

Working Paper of the Legal Subgroup on the Protection of Confidential Information

In the Proposed Protocol to the Biological Weapons Convention

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EXECUTIVE SUMMARY OF THE WORKING PAPER

Introduction

In the negotiations for a Protocol to the Biological Weapons Convention ("BWC Protocol"), the protection of private confidential information is a major issue. A BWC compliance regime will require private sector cooperation. For the regime to work, inspectors must have access to private enterprises with dual-use capabilities. Private enterprises subject to compliance measures are rightly concerned about the protection of their proprietary information and trade secrets. The negotiators of the BWC Protocol must be creative in developing provisions to protect confidential information that will not conflict with effective compliance measures

In other arms control compliance regimes, two strategies have been developed to protect confidential information: rules on the prevention of breaches of confidentiality and punishment of any breaches. When the provisions addressing confidential information in the October 1997 BWC Protocol Rolling Text are compared to the confidentiality regime in the Chemical Weapons Convention ("CWC"), two things stand out: (1) the less developed nature of the rules on preventing loss of confidential information, and (2) the efforts to go beyond the CWC confidentiality regime in connection with alleged breaches of the confidentiality rules.

Prevention Measures

The need to analyze and handle private information in order to create a public good--the reduced likelihood of the use or development of biological weapons--strongly suggests the need to craft on-going confidence building measures between the private and public spheres. A key element of the ideas presented in this Working Paper for new prevention measures is building a partnership between the proposed Organization for the Prohibition of Bacteriological (Biological) and Toxin Weapons ("OPBTW"), governments, and private industry in crafting and maintaining the BWC Protocol confidentiality regime:

Establish a formal process between the OPBTW and the Organization for the Prohibition of Chemical Weapons to review the functioning of rules on confidentiality. Private industry representatives could also be included in this cross-fertilization process.

Incorporate a precautionary principle such that in any case where it is uncertain whether information is confidential, the OPBTW and States Parties will treat it as confidential.

Allow facilities subject to inspections or visits to file formal reports on the compliance of inspection or visit teams with OPBTW's rules on confidentiality.

Create a Committee of Private Industry Experts to review periodically the confidentiality regime and make recommendations to the Conference of States Parties.

Establish in the OPBTW, and in national governments, programs to educate private enterprises about the compliance regime and to prepare them to protect confidential information.

Develop an agreement among private enterprises affected by the compliance regime: (1) not directly or indirectly to seek OPBTW confidential information from any person, entity, or government, (2) to report immediately to their governments and the OPBTW any person, entity, or country that offers them OPBTW confidential information without authorization, and (3) to cooperate with other companies in implementing corporate systems for protecting confidential information.

Post-Breach Measures

The Rolling Text's proposed attempts to go beyond the CWC confidentiality regime in connection with post-breach rules are questionable. The provisions that impose liability on OPBTW staff members and the OPBTW are inconsistent with other provisions according diplomatic immunity, would undermine the compliance mission of the OPBTW, and are politically unrealistic. Provisions attempting to constrain the discretion of the OPBTW officers or bodies in waiving immunity in cases of breaches of confidentiality rules do not seem to promise great advantages over the CWC approach.⁽¹⁾ In addition, the proposed BWC Protocol post-breach rules do not remove any of the structural or systemic obstacles to adequate compensation for a private enterprise. These obstacles, which affected the CWC confidentiality regime, appear in several forms:

Diplomatic immunity must be accorded to the staff of the OPBTW, thereby creating a barrier to rules that impose liability directly on individuals alleged to have violated confidentiality rules.

The OPBTW also must have immunity to function effectively, and proposals to create liability for it are unrealistic as States Parties to the BWC Protocol are unlikely to impose liability on themselves.

Even when immunity is waived for OPBTW staff members who have violated confidentiality rules, private enterprises will still face difficulties overcoming the lack of jurisdiction over such individuals and those individuals' lack of adequate personal resources to provide adequate compensation in the event jurisdiction could be legitimately exercised.

Sovereign immunity will prevent suits by companies in their domestic courts against States Parties that might be involved in misusing confidential information.

The BWC Protocol could encourage, or even require, national governments to write into their domestic laws the possibility of claims against such governments by companies under their jurisdiction, on the basis that unauthorized disclosure of confidential information by OPBTW staff members amounts to expropriation of property by the companies' own governments. Proposed U.S. legislation to implement the CWC facilitates such claims by American companies against the United States. Ultimately, however, this remedy is a matter of national or constitutional law within States Parties.

Conclusion

The FAS Working Group believes that the best way for the Ad Hoc Group to address the serious concern of protecting confidential information is to emphasize prevention rules. The CWC confidentiality regime provides an excellent precedent and should continue to be utilized by the BWC Protocol negotiators. Important in crafting new prevention measures will be solidifying a role for private industry in the BWC Protocol confidentiality regime.

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