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THE COMPOSITE PROTOCOL TEXT: AN EFFECTIVE STRENGTHENING OF THE BIOLOGICAL AND TOXIN WEAPONS CONVENTION

by Graham S. Pearson* , Malcolm R. Dando[§] & Nicholas A. Sims[†]

Introduction

1. Before, during and immediately after the twenty-second session of the Ad Hoc Group from 12 to 23 February 2001, the Chairman, Ambassador Tibor Tóth provided delegations with written elements for virtually the complete Protocol. Several delegations including South Africa and the European Union (speaking also on behalf of the nine Central and Eastern European countries associated with the European Union and the associated countries Cyprus, Malta and Turkey) called on Ambassador Tóth to provide a Chairman's text as delegations needed to see the complete picture in order to complete the negotiations.

2. On Thursday 29 March 2001 at a seminar entitled "Facing the Challenge of Disease in the 21st Century" organized in Geneva by the Quaker United Nations Office and the University of Bradford Department of Peace Studies, Dr Guenael Rodier, Director, Department of Communicable Disease and Surveillance, WHO spoke on "Preventing Disease: The Challenge for WHO", a message from Lt. Gen Jansen van Rensburg, Surgeon General of the South African National Defence Forces "Countering Disease in Africa" was presented and Professor Graham S. Pearson spoke on "Preventing Deliberate Disease: The Protocol Contribution." These presentations and the subsequent discussion focussed on the complementary nature of the BTWC Protocol and the WHO in combating disease and the opportunities and benefits that such cooperation could bring to all countries, both developing and developed. Ambassador Tibor Toth of Hungary, Chairman of the Ad Hoc Group, was in the chair and took the opportunity to say that a composite text would be available for delegations in Geneva during the afternoon of Friday 30 March 2000. It was thus clear that the requests by several delegations during the February 2001 Ad Hoc Group session for a complete Protocol text have been answered with the provision by Ambassador Toth of a composite text that is clearly based on the rolling text with compromises adopted to address the remaining differing views.

3. This Evaluation Paper considers the composite Protocol text¹, compares it with the latest version of the rolling text² and evaluates the compromises that had been adopted to resolve the differing views of delegations. It then considers the potential contribution that the Protocol based on the composite text will make to strengthening the regime against biological

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¹United Nations, *Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/CRP.8(FUTURE), 30 March 2001, Geneva.

²United Nations, *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/55-1 and 55-2, 1 March 2001, Geneva.

weapons. A comparison is made of the BTWC Protocol regime to a regime based on the Biological and Toxin Weapons Convention alone and then a comparison of the Protocol regime and the Chemical Weapons Convention regime. It is concluded that the Protocol regime brings significant and worthwhile benefits to all States Parties -- both developed and developing -- over and above the basic prohibitions and obligations of the BTWC. In addition, the Protocol will be effective, over time, in building confidence between States Parties that other States Parties are indeed in compliance with the Convention, thereby reinforcing the norm that work on biological weapons, whether directed against humans, animals or plants, is totally prohibited. The Protocol will thus bring improved health, safety, security and prosperity to all States Parties.

The Composite Protocol Text

4. The previous Bradford Evaluation Papers have evaluated and analysed the majority of the Articles in the Protocol and the Bradford Briefing Papers have addressed many of the key issues for the Ad Hoc Group. In this Evaluation Paper, the composite Protocol text provisions are examined and compared with the latest version of the rolling text with emphasis being placed on those issues where compromises have been adopted to resolve the differing views. The composite Protocol text has a Preamble with 30 Articles, 3 Annexes and 9 Appendices; the Articles have arabic numerals instead on roman numerals as in the rolling text. The following Table shows the relationship of the composite Protocol structure to that of the rolling text attached to the procedural report of the February 2001 session. Although it is recognised that the composite Protocol text also bears a close relationship to the written elements addressing conceptual solutions provided to delegations by the Chairman following his informal bilateral consultations and that by February 2001 such written elements had been provided for virtually the whole of the Protocol, the comparison in this Evaluation Paper is between the composite Protocol text (CRP.8) and the latest version of the rolling text (AHG/55).

Composite Protocol text (CRP.8)	Previously in rolling text (AHG/55-1 & 55-2)
Preamble	Preamble
Article 1 General Provisions	Article I General Provisions
Article 2 Definitions	Article II Definitions
Article 3 Lists and Criteria, Equipment and Thresholds	Article III A, B, C Lists and Criteria, Equipment and Thresholds
Article 4 Declarations	Article III D I Declarations
Article 5 Measures to ensure submission of declarations	Article III D III Measures to ensure submission of declarations
Article 6 Follow-up after submission of declarations	Article III D II Follow-up after submission of declarations
Article 7 Measures to strengthen implementation of Article III of the Convention	Article III F Measures to strengthen implementation of Article III (of the Convention)
Article 8 Consultation, Clarification and Cooperation	Article III E Consultation, Clarification and Cooperation
Article 9 Investigations	Article III G Investigations

Composite Protocol text (CRP.8)	Previously in rolling text (AHG/55-1 & 55-2)
Article 10 Additional provisions on declarations, visits and investigations	Article III H Additional provisions on declarations, visits and investigations
Article 11 Confidentiality provisions	Article IV Confidentiality provisions
Article 12 Measures to redress a situation and to ensure compliance	Article V Measures to redress a situation and to ensure compliance
Article 13 Assistance and protection against bacteriological (biological) weapons	Article VI Assistance and protection against bacteriological (biological) weapons
Article 14 Scientific and technological exchange for peaceful purposes and technical co-operation	Article VII Scientific and technological exchange for peaceful purposes and technical co-operation
Article 15 Confidence-building measures	Article VIII Confidence-building measures
Article 16 The Organization	Article IX The Organization
Article 17 National implementation measures	Article X National implementation measures
Article 18 Relationship of the Protocol to the Convention	Article XI Relationship of the Protocol to the Convention
Article 19 Settlement of disputes	Article XII Settlement of disputes
Article 20 Review of the Protocol	Article XIII Review of the Protocol
Article 21 Amendments	Article XIV Amendments
Article 22 Duration and Withdrawal	Article XV Duration and Withdrawal
Article 23 Status of the Annexes and Appendices	Article XVI Status of the Annexes and Appendices
Article 24 Signature	Article XVII Signature
Article 25 Ratification	Article XVIII Ratification
Article 26 Accession	Article XIX Accession
Article 27 Entry into Force	Article XX Entry into Force
Article 28 Reservations	Article XXI Reservations
Article 29 Depositary	Article XXII Depositary
Article 30 Authentic Texts	Article XXIII Authentic Texts

5. The following sections of the composite Protocol text are addressed below:

- a. Preamble
- b. Article 1 General Provisions
- c. Article 2 Definitions
- d. Article 3 Lists and Criteria, Equipment and Thresholds
- e. Article 4 Declarations
- f. Article 5 Measures to ensure submission of declarations
- g. Article 6 Follow-up after submission of declarations

- h. Article 7 Measures to strengthen implementation of Article III of the Convention
- i. Article 8 Consultation, Clarification and Cooperation
- j. Article 9 Investigations
- k. Article 10 Additional provisions on declarations, visits and investigations
- l. Article 11 Confidentiality provisions
- m. Article 13 Assistance and protection against bacteriological (biological) weapons
- n. Article 14 Scientific and technological exchange for peaceful purposes and technical co-operation
- o. Article 15 Confidence-Building measures
- p. Article 16 The Organization
- q. Legal issues (15 Articles including Article 12 Measures to redress a situation and ensure compliance)

In our analysis, we have evaluated and compared the composite Protocol text to the language in the rolling text. It should be noted that there have been some editorial changes made in the composite Protocol text such as the replacement of "pursuant to" by "in accordance with" which have not changed the substance. Consequently where we state that the composite Protocol text is identical to that in the rolling text we disregard any minor editorial changes that have no effect on the substance.

Preamble

5. The composite text has taken all the paragraphs in the rolling text that were out of overall square brackets and omitted five of the six that were in overall square brackets. The sixth one that had been within overall square brackets is included thus achieving a balance between paragraphs addressing the implementation of Article X of the Convention and a paragraph reaffirming the obligations under Article III of the Convention. The paragraphs omitted do not, in our view, result in any diminution to the overall thrust of the Preamble.

Article 1 General Provisions

6. The composite text has taken all the paragraphs that were in the rolling text that were out of overall square brackets and omitted all but one of those paragraphs that were within overall square brackets. A new opening paragraph stating the purpose of the Protocol has been added that draws upon some of the concepts within two of the paragraphs within overall square brackets and a new final paragraph has been added which usefully makes it clear that the definitions and objective criteria shall be used solely for the application of specific measures set out in the Protocol.. The single paragraph that was within overall square brackets that has been included is the one which requires the States Parties and the Director-General, as appropriate, to take into account existing agreements and competencies of other relevant international organisations and agencies in order to avoid duplication and to ensure an effective and co-ordinated use of resources. This paragraph had previously been included

within Article VII of the rolling text. Its inclusion to Article 1 General Provisions thereby making it applicable to the entire Protocol is laudable. None of the omitted paragraphs, in our view, result in any diminution of the provisions of Article 1 General Provisions.

Article 2 Definitions

7. Article 2 is based on the language and definitions in *Article II Definitions* of the rolling text. The composite Protocol text has rightly concentrated as required by the mandate for the Ad Hoc Group on definitions of terms *where relevant for specific measures designed to strengthen the Convention*. Three basic definitions have been included in Article 2 for *Bacteriological (biological) and toxin weapons, Purposes not prohibited by the Convention*, and a new definition of *Biological materials* which is for use with the transparency threshold levels for facilities involved in national biological defence programmes and/or activities. The first two of these basic definitions are drawn directly from the relevant language in Article I of the Convention thereby ensuring that the definitions used in the Protocol in no way amend the basic prohibitions in the Convention. The inclusion of these three basic definitions and the omission of three other basic definitions from the rolling text represents a fair compromise.

8. The remaining definitions in Article 2 are all based on the definitions in the rolling text; 15 of these have essentially identical language to that in the rolling text with the removal of square brackets and the adoption of appropriate compromises. The definition of facility has been clarified with one definition for the purposes of declarations and follow-up after declarations and another definition for the purpose of investigations. A useful definition has also been added for national biological defence programmes and/or activities. Three additional definitions are now included in Article 2 for Conference, Director-General and Organisation.

9. Article 2 has successfully adopted compromises to ensure that there are no definitions in the Protocol which has the effect of amending the Convention itself and that the definitions in Article 2 are for the purpose of implementation of the Protocol alone.

Article 3 Lists and Criteria, Equipment and Thresholds

10. Article 3 comprises three sections:

- A. List of Agents and Toxins
- B. List of Equipment
- C. Annual and Current Transparency Threshold Levels

which are based upon language previously contained in Annex A of the rolling text. Each of the sections is considered in turn:

- a. **A. List of Agents and Toxins.** This section of Article 3 now contains the chapeau text which had previously appeared in *Annex A I. Lists and Criteria (Agents and Toxins)* whilst the list of agents and toxins is retained in Annex A of the composite Protocol text. The first paragraph makes it clear that the list of agents is for use with the declaration trigger for work with listed agents and toxins as well as for the declaration formats for national biodefence programmes and for declared facilities. The second paragraph usefully emphasises that the list of agents and toxins in Annex A is not exhaustive and does not exclude the relevance of unlisted microbial

or other biological agents or toxins. The third and fourth paragraphs set out the procedure for review and modification of the list of agents which requires that the Executive Council shall consider the same criteria which had previously appeared out of square brackets in *Annex A. I* of the rolling text.

The list of agents and toxins appears in the composite Protocol text in the *Annex on Lists (Annex A) A. Lists of Agents and Toxins*. This is essentially identical to the list in Annex A of the rolling text with compromises adopted where there had been agents still within square brackets in the rolling text; in respect of the human and zoonotic pathogens list the composite Protocol text includes *Brucella suis* but not *Brucella abortus*, *Nagleria fowleri* but not *Nagleria australiensis*. For the animal pathogen list which was less developed in the rolling text, the composite Protocol text has adopted a compromise list of six animal pathogens. The plant pathogen list contains the same eight plant pathogens listed in the rolling text and the list of toxins is also the same as in the rolling text.

b. **B. List of Equipment.** This section consists of three paragraphs which set out which declaration triggers and declaration formats apply to the list of equipment and also provides for the use of the list of equipment during a facility investigation. Finally the provisions for the review and amendment of the list are stated.

The list of equipment appears in the composite Protocol text in the *Annex on Lists (Annex A) B. Lists of Equipment* and is essentially identical to that in *Annex A.II* of the rolling text which was largely out of square brackets. Sensibly, the requirement in square brackets in the rolling text to provide information on biological safety cabinets Class II has been removed.

c. **Annual and Current Transparency Threshold Levels.** This section of some nine paragraphs has been developed from *Article III. C. Thresholds* of the rolling text. The compromise adopted in the composite Protocol text recognises the long debate about thresholds during the VEREX process, at the Special Conference which established the mandate for the Ad Hoc Group and during the Ad Hoc Group negotiations. This section makes it clear that the transparency thresholds set out are to provide additional transparency for national biological defence programmes and/or activities through the provision of information on the aggregate quantities, expressed in ranges, for all biological materials, defined as in Article 2, present at such a facility during the previous year. This information is to be provided in the declaration formats for such facilities in Appendix C.

Article 4 Declarations

11. Article 4 which sets out the declaration triggers is closely based on the language in *Article III. D. Declarations I. Submission of Declarations* in the rolling text. It is subdivided into three sections:

- A. Submission of Declarations
- B. Initial Declarations
- C. Annual Declarations

12. **Section A** consists of two paragraphs which set out first the requirement for States Parties to declare all activities and facilities listed in this Article and for the appropriate declaration format in the Appendices to be submitted not later than 180 days after the entry into force of the Protocol for initial declarations and no later than 30 April each year for annual declarations. This language is essentially identical to that in the two paragraphs out of square brackets in the initial section of *Article III. D. I* of the rolling text. The other paragraphs which had been in square brackets in the initial section of *Article III. D. I* have now been addressed in Articles 10 and 21 of the composite Protocol text and are therefore removed from Article 4.

13. **Section B** requires two initial declarations -- first of offensive biological weapons programmes and/or activities conducted in the period between 1 January 1946 and entry into force of the Convention for that State Party and secondly of defensive biological weapons programmes and/or activities conducted during the 10 years prior to the entry into force of the Protocol for that State Party. These provisions are based on the language in *Article III. D. I* of the rolling text and have reasonably adopted the same date for the start of past offensive programmes and/or activities as in the Confidence-Building Measure F agreed by the States Parties at the Third Review Conference in 1991. Any information on past offensive programmes that subsequently comes to light has also to be declared within a specified time period. The information required in these initial declarations is to be provided as specified in the declaration format in Appendix A and rightly seeks additional detail for the 10 years prior to entry into force of the Convention or of the Protocol and as such is a reasonable compromise. We **recommend** that on the basis of consensus a change should be made to the first subtitle in Section B so that this reads "Offensive biological and toxin programmes and/or activities conducted prior to entry into force of the Convention for each State Party" and is thereby consistent with the language in paragraph 3 and the title of Appendix A.

14. **Section C** sets out the requirements for annual declarations of national biological defence programmes and/or activities, maximum biological containment facilities, high biological containment facilities which exceed 100 m² and have produced vaccines or other specified production or have carried out genetic modification of any agent or toxin listed in Annex A, plant pathogen containment, specified work with listed agents and toxins and specified production facilities. These provisions are based on the language in *Article III. D. I* of the rolling text. The compromises adopted in respect of these various declaration triggers ensure that facilities of very little relevance are excluded. Consequently, biodefence programmes/activities involving perhaps a single person monitoring developments in the literature are excluded as are high biological containment facilities with a working area of less than 100 m² and similarly plant pathogen containment facilities with a working area of less than 100 m².

15. The compromise adopted for biological defence programmes/activities requires a summary of the objectives and elements of the programme -- rightly including research and development, testing, evaluation and production -- as well as a summary of the research and development carried out in accordance with Appendix B. The requirements for the declaration of national biodefence facilities in accordance with Appendix C strikes a balance between the requirements for States Parties with large programmes and many facilities and those States Parties with much smaller programmes and fewer facilities.

16. The requirements in Article 4 for maximum biological containment facilities and for plant pathogen containment facilities are closely similar to those in *Article III. D. I* of the

rolling text. In respect of high biological containment, the requirement in Article 4 has usefully been more sharply focussed onto relevant production facilities and facilities in which genetic engineering of listed agents and toxins than the previous language in the rolling text. The requirements for facilities which have engaged in work with listed agents and/or toxins is based on the language in *Article III. D. I* of the rolling text with the removal of square brackets and the adoption of reasonable compromises in respect of the various capacities that had previously been in square brackets. The requirement is that a declaration is necessary if work with the listed agent and/or toxin is associated with specified production and recovery features, certain forms of genetic engineering or certain types of aerosolisation activities.

17. The requirements for the declaration of production facilities have usefully been brought together requiring the declaration of vaccine, microorganism and biological control agent production under specified circumstances. A final paragraph additionally requires general information to be provided on certain facilities producing for public sale microbially produced substances. Provision is made for the First Review Conference to consider whether such facilities should become subject to randomly-selected transparency visits in the light of the experience that will then have been gained on the implementation of the Protocol.

18. Overall, Article 4 has successfully focussed on requiring States Parties to declare those facilities and activities of the greatest relevance to the Convention.

Article 5 Measures to ensure submission of declarations

19. Article 5 follows closely the language in *Article III. D. III. Measures to ensure the submission of declarations* in the rolling text. The first three paragraphs are identical to those in the rolling text. Article 5 in its subsequent six paragraphs has struck a reasonable balance in relation to the options within square brackets in the rolling text relating to the consequences should a State Party not have submitted its initial declarations within one year or its annual declarations within six months after the deadlines specified in Article 4. It has adopted a three tier approach which combines some automatic measures with some conditional measures which have to be considered by the Executive Council:

- a. If the State Party has not submitted its initial declarations within one year or its annual declarations within six months after the deadlines specified in Article 4 then it shall not have access to the declarations of other States Parties.
- b. In addition, the Executive Council shall consider whether to apply one or more of three further measures until the declarations are received.
- c. If the State Party has not submitted its initial declarations within **two** years or its annual declarations within a **year** after the deadlines specified in Article 4, then two further measures shall apply until the declarations are received.

Article 6 Follow-up after submission of declarations

20. Article 6 is developed from and is based on the provisions and language in *Article III. Declarations II. Follow-up after the submission of declarations* in the rolling text. Article 6 is subdivided into four sections:

- A. The role of the Technical Secretariat
- B. Randomly-selected transparency visits
- C. Voluntary assistance visits
- D. Declaration clarification procedures.

21. **Section A** on the role of the Technical Secretariat starts with two paragraphs identical to the first two in Article III. D. II of the rolling text. Its third paragraph states what the Technical Secretariat is to do to promote the fulfilment of the declaration obligations under the Protocol. These are to process and make a technical analysis of the declarations, conduct a limited number of randomly-selected transparency visits to facilities declared in accordance with certain paragraphs in Article 4, seek clarification should any ambiguity, uncertainty, anomaly or omission be identified in the content of a declaration, provide technical assistance to States Parties and help them compile their declarations including a voluntary assistance visit, if requested. The fourth paragraph relates to the procedures whereby a State Party may seek a clarification regarding the declaration of another State Party; the State Party seeking clarification can do so either using the provisions of *Article 8 Consultation, Clarification and Cooperation* or by using the clarification process in this Article.

22. The next ten paragraphs relate to the allocation of the different types of visits, the selection of facilities for randomly-selected transparency visits, the limitations on such visits and on voluntary clarification visits, the review of these provisions by the first and subsequent Review Conferences and the annual programme of visits and its review by the Executive Council. The key elements are the following:

- a. An overall limit for the total number of all visits in any calendar year of 120 -- with provision for the Director-General to conduct less in the light of declarations submitted and visits requested.
- b. Limits for the number of randomly-selected transparency visits of not more than 75% and not less than 50% of the total number of visits -- i.e. between 60 and 90 such visits.
- c. Limits for the number of voluntary assistance visits of not more than 25% and not less than 5 % of the total number of visits -- i.e. between 6 and 30 such visits.
- d. Any clarification visits are deducted successively from the number of randomly-selected transparency visits and the number of voluntary assistance visits whilst ensuring that the minimum numbers of such visits are conducted.

Provision is also made for the first and subsequent Review Conferences to revise the total number of visits and their allocation between the different categories in the light of the experience gained in the implementation of the Protocol.

23. In addition limits are placed on the numbers of visits so that they are distributed equably among the States Parties as follows:

- a. No State Party shall receive more than seven randomly-selected transparency visits in any calendar year.
- b. Each State Party which declares facilities shall receive at least two randomly-selected transparency visits in any five-year period.

c. No individual facility shall receive more than three randomly-selected transparency visits in any five year period.

d. The probability of a State Party receiving a visit shall be proportional to the number of declared facilities in that State Party taking into account the limits detailed in the preceding subparagraphs a to c.

Insofar as voluntary clarification visits are concerned, no State Party shall receive more than five such visits in any five-year period.

24. It is thus evident that the composite Protocol text has successfully adopted a number of compromises which together ensure an effective follow-up after the submission of declarations with an equitable spread of visits between States Parties and across the range of facilities subject to this Article.

25. **Section B** is closely based on the provisions and language in *Article III. D. II (A) Randomly-selected Visits* in the rolling text. The purpose of randomly-selected transparency visits is clearly set out as:

a. Increasing confidence in the consistency of declarations with the activities of the facility and encouraging submission of complete and consistent declarations;

b. Enhancing transparency of facilities subject to the provisions of this section;

c. Helping the Technical Secretariat to acquire and retain a comprehensive and up-to-date understanding of the facilities and activities declared globally.

In addition, randomly-selected transparency visits can be extended by up to two days if requested in order for the visiting team to provide assistance on any of the subjects or programmes listed in the relevant paragraphs of Article 14.

26. The detailed provisions for carrying out such randomly-selected transparency visits are essentially the same as in the rolling text. It is made clear that the visited State Party shall provide access to the visiting team within the facility sufficient to fulfil its mandate whilst leaving the nature and extent of all access inside the facility, and to the information it contains, to the discretion of the visited State Party.

27. **Section C.** The provisions for voluntary assistance visits are essentially the same as in *Article III. D. II (A) Voluntary Assistance Visits* in the rolling text. It is, however, noted that the purposes of the voluntary assistance visits as detailed in paragraph 49 (b) refer only to paragraph 21 of Article 14 and not to paragraph 23 of Article 14. As this is inconsistent with the provision for the extension of randomly-selected transparency visits for up to two days in relation to both paragraphs 21 and 23 and is also inconsistent with the provision in paragraph 23 of Article 14 which specifically cross refers to paragraph 49 (b) of Article 6, we **recommend** that on the basis of consensus paragraph 49 (b) be amended to refer to "as specified in Article 14 (21) and 14 (23);".

28. **Section D** is closely based on the provisions and language in *Article III. D. II (A) Declaration Clarification Procedures* in the rolling text. The composite Protocol text has

adopted a compromise in that it provides an option as to whether such clarification is carried out using the procedures set out in Article 6 or by the consultation, clarification and cooperation procedures set out in Article 8. In the particular case of clarification requests relating to a facility which is believed to meet the criteria for declaration and which has not been declared, then the State party from whom clarification is requested may at its discretion respond either using the procedures in Article 8 or the procedures in Article 6.

29. Insofar as the Director-General is concerned, a compromise has been adopted under which the Director-General can initiate the declaration clarification procedure in regard to the content of a declaration submitted by a State Party but in respect of a facility which is believed to meet the criteria for declaration and which has not been declared, the Director-General may request the State Party to submit a declaration for the facility concerned.

30. The detailed procedures are closely similar to those in the rolling text. However, should the declaration clarification procedure not resolve the issue and if a suggested voluntary clarification visit is not offered, then the Director-General shall make a report to the Executive Council. The composite Protocol text sets out a range of decisions that might be taken by the Executive Council including the decision initiate a clarification visit. It is clear that the composite Protocol text has taken care to strike a balance between the interests of all delegations.

Article 7 Measures to strengthen implementation of Article III of the Convention

31. Article 7 has been developed from the provisions and language in Article III. F. Measures to strengthen the implementation of Article III. The title of Article 7 has usefully been modified to make it clear that these are measures related to Article III of the Convention. Article 7 has been restructured thereby improving clarity into five sections:

- A. Implementing Legislation*
- B. Transfer Guidelines*
- C. Notifications*
- D. Consultations*
- E. Review*

a. **Section A** on implementing legislation contains language from Article III. F of the rolling text requiring States parties to review, amend or establish any legislation, regulatory or administrative provisions to regulate the transfer of agents, toxins, equipment and technologies relevant to the Convention, providing assistance from the Technical Secretariat in this respect and requiring States Parties to report any legislative, regulatory or administrative provisions or other measures it has taken to implement Article III of the Convention.

b. **Section B** on transfer guidelines draws upon language from Article III. F of the rolling text and requires States Parties to take all measures they deem necessary to ensure that obligations under Article III of the Convention are implemented fully and effectively. Measures are also required to ensure that transfers to any recipient whatsoever of dual-use items are only used for prophylactic, protective or other peaceful purposes; these may include four measures which are set out. Four particular dual-use items are identified to which such measures are to be applied to

ensure that their use is only for prophylactic, protective or other peaceful purposes are to be taken.

c. **Section C** on notifications requires States Parties to use the reporting format in Appendix I to notify the Director-General annually of aggregate data on exports of the four particular dual-use items identified in Section B.

d. **Section D** on consultations provides for States Parties to consult among themselves on the implementation of the provisions of this Article and also with a view to specifying the context of a request for a transfer. It also provides for a State Party, which has a concern that an authorised transfer could be in violation of Article III of the Convention, to consult directly with the transferring State Party. Additional supporting information that might be provided during these consultations is elaborated.

e. **Section E** provides for the first Conference of States Parties held after the first Review Conference of the Protocol to review the operation of the provisions of this Article and to consider whether the introduction of restrictions or prohibitions on transfer to States not party to the Protocol or the Convention of the four particular dual-use items identified in Section B would further universal adherence to the Protocol. Subsequent Review Conferences shall keep under review the provisions of this Article.

32. Article 7 has struck a balance between the range of different views as to how the implementation of Article III of the Convention should be improved. It was concluded in the University of Bradford Briefing Paper No 33³ in February 2001 that:

The issue of how to improve the implementation of Article III of the Convention has been an emotive and sensitive topic for the Ad Hoc Group. In a world in which transfers of dual use materials – whether of chemicals, biological agents or drugs – are increasingly being monitored and controlled, it is not an option to ignore measures to improve the implementation of Article III of the Convention. It is also unrealistic to consider the removal of such monitoring and controls between States Parties as the trend is the opposite. However, under a regime in which there is greater transparency as to what transferred materials are to be used for and are used for together with assurances that there are the necessary national internal and interstate controls of transfers, the probability over time will increase that transfers between States Parties will be made. A pragmatic approach would be to make provision for some initial controls of transfers of both biological agents and equipment, with a requirement for States Parties to report to the Organization annually on such transfers, along with provisions enabling this transfer regime to be reviewed and developed by States Parties at the Review Conferences of the Protocol.

33. Article 7 has, in our view, successfully addressed the difficult issue of how to improve the implementation of Article III of the Convention through requiring States Parties to take necessary implementing legislation; setting out transfer guidelines; requiring annual notifications of aggregate data for four particular dual-use items; providing for consultations;

³Graham S. Pearson, *The BTWC Protocol: Improving the Implementation of Article III of the Convention: Pragmatic Considerations*, University of Bradford, Department of Peace Studies, Briefing Paper No. 33, February 2001.

and requiring the implementation of these provisions to be kept under review. The approach adopted in Article 7 provides a reasonable compromise that will contribute over time to the strengthened effectiveness and improved implementation of the Convention.

Article 8 Consultation, Clarification and Cooperation

34. Article 8 sets out the provision that States Parties should consult and cooperate directly among themselves on any matter relating to the purpose and objective of the Convention, or the implementation of the provisions of the Protocol, and clarify and resolve any matter which may raise concern about possible non-compliance with the obligations of this Protocol or the Convention. It follows closely the language in *Article III. E Consultation, Clarification and Cooperation* of the rolling text. Article 8 has in some paragraphs simplified the rolling text by removing unnecessary duplication or repetition and striking a balance between the options within square brackets in the rolling text; for example, the time within which clarification shall be provided is reasonably set at 20 days after receipt of the request.

Article 9 Investigations

35. Article 9 is largely based on the provisions and language in *Article III. G. Investigations* of the rolling text. It is subdivided into nine subsections:

- A. Types of Investigations
- B. Outbreaks of Disease
- C. Consultation, Clarification and Cooperation
- D. Initiation of Investigations
- E. Information to be Submitted with a Request for an Investigation to Address a Concern of Non-compliance with the Convention
- F. Follow-up after Submission of an Investigation Request and Executive Council Decision-making
- G. Access and Measures to Guard Against Abuse During the Conduct of Investigations
- H. Final Report
- I. Review and Consideration of the Final Report.

36. **Section A** sets out the two types of investigation: field and facility investigations using language that is essentially identical to that in the rolling text.

37. **Section B** has language that is essentially identical to that in the rolling text with some small variations in the titles of subheadings and of the language. This section deals with outbreaks of disease and the circumstances under which a field investigation of an outbreak of disease can be requested to address a non-compliance concern. It is also made clear that reports coming exclusively from the mass media cannot be regarded as evidence.

38. **Section C** has language that is closely based on that in the rolling text and requires that States Parties should, whenever possible, consult between themselves in accordance with Article 8 about any matter that causes concern about compliance with the Convention.

39. **Sections D and E** have language that is essentially identical to that in the rolling text.

40. **Section F** addresses the follow-up after submission of an investigation request and Executive Council decision making. This is based upon and developed from the language in the rolling text. Section F has adopted a compromise in respect of the Executive Council decision making in which different decision-making procedures are to be followed depending on the particular circumstances relating to the investigation:

a. A request for a field investigation of alleged use of biological weapons on the territory or other place under the control of the requesting State Party shall proceed unless a three-quarters majority of members present and voting decide otherwise.

b. A request for a field investigation of alleged use of biological weapons on the territory or other place under the control of another State Party shall proceed unless a simple majority of members present and voting decide otherwise.

c. A request for a field investigation on the territory or other place under the control of a requesting State Party where there is a concern that an outbreak of disease is related to prohibited activities shall proceed unless two-thirds of members present and voting decide otherwise.

d. A request for a field investigation on the territory or other place under the control of another State Party when there is a concern that an outbreak of disease is related to prohibited activities shall proceed only if approved by a simple majority of members present and voting.

e. A request for a facility investigation should proceed only if approved by a simple majority of members present and voting.

The key thing is that in all these cases an investigation will take place if the Executive Council so decides thereby providing the Protocol with the essential ultimate measure to address concerns about non-compliance with the Convention.

41. **Section G** is closely similar to the language in the rolling text. Essentially the receiving State Party is obliged to make every reasonable effort to demonstrate its compliance with the Convention and to enable the investigation team complete its mandate. However, the nature and extent of access shall be negotiated between the investigation team and the receiving State Party with the receiving State party having the right to make the final decision on the nature and extent of access, taking into account its rights and obligations under the Protocol. The composite Protocol text has thus struck a reasonable balance to ensure that investigations can be carried out effectively whilst safeguarding the interests of the receiving State Party.

42. **Section H** is essentially identical to the language in the rolling text.

43. **Section I** is essentially identical to the language in the rolling text with the addition of a new paragraph which usefully specifies that, in the event of non-compliance being determined, the Executive Council shall circulate the final report to all State Parties before the meeting of the Conference of State Parties.

Article 10 Additional provisions on declarations, visits and investigations

44. The additional provisions of Article 10, which addresses declarations, visits and investigations on the territory of a State Party but falling under the control of another State Party/Party, closely follow the language in *Article III H. Additional Provisions* of the rolling text. Article 10 has struck a balance between the alternative language in the rolling text and has also introduced a new *Appendix G Facilities existing in the territory of a State Party but falling under the control of another State Party/Party* which is to be completed by the State Party on whose territory the facility exists; this simply requires answers to some YES/NO questions. The overall thrust of Article 10 is not substantively different from that in the rolling text; Article 10 provides a useful complement to the regime in regard to declarations, visits and investigations under such circumstances.

Article 11 Confidentiality provisions

45. The six paragraphs of Article 11 are essentially identical to the first six paragraphs of *Article IV Confidentiality Provisions* in the rolling text. The other paragraphs in Article IV in the rolling text which were within square brackets and which reproduced the language of Annex D which was out of square brackets apart from a single paragraph are included in the Chairman's composite Protocol text in the *Annex on Confidentiality Provisions (Annex C)*. The square brackets have been removed from the only paragraph in Annex D which had been within square brackets -- this obliges observers and States Parties sending observers to an investigation to protect confidential information should such information be disclosed to or acquired by such observers during an investigation. The removal of these square brackets is both reasonable and sensible.

Article 13 Assistance and protection against bacteriological (biological) weapons

46. Article 13 is largely unchanged from *Article VI Assistance and Protection against Biological and Toxin Weapons* in the rolling text. There are a number of small changes relating to text that had been within square brackets in the rolling text. These changes are as follows:

- a. Paragraph 1. The phrase "including biosensors" which had been in square brackets is included in the composite Protocol text. Given that biosensors are frequently an integral part of detection equipment, the inclusion of the words "including biosensors" provides a useful clarification which does not significantly amend the substance.
- b. Paragraph 3. This has been simplified by the removal of the clauses which had been in square brackets in the rolling text. Paragraph 3 in the composite Protocol text is identical to the corresponding paragraph in Article X of the CWC.
- c. Paragraph 9. The square brackets around the word "serious" have been removed in the composite Protocol text which is thus identical to the corresponding language in Article X of the CWC.
- d. Paragraph 10. The rolling text had two alternative forms of words which were both within square brackets. The composite Protocol text requires that requests for assistance when a State Party considers that biological or toxin weapons have been used against them shall be accompanied, either simultaneously or within 24 hours by a request for an investigation.

e. Paragraph 11. The rolling text had various times within square brackets. The composite Protocol text has these square brackets removed and the time during which the Director-General shall initiate an examination of the request has been increased from 12 to 24 hours -- the same time as the corresponding requirement in Article X of the CWC. The final sentence of paragraph 11 which had several square bracketed alternatives has been simplified without any change of substance.

f. Paragraph 12. The rolling text had various times within square brackets. The composite Protocol text has these square brackets removed. The times are identical to those in the corresponding paragraph in Article X of the CWC.

Article 14 Scientific and technological exchange for peaceful purposes and technical co-operation

47. Article 14 is largely unchanged from *Article VII Scientific and Technological Exchange for Peaceful Purposes and Technical Cooperation* in the rolling text. Article 14 is subdivided into seven subsections:

- A. General Provisions
- B. Measures to Promote Scientific and Technological Exchanges
- C. Measures to Avoid Hampering the Economic and Technological Development of States Parties
- D. Institutional Mechanisms for International Cooperation and Protocol Implementation Assistance
- E. Review and Consideration of Concerns Related to the Implementation of Article X of the Convention and this Article
- F. Co-operative Relationships with Other International Organizations and Among States Parties
- G. Declarations.

48. **Section A** is closely based on the language in *Article VII (A) General Provisions*. In paragraph 1 (c) the composite Protocol text has simplified the text and has struck a reasonable balance by adopting the word "through" and in the second paragraph it has rightly simplified the language so that the Organization shall provide a forum for the review of the implementation of Article X of the Convention.

49. **Section B** is closely similar to that in *Article VII (B) Measures to Promote Scientific and Technological Exchanges*. The composite Protocol text has adopted a different formulation in paragraph 3 -- and elsewhere in the composite Protocol text -- using "microbial and other biological agents" instead of the formulation "bacteriological (biological) agents" in the rolling text. The different formulation usefully reflects the language in Article I of the Convention. In paragraph 4, the composite Protocol text has removed the square brackets around "where appropriate" in the rolling text and has given the names of the various international organizations and agencies in full instead of using their abbreviations as in the rolling text. There are a number of changes to the subparagraphs in paragraph 4:

a. Paragraph 4 (a). The composite Protocol text has usefully adopted a different formulation with "microbial or other biological agents" replacing the more limited "microorganisms" in the rolling text. This change has also reasonably been made in various other paragraphs of this Article. In paragraph 4 (a), the phrase "prophylactics

and protection" has replaced the term "biodefence" which had been in square brackets in the rolling text.

b. Paragraph 4 (c) and (d). The composite Protocol text has adopted a simpler and broader form of words -- "including laboratories" and "including research institutes" -- than the more limited language in square brackets in the rolling text.

c. Paragraph 4 (h). The composite Protocol text has adopted a simple and reasonable solution to the alternatives in square brackets in the rolling text.

d. Paragraph 4 (i). The composite Protocol text has usefully adopted the broader language of "prophylactics and protection" instead of the term "biodefence" which had resulted in this subparagraph being within overall square brackets. The broader language makes the subparagraph entirely appropriate to this Article.

e. Paragraph 4 (k). The composite Protocol text has removed the square brackets from this subparagraph in the rolling text thereby reasonably making provision for this Article to address whatever future specific measures might be approved by the Conference of States Parties to improve the implementation of Article X of the Convention and this Article.

50. **Section C.** The composite Protocol text has struck a balance in paragraph 6 between the different alternatives within square brackets within the rolling text. The resulting text is a reasonable compromise. It also removes the paragraph in the rolling text which had stated the obvious that States Parties have the right to seek measures in accordance with Article V of the Protocol.

51. **Section D** is closely based on the language in *Article VII (D) Institutional Mechanisms for International Cooperation and Protocol Implementation Assistance* in the rolling text. In respect of the Cooperation Committee, paragraph 7 of the composite Protocol text in the first sentence has added a formulation that usefully links this paragraph back to paragraph 2 of this Article. In the second sentence it has removed from square brackets the word "monitor" in the rolling text and removed the additional wording in square brackets in the rolling text. The final sentence has usefully been streamlined through a further reference back to paragraph 2 of this Article. The composite Protocol text has in paragraph 8 adopted language on the size of the Cooperation Committee and its distribution amongst the regional groups. The size of 57 is six larger than the Executive Council with each regional group having one more representative than in the Executive Council. In paragraph 9, the first election calls for one third of the members to be elected for one year, and two thirds for two years. This latter provision is surprising as it will result in due course in two-thirds of the committee changing every three years. It is inconsistent with the provisions in Article 16 where the 51 member Executive Council will normally serve for two years with 25 members being elected in the first election to serve for one year. We **recommend** that the Ad Hoc Group on the basis of consensus amend this paragraph so that "For the first election of the Committee one-third of the members shall be elected for one year, one-third of the members being elected for two years and one third of the members being elected for three years due regard..." The remaining paragraphs relating to the Cooperation Committee set out more clearly the provisions already agreed in the rolling text.

52. In respect of the role of the Technical Secretariat the composite Protocol text in paragraph 21 (a) has adopted a reasonable compromise drawing upon language and ideas in the three alternatives in the rolling text. In subparagraphs (h) and (i), the composite Protocol text has reasonably removed language within square brackets in the rolling text. The composite Protocol text then usefully includes at this point a paragraph which occurred later in the rolling text and requires the Technical Secretariat to contain a department devoted to implementation of this Article thereby underlining the importance to the regime of the contribution coming from the implementation of Article X of the Convention.

53. **Section E.** The composite Protocol text has adopted streamlined language in paragraph 28 which reasonably addresses the concepts relating to the actions that may be taken by the Executive Council in considering concerns about the implementation of Article X of the Convention and this Article which has been contained in two paragraphs within square brackets in the rolling text.

54. **Section F.** The composite Protocol text in paragraph 29 has added a useful introductory phrase outlining the objectives of such co-operative relationships. It has also given the names of the various international organizations and agencies in full instead of using their abbreviations as in the rolling text. In paragraph 30 it has reasonably removed this paragraph from the square brackets in the rolling text. It would have been imprudent to have excluded possible ad hoc collaborative arrangements with non-governmental organisations as it is not possible to predict what future non-governmental organisations might exist and be appropriate to enter into such arrangements.

55. **Section G** is essentially identical to the language in the rolling text apart from the removal of the paragraph within square brackets.

Article 15 Confidence-building measures

56. Article 15 has identical language to that previously within overall square brackets in Article VIII of the rolling text.

Article 16 The Organization

57. Article 16 is essentially identical to the language in *Article IX The Organization* in the rolling text apart from a few areas where compromises have been adopted. One such area relates to the size of the Executive Council in which the composite Protocol text has a membership of 51 comprising of 11 States Parties from Africa, 7 States Parties from East Asia and the Pacific, 7 States Parties from Eastern Europe, 9 States Parties from Latin America and the Caribbean, 12 States Parties from the Western European and other States and 5 States Parties from West and South Asia. A second area is in Section E. Privileges and Immunities where language providing for the concept of the waiving of the immunity of the Organization or of the Director-General has not been included. This exclusion parallels the situation that applies under the Chemical Weapons Convention to the Organization for the Prohibition of Chemical Weapons. We **welcome** this as we had argued in previous

Evaluation Papers⁴ that inclusion of language waiving the immunity of the Organization or the Director-General was tantamount to expressing an *a priori* lack of confidence in the Organization and its Director-General and was unnecessary as should the circumstances ever arise then the Conference of States Parties could decide on such a waiver of immunity.

58. The provisions in paragraph 42 for the appointment of the staff of the Technical Secretariat continues to say that "due regard shall be paid to the necessity of securing the highest standards of efficiency, competence and integrity". In Evaluation Paper No. 14⁵, *Article IX: The Organization*, we noted in paragraph 62 that the WHO constitution emphasised the importance of ensuring that the efficiency and integrity of the secretariat *shall be maintained at the highest level* thereby avoiding the problems being faced by the OPCW in maintaining expertise and experience. We therefore **recommend** that on the basis of consensus the language in paragraph 42 of the composite Protocol text should be amended to read "due regard shall be paid to the necessity of securing and maintaining the highest standards of efficiency, competence and integrity".

Legal Issues

59. The term *legal issues* is used in this Evaluation Paper to refer to those Articles in the composite Protocol text that in the rolling text had been developed by the Friend of the Chair on Legal Issues together with *Article 17 National Implementation Measures* which in the rolling text had been developed by the Friend of the Chair on national implementation/assistance. As most of these Articles had already reached the stage of clean text, free from square brackets, the composite Protocol text is identical to that in the rolling text. The following Table indicates which Articles have essentially identical text to that in the rolling text.

Composite Protocol text (CRP.8)	Identical to rolling text (AHG/55-1 & 55-2)
<i>Article 12 Measures to redress a situation and to ensure compliance</i>	Identical to <i>Article V Measures to redress a situation and to ensure compliance</i> with the removal of square brackets from the final paragraph so that the issue can be brought to the attention of both the General Assembly and the Security Council.
<i>Article 17 National implementation measures</i>	Identical to <i>Article X National implementation measures</i> with the removal in para 1 (a) of the words within square brackets and in para 4 of the words <i>inter alia</i> .
<i>Article 18 Relationship of the Protocol to the Convention</i>	Identical to <i>Article XI Relationship of the Protocol to the Convention</i>

⁴See, for example, Graham S. Pearson, Nicholas A. Sims, Malcolm R. Dando & Ian R. Kenyon, *The BTWC Protocol: Proposed Complete Text for an Integrated Regime*, University of Bradford, Department of Peace Studies, Evaluation Paper No. 19, September 2000, p.16. Available at <http://www.brad.ac.uk/acad/sbtwc>

⁵Graham S. Pearson, Nicholas A. Sims, Malcolm R. Dando & Ian R. Kenyon, *Article IX: The Organization* University of Bradford, Department of Peace Studies, Evaluation Paper No. 14, January 2000. Available at <http://www.brad.ac.uk/acad/sbtwc>

<i>Article 19 Settlement of disputes</i>	Identical to <i>Article XII Settlement of disputes</i> with the removal of overall square brackets from the fifth para
<i>Article 20 Review of the Protocol</i>	Identical to <i>Article XIII Review of the Protocol</i> with the removal of a non-essential explanatory phrase in parentheses from the first para
<i>Article 21 Amendments</i>	Identical to <i>Article XIV Amendments</i> with the requirement in para 2 being for one third or more States to support the holding of an Amendment Conference
<i>Article 22 Duration and Withdrawal</i>	Identical to <i>Article XV Duration and Withdrawal</i>
<i>Article 23 Status of the Annexes and Appendices</i>	Identical to <i>Article XVI Status of the Annexes and Appendices</i>
<i>Article 24 Signature</i>	Identical to <i>Article XVII Signature</i>
<i>Article 25 Ratification</i>	Identical to <i>Article XVIII Ratification</i>
<i>Article 26 Accession</i>	Identical to <i>Article XIX Accession</i>
<i>Article 27 Entry into Force</i>	Paragraphs 2 & 3 identical to <i>Article XX Entry into Force</i>
<i>Article 28 Reservations</i>	Square brackets in <i>Article XXI Reservations</i> have been removed and one clause in square brackets removed
<i>Article 29 Depositary</i>	Identical to <i>Article XXII Depositary</i> with UN Secretary-General as Depositary
<i>Article 30 Authentic Texts</i>	Identical to <i>Article XXIII Authentic Texts</i> with UN Secretary-General as Depositary

60. Those Articles for which there have been changes from the rolling text are considered briefly:

a. *Article 12 Measures to redress a situation and to ensure compliance* is identical to Article V in the rolling text with the removal of the square brackets from the final paragraph so that the issue can be brought to the attention of both the General Assembly and the Security Council. This provision is identical to the provision in the corresponding Article XII in the Chemical Weapons Convention (CWC)⁶.

b. *Article 17 National implementation measures* is identical to Article X in the rolling text with the removal in para 1 (a) of the words within square brackets. The words in square brackets in Article X referred to Article I of the Protocol; no such cross-reference is necessary to the provisions in Article 1 General Provisions of the composite Protocol text. This is because Article 1 does not add further prohibitions. Instead, it reaffirms the obligations already contained in the Convention. Linkage with Article 1 of the Protocol is already sufficiently ensured by the similarity of Article 1 paragraph 8 with Article 17 paragraph 1.

c. *Article 19 Settlement of disputes* is identical to Article XII in the rolling text with the removal of overall square brackets from the fifth paragraph which states that this

⁶Organisation for the Prohibition of Chemical Weapons, *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, Available on the web at <http://www.opcw.org>

Article is without prejudice to Articles 3 to 12. It is essentially the same as the provisions in the final paragraph of the corresponding Article XIV in the CWC.

d. *Article 20 Review of the Protocol* is identical to Article XIII in the rolling text with the removal of a non-essential explanatory phrase "(hereinafter referred to as a "Review Conference")" from the first paragraph.

e. *Article 21 Amendments* is identical to Article XIV in the rolling text apart from the second sentence of paragraph 1 which states that any State Party may propose changes, in accordance with paragraph 4, to specified parts of this Protocol or its Annexes or its Appendices and the requirement in the second paragraph being for one third or more States to support the holding of an Amendment Conference. This latter provision is identical to the provision in the corresponding Article XV in the CWC. Insofar as the provision in the second sentence of paragraph relating to changes, we **recommend** that because it is clear from paragraph 4 that **changes** can only be proposed to certain Annexes and Appendices and not to any parts of the Protocol, it would be clearer if the second sentence were to be amended, on the basis of consensus, to read that "*any State Party may propose changes, in accordance with paragraph 4 to specified Annexes and Appendices.*"

f. *Article 27 Entry into Force* consists of three paragraphs; the second and third paragraphs are identical to those in Article XX in the rolling text. The first paragraph contains language stating that:

This Protocol shall enter into force 180 days after the deposit of instruments of ratification by 65 States, which shall include seven States from Africa, four States from East Asia and the Pacific, four States from Eastern Europe, six States from Latin America and the Caribbean, nine States from among Western European and other States and three States from West and South Asia, but not earlier than two years after its opening for signature.

The number of States required to deposit their instruments of ratification broadly reflect the composition of the Executive Council which is specified in Article 16 as being composed of 11 States Parties from Africa, seven States Parties from East Asia and the Pacific, seven States Parties from Eastern Europe, nine States Parties from Latin America and the Caribbean, 12 States Parties from among Western European and other States and five States Parties from West and South Asia. This formulation wisely avoids the situation in which a single State can effectively veto the entry into force of the Protocol through withholding its instrument of ratification.

Article 27 provides for entry into force to occur 180 days after the deposit of the 65th instrument of ratification -- an identical provision to that of Article XXI of the CWC. This ignores the lessons learned from the entry into force of the CWC which has shown that there are benefits from having a longer interval than 180 days between the trigger point, when the 65th instrument of ratification has been deposited, and entry into force on two counts: first, once the 65th instrument of ratification is lodged, a significant number of States then sought to ratify so that they would be States Parties at entry into force. A longer period would allow more States to ratify the Protocol so that they would be States Parties to the Protocol at its entry into force and thus entitled to provide staff for the Organization as well as receiving the benefits from the Protocol. The second count is a more practical consideration in that it is only at entry

into force that the Provisional Technical Secretariat (PTS) can commence recruitment and training of future visiting team staff and investigation personnel. The OPCW PTS found that 180 days imposed immense pressure on them to meet this timescale. A longer period would enable recruitment and training to be carried out more thoroughly. **We recommend** that the Ad Hoc Group consider changing on the basis of consensus the provision in Article 27 from 180 days to 270 days.

g. *Article 28 Reservations* is developed from Article XXI in the rolling text. The provision in Article 28 is that the Articles and Annexes in the Protocol shall not be subject to reservations and the Appendices shall not be subject to reservations incompatible with the object and purpose of the Protocol. It is essentially the same as the provision in the corresponding Article XXII in the CWC.

h. *Article 29 Depositary* is identical to Article XXII in the rolling text with the UN Secretary-General designated as Depositary and the other alternative deleted. This provision is identical to the provision in the corresponding Article XXIII in the CWC. A consequential deletion of the alternative has occurred in Article 22, paragraph 2 and Article 30.

i. *Article 30 Authentic Texts* is identical to Article XXIII in the rolling text with the UN Secretary-General as depositary and with London shown as the location at which the Protocol is signed. This provision is identical to the provision in the corresponding Article XXIV in the CWC apart from London appearing instead of Paris.

61. It is thus evident that for these 15 Articles in the Chairman's composite Protocol text that the language is essentially identical to that in the rolling text; the single Article in which new language has usefully been introduced is in relation to *Article 27 Entry into Force*. The provisions in the Chairman's composite Protocol text are essentially identical to those in the corresponding Articles of the CWC. We do, however, **recommend** that the Ad Hoc Group give consideration to amending, on the basis of consensus, the duration between the trigger point when the 65th instrument of ratification is deposited and the entry into force from 180 days to 270 days so as to benefit from the experience of the CWC.

Annexes and Appendices

62. The composite Protocol text has three Annexes:

Annex on Lists (Annex A)

Annex on Investigations (Annex B)

Annex on Confidentiality Provisions (Annex C)

The Annex on Lists (Annex A) is, as already discussed under Article 3, closely related to the language in *Annex A Declarations I Lists and Criteria (Agents and Toxins)* and *Annex A Declarations II List of Equipment* of the rolling text. The Annex on Investigations (Annex B) is largely based on the language in *Annex C Investigations* of the rolling text although compromises have been adopted to resolve issues previously within square brackets in the rolling text. The Annex on Confidentiality Provisions (Annex C) is, as already discussed

under Article 11, essentially identical to *Annex D Confidentiality Provisions* in the rolling text.

63. The composite Protocol text has nine Appendices:

Appendix A Declarations of Offensive and/or Defensive Biological and Toxin Programmes and/or Activities Conducted Prior to Entry into Force of the Convention/Protocol for Each State Party

Appendix B Declaration of Current National Biological Defence Programmes and/or Activities

Appendix C Declaration Format for Facilities Declared in Accordance with Article 4 (6)

Appendix D Declaration Format for Facilities Declared in Accordance with Article 4 (8) to (14)

Appendix E Listing of Facilities in Accordance with Article 4 (7)

Appendix F Listing of Facilities in Accordance with Article 4 (15)

Appendix G Facilities Existing on the Territory of a State Party but Falling under the Jurisdiction or Control of Another State Party/State

Appendix H Information to be provided in the Declarations Required under Article 14 (33)

Appendix I Format for Reporting International Transfers of Equipment

These provide the formats for the various declarations and listing of facilities required under the Protocol.

Analysis of the composite Protocol text

64. It is evident from this evaluation of the composite Protocol text that it is in many areas identical to the language in the rolling text and is firmly based on the agreed language out of square brackets in the rolling text. Compromises have been adopted to address those issues where there continued to be a divergence of views. These compromises have emerged from the bilateral informal consultations held by the Chairman and have been explored through the written elements addressing conceptual solutions based on the rolling text which had been circulated by the Chairman for virtually the whole of the Protocol to all delegations by February 2001. Whilst these compromises will not satisfy the aspirations of all the delegations to the Ad Hoc Group, they do, in our view, successfully ensure that the composite Protocol text achieves its mandate of strengthening the effectiveness and improving the implementation of the Convention. The composite Protocol text has successfully retained all the essential elements for an effective Protocol ranging from definitions and objective criteria, through compliance measures to measures for scientific and technological exchange for peaceful purposes and technical cooperation.

The value of the Protocol

65. In considering the composite Protocol text, it is important to remember that the BTWC with its basic prohibitions and obligations has been **in force** for over 25 years and that the Protocol is to strengthen the effectiveness and improve the implementation of the Convention. It makes **no** changes to the basic prohibitions and obligations. The Protocol regime is supplementary and additional to the Convention.

66. The key comparison is thus between the BTWC Protocol regime and the BTWC alone, including the procedures devolved from its provisions. A tabulation of the principal measures in the regime, compared with the procedures of the BTWC alone, clearly brings out the significant benefits from the Protocol.

BTWC and its Protocol Regime	BTWC alone
Mandatory declarations -- measures to ensure submission	Confidence-Building Measures -- patchy and variable (if made)
Declaration follow-up procedures -- analysis of declarations -- randomly-selected transparency visits	None -- none -- none
Declaration clarification procedures -- clarification visits	None -- none
Voluntary assistance visits	None
Non-compliance concerns -- Consultations >>> Investigations	Art V consultation procedures Art VI complaint to UN Security Council
Field investigation	Possible UN Secretary-General investigation if invited by State Party concerned

BTWC and its Protocol Regime	BTWC alone
Facility investigation	None
Transfer procedures	None
Assistance -- provisions detailed	Art VII assistance if UN Security Council decides a Party has been exposed to danger
International Cooperation -- elaborated in detail -- Cooperation Committee	Art X provisions -- no implementation procedures -- none
Organization -- CoSP, ExC & Technical Secretariat	None
National implementation -- Penal legislation required -- National Authority	Art IV National implementation -- No penal legislation requirement -- None

67. Taking all of the elements of the BTWC Protocol regime as a whole, it is clear that there are overall three particularly significant benefits that will accrue from the BTWC Protocol regime and which are not available with the Convention alone:

BTWC and its Protocol Regime	BTWC alone
Measures to increase transparency and build confidence	Suspicious not addressed -- and over time reduce international confidence in the regime
Procedures to address non-compliance concerns	Art V consultations (no teeth) Art VI complaints to UN SC (not used)
International cooperation and assistance provisions	No action despite aspirations at successive Review Conferences

68. It is evident from the above comparisons that the Protocol regime brings significant and worthwhile benefits to all States Parties -- both developed and developing -- over and above the procedures to uphold the basic prohibitions and obligations of the BTWC, which remain unchanged. In addition, the Protocol will be effective, over time, in building confidence between States Parties that other States Parties are indeed in compliance with the Convention, thereby reinforcing the norm that work on biological weapons, whether directed against humans, animals or plants, is totally prohibited. The Protocol thus brings improved health, safety, security and prosperity to all States Parties.

69. It is also appropriate to compare the BTWC Protocol regime with the CWC regime. The CWC regime is of considerable relevance to the BTWC Protocol regime for a number of reasons. First, there is a close relationship between chemical and biological weapons which is shown by the CBW spectrum:

CBW SPECTRUM

Classical CW	Industrial Pharmaceutical Chemicals	Bioregulators Peptides	Toxins	Genetically Modified BW	Traditional BW
Cyanide Phosgene Mustard Nerve Agents	Aerosols	Substance P Neurokinin A	Saxitoxin Ricin Botulinum Toxin	Modified/ Tailored Bacteria Viruses	Bacteria Viruses Rickettsia Anthrax Plague Tularemia
← Chemical Weapons Convention →			← Biological and Toxin Weapons Convention →		
← Poison →			← Infect →		

The two regimes rightly overlap for the materials of biological origin such as toxins. Both regimes address dual use materials and technology and both have general purpose criteria which embrace all possible agents, past, present and future. Indeed the CWC regime is the one of greatest relevance to the BTWC Protocol regime and it is already evident that National Authorities for the two regimes are likely to be colocated in a number of countries.

70. It is hardly surprising that the BTWC Protocol regime has been largely developed from the CWC regime; it is, however, much more elaborated than the CWC and has been finely tailored to address those biological agents and facilities of greatest relevance to the Convention. There are, however, some particular differences between the CWC regime and the BTWC Protocol regime largely arising from the fact that the CWC came into force in 1997 with a number of States known to be possessors of chemical weapons and chemical weapon production facilities whilst the BTWC came into force over 25 years ago. These differences are summarised in the Table:

BTWC and its Protocol Regime	CWC Regime
No biological weapon stockpiles	Declaration of chemical weapon (CW) stockpiles
Declaration of past offensive biological weapon programmes	Declaration of chemical weapon production facilities (CWPFs)
No destruction of biological weapon stockpiles	Destruction of chemical weapon stockpiles
No destruction of biological weapon production facilities	Destruction of chemical weapon production facilities
No tight timelines	Tight timelines for declaration and inspection of CW and CWPFs
List of agents and toxins -- No SSSF equivalent -- Declaration trigger	Scheduled chemicals -- Single small scale facility (SSSF) -- Varying regime according to Schedule

71. If the CW and CWPf elements of the CWC are ignored, then the basic architecture of the BTWC Protocol regime and the CWC regime is the **same**. The differences between the regimes are in the detail with the BTWC Protocol regime having built on the confidence-building measures agreed at the Second Review Conference in 1986 and extended at the Third Review Conference in 1991 as well as being developed from the CWC regime. In respect of the monitoring of dual-purpose materials and facilities, the two regimes are very comparable with the Protocol regime imposing a less onerous but more focussed burden in respect of declarations and visits whilst the international cooperation provisions are much more extensive than those of the CWC. In comparing the BTWC Protocol regime with that of the CWC, the fact that the BTWC is **already** in force has to be remembered.

72. The two regimes are compared in the following Table.

BTWC and its Protocol Regime	CWC Regime
Mandatory declarations -- measures to ensure submission	Mandatory declarations -- no measures to ensure submission
Declaration follow-up procedures -- analysis of declarations -- randomly-selected transparency visits	Routine inspections of Scheduled chemical facilities and DOC (discrete organic chemical) facilities
Declaration clarification procedures -- clarification visits	No declaration clarification procedures -- implicit not elaborated
Voluntary assistance visits	No provision for voluntary assistance visits -- implicit not elaborated
Non-compliance concerns -- Consultations >>> Investigations	Non-compliance concerns -- Consultations >>> Investigations
Field investigation	Investigation of alleged use
Facility investigation -- team size and duration limited	Challenge inspection -- duration limited
Transfer procedures	Transfer controls
Assistance -- provisions similar to CWC	Assistance
International Cooperation -- elaborated in detail -- Cooperation Committee	International Cooperation -- not elaborated in detail -- no provision for Cooperation Committee
Organization -- CoSP, ExC & Technical Secretariat	Organization -- CoSP, ExC & Technical Secretariat
National implementation -- Penal legislation required -- National Authority	National implementation -- Penal legislation required -- National Authority

73. The similarities between the two regimes are apparent. It is evident that the BTWC Protocol regime is considerably more elaborated, with limitations on the overall number of visits, team sizes and durations, than the CWC regime. There are, however, *de facto* limitations within the CWC regime through the annual scrutiny of the Organization's programme and budget by the Executive Council and the Conference of the States Parties. On the other hand, there are several areas where the BTWC Protocol regime has additional provisions that are not specifically included in the CWC regime.

74. In making an overall comparison of these two regimes, consideration also has to be given to the intensity of the visits/inspections of the facilities declared under the two regimes (and

ignoring the CWC inspection regime for chemical weapon and chemical weapon production and destruction facilities). It needs to be recalled also that the numbers of facilities declared under the BTWC Protocol regime has been estimated by several European countries as being of the order of tens of facilities per European country; this can be compared to the UK declaration⁷ under the CWC of over 550 plants at over 150 sites. Consequently, it can be expected that the number of declared facilities under the BTWC Protocol regime will be smaller by a factor of ten. The CWC regime has an intensity that varies depending on which Scheduled chemical is produced or used in a facility and reflects the risk to the Convention with Discrete Organic Chemical (DOC) facilities having a much smaller intensity of routine inspection. The BTWC Protocol regime has an intensity of visits that is not dependent on the type of declared facility and should therefore ensure that all declared facilities that are subject to randomly-selected visits will receive such visits over time.

75. In September 1999 in Briefing Paper No. 25⁸, we examined the Ad Hoc Group in order to identify appropriate criteria against which to evaluate the individual elements of the emerging Protocol regime and we then made a comparative evaluation using these criteria of both the emerging Protocol regime and the existing CWC regime. The conclusions we reached were the following:

43. *The CWC regime was finalised in the late 1980s whilst the BTWC Protocol regimes is currently being finalised -- and has benefitted from the experience gained by the OPCW and by States Parties in the implementation of the CWC as well as the other international developments during the past decade. Thus the BTWC Protocol regime has been tailored -- and rightly so -- to deal with the particular problems associated with compliance of the BTWC which includes the necessity to cope with a situation in which smaller quantities of agent and smaller facilities could be used in a non-compliant activity. However, the experience gained from compliance and verification regimes over the past decade has made it clear that one of the strongest tools in assessing compliance is the consistency of the information that becomes available from many sources. In a world in which more and more information is being provided on official as well as unofficial websites, it is becoming harder and harder to be confident that proscribed activities can be hidden in such a way that no inconsistencies are evident. In terms of the jigsaw analogy, there is no requirement to have all the pieces of the jigsaw to be confident of compliance **so long as all the pieces are clearly from the same picture**. It is for this reason that it is vital that the BTWC Protocol regime is a three pillar regime⁹ with declarations of which the completeness and accuracy are ensured through declaration follow-up procedures and declaration clarification procedures, infrequent visits as part of these declaration follow-up procedures as well as to implement Protocol Article VII measures, and both field and facility investigations.*

44. *The BTWC Protocol regime can thus be considered in the round and compared with the CWC regime. The Protocol declarations will be considerably less onerous*

⁷Department of Trade and Industry, *1997 Annual Report on the Operation of the Chemical Weapons Act 1996 by the Secretary of State for Trade and Industry*, February 1998, p.14.

⁸Graham S. Pearson & Malcolm R. Dando, *The Emerging Protocol: An Integrated Reliable and Effective Regime*, University of Bradford, Department of Peace Studies, Briefing Paper No. 25, September 1999. Available at <http://www.brad.ac.uk/acad/sbtwc>

⁹Douglas J MacEachin, *Routine and Challenge: Two Pillars of Verification*, The CBW Conventions Bulletin, Issue No 39, March 1998, pp.1 - 3.

than those for the CWC as only tens of facilities will need to be developed in a typical developed country such as those in Europe. No CPI information will be required yet the facilities to be declared will be selected to be those of particular relevance. The provisions for ensuring the submission of declarations have no parallel in the CWC regime and should be effective in ensuring that States Parties to the Protocol comply with their obligations. The declaration follow-up procedures with infrequent randomly-selected/transparency visits will ensure that declarations are accurate with the potential for extension of such visits to provide advice and technical cooperation providing a useful bonus for States Parties. The declaration clarification procedures, ranging from written correspondence through a consultative meeting to, if necessary, a clarification visit, will ensure that declarations are complete and accurate. Both of these are developments from the CWC regime and should ensure that the Protocol regime is more reliable. Investigations are always going to be highly political in nature and consequently extremely rare events. They are, however, vital elements of the overall regime. The specific Protocol provisions for implementation of Article X of the BTWC go far beyond the comparable provisions in the CWC -- and will contribute both to the promotion of universality of the Protocol and to the increasing of transparency and the building of confidence in compliance.

45. All in all, the BTWC Protocol is being crafted so that it will achieve the requirement for an effective and reliable regime which, in accordance with the AHG mandate, will strengthen the effectiveness and improve the implementation of the BTWC and thereby strengthen the norm against biological weapons.

We have reexamined that comparative evaluation in the light of the composite Protocol text and conclude that the conclusions are still valid and apply to the Protocol as detailed in the composite Protocol text.

Conclusions

76. This evaluation of the composite Protocol text has shown that it is in many areas identical to the language in the rolling text and is firmly based on the agreed language out of square brackets in the rolling text. Compromises have been adopted to address those issues where there continued to be a divergence of views. These compromises have emerged from the bilateral informal consultations held by the Chairman and have been explored through the written elements addressing conceptual solutions based on the rolling text which had been circulated by the Chairman for virtually the whole of the Protocol to all delegations by February 2001. Whilst these compromises will not satisfy the aspirations of all the delegations to the Ad Hoc Group, they do, in our view, successfully ensure that the composite Protocol text achieves its mandate of strengthening the effectiveness and improving the implementation of the Convention. **The composite Protocol text has successfully retained all the essential elements for an effective Protocol** ranging from definitions and objective criteria, through compliance measures to measures for scientific and technological exchange for peaceful purposes and technical cooperation.

77. In considering the composite Protocol text, it needs to be remembered that the BTWC with its basic prohibitions and obligations has been **in force** for over 25 years and that the Protocol is to strengthen the effectiveness and improve the implementation of the Convention. It makes **no** changes to the basic prohibitions and obligations. The Protocol regime is supplementary and additional to the Convention. Consequently, **the key**

comparison is between the BTWC Protocol regime and the BTWC alone. A tabulation of the principal measures in the regime, compared with the procedures of the BTWC alone, clearly brings out the significant benefits from the Protocol. It is evident that the Protocol regime will bring significant and worthwhile benefits to **all** States Parties -- both developed and developing -- over and above the procedures to uphold the basic prohibitions and obligations of the BTWC, which remain unchanged. In addition, the Protocol will be effective, over time, in building confidence between States Parties that other States Parties are indeed in compliance with the Convention, thereby reinforcing the norm that work on biological weapons, whether directed against humans, animals or plants, is totally prohibited. The Protocol thus brings improved health, safety, security and prosperity to all States Parties.

78. A comparison of the BTWC Protocol regime and the CWC regime has shown that the two regimes are indeed comparable and effective. It is concluded that the composite Protocol text has successfully been crafted so that it will achieve the requirement for an effective and reliable regime which, in accordance with the AHG mandate, will strengthen the effectiveness and improve the implementation of the BTWC and thereby strengthen the norm against biological weapons.