team could seek agreement to its conducting any or all of the following specific on-site activities in the course of an investigation. The investigated State Party could have the right to restrict conduct of such activities where particularly sensitive information unrelated to the BWC (such as national security or commercial proprietary information) was at risk. If an investigated State Party were to restrict any on-site activity, it should be obliged to make every reasonable effort to demonstrate compliance through other means. Such means should include the conduct of the other on-site activities available to the investigation team.]

[Specific on-site activities should be implemented in accordance with the principles of managed access, as set out in paragraphs 28 to 30. The following activities may be conducted by the investigation team: interviewing, visual observation, identification of key equipment, auditing, medical/disease-related examination, sampling and identification and collection of background information and data.]

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Details of the implementation of specific on-site activities could be included in an annex.

[For facility investigations:]

### 32. Interviewing

The investigation team could interview any relevant personnel in the presence of representatives of the investigated State Party. [These may include a legal adviser and a senior member of facility staff.] Advance notice of interviews should be given.

Interviews could be conducted in such a way as to avoid unduly hindering the work of the site.

The investigation team should only request information and data relevant and necessary to the fulfilment of its investigation mandate. If required, interpretation could be provided by the investigation team/the Organization, or, where, requested, by the investigated State Party.

In conducting interviews, the investigation team could make use of [but not be limited to] [questions related to

declarations] [questions related to agreed lists where relevant e.g. of pathogens and toxins, and equipment].

[Interviews should be conducted according to set guide-lines.]

### 33. Visual Observation

The investigation team could [inspect] [visually observe] any part of, or items [relevant to its investigation mandate] on the investigation site.

If direct visual observation is not possible because of national security, commercial proprietary or safety considerations [or if standard health and safety regulations mean that the investigation team cannot have access to certain areas] the investigated State Party should, in accordance with paragraph 31, provide other means which could include [but not be limited to] the use of [for example] [a video camera or drawings].

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Further consideration is required of the scope and content of the investigation mandate.

#### 34. Identification of key equipment

The investigation team could [have access to] [inspect and identify] equipment at the investigation site. [In identifying key equipment, the investigation team could make use of, but not be limited to questions related to agreed lists of equipment [or to other agreed criteria for determining the relevance of equipment to strengthening confidence in compliance].

The investigation team could also note the absence of, size and quantity of dual-use equipment on the site [and compare this with information provided in declarations where appropriate].

#### [35. Auditing

[The investigation team could [have access to] [inspect] documentation and records held at the facility, as necessary to the conduct of their mission.] The investigated State Party could take measures, in accordance with managed access procedures, to protect information and records which it considers confidential for reasons of national security or commercial sensitivity.

The investigation team could take and remove copies of documents or print-outs of records from the site only with the permission of the investigated State Party.

All documents, print-outs of records or other information obtained as a result of access to documentation and records, could be required to be handled confidentially.

On-site auditing must be conducted in such a way as to minimize disruption to the normal work of the facility.

The investigated State Party should provide the investigation team with any information, such as details of national procedures/financial regulations, which may be relevant to the inspection of such documents and records.

If issues remain unresolved after an investigation which [in the opinion of the investigation team] could be addressed by specific off-site auditing, the investigation team/a future Organization/requesting State Party could pursue with the investigated State Party how this measure could be

implemented.]

### 36. [Medical examination]

In investigations involving epidemiological evidence, [such as field investigations], the investigation team could have the right to conduct medical examination, with the appropriate consent. They could also conduct autopsies where relevant.

[Appropriate] [medical] investigators could have access to other medical or veterinary information such as records, and could request the examination of laboratory animals or samples.]

### 37. Sampling and identification

The investigation team could [as a last resort and only in investigations to address a specific non-compliance concern [either in a facility or field investigation]] in accordance with the principle of [negotiated] [managed] access take samples and test for the presence of specific pathogens or toxins.

[The investigation team should be guided by the following principles:

- (i) Sampling could be the final resort to address a particular point of relevance to the non-compliance concern.
- (ii) Sampling should be used only where there is other evidence acquired during the investigation or otherwise available to the investigation team which suggests that sampling might provide significant information. [Investigators should use specific tests to focus on specific agents, strains or genes, if possible.]
- (iii) The investigated State Party has the right to take measures to protect national security and confidential proprietary information such as requiring the use of specific tests or on-site analysis [or if necessary to refuse a sample].

[If the investigation request includes information about the

possible involvement of specific agents in non-compliant activity at a site, the intention to test for such agents could be required to be stated in the investigation mandate.]

[If a specific agent has not been identified in the investigation mandate, and if the investigation team decides during an investigation that an issue can only be resolved through the use of sampling and analysis, they could also have the right to take and analyze samples to detect the presence of [listed] pathogens and toxins [of concern.]]

Any sampling and analysis could be required, wherever possible, to be carried out [on site] [on the territory of the investigated State Party] [by personnel of the investigated facility] [only in the presence of a representative of the investigated State Party]. [Where the investigation team deems on-site analysis to be impossible, it could have the right to remove samples for off-site analysis which could be done in the presence of a representative of the investigated State Party. All sampling should be conducted according to agreed procedures and methods to protect CPI.] [Analysis of samples could be carried out at laboratories designated for the purpose by the Organization.]

An investigated State Party may offer a reliable sample at any time which meets the needs of the investigation to help resolve a non-compliance concern or other ambiguity.

[If sampling resulted in substantial loss of production compensation could be considered.]]

38. [For [field investigations] [investigations into alleged use]:

- (i) [The investigation team could have access to all areas which could be affected [with the consent of the investigated State Party], [including hospitals, refugee camps, and other places it considers necessary for the effective conduct of its investigation], without interfering with national measures to contain the outbreak.]
- (ii) [If during an investigation, the team considers it necessary to extend the investigation to a neighbouring State, [the investigation should be conducted in accordance with the uniform procedures of initiation and conduct of an investigation, as

well as in accordance with the United Nations Charter and applicable norms of international law] [the United Nations Secretary-General or other appropriate persons/organization] could notify the State Party of the need to have access to its territory. The consent of the other State Party would be required. The extent of any such access would be agreed between the parties involved.]

In [field investigations] [investigations into alleged use], specific on-site activities available to the investigation team would be comparable to those available in facility investigations, but would differ in scope, aim, and implementation. Such activities [should] [could] include the following:

39. Interviewing of eyewitnesses

The investigation team could interview persons, with their agreement, who witnessed a specific incident or provide information on a series of incidents, that might be used as information in the investigation. The interview should take place in the presence of representatives of the State Party on whose territory the investigation is conducted.

The investigation team could request information relevant to the investigation which is necessary to fulfil their investigation mandate. If required, interpretation could be provided by the investigation team, or where requested, by the State Party.

40. Interviewing of potentially exposed humans and owners of potentially exposed plants and animals

The investigation team could interview humans, or personnel responsible for plants or animals potentially exposed to BTW, with their agreement in order to establish how the exposed humans, plants or animals were affected. The interview should take place in the presence of representatives of the State Party on whose territory the investigation is conducted.

The investigation team could request information relevant to the investigation which is necessary to fulfil their investigation mandate. If required, interpretation could be provided by the investigating team, or where requested, by the State Party.

41. Interviewing of Officials/Personnel

The investigation team could interview any relevant personnel, such as national/local government officials, personnel of any involved institutions, hospitals/medical facilities, etc with their agreement, in the presence of a representative of the State Party. Advance notice of interviews should be given.

The investigation team should only request information and data relevant to the incident under investigation which is necessary for the conduct of the investigation. If required, interpretation could be provided by the investigation team, or where requested, by the State Party.

[Interviews should be conducted according to set guidelines.]

42. Visual observation

The investigation team could [inspect] [visually observe] relevant areas in order to obtain information which could be relevant to the investigation. All necessary precautions should be taken to ensure the health and safety of the investigation team. The investigation team should be accompanied by representatives of the State Party.

43. Disease-related examination

Medical examination of affected humans, plants or animals potentially exposed to BTW or those unaffected, but potentially exposed could form an important part of a field investigation in order to enable the investigation team to determine whether victims have in fact been affected and what they have been affected by.

Appropriate members of the investigation team could conduct medical examinations, with informed consent, on persons affected, as well as on animals and plants affected, in order to be able to make a diagnosis.

The investigation team could conduct post mortem examinations where relevant.

The investigation team could have access to other medical, veterinary or agricultural information such as records, and could request the examination of laboratory animals or samples.

The investigation team could, where necessary and applicable, with the necessary consent, take body samples in order to diagnose or confirm a clinical diagnosis of the disease.

#### 44. Sampling and Identification

The investigation team could take and evaluate, where appropriate, environmental samples, samples of affected plants, samples of munitions and devices or remnants of munitions and devices in order to conduct tests for the presence of specific pathogens or toxins.

All sampling should be conducted according to agreed procedures and methods and be transported according to the required safety standards.

Analysis could be required, wherever possible, to be carried out on the territory of the State Party where the investigation is being conducted, and only in the presence of a representative of the State Party. Where the investigation team deems analysis on the territory to be impossible, it could remove samples for analysis elsewhere, provided the presence of a representative of the investigated State Party

is guaranteed. Analysis of samples could be carried out at laboratories designated for the purpose by the future Organization.

Where applicable, the State Party on whose territory the investigation is carried out, has the right to take measures to protect national security and confidential proprietary information.

#### 45. Collection of background information and data

The investigation team could collect and interpret background data necessary for the investigation. Background data could include normal and epidemic disease incidents and/or prevalence, demographic data and vaccine production/purchase or usage. Only data that could have direct effect on the investigation [may] could be collected.

**(H) POST\_INVESTIGATION [PROCEDURES] [ACTIVITIES]**

46. Initial [Factual] [Findings] [Report]

Right of investigated State Party to review, with investigation team, its initial [factual] [findings] [report] following completion of the investigation.

[Right of investigated State Party to request the removal from the initial findings of any information unrelated to the investigation mandate.]

Right of investigated State Party to receive information on samples taken [and copies of other data relevant to the investigation mandate to be removed by investigation team], if any [and to impose restrictions on their removal].

47. Departure

Requirement for investigation team to depart from territory of investigated State Party as promptly as possible, following completion of the investigation.

48. Final Report

Right of investigated State Party to receive draft final report within a specified time period after completion of investigation.

Right of investigated State Party to identify any information unrelated to the investigation mandate which [in the view of the investigated State Party] should not be contained in final report [and to request its removal].

The investigation team's final report could include [factual findings with regard to the concerns regarding possible non\_compliance with Article I of the BWC] [an indication of whether non\_compliant activity had taken place] [and the extent to which the investigated State Party had cooperated in the investigation].

[In case of remaining uncertainties identified by the investigation team, or in case cooperation offered by the investigated State Party is not considered to meet required standards, consultations could be undertaken to allow for further clarification.]

The final report could [make recommendations on] [take note

of] any technical or humanitarian assistance needed.

#### 49. Post Investigation Review

The political representative body of the] States Parties [could] [should] consider [collectively] (as part of post investigation review) whether a request for an investigation was frivolous, abusive or beyond the scope of the [Convention] [Protocol]. In addressing such concerns, one or more of the following factors could be taken into account, where relevant:

- (i) Information relating to the investigated site available prior to the investigation request (the authenticity and reliability of any information would need to be carefully assessed);
- (ii) Whether any of the information submitted as part of the investigation request was shown to be false;
- (iii) Information from and/or outcome or results of [any] prior consultations/clarifications relevant to the request.
- (iv) Whether any investigation(s) (including any instituted under Article VI of the Convention) had previously been requested by the same State Party vis à vis the same investigated site, and if so, their number, frequency and outcome (including any follow\_up action).

[The political representative body of the] States Parties could consider [collectively] (as part of post investigation review) appropriate [sanctions] [penalties] [actions], [by the Organization] if they decide that a request has been frivolous, abusive, or beyond the scope of the [Protocol] [Convention].

[Individual investigators and/or the Organization could be liable for damages arising from their actions, including leakage of CPI.]

Disciplinary procedures to deal with misconduct by investigators.

[The [political representative body of States Parties] [United Nations Security Council] could [consider whether there had been any non\_compliant activity] and take a decision on [any]

response or further action, [particularly if a State Party was found to have violated the Convention].]

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