

Strengthening the Biological and Toxin Weapons Convention

A four week session, the twentieth, of the Ad Hoc Group to consider a legally binding instrument to strengthen the Biological and Toxin Weapons Convention (BWC) were held in Geneva from 10 July to 4 August. Although as in the previous sessions, negotiations focused on the rolling text of the Protocol, the Chairman initiated a series of bilateral consultations with the representatives of the states parties participating in the negotiations to address those issues in the draft Protocol which had been categorized by the Friends of the Chair as ones on which there were strong conceptual differences in views. Ninety such consultations were held during the four week session. Overall, the July/August session saw a change to less work being carried out in formal sessions and more “give and take” discussion in informal consultations. There was further evidence that the negotiations have entered the endgame by the “bracket bazaar” held on the last two days when a number of square brackets were successfully removed in a series of trade-offs.

In the July/August session, 51 states parties and 1 signatory state participated; a total of two fewer state parties than in March session as 2 states (Cyprus, Thailand) participated in July/August whilst 4 states (Jordan, Mongolia, Panama and Singapore) which had participated in March did not in July/August. The same signatory state (Morocco) participated in July/August as in March 2000.

There was no change to the Friends of the Chair although Dr Anthony Phillips of the UK was shown in the procedural report as Friend of the Chair for Declaration Formats rather than, as in April, as Friend of the Friend of the Chair on Compliance Measures.

There was a modest increase in the number of new Working Papers — to 12 in July/August from 3 in March 2000. The 12 papers (WP.416 to WP.427) were presented by the following states (2 each by France [on behalf of the European Union], Iran, Russian Federation, and South Africa with single papers by Cuba, Germany, UK and the Ukraine). These focused on some of the outstanding issues — for example, 3 were on declaration formats, 2 on Article I General Provisions, and 2 on transfers. One WP (WP. 427 by South Africa) proposed the first text for *Article VIII Confidence Building Measures* with two CBMs — one relating to investigation of outbreaks and the other to national legislation and regulations. The language saying that “Each State Party may at its own discretion...” is much weaker than that for the current politically binding confidence-building measures agreed by the 2nd and 3rd Review Conferences.

The outcome of the July/August session was produced as a complete update of the Protocol issued as Part I of the procedural report (BWC/AD HOC GROUP/52 (Part I)). This was thus the thirteenth version of the rolling text – previous versions having been produced in June 1997 (#35), July 1997(#36), October 1997 (#38), February 1998 (#39) and June/July 1998 (#41), September/October 1998 (#43),

January 1999 (#44), April 1999 (#45), July 1999 (#46), October 1999 (#47) February 2000(#50), and April 2000(#51). Part I of the August 2000 procedural report included as Annex II copies of the letters and questionnaire sent by Ambassador Noburu of Japan, the Friend of the Chair on the Seat of the Organization, to the Ambassadors of the Netherlands and of Switzerland requesting that the questionnaires be completed and returned by the deadline of 13 October 2000. As with previous procedural reports, a Part II containing an Annex V was again produced containing papers prepared by the Friends of the Chair of proposals for further consideration in which the Part I draft Protocol text is modified in a transparent way. Annex V (Part II text) as usual reflected the structure of the Protocol with Friend of the Chair proposed language for some of the Articles and Annexes of the Protocol.

The July/August session focused on definitions and objective criteria (5 1/2 meetings), Article X measures (5 meetings), compliance measures (4 2/3 meetings), investigations (4 2/3 meetings) and declaration formats (4 meetings) with between 1 1/2 meetings to 1/6 meeting on the preamble, general provisions, confidentiality issues, legal issues, national implementation and assistance and seat of the organization. There were 3 1/6 meetings devoted to plenary meetings. As already noted there were 90 bilateral consultations during the 4 week session.

The AHG meeting as usual saw the presentation and distribution on 13 July by the Department of Peace Studies at the University of Bradford of a further three Briefing Papers in its series: No 29 *Maximizing the Security Benefits from International Cooperation in Microbiology and Biotechnology*, No 30 *Draft Resolution Establishing the Preparatory Commission for the Organization for the Prohibition of Biological Weapons* and No 31 *The CWC Paris Resolution: Unresolved Issues* as well as a further Evaluation Paper: No 18 *The BTWC Protocol: Revised Proposed Complete Text for an Integrated Regime* (all are available at <http://www.brad.ac.uk/acad/sbtwc>). The Federation of American Scientists did a presentation on implementing legislation on 25 July, repeated on 27 July.

Political Developments

A number of political statements were made between the March and July/August sessions both in Geneva and elsewhere.

On 8/9 April, the XIIIth Ministerial Conference of the Movement of the Non-Aligned Countries meeting in Cartagena, Colombia reaffirmed

the decision by the Fourth Review Conference urging the conclusion of the negotiations by the Ad Hoc Group as soon as possible, before the commencement of the Fifth Review Conference.... we call on the Ad Hoc Group to conclude its work at the earliest possible date allowing sufficient time for

the steps which would need to be taken for the consideration of the outcome of the Ad Hoc Group's work at a special conference to be held prior to the BWC's 2001 Review Conference.

A month later, on 24 May, the Final Communiqué of the Ministerial Meeting of the North Atlantic Council in Florence, Italy stated:

As we celebrate the 25th anniversary of the entry into force of the Biological and Toxin Weapons Convention (BTWC), we continue to regard as a matter of priority the conclusion of negotiations on appropriate measures, including possible verification measures and proposals to strengthen the convention, to be included as appropriate in a legally binding instrument. We reiterate our commitment to efforts to achieve such an instrument as soon as possible before the 5th Review Conference of the BTWC in 2001.

The 75th Anniversary on 17 June of the Geneva Protocol was marked by statements by President Clinton, President Putin and by the French Foreign Minister which all referred to the negotiation of the Protocol. President Clinton said:

In my 1998 State of the Union address, I called on the international community to strengthen the Biological Weapons Convention with a new international inspection system to help detect and deter cheating. Significant progress has been made in Geneva at the Ad Hoc Group of the BWC States Parties towards achieving this goal. We urge all participants in this process to work toward the earliest possible conclusion of a BWC Protocol that will further strengthen international security.

President Putin in his statement on 17 June noted that a federal bill on the withdrawal of the reservations to the Geneva Protocol made by the USSR in 1928 was tabled on 22 May in the State Duma and went on to say:

As a depositary country, Russia has constantly advocated the establishment of effective arrangements for monitoring compliance with the Biological Weapons Convention and is taking an active part in the negotiations to develop a protocol to strengthen and improve the convention.

The French Ministry of Foreign Affairs in a statement issued on 15 June said that the Ad Hoc Group negotiations were slow and laborious as they must conclude with new obligations in respect of transparency and control of biological activities, which are dual use in nature. France seizes this occasion to call all the parties to demonstrate the determination necessary to conclude these negotiations before the next Review Conference in 2001.

The G-8 Foreign Ministers meeting in Miyazaki, Japan on 13 July said:

We will make utmost efforts with others to conclude the negotiations on a Protocol which will effectively strengthen the Biological Weapons Convention as early as possible in 2001.

A somewhat stronger statement was made by the G-8 Heads of State and Government at their meeting ten days later on 23 July 2000 when their Communiqué stated

We commit ourselves with others to conclude the negotiations on the Verification Protocol to strengthen the Biological Weapons Convention as early as possible in 2001.

At the 33rd ASEAN Ministerial Meeting in Bangkok on 24–25 July the Foreign Ministers in their joint communiqué noted:

the progress in negotiating a verification Protocol to strengthen the Biological Weapons Convention (BWC) by the Ad Hoc-Group of the states parties to the BWC.

The Chairman's Statement following the seventh meeting of the ASEAN Regional Forum (ARF) meeting (consisting of the 10 ASEAN member states plus Australia, Canada, China, the European Union (EU), India, Japan, North Korea, South Korea, Mongolia, New Zealand, Papua New Guinea, Russia and the United States) held on 27 July stated:

The Ministers reiterated their support for the work of the Ad Hoc Group of States Parties to the Biological Weapons Convention (BWC) on the negotiations on a verification protocol for the BWC and their call for a speedy conclusion of the said negotiations.

During the July/August Ad Hoc Group session there were some political statements made in the opening plenary sessions on Monday 10 July. Mr Gu Ziping, Deputy Director-General of Arms Control and Disarmament Department, Ministry of Foreign Affairs of China, said:

we should make further efforts to strengthen the effectiveness of the Convention in a comprehensive and practical manner, so that the humanity can be free of the threat of biological warfare.

Noting that China had been a victim of biological weapons, he said:

Complete elimination of the threat of biological weapons is of special historical and realistic significance to the Chinese people, which has also been their long aspiration. ... China stands for the early conclusion of a good Protocol acceptable to all

and finished by saying that the Chinese delegation would continue to participate in the negotiations:

in an active and constructive way and cooperate fully with you [the Chairman] and other delegations so as to achieve an early conclusion of the Protocol.

Ambassador Carlos Amat Fores of Cuba said that "It is essential for my country that the forthcoming Protocol addresses and improves the two mainstays on which Convention builds upon: security and development". He went on to call for the Protocol to respect "the necessary balance between verification and cooperation and assistance measures. ... Should that balance be attained, it would become an important incentive for the universality of the Protocol". He emphasized that "We are convinced on the need to develop an efficient, comprehensive and non-discriminatory, legally binding international instrument".

Ambassador Ali Ashgar Soltanieh of Iran addressed both substantial and procedural issues noting that "Consensus will not be reached unless a balance is made for the promotions and regulatory pillars in the text" and on procedural aspects that "In order to increase the efficiency of the negotiation and the probability of reaching consensus, informal consultations by the chairman and the FOCs could be made with maximum transparency with those delegates mostly involved in the issues in question".

He ended by assuring “the full cooperation of my delegation and its readiness for a constructive negotiation with the hope of the conclusion of our deliberation not later than the timeline envisaged by the Fourth Review Conference”.

The Emerging Regime

In the opening session, Ambassador Tibor Toth noted that at the previous AHG session in March 2000, the Friends of the Chair had informally shared their judgement about the level of difficulty of certain issues by categorizing them, using the February AHG/50 (Part I) text as this was the latest version available during the March session, as Cat I “little controversy, relatively easy to resolve”, Cat II “medium level of disagreement” or Cat III “strong conceptual differences in views”. This informal judgement had been made available to delegations in an electronic format in which the Cat I areas of text were marked in yellow, Cat II areas in green and Cat III areas in red (This categorized version of BWC/AD HOC GROUP/50 (Part I) is available at <http://www.brad.ac.uk/acad/sbtwc/ahg50/ahg50.htm>). He therefore proposed that a parallel approach should be adopted in the July/August session with the Chairman undertaking some extensive bilateral consultations with delegations seeking conceptual ideas for the resolution of Cat III issues and with the Friends of the Chair focusing on Cat I and Cat II Issues in their sessions and in informal consultations.

The Chairman’s bilateral consultations — which totalled some 90 such consultations over the four week session — were structured so as to address clusters of issues: investigations; compliance measures and objective criteria; transfers; cooperation; and legal and other issues and organization. Oral reports were provided by the Chairman at the end of each week about these consultations with a more comprehensive briefing at the end of the session which delegations were asked to consider holistically during the period between the July/August and the November/December sessions.

Rather than as in previous Progress in Geneva reports detailing the progress in the various areas of the draft Protocol, this Progress in Geneva analyzes the principal Cat III issues, grouping them, for convenience, into the same clusters as those in the Chairman’s bilateral consultations.

Category III Issues — “Strong conceptual differences in views”

Investigations

Red Light/Green Light Initiation Procedure for Investigations
The Cat III language occurs Article III. G subsection (F) and reads as follows:

26. The investigation shall proceed [in the case of a request for a facility investigation] [if formally approved by at least a [two-thirds] [three-quarters] majority [present and voting] of the Executive Council] [unless the Executive Council decides by a three-quarters majority of [all] its members [present and voting] against carrying out the investigation] [and, in the case of a request for a field investigation, if

formally approved by a simple majority of the Executive Council members present and voting].

Investigations are the ultimate measure in the Protocol and, on the very rare occasions when they are requested, they do need to take place. These should have the presumption that they will occur — as in the Chemical Weapons Convention (CWC) — and that the safeguards against abuse will be provided both by the Executive Council voting to **stop** an investigation and by the Executive Council deciding on redress should it conclude that there has been abuse. The reality is that such investigations — as with challenge inspections or investigations of alleged use under the CWC — will be extremely infrequent — and provisions already in the text, which mirror those in the CWC, to protect against abuse will suffice. Consequently, a red light initiation procedure is vital to ensure that the Protocol regime is a strong one. A simple green light initiation procedure is not equivalent to a simple red light procedure as the presumption is quite different. Moreover, under a green light procedure absences and abstentions are tantamount to votes against proceeding — especially if majorities are based from the total membership of the Executive Council as opposed to simply those present and voting.

It is possible that consideration may be given to a mixed red/green light procedure with a red light for certain types of investigations and a green light procedure for other types of investigations which could be further divided by having different requirements (simple, two-thirds or three-quarters majority of the Executive Council) for different types of investigations. As the CWC has a red light procedure requiring a three-quarters majority, and the two regimes overlap in the area of toxins, there is much to be said for the Protocol regime being no less strong than that of the CWC.

Request for Assistance being Conditional on a Simultaneous Request for a Field Investigation In Article VI Assistance and Protection against Biological and Toxin Weapons there is Cat. III language in paragraph 9 on page 96 of AHG/51 which makes a request for assistance effectively conditional on a similar request for a field investigation.

[Requests for assistance when a State Party considers that biological or toxin weapons have been used against it shall [not be considered or otherwise acted upon by the Director-General or the Executive Council unless a field investigation request from the State Party making the Article VI request is submitted] [also be accompanied, either simultaneously or within [12] hours, by a request for a field investigation pursuant to Article III, section G].]

There is no parallel requirement in the CWC and there is no obvious reason why assistance under the Protocol should be conditional especially when it is recognised that a state party may well require assistance at a much earlier time, well before it has sufficient information to request a field investigation.

Documentation Availability During Visits/Investigations

There are differences in views about the availability of documentation during visits and investigations. For example, in respect of randomly-selected visits, there is Cat III language in Article III D. II that the visiting team may:

[(c) Examine, with the consent of the visited State Party, documentation relevant to the mandate in order to facilitate the visiting team's understanding of the activities being conducted at the declared facility. The visited State Party shall endeavour to provide such documentation, or to provide alternative means to address the questions of the visiting team if provision of any documentation is denied;]

As visits are non-confrontational measures aimed at building understanding and confidence, such language in the Protocol is helpful in that it enables the visiting team to maximize the benefits from the visit whilst enabling the visited state party to provide alternative means if, for some reason, it decides not to provide the documentation.

In the context of facility investigations, there is Cat III language in Annex D. III that:

[47. If specific issues arise during the investigation, which in the opinion of the investigation team could be resolved by the examination of specific documentation and records not available at the investigated facility, the investigation team may request the receiving State Party to provide access to these specific documents and records for review at the investigated facility in accordance with the provisions of Article III, section G, subsection G.]

Insofar as the documentation in the context of facility investigations is concerned, it is in the interests of the investigated state party to do all that it can to resolve any issues that arise during an investigation — and the provisions in Article III, section G, subsection G include the option for the investigated state party to provide alternative means should it decide not to provide full access to information.

Sampling During Visits/Investigations There are differences again in regard to sampling in both visits and investigations. In respect of visits, there is Cat III language in Article III D. II that:

[(h) Sampling shall not be conducted unless offered by the visited State Party and visited facility personnel and deemed useful by the visiting team. Any mutually agreed sampling and analysis shall be performed by facility personnel in the presence of the visiting team and representatives of the visited State Party. The visiting team shall not seek to remove samples from the facility.]

Sampling is unlikely to be necessary or appropriate in the course of visits and such language is therefore reasonable.

In respect of investigations, differences are in respect of the detail regarding precisely where analysis of a sample shall take place — thus there is Cat III language in Annex D I that “[Analysis [of a part of a sample] should, whenever possible, be carried out on the territory of the receiving State Party]”, in Annex D II Field Investigations that “Analysis [of one of the sealed duplicate samples referred to in paragraph 40] shall, whenever possible be carried out on the territory of the receiving State Party”, and that “samples shall be analysed in two designated and certified laboratories [in different States Parties]” and in Annex D. III Facility Investigations that “Where possible a sample [shall][may also] be analysed in an accredited and certified laboratory on the territory of the receiving State Party”.

In the case of investigations, it is of crucial importance that the analytical results of samples shall be unequivocal

and thus that the samples shall be analysed blind in designated and accredited laboratories in at least two states parties with the possibility of further samples being analysed in a designated and accredited laboratory in a third state party should the results from the first analyses be inconsistent. It is unsound and imprudent to suggest that samples from an investigation be analysed **only** in a designated and accredited laboratory in the receiving state party — and this would not be in the interests of the states parties to the Protocol as it could bring the Protocol into disrepute.

In the context of sampling and analysis, it is to be noted that attempts in the Protocol text to set deadlines, for example, for the carrying out of the analysis in the designated and certified laboratories in separate states parties of samples taken during investigations are unwise as there can be no certainty that these designated and certified laboratories will have the capacity available to carry out these sample analyses within a set time. The Protocol regime will fall into disrepute if the analysis of samples is not carried out using the highest international standards.

Access and Executive Council Procedures for Visits/

Investigations There is Cat III language at various points in Article III and in Annex D relating to access, to the report of the visit/investigation and to Executive Council procedures. Thus, there is Cat III language in that the visiting team shall:

[(f) Have the right to state the relevance of questions asked by the visiting team and objected to by the visited State Party; the team leader may ask the visited State Party to reconsider its objection. The visiting team may note in the final report any refusal to permit interviews or to allow questions to be answered without any justification given for any such refusal by the visited State Party.]

that:

[The draft report shall also include an account of the degree and nature of access and the cooperation provided by the visited State Party in order to fulfil the visit mandate.]

and that:

[The Director-General may, with the consent of the visited State Party, provide copies of the final report, on request, to any other State Party.] [The Director-General shall, as a rule, provide copies of the final report, on request, to any other State Party, taking into account the provisions of Article IV, paragraph 4 (d) [, unless otherwise indicated by the visited State Party].]

Likewise in Art III. G regarding access during investigations there is Cat III language that:

[46. The investigation team may, during the course of the investigation, request the receiving State Party to provide access to a facility, building or other structure as objects of investigation within the area(s) designated for investigation [if the field investigation mandate already specifies that access to such a facility, building or other structure may be required, or] if access is required in order to fulfil the field investigation mandate. The investigation team shall, together with its request for access, provide the receiving State Party with information substantiating its request.

and also in respect of the review by the Executive Council of the final report of an investigation that:

[54. The Executive Council shall, in accordance with its powers and functions as determined in Article IX, section C, review and consider the final report of the investigation team as soon as it is presented, and address [and decide on] any concern as to whether:

- (a) Any non-compliance has occurred;
- (b) The request had been in accordance with the provisions of this Protocol;
- (c) The right to request an investigation has been abused.]

The access provided during visits and investigations is a crucial element of the Protocol regime as it is through access that transparency is demonstrated and confidence is built that the receiving state party is in compliance with the Protocol and the Convention provisions. There are adequate provisions already in the Protocol to protect commercial proprietary information or national security information enabling the receiving state party to use alternative means to meet the requirements of the visiting or investigating teams. It is important that the reports of visits and investigations include factual accounts of the access provided by the receiving state party as this will facilitate the accurate appreciation by other states parties of the effectiveness of the Protocol regime and, over time, build confidence. It should also be recalled that there are extensive provisions enabling the receiving state party to review the report of the visit or investigation and to comment upon that report so that any inaccuracies can be readily countered and corrected. Consequently, reports of visits and investigations should be made available to other states parties as it is through such reports that transparency is increased and confidence is built that the regime is being applied effectively and equitably to all states parties.

Compliance Measures and Objective Criteria

The Cat III issues are considered in three groups — declarations, declaration follow-up procedures and definitions and thresholds.

a. Declarations

Date for Initial Declarations (1925/1946/1975) The draft Protocol contains in Cat III language alternative dates — 17 June 1925 (the date of signature of the Geneva Protocol), 1 January 1946 (the date agreed by the states parties at the Third Review Conferences for the information to be provided under the Confidence-Building Measures) and 26 March 1975 (the date of entry into force of the BTWC) — for the initial declaration of past offensive programmes and an even greater range of dates — of 1 January 1946, 26 March 1975, the date of entry into force for a state after 26 March 1975, 31 December 1991 and five years prior to the first annual declaration for that state party — for the initial declaration of past defensive programmes. In considering these alternative dates, it needs to be remembered why these declarations of past offensive and defensive programmes are required — to build confidence between and increase transparency within states parties to the Protocol. As the

states parties to the Convention have already agreed in 1991 as a Confidence-Building Measure to provide information on both past offensive and past defensive programmes since 1 January 1946, and states parties are already politically bound to provide this information, there is much to be said for adopting the same date, 1 January 1946, for the Protocol initial declarations. To adopt a later date would be incompatible with the object and purpose of the Protocol whilst there is no compelling argument for the earlier date of 17 June 1925 especially given the uncertainty that information would be available in full from that earlier date. The date of 1 January 1946 should be adopted for the initial declarations and, as has been the case with the information provided under the Confidence-Building Measures, individual states parties can provide earlier information where that is available thereby providing a more complete appreciation of the past offensive and defensive programmes. Adoption of the date of 1 January 1946 would also be consistent with the CWC requirements for declarations of chemical weapons transfers and chemical weapon production facilities since that date.

It is, however, possible that a compromise may be sought in which the amount of detail sought is related to the date selected with more detailed information being sought for a more recent date. The requirements for past defensive declarations might be more detailed with an effective date being the entry into force of the Protocol or a certain number of years prior to the entry into force of the Protocol. There is no compelling argument for such later dates given that the existing CBMs have been agreed by all states parties and the purpose for these past declarations is to increase transparency and build confidence between states parties.

Testing and Evaluation, Production Information in Declarations

Whilst there is general agreement that research and development activities should be declared under the initial declarations of past offensive and defensive programmes and/or activities and under current declarations of defensive programmes and/or activities, there is Cat III language where the words “testing or evaluation, and production” occurs in the requirements for these declarations. This general agreement on the declaration of research and development activities reflects the agreement that such declarations should be made under the politically-binding Confidence-Building Measures agreed by the states parties at the Second and Third Review Conferences. As the **purpose of all** the declarations in the Protocol is to increase transparency in and confidence between states parties, it is illogical to provide incomplete information on past offensive and defensive programmes and on current defensive programmes as it is incomplete information that gives rise to suspicions and concerns about compliance. The information provided should cover **all** the activities within these past and current programmes as comprehensive and complete information is vital to increasing transparency and assuring other states parties that activities within a state party are for permitted purposes. However, the requirement for such comprehensive and complete information should be tailored so as to provide transparency and to build

confidence — it does not require and should not seek, for example, information about detailed performance capabilities of current biodefence equipment.

Declaration Triggers (BL-3, Work with Listed Agents, Other Production Facilities, Other Facilities, Outbreaks) A balance has to be struck between those facilities of **most** relevance to the Convention and facilities of some relevance to the Convention. In considering declaration triggers and the associated declaration formats in Appendices A, B and C it is important to bear in mind the information available from the BTWC Confidence-Building Measures on the numbers of biological defence facilities, maximum containment (BL-4) facilities and vaccine production facilities around the world as this gives a useful indication, even though only about half the states parties have provided information, of which triggers and declaration formats will capture information from a greater number of states parties. This information, based on the 1997 CBM responses, shows that some 43 biological defence facilities were declared by 15 countries, some 49 maximum containment facilities declared by 22 countries and some 162 vaccine production facilities declared by 36 countries (The detailed information is on pages 9 & 10 of Evaluation Paper No 18 available on <http://www.brad.ac.uk/acad/sbtwc>).

From this, it is evident that biological defence facilities are only likely to be declared in a small number of countries (15), and that the addition of maximum containment facilities only increases the number of countries by six. It is only when vaccine production facilities are considered that the number of countries increases by another 15 to a total of 36. Given the Protocol objective of increasing transparency and building confidence between states parties, triggers such as “Other Production Facilities” and “Work with Listed Agents and Toxins” are necessary in order to increase the distribution and spread of relevant declared facilities both within these countries and to additional countries.

The declaration triggers that are currently assigned to Cat. III are the following:

- **BL-3 facilities.** The focus on containment facilities is seen as basically flawed as containment standards are primarily a manifestation of the more developed countries within which there is generally a developed national infrastructure which will monitor and inspect such maximum containment facilities. It is also a fact that countries which have in the past developed offensive biological weapons have done so without using containment facilities. Nevertheless, it is recognized that there is a perception that the capabilities in maximum containment (BL-4) facilities might be misused and therefore should be subject to appropriate compliance monitoring. However, there is not a strong argument for high containment (BL-3) alone as a trigger for declarations.
- **Work with Listed Agents.** There is a need for the declaration of facilities working on listed agents and toxins that also have one or more of the following characteristics:
 - a certain scale of production capability;
 - work on certain types of genetic modification; or

— work on aerosolization.

- **Other Production Facilities.** It would be illogical to require declaration of vaccine production facilities and not to require declaration of other production facilities although the requirement for declaration needs to be precise so that only the most relevant facilities are declared.
- **Other Facilities.** There is a need for the declaration of facilities which:
 - possess aerosol test chambers for work with microorganisms and toxins;
 - possess equipment for aerosol dissemination in the open air with a particle mass median diameter not greater than 10 microns; or
 - conduct genetic modification within a high containment facility (BL-3) to enhance pathogenicity, virulence, stability or resistance to antibiotics or which are intended to alter the host range, the infection route or the ease of identification or diagnosis.

This declaration trigger might be combined with the trigger on work with listed agents and toxins.

- **Disease Outbreaks.** The future Protocol Organization will need to have background information on human, animal and plant disease profiles around the world. It is, however, apparent that information on outbreaks of disease is increasingly being reported both officially and unofficially at the national, regional and international level. It is also evident that there is considerable variation between states in which diseases are reported nationally, regionally and internationally. Consequently, a requirement for states parties to report on outbreaks of disease to the future BWC Organization would necessarily result in different reports from different countries because of the different national reporting systems and would also be an unnecessary duplication of existing reporting systems. States parties under the Protocol should be encouraged to improve their disease surveillance systems and their national, regional and international reporting of such information to organizations such as the WHO, FAO and OIE. In addition, it would be useful if states parties would provide copies of such disease surveillance information, to the extent possible, to the future Protocol Organization.

It is to be noted that in its consideration of Declaration Formats in the Appendices to the Protocol, the Ad Hoc Group is engaged in far more detailed elaboration than in the negotiation of the CWC where the detailed declaration formats were addressed in the PrepCom phase.

b. Declaration Follow-Up Procedures

Randomly-Selected Visits to All Declared Facilities The Cat III language relates to two points — first regarding the facilities to receive the randomly selected visits “to [declared] [biodefence and BL4] facilities” and second regarding the purpose of these visits and whether these are “[Promoting accuracy of declarations] [Promoting the accurate fulfilment of the declaration obligations under this Protocol]”. Infrequent randomly-selected visits to **all** declared facilities are necessary to ensure that declaration obligations are consistently fulfilled. If such visits were to

be limited to biodefence and BL-4 facilities then there would be very few visits to the majority of states parties. The consequence would be that, should there subsequently be an investigation in one of those states parties which had never been visited by the Technical Secretariat, there would be a greater probability that the investigation may reach an incorrect conclusion because of a lack of understanding of the approaches to microbiology and biotechnology in that country. In addition, in respect of visits, it has to be recognized that the frequency of such visits will be controlled effectively by the Conference of the States Parties through their annual scrutiny and approval of the programme and budget of the Protocol Organization, and it is unnecessary therefore in the Protocol, as in the CWC, to specify an overall limit for the number of visits, of whatever type. Indeed, specification of such a limit in the Articles of the Protocol would be unwise as it would reduce flexibility and further it is inefficient as it would remove the incentive for the future Organization to optimize its operations. Additional visibility of the planned visits could be achieved through the Director-General, every three months, notifying the Executive Council of the overall plan of visits for the forthcoming three months; the overall plan should not include sufficient detail to enable states parties to identify which states parties would receive a visit in the next quarter.

It is possible that certain guidelines might be agreed for the proportions of the three different types of visits with the randomly-selected visits being perhaps about two-thirds of all visits and the remaining visits split in a 2 to 1 ratio between assistance and clarification visits. In addition, the numbers of randomly-selected visits to a state party might range between a lower limit and an upper limit with particular provisions for the frequency of such visits to biodefence facilities. The important thing is to avoid over-prescription of the visits regime as the future Organization must have the flexibility to develop in the light of experience. After all, the CWC has shown that there is more than enough control in the Conference of States Parties and the Executive Council of the inspection regime which is not overspecified in the CWC.

Clarification Procedures Regarding Facilities that Appear to Meet the Requirements for Declaration and Have Not Been Declared The language addressing how such clarifications should be processed has been assigned to Category III. There is a need for a non-controversial, non-confrontational and non-accusatory clarification procedure in respect of any ambiguity, uncertainty, anomaly or omission in declarations whether of declared facilities and/or activities or of facilities and/or activities which should have been declared. Such clarification requests should be initiated by the Protocol Organization or at the request of a state party. It is evident from the Organization for the Prohibition of Chemical Weapons (OPCW) experience that there are numerous occasions on which clarification is needed of information provided in declarations received from states parties. Indeed, the OPCW Director-General in his address to the Fifth Conference of the States Parties on 15 May 2000 spoke of “certain implementation-related inconsistencies and technicalities which, unfortunately, continue to occur.

However, they are being addressed and corrected”. The vast majority of these ambiguities, uncertainties, anomalies or omissions have been resolved through correspondence or consultation with the state party concerned and do not necessarily result in an on-site activity. In some situations, a visit to the facility and/or activity concerned may well be the most efficient and effective way of resolving the ambiguity, uncertainty, anomaly or omission. However, should a state party consider that it has taken all reasonable steps to clarify the ambiguity, uncertainty, anomaly or omission then it can refuse the proposed clarification visit. Such refusals should be reported to the Executive Council. There is much to be said for declaration clarification procedures applying **both** to declared facilities and/or activities **and** to facilities and/or activities that the Protocol Organization or a state party believe appear to meet the criteria for declaration and have not been declared. Safeguards could be incorporated such as recognizing that clarification procedures should not necessarily result in on-site activities and providing a relatively low ceiling for the number of such clarification visits to a state party. Such procedures, with their minimal political profile, will add significantly to the increase of confidence by states parties over time that other states parties are in compliance with the Protocol. Consequently, resolution of such ambiguities, uncertainties, anomalies or omissions from declarations should not become blurred into the C3 (Clarification, Consultation and Cooperation) process of Article III. E which should be reserved as the first stage in addressing non-compliance concerns.

c. Definitions and Thresholds

Definitions There are a number of instances in the Protocol (*Art I General Provisions, Art II Definitions*) where there is language within square brackets, which has been categorized as Cat III, which would have the effect of modifying the BWC. As the mandate for the Ad Hoc Group is *to strengthen the effectiveness and improve the implementation of the Convention* through the consideration of *appropriate measures, including possible verification measures, to strengthen the Convention to be included, as appropriate, in a legally binding instrument*, it is clear that the Ad Hoc Group has a mandate to develop a Protocol to strengthen the BWC — but **not** to **amend** the Convention. Consequently, it is beyond the mandate of the Ad Hoc Group to propose language within the body of the Protocol which in any way amends the scope of the Convention. Whilst it is appropriate for the Preamble to set the Protocol in the wider framework of the Convention and its Review Conferences, care needs to be taken within the Protocol — such as in *Article I General Provisions* or *Article II Definitions* — not to amend the scope of the Convention. The place for considering an extended understanding of the BWC is in the Review Conferences of the Convention where such extended understandings can be and are reflected in the Final Declaration. Two working papers (WP.418 Germany & WP.419 Iran) during the July/August session proposed alternative language for *Article I General Provisions*.

In respect of *Article II Definitions* there has long been a divergence of views as to what should be defined and what should not. There is, however, a general recognition that care needs to be taken to ensure that nothing in the Protocol might be perceived as modifying in any way the basic prohibitions in Article I of the Convention. There is also broad agreement that in order to avoid ambiguity there is a need for definition of some of the terms used in the language relating to the provision of declarations and in other measures. There is much to be said for limiting definitions and objective criteria to those **necessary** for an unambiguous and effective Protocol. This would be in accord with the mandate requirement for the consideration of definitions and objective criteria *where relevant for specific measures designed to strengthen the Convention*.

Thresholds Because of the nature of microorganisms and the ease with which they can be grown, there is less technical justification for thresholds in the BWC Protocol than in the CWC. However, as in the CWC, there is a need for quantitative information in the declarations made under the Protocol and there are therefore quantitative thresholds that will need to be exceeded in order for a declaration to be required. Consequently, the Protocol would be expected to include, where appropriate, the need for declarations when the stated threshold capacities have been exceeded. There is no requirement, however, for the determination of individual thresholds for individual agents and toxins nor is there any requirement for the exceeding of a threshold to be notified to the Organization.

Transfers

Transfer Guidelines (Art III of The BTWC, Non-Impedance of Economic and Technological Development Issues) The Cat III language relates to several elements of *Article III. F. Measures to Strengthen the Implementation of Article III* (of the Convention) as well as to language in Article VII Section (C) referring to maintenance of discriminatory measures or restrictions. As the mandate of the Ad Hoc Group is to consider measures “to strengthen the effectiveness and *improve the implementation* of the Convention” [emphasis added] it is both appropriate and necessary to consider measures to strengthen Article III of the Convention. It needs to be appreciated that in order to permit a transfer, the state making a transfer will need to have confidence that the transfer to a state party to the Protocol is:

- a. **only** being used for permitted purposes;
- b. **not** being retransferred, without approval, to another facility within the receiving State Party; or
- c. **not** being retransferred, without approval, to another State Party to the Protocol.

The requirements are thus three. First, that there should be **transparency** as to what the transferred materials and equipment are being used for. Secondly, that there should be **national internal** controls on the facilities within a state party to the Protocol in which particular agents are handled and on transfers between such facilities. Thirdly, that there should be **national** controls of **interstate** transfers from the

state party to the Protocol to other states parties. The Protocol regime should establish minimum standards for transfers and it would be a matter for individual states as to whether they decide that they need to adopt and implement higher standards. It needs to be recognized that over time after the entry into force of the Protocol **for the requesting state**, the state making the transfer should gain greater transparency of activities in the requesting state together with greater confidence that the requesting state has indeed the appropriate **national internal and interstate controls** both in place and in operation — and thus the transfer is more likely to be approved. Such confidence will over time decrease in regard to states who have not become party to the Protocol and it is evident from the CWC experience that a regime in which transfers to non-states parties to the Protocol is likely to become increasingly controlled and prohibited. Such a situation both contributes to enhancing the safety and security of states parties to the Protocol and provides a strong incentive for non-states parties to become party to the Protocol.

Two working papers at the July/August session addressed transfers from rather different viewpoints. WP. 424 by the UK focussed on how to ensure that dual use biological capabilities are used for peaceful purposes only and demonstrated the importance of both the Protocol and effective export controls. It concludes that any genuine remaining problems with export denials can best be dealt with under the Protocol by improving transparency and providing opportunities for dialogue. WP. 426 by Iran addressed the settlement of disputes on transfer denial outlining a possible settlement process under the Executive Council. WP. 426 focuses virtually exclusively on Article X of the Convention and Article VII of the Protocol with Article III of the Convention only being mentioned in the first sentence.

Cooperation

Cooperation Committee Role Whilst there is general agreement about the establishment of the Cooperation Committee, there is Cat III language in respect of some aspects relating to the Committee. Thus, in Art VII, para 13 there is language that:

[13. [The Committee shall be open to all States Parties] [The members of the Committee shall be elected for a term of two years, on the basis of an equitable geographical distribution, in accordance with Article IX, paragraph ... of this Protocol].]

[13 *bis* The Committee shall be a pluridisciplinary body open to the participation of all States Parties and shall comprise government representatives competent in the relevant fields of expertise. The Committee may establish working groups on an ad hoc basis.]

and in para 15 that:

15. The chairmanship of the Committee shall rotate annually between each regional group, as defined in Article IX, paragraph ..., represented in the Committee. [Decisions shall be taken [by consensus] [in the same manner as decisions by the [Conference of State Parties] [Executive Council], in accordance with Article IX, paragraph ...].] [Recommendations shall be agreed by consensus.]

A Cooperation Committee open to the participation of **all** states parties would rapidly become unwieldy as the number of states parties to the Protocol grew. It is therefore appropriate to require membership to be drawn on an equitable geographical basis from among the states parties to the Protocol. The requirement that the Committee be a pluridisciplinary body comprising government representatives competent in the relevant fields of expertise is a statement of the obvious as states parties can be expected to appoint appropriate representatives — after all, there is quite correctly no comparable specification for members of the Conference of the State Parties or for the Executive Council. As to decisions and recommendations, these should be taken by consensus.

Biodefence in Art VII of the Protocol The Cat III language is in respect of all mentions of biodefence in Article VII. The measures in *Article VII Scientific and Technological Exchange for Peaceful Purposes and Technical Cooperation* are an important part of the Protocol contributing **both** to promoting technical cooperation between states parties to the Protocol **and** to increasing transparency and enhancing confidence in compliance. The breadth of activities covered in Article VII including surveillance and countering of infectious diseases, biosafety and good manufacturing practice is welcomed as it is recognized that the infrastructure required by states parties to carry out such activities will indeed, over time, lead to increased transparency and enhanced confidence. Nevertheless, it is important to avoid unnecessary duplication and for the Protocol Organization to concentrate on those measures for which it is particularly well fitted. It would be inappropriate to address biodefence related activities in Article VII although in Article VI, it could be appropriate to note that the states parties may benefit from scientific and technological exchanges pursuant to the provisions of this Protocol, including Article VII thereof.

Legal and Other Issues and Organization

There are several Cat. III issues under this heading. For convenience, they are considered here in three groups: legal issues; other issues; and organization.

a. Legal Issues

Redress Situation — Report to UN General Assembly/ Security Council In *Article V Measures to Redress a Situation and to Ensure Compliance* there is Cat III language concerning which United Nations body the issue should be brought to:

4. The Conference or, alternatively, if the case is particularly grave and urgent, the Executive Council, may bring the issue, including relevant information and conclusions, to the attention of the [General Assembly [and] [or] the Security Council of the] [relevant organs of the] United Nations.

There is no reason why this should not be brought to both the General Assembly and the Security Council in exactly the same way as for the CWC.

Dispute Procedure In *Article XII Settlement of Disputes* there is Cat III language, highlighted in bold below, concerning the procedure to address disputes:

The parties to a dispute [shall] [may] inform the Executive Council of the commencement of consultations, and shall keep the Executive Council informed of the actions being taken [and their outcomes].

In parallel with the CWC Article XIV requirement that “the States Parties involved shall keep the Executive Council informed of actions being taken”, it would be logical under the Protocol to require that the parties shall inform the Executive Council of the commencement of their consultations and shall also inform the Executive Council of the outcomes.

Frequency of Review Conferences (5/10 years) In Article XIII Review of the Protocol, the alternatives of **[5][10]** years for the convening of the first Review Conference and the frequency of subsequent Review Conferences are shown as Cat III language. There is much to be said for the first Review of the Protocol occurring within 5 years after entry into force and subsequent Review Conferences at 5 year intervals because this frequency has worked well for the BTWC and is also being used for the CWC — and a first Review Conference after 5 years is clearly not being regarded as too soon in the context of the CWC.

Amendments to Annexes/Appendices There is Cat. III language in Article XIV Amendments regarding proposals for changes in the technical sense of a simplified procedure, distinct from amendments, to Annexes and Appendices of the Protocol:

[1. Any time after the entry into force of this Protocol any State Party may propose amendments to this Protocol or its Annexes or Appendices. Any State Party may also propose changes, in accordance with paragraph 4, to [the Annexes and Appendices of this Protocol] [specified parts of this Protocol or its Annexes or to its Appendices].

and

4. In order to assure the viability and effectiveness of this Protocol, provisions in [sections ... of the Annexes and Appendices] [the Appendices, sections of the Annexes, and those sections of Article III, section D, which are so identified in that Article,] shall be subject to changes in accordance with paragraph 5, if the proposed changes are related only to matters of a technical or administrative nature.

There is a strong argument, as in the CWC, that changes in this sense of a simplified procedure, distinct from amendments, should apply **only** to **specified** parts of the Protocol or its Annexes and Appendices, that **all** changes to Section I Lists and Criteria (Agents and Toxins) of Annex A should be made in accordance with paragraph 5 (thereby paralleling the CWC Article XV provisions in respect of the CWC Annex on Chemicals) and that changes should **not** apply to Annex D or to section I of Annex E (thereby paralleling the CWC Article XV provisions excluding parts of the Verification and the Confidentiality Annexes from the simplified procedure for changes).

Entry into Force There is Cat III language in *Article XX Entry into Force* in paragraph 1 regarding the conditions for entry into force:

1. This Protocol shall enter into force 180 days after the deposit of instruments of ratification by [45] [50] [65] [75] [...] States [, including the Governments of the Depositaries of the Convention,] [having advanced biological capabilities and technologies listed in Annex ...] but not earlier than two years after its opening for signature.

The paramount need is to achieve the earliest possible entry into force of the Protocol so that the strengthening of the regime can begin to benefit from the operation of the Organization. A requirement for a large number of ratification instruments before entry into force would delay the strengthening of the regime. With the Organization in existence, with full authority to implement and promote the Protocol, in accordance with Article IX, the Protocol will gather momentum and the number of states parties will increase significantly as confidence grows in the Organization and its operations. A simple numerical condition for entry into force, with no requirement for particular ratifications within this number, is therefore desirable. A requirement for the deposit of 20 ratification would correspond, based on the CWC experience, to a two year interval between signature and entry into force.

Reservations There is Cat III language in *Article XXI Reservations* as follows:

[The Articles of this Protocol [shall not be subject to reservations] [incompatible with its object and purpose or that of the Convention]. The Annexes and Appendices of this Protocol [shall not be subject to reservations] [incompatible with its object and purpose or that of the Convention].]

It is important that states parties do not enter reservations or exceptions to the Protocol, particularly in the light of the conditions attached by the US Senate to its resolution of advice and consent for United States ratification of the CWC and those within the *Chemical Weapons Convention Bill 2000* passed by the parliament of India. The language in Article XXI should be strengthened:

The Articles of and the Annexes and Appendices to this Protocol shall not be subject to reservations. In addition, no exceptions or conditions, however phrased or named, including interpretative statements or declarations, which purport to exclude or modify the legal effect of the provisions of the Articles and the Annexes and Appendices to this Protocol in their application to any State, may be made by any State upon signing, ratifying or acceding to this Protocol.

The additional final sentence is necessary in order to prevent, as comprehensively as possible, any attempt to circumvent the ban on reservations by means of statements, declarations, exceptions or conditions which similarly purport to exclude or modify the legal effect of any part of the Protocol in its application to any state.

b. Other Issues

Preambular language There is Cat III language in two places in the Preamble. The first is in paragraphs (9) and (10):

[(9) Determined to achieve effective progress toward the prohibition and complete elimination of all types of weapons of mass destruction,

(10) Determined also to achieve effective progress toward general and complete disarmament under strict and effective international control,]

OR

[(9+10) Determined to act with a view to achieving effective progress toward general and complete disarmament under strict and effective international control, including the prohibition of all types of weapons of mass destruction,]

and the second in paragraph (23):

(23) Convinced that to contribute as effectively as possible to the prevention of [the proliferation of] [weapons of mass destruction, including] biological and toxin weapons, and thereby to enhance international peace and security, all States Parties to the Convention should become States Parties to this Protocol,

The language in paragraphs (9) and (10) is closely similar to the preambular language in the CWC and the BTWC and are unexceptional. The alternative combined (9+10) could disappear. The reference to *complete elimination* in paragraph (9) should now be more acceptable following the 2000 NPT Review Conference which in the Final Document in subpara 6 to paragraph 15 records:

6. An unequivocal undertaking by the nuclear-weapon States to accomplish the total elimination of their nuclear arsenals leading to nuclear disarmament to which all States Parties are committed under Article VI.

This followed the statement by the five nuclear-weapon states in which they state:

We reiterate our unequivocal commitment to the ultimate goals of the complete elimination of nuclear weapons and a treaty on general and complete disarmament under strict and effective control.

Insofar as paragraph (23), this could with advantage be strengthened to read as follows:

(23) Convinced that to contribute as effectively as possible to the prohibition and complete elimination of biological and toxin weapons, and thereby to enhance international peace and security, all States Parties to the Convention should become States Parties to this Protocol,

c. Organization

Seat of Organization The paragraph in Article IX The Organization concerning the seat of the organization is assigned to Cat III as two bids have been lodged from the Netherlands for The Hague and from Switzerland for Geneva. The detailed bids have now been called for and, until after these have been provided on 13 October and considered by the states parties, it is uncertain where the seat of the future Organization will be located.

Executive Council representation from Asia/East Asia and the Pacific/West and South Asia The alternatives in Article IX for ... *States Parties from Asia* or ... *States Parties from East Asia and the Pacific* or ... *States Parties from West and South Asia* are all shown as Cat III language. This is primarily a matter for the countries in the region to resolve.

Waiver of Immunity for the Director-General and the OPBW
There is Cat III language in *Article IV Confidentiality Provisions* that:

In case of breaches of confidentiality, the immunity of [the Director-General and] the staff members of the Technical Secretariat [as well as the immunity of the Organization] may be waived in accordance with the provisions on privileges and immunities contained in Article IX of this Protocol and the agreement referred to in paragraph 49 of that Article.

Inclusion of specific language providing for the waiver of immunity for the Organization or the Director-General is tantamount to a prior expression of no confidence in either the Organization or the Director-General. As the absence of an explicit provision for waiver of the immunity of the Organization or the Director-General does not prevent the Conference of the States Parties from taking such action at some future date should it judge that this was necessary, this provision should be deleted from the draft Protocol.

Prospects

The July/August session also saw agreement that the next, twenty-first, session would be a three week session from 20 November to 8 December 2000. During the preceding week, from 13 November, Ambassador Toth would be in Geneva to conduct very intensive informal consultations. The programme of work for the next session was agreed with the 30 meetings allocated as follows:

Compliance measures	2
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Declaration formats	2
Investigations	2.5
Article X	2
Definitions	2.5
Ad Hoc Group/Informal	16.5
General Provisions	0.5
Preamble	0.5
Legal Issues	1
<u>National Implementation</u>	<u>0.5</u>
Total	30

The increased number of meetings allocated to Ad Hoc Group/Informal sessions continues the change made in the July/August session to less work being carried out in formal sessions and more “give and take” discussion in informal consultations.

During the 15 weeks between the end of the July/August and the start of the November/December session, delegations can be expected to review with their respective governments their national positions on the conceptual approaches being considered to resolve the Cat III issues so as to develop approaches to reaching consensus on the outstanding issues. There were valuable indications from delegations of a flexibility and willingness to engage in bilateral consultations with both the Chairman and the Friends of the Chair to find solutions.

The July/August session saw further modest progress in the reduction of the total number of square brackets in the Protocol although there is overall a slowing down in the removal of square brackets as the outstanding Cat. III issues are debated and discussed. There continues to be real engagement between the delegations who are addressing how to find solutions to the differences of views which augurs well for the future. There is a real impetus to complete the Protocol before the Fifth Review Conference.

This review was written by Graham S Pearson, HSP Advisory Board