

Second session
Geneva, 10-21 July 1995

THE APPLICATION OF INTRUSIVE MEASURES
ON-SITE INSPECTIONS, AUDITING, SAMPLING AND IDENTIFICATION
IN ORDER TO STRENGTHEN THE BWC

Working Paper submitted by South Africa

INTRODUCTION

During the VEREX meetings of 1993/4, the concept of intrusive inspections of facilities suspected of contravention of the provisions of the BWC (or even, perhaps, random inspections) was a disputed issue.

Intrusive measures, such as on-site inspections, auditing, sampling and identification are so intrusive that they could adversely affect the intellectual property rights of a commercial company and they would be unacceptable for use in a routine or random fashion. However, they will become necessary in circumstances where due cause for suspicion can be shown, and where all possible measures have to be applied in order to resolve whether the provisions of the convention have been contravened or not.

The circumstances where it will be necessary to apply these intrusive measures will not always be identical, therefore a formal set of rules to establish due cause, is not possible. A proper procedure to establish due cause is, however, necessary.

COMPLAINT

The process of establishing the existence of due cause for the application of intrusive measures against a state or facility, must be triggered by a complaint lodged with the Security Council in accordance with Article VI of the BWC or with an international authority established under a verification protocol of the BWC.

The complaint should contain factual evidence or enough evidence to provide reason to believe that a state has allegedly used biological or toxin weapons, is producing or transferring these weapons or otherwise acting contrary to the provisions of the BWC.

PRELIMINARY INVESTIGATION

When a complaint has been lodged, all available evidence must first be investigated by a team of experts. The nature of the investigation and the composition of the investigating team will depend on the complaint. The investigation team will be established/maintained by the international authority reporting to the states parties and/or to the Security Council.

If the outcome of this investigation is a recommendation for an intrusive inspection, evidence will be required to show:

1. That the complaint is serious and non-frivolous;
2. That sufficient cause exists to proceed with an on-site inspection;
3. That the inspection is likely to resolve the complaint;
4. That the suspect institution/facility has been identified with reasonable certainty;
5. That sufficient evidence is available to argue the issue in an appropriate legal environment.

Evidence which may be sufficiently indicative of due cause would include:

1. Evidence of alleged use;
2. Existence of containment facilities without adequate explanation;
3. Evidence of weaponizing systems for biological and toxin weapons;
4. Discrepancies in annual declarations compared with public knowledge or other intelligence.

PRELIMINARY REPORT

The investigating team will make a report to the international authority regarding the appropriateness of further action. The suspect state should be invited to present arguments to refute the evidence or allegations.

REQUEST FOR INSPECTION /EXPLANATION

In the event that the report recommends further action, the international authority must approach the suspect state with a request to allow an inspection of the designated facilities.

INSPECTION

The inspections will be carried out on the basis of managed access, where the facility can decide on whether access will be granted to certain buildings, documents or items of equipment. This confidentiality may be necessary to protect commercial interests or proprietary knowledge or know-how in the rapidly evolving biotechnological field. However, such withholding of information will be noted, and could form the basis for further suspicion.

During the investigation confidential information will become available to the investigating team. The national security and commercial proprietary rights of the investigated state and/or facility should be respected, and measures must be instituted to ensure that these rights are protected and not compromised.

REPORT

The investigating team must prepare a report to the international authority in which they detail their grounds for finding the allegation/complaint with or without substance. If the investigating team is not satisfied that the allegations/complaints are without foundation then additional inspections and investigations will be requested of the suspect state until sufficient information is available to prove or disprove the complaint.

ACTION

In the event that the suspect country is unwilling to allow an inspection, or if sufficient evidence is gathered by the inspection team to show that there is/was a contravention of the BWC, then the international authority will report this contravention to the states parties and to the Security Council with a view to appropriate action in terms of the Charter of the United Nations.
