THE DRAFT BWC COMPLIANCE PROTOCOL

Executive Summary

- The Biological Weapons Convention was opened for signature in 1972 and entered into force in 1975. Unlike the 1993 Chemical Weapons Convention, the BWC lacks an effective verification mechanism.

- Negotiations have been underway in Geneva since 1994 to develop a compliance protocol which would strengthen the BWC. In that time, the Ad Hoc Group has held 23 sessions.

- The negotiations transitioned in 1997 to negotiations based on a "rolling text" with the objective of having the final text of a Protocol ready by the fifth BWC Review Conference which will meet in Geneva in November/December 2001.

- At the most recent session of the Ad Hoc Group in April/May, the chairman of the negotiations, Ambassador Tibor Tóth of Hungary formally introduced a "composite text" presenting his ideas as to how the final Protocol might look.

- There is now only one four-week negotiating session left prior to the Review Conference. Many countries have welcomed the "composite text" but there has been press reporting that the USA will not support it and other countries have also expressed concerns.

- The "composite text" establishes a verification architecture based on three pillars: declarations, visits and investigations. It also establishes an international organization to oversee States Parties implementation of its provisions. The text additionally creates a stringent regime for the protection of confidential information.

- The task now must be to address the specific concerns of States Parties so that the Protocol can be adopted by consensus at a Special Conference around the time of the Review Conference. If that proves impossible, a fixed period of time should be set, in which concerns are addressed, without watering down the current "composite text", and States Parties are sensitised to the fact that the Protocol is an integrated package of balances and compromises which is not designed to precisely meet the objectives of any one State Party.

- Failure of the negotiations, which are the only multilateral disarmament talks currently underway, would have ramifications for international security and could undermine the global norm against biological weapons built up over the past 25 years.

INTRODUCTION

The Biological Weapons Convention (BWC) was opened for signature in 1972 and entered into force in 1975. Unlike the later Chemical Weapons Convention (CWC), the BWC lacks any mechanisms for verifying compliance with its provisions.[1] As part of an evolutionary process of strengthening the Convention, negotiations on a compliance protocol supplemental to the BWC began in early 1995 and are scheduled for completion by November 2001 when the Fifth BWC Review Conference convenes in Geneva.

Four landmarks in the negotiations of the Protocol can be distinguished. The first was the decision of the 1994 Special Conference to establish the Ad Hoc Group (AHG) with the mandate "to consider appropriate measures including possible verification measures, and draft proposals to strengthen the Convention, to be included as appropriate in a legally binding instrument to be submitted for the consideration of the States Parties."[2] Second was the decision of the AHG to intensify its negotiations with a view to completing them as soon as possible before the Fifth Review Conference; a decision welcomed and endorsed by States Parties at the Fourth Review Conference in 1996. The third landmark was the transition of the negotiations from conceptual discussions to a "rolling text" in July 1997. Negotiations on the basis of the rolling text continued until April 2001 when the fourth landmark, the composite text, was released by AHG chairman Ambassador Tibor Tóth of Hungary.

The shift to the composite text was a long-time coming given the diminishing utility of continuing negotiations on the rolling text from December 1999. From that point the number of differences resolved in the rolling text, however measured, became fewer and fewer at each subsequent session. By the end of 2000, formal negotiations on the rolling text were taking second place to informal bilateral consultations conducted by the chairman, the friends of the chair and by individual delegations.

Nevertheless, a number of countries, such as China, Cuba India, Iran, Pakistan and Russia remained committed to the rolling text as the only basis of negotiations. Despite the obvious slowdown in progress it remained unclear whether or not these and other delegations would support negotiations based on anything other than the rolling text; even if a new text originated with the chairman. The reticence of these and other delegations was worn down by a gradual release of ideas originating from the informal negotiations taking place outside the formal meetings of the AHG.

To all intents and purposes the chairman's text had been released bit by bit in the "building blocks" distributed to all AHG participants during the February 2001 session. During the next five weeks, March 2001, Tóth reviewed, revised and integrated the "building blocks" into one document. On 30 March, this composite text was simultaneously presented in the capital cities of AHG participants and released in Geneva to delegations. The document was introduced formally to all delegations at the beginning of the twenty-third session, on 23 April 2001.[3]

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[1] The initial UK draft of a convention prohibiting biological weapons provided for States Parties to lodge complaints with the UN Security Council and request that they be investigated. However, the specific proposals on investigations were absent from the final text. See: *SIPRI Yearbook of World Armaments and Disarmament 1969/70*, (Stockholm: Almqvist and Wiksell, 1970), p 202-6 and p 446-9.

[2] United Nations, document BWC/SPCONF/1, 1994, as posted on the internet at <www.opbw.org>.

[3] United Nations, document BWC/AD HOC GROUP/CRP.8 dated 3 April 2001. A copy of the chairman's text can be found on the internet at <http://www.fas.org/bwc/papers/chairtxt.htm>.

This briefing paper will focus on the main elements of the verification regime which the chairman's text seeks to establish. It will also outline the international organization created to oversee this verification regime and the provisions pertinent to the protection of confidential information. The latter are essential if States Parties and the biotech and pharmaceutical industries are to accept the burdens imposed by the verification regime. This focus on the verification regime is not intended to downplay the equally important provisions in the text relating to scientific cooperation, technical exchanges and assistance and protection against biological weapons. Indeed, the chairman's text should be seen as an integrated package of balances and compromises, within which many of the provisions are intricately linked together.

THE VERIFICATION ARCHITECTURE

The verification architecture is based on three pillars and is similar, at least in its structure, to the CWC. These pillars are: a baseline of information on the relevant capabilities of each State Party – **declarations**; procedures for assessing the accuracy of declarations – **visits**; and provisions for assessing non-compliance or alleged non-compliance with the Convention – **investigations**. In the CWC these are referred to as declarations, inspections and challenge inspections, whereas the nomenclature of the AHG has developed into declarations, visits and investigations.[4]

DECLARATIONS

One of the things all AHG delegations have been able to agree on from the beginning of the negotiations was that declarations should cover the facilities most relevant to the BWC. It was unfortunate that they could not agree on what constituted most relevant to the Convention. The chairman's text contains two types of declarations, initial declarations relating to past offensive BW activities and past defensive BW activities and annual declarations. The rolling text included ten annual declaration triggers and three notifications, whereas the composite text contains six annual declaration triggers and no notifications.[5] There has also been a certain re-ordering of the text, particularly in relation to production facilities.

In an innovation based on experience with CWC implementation, the chairman's text also includes penalties for those States Parties which do not submit their declarations within certain timeframes.[6] The initial sanction is losing the right to access the declarations of other States Parties. After this, if the declaration is still not forthcoming there is a series of graduated steps ranging from withholding the right to invoke declaration clarification procedures or request a facility investigation, to withdrawing the right to vote in the Conference of the States Parties and losing eligibility for election to the Executive Council.

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[4] While comparisons with the CWC can be helpful, it is important to remember that each treaty is designed to deal with different agents (except for toxins which are covered by both) and technologies and that different approaches have sometimes had to be taken. Equally important, is that fact that the Protocol is supplemental to the BWC which has been in force for over 25 years. It is also worth noting that neither treaty was negotiated in a vacuum and that developments and events in the contemporary international security arena influenced the negotiation of both treaties.

[5] The rolling text contains 2 initial declarations (past offensive and defensive) and 10 annual declarations (current biodefence, vaccine production facilities, maximum biological containment, high biological containment, plant pathogen containment, work with listed agents and/or toxins, other production facilities, other facilities, transfers, implementation of BWC Article X). The notifications are, national legislation, outbreaks of disease and current exceeding of threshold.

[6] During the first three years of CWC implementation there was a persistent minority of States Parties which had not submitted their initial declarations.

Taking each of the six annual declaration triggers in turn, they are as follows:

Biological defence programmes

This trigger is in four parts, with the first two parts applicable to all States Parties. In those parts a summary of the general objectives and the main elements of biodefence programmes is required together with a summary of research and development of ten aspects of biodefence programmes: prophylaxis; pathogenicity; virulence; diagnostic techniques; detection; aerobiology; medical treatment; toxinology; physical protection and decontamination; aerobiological testing and evaluation.

The next two establish which facilities shall be declared. Declarations are required for all facilities which conduct research and development on pathogenicity, virulence, aerobiology or toxinology at which 15 or more technical and scientific person years of effort OR 15 or more technical and scientific personnel were engaged in such research and development work as part of the biological defence programme. The State Party chooses which of the criteria it declares under, i.e. person years or staff numbers.

That constitutes the basic facility declaration. However, in recognition that not every State Party has a biodefence programme of that magnitude, the trigger also requires that if fewer than 10 facilities are declared under the above criteria, the State Party must declare the largest facilities – by whichever criterion is chosen – representing 80% of the programme devoted to research and development on pathogenicity, virulence, aerobiology or toxinology.

Furthermore, if no facilities are declared under either of these criteria, a State Party must list and provide general information on all of its facilities where two or more technical and scientific person years or two technical and scientific personnel are employed conducting research and development involving experimental work in any of the ten aspects identified in the second summary. If three or more facilities are listed under this obligation, the largest facility must be declared and the remainder listed. It is important to note that declared facilities are subject to randomly-selected transparency visits; listed facilities are not.

A number of delegations still want to see all biodefence facilities declared under the Protocol and the approach of listing some facilities and declaring others will be a major issue in the next round of negotiations.

Maximum biological containment

This uncontroversial declaration requirement remains from the rolling text and all maximum biological containment facilities are to be declared. Nevertheless, the AHG still contains different views on the actual definition and whether it is based only on physical characteristics, i.e. the design of the building and the physical containment features OR it is based on the work undertaken on risk group 4 pathogens.

High biological containment

Long-standing different views exist over whether or not high biological containment should be a stand-alone trigger. The industrialised states are opposed because of the number of declarations it would require and the fact that in their view the activities relevant to the BWC

which occur under high biological containment would be captured under other triggers. China is reported to be one of the leading proponents of a stand-alone trigger.[7]

In the composite text high biological containment is a stand-alone trigger if the working area under high biological containment exceeds $100m^2$ AND any of the following activities are conducted: production of vaccines; production of micro-organisms; or genetic modification of listed agents and toxins for the purpose of creating a novel genetically modified agent or genetically modified organism with increased disease causing or toxic properties.

Each of these four elements are cross-referenced to either the "work with listed agents" trigger or the "production facilities" trigger.

It is understood that the industrialised States still see no need for this trigger but it may be acceptable to them as a compromise with the size limitation and the four elements listed. It is also understood that those delegations which wanted to include a separate high biological containment trigger are far from convinced about the composite text formulation which does provide a stand-alone trigger; but not in the way they envisaged it.

Plant pathogen containment

Such facilities are required to be declared where the floor area of the working area exceeds $100m^2$.

Work with listed agents and/or toxins

The listed agents and toxins are contained in Annex A of the composite text. Four areas of work will trigger a declaration: production or recovery of listed agents/toxins using certain quantitative limits relating to fermenters and bioreactors, embryonated eggs and growth media which meets or exceeds the quantitative elements; genetic modification of any listed agent or toxin for the purpose of creating a novel or genetically modified agent, organism or toxin, or to enhance the production of a toxin or its toxic sub-units; genetic modification of a listed agent or toxin for the purpose of creating a novel or genetically modified organism with increased disease causing or toxic properties or to enhance the production of any such toxin or its toxic sub-units; and certain intentional aerosolisation of any listed agent/toxin.

Production facilities

The final declaration trigger is itself divided into four types of activity. The first relates to production of any vaccine for humans that is for the general public or for the armed forces or was licensed, registered or otherwise approved for distribution or sale by the government of the State Party. Additionally, any vaccine for animals that is available to the general public or which was licensed, registered or approved for distribution or sale by the government of the State Party is also covered by the declaration trigger. The second category relates to production of any micro-organism, unless it is for food and beverages for humans or as a waste or by product, or a microbially produced diagnostic reagent for public sale, using certain equipment or production methods which exceed certain quantitative amounts. The third category relates to production of biocontrol agents and plant inoculants using any similar equipment or production methods.

[7] Henrietta Wilson, *Disarmament Diplomacy*, (December 1999), p 31, "Strengthening the BWC: Issues for the Ad Hoc Group".

The final category is not a declaration trigger at all but a requirement to "list and provide general information" on all facilities – unless otherwise declared under the Article – which produced for public sale microbially produced substances, other than for food or beverages for humans, or as a waste or by-product. According to the declaration format in Appendix F, the information to be provided includes the name and address of the facility and a brief description of the objectives of its work. Again, equipment and production methods over certain amounts are used as the triggers. The facilities under this final category are not subject to randomly-selected transparency visits for the first five years of the Protocol. The decision on whether or not they shall become subject to such visits is to be taken by the First Review Conference.

VISITS

The second verification pillar of the chairman's text is formally titled "follow-up after submission of declarations" and is based on three types of activity: **randomly-selected transparency visits**; **voluntary assistance visits**; and **declaration clarification procedures**. The key elements in terms of verification are the randomly-selected transparency visits (RSTVs) and the declaration clarification procedures, which may entail a voluntary clarification visit or may result in the Executive Council initiating a clarification visit.

Randomly-selected transparency visits

Very different visions of all aspects of the visit regime exist in the AHG. Even with the narrowing of these visions during the negotiations, the final rolling text contains various different provisions regarding the scope of RSTVs. For illustrative purposes, the table indicates the envisaged parameters of the options in the rolling text. The table consists of three alternatives, identified by "strong", "compromise" and "weak". The strong and weak models do not represent or reproduce a coherent proposal by one or more States Parties, The "compromise" model illustrates the provisions in the chairman's text.

The RSTV regime is certainly not as intrusive as proposals contained in earlier versions of the rolling text. However, it remains more intrusive than certain delegations would wish it to be; not least in its application to all declared facilities. Equally, the language used provides an element of latent potential, such as the ability to revisit parts of the facility and the ability of the visit team to request and conduct other on-site activities. In that respect, there is a certain amount of flexibility which might not be immediately obvious. Perhaps more importantly, the RSTV regime has to be judged against the objectives of such visits, their purpose, and the overall purpose of the Protocol, which is to strengthen the BWC.

TABLE I: OPTIONS CONTAINED IN BWC/AD HOC GROUP/55-1 AND BWC/AD HOC GROUP/CRP.8

VARIABLE FACTOR	STRONG MODEL	COMPROMISE MODEL	WEAK MODEL
Purpose of visit	To determine that declarations submitted are complete and accurate – as part of the overall package of TS' undertakings; Enhance transparency of facilities; Promote accuracy of declarations; Assist TS to acquire understanding of facilities declared globally	Increase confidence in consistency of declarations; Encourage submission of complete and consistent declarations; Enhance transparency of facilities; Assist TS to acquire understanding of facilities declared globally	Increase confidence in consistency of declarations with the situation at the facility and encourage submission of complete declarations; Enhance transparency of facilities; Promote accurate fulfilment of declarations; Assist TS to acquire understanding of facilities declared globally
Duration	Up to 2 days	Up to 2 days	Up to 2 days
Size of visit team	Maximum 4 personnel	Maximum 4 personnel	Maximum 4 personnel
Mandatory / Voluntary	Mandatory	Mandatory	Mandatory
Period of notice	14 days	14 days	14 days
Types of facility	All declared facilities	All declared facilities	Biodefence and high biological containment facilities only
Selection criteria	As wide and equitable distribution as possible among States Parties submitting declarations	To ensure spread of visits among a representative range of declared facilities taking into account the principle of proportionality[8]	By principle of proportionality
Level of access	Sufficient access to fulfil mandate; Right to protect CPI & NSI; Make every reasonable effort to provide alternative means to fulfil visit mandate if proposed activities not agreed to	At discretion of State Party; Sufficient to allow permitted activities; Right to protect CPI & NSI; Every reasonable effort to provide alternative means to fulfil visit mandate if proposed activities not agreed to	Provide access, nature and extent decided by visited State Party; Right to protect CPI & NSI; Make every reasonable effort to provide alternative means to fulfil visit mandate if proposed activities not agreed to

8. Probability of receiving a RSTV shall be proportional to number of declared facilities noting that no State Party shall receive more than 7 per year, each State shall receive at least 2 in a 5-year period, and no facility shall receive more than 3 in a 5-year period.

VARIABLE FACTOR	STRONG MODEL	COMPROMISE MODEL	WEAK MODEL
Permitted activities	Briefing; Tour; Review and discuss information provided; Discussion (with consent) of points relevant to visit mandate; Examine (with consent) relevant documentation; Revisit parts of the facility relevant to mandate and declared activities; Access (by invitation) other areas within the declared facility; Other on-site activities granted to assist fulfilment of mandate	Briefing; Tour; Review & discuss information provided; Discussion (with consent) of points relevant to visit mandate; Review (with consent) documentation relevant to mandate; Visit and revisit parts of facility involved in declared activities; Other on-site activities as agreed by the visit team and facility	Briefing; Possible tour determined by State Party; Review and discuss information provided; Discussion on declared activities related to visit mandate; Visit parts of facility and observe; Other on-site activities as offered by the State Party
Report drafting	Factual report on activities; Factual account of degree of access and co-operation provided by State Party; Comments on how activities furthered purpose of visit; Comment by visited State Party – confidential and/or irrelevant information identified; Final report adjusted, as a rule, to take account of comments	Factual report on activities; No comment on information and/or access denied by facility; Account of how activities furthered the purpose of the visit; Comment by visited State Party – confidential and/or irrelevant information moved to annex; Final report adjusted, as a rule, to take account of comments	Factual report on activities; Comment on how activities furthered the purpose of the visit; No record or comment on access or information denied; Identification of confidential and/or irrelevant information by visited State Party; Final report adjusted, as a rule, to take account of comments
Number per year	140	60 – 90	30

Declaration clarification procedures

Any concern raised about a facility declaration may be dealt with using either the declaration clarification procedures under Article 6 or the "three C's" measures (consultation, clarification and co-operation) under Article 8. Tóth has referred to this approach as a "fork in the road" and the compromise seeks to allay the concerns of some delegations about having two types of clarification procedures in the text.

If the concern relates to a facility which the State Party seeking clarification believes should have been declared, but was not, the State Party from which the clarification is requested has the right to choose which clarification procedure is followed; Article 6 or Article 8.

The clarification procedures under Article 6 are widely accepted and not controversial until the point is reached where the State Party seeking a clarification believes that the initial consultative meeting has failed to resolve its concern. In that event, the Director-General may suggest the State Party subject to a clarification request offer a voluntary clarification visit. If no such voluntary clarification visit is offered within 21 days, all the information is submitted to the Executive Council and considered at its next regular session. The Executive Council may initiate a clarification visit.

It is the ability to initiate a clarification visit that is subject to continued debate within the AHG. The difference in views revolves around whether or not mandatory clarification visits are a specific and targeted way of resolving concerns and ambiguities about declarations or, alternatively, they imply something short of an investigation by the back-door. The latter is arguably overstating the concern because the provisions for clarification visits are the same, whether voluntary or not, and are less intrusive than RSTVs and significantly less intrusive than investigations.

Despite the concerns of some, there appears to be a widespread feeling among a majority of States that the clarification provisions are not as extensive as they could be, particularly given the ability of the State Party subject to clarification on undeclared facilities to choose the clarification procedure. Under Article 6 the procedures include four steps: submitting a request in writing to the Director-General; a response from the State Party subject to a clarification within 30 days; a consultative meeting if the written response does not resolve the issue; and forwarding the information, if no voluntary clarification visit is offered and the issue is still not resolved, to the Executive Council.

Article 8 does not include explicit provisions for mandatory clarification visits, although a special session of the Executive Council may be requested by the party initiating the clarification request. That special session may recommend to the States Parties involved any measures it deems appropriate to resolve the issue. There appears to be some concern that Article 8 procedures will be chosen by States wishing to obstruct the process.

One of the reasons that the industrialised States feel quite strongly about the clarification process is the fact that in their view they have already compromised on the RSTV provisions to accommodate the concerns of other countries and therefore, the clarification procedures should be stronger and carry a mandatory visit element. Equally, the kind of evidence required to launch an investigation is unlikely to be available on such facilities and, perhaps more importantly, the clarification procedures can increase confidence about compliance at a low level.

The clarification provisions do not affect the right of any State Party to initiate an investigation; but the provisions of Article 8 do impact upon that process.

INVESTIGATIONS

Investigations are the third pillar of the verification architecture in the chairman's text. Two types of investigations are envisaged in the chairman's text. **Field investigations** where there is a

release of or exposure of humans, animals or plants to biological agents and toxins that gives rise to a concern of possible non-compliance or use of biological or toxin weapons. **Facility investigations** when there is substantive basis for concern that a facility is engaged in activities prohibited under BWC Article I.

One important point of difference in the AHG is whether the consultation, clarification and co-operation provisions would be mandatory prior to an investigation request being submitted. The composite text does not make those provisions mandatory but notes that States Parties "should, whenever possible, first make every effort" to use the procedures to resolve concerns.[9]

The most difficult area has been the decision-making procedures of the Executive Council; the so-called red-light/green-light issue. Under the former the Executive Council must vote to stop an investigation from proceeding, whereas in the latter it must vote to permit an investigation to proceed. Under both procedures there were then questions over the number of votes required, either a simple majority or a qualified majority, usually two-thirds or three-quarters of Council members. An additional question was whether or not votes should include all members of the Council or just those present and voting. One final question was the timelines issue; how soon should an investigation request be considered and a decision taken on it by the Council. Options ranged from 12 hours to 96 hours in the rolling text.

In the chairman's text all investigation requests must be decided upon by the Council within 24 hours of being informed by the Director-General that the request fulfils the requirements specified. There is no uniform red-light/green-light approach. Rather a mix of the two is used depending on the investigation request:

- Field investigations are divided into four categories:
    - An investigation of alleged use of BW on the territory of the requesting State Party shall proceed unless a three-quarter majority of EC members present and voting decide otherwise (red-light)
    - An investigation of alleged use of BW on the territory of another State Party shall proceed unless a simple majority of EC members present and voting decide otherwise (red-light)
    - Where an outbreak of disease is believed to be directly related to activities prohibited under the BWC on the territory of the requesting State Party an investigation shall proceed unless a two-thirds majority of EC members present and voting decide otherwise (red-light)
    - Where an outbreak of disease is believed to be directly related to activities prohibited under the BWC on the territory of another State Party an investigation shall proceed only if a simple majority of EC members present and voting approve the request (green-light).
- Facility investigations shall proceed only if a simple majority of EC members present and voting approve the request (green-light).

Managed access provisions apply to the investigations and include similar provisions to those contained in the CWC. The chairman's text also outlines the possible penalties for abusing the right to request an investigation: the requesting State Party bearing some or all of the financial implications of the investigation; suspending the requesting State Party's right to request further investigations for a

[9] United Nations, document BWC/AD HOC GROUP/CRP.8, Article 9 (10), page 56. Even under the CWC, which has been in force for over four years, there are similar differences of interpretation among States Parties.

period of time; and suspending the right of the requesting State Party to serve on the Executive Council for a period of time. While the CWC also contains a provision relating to financial implications of abuse[10], the additional provisions are another example of how the chairman's text is a development of the CWC.

INTERNATIONAL OVERSIGHT

The verification regime outlined above is to be overseen by an international organization, the Organization for the Prohibition of Bacteriological (Biological) and Toxin Weapons, otherwise known as the OPBW. Bids to host the Organization have been received from both the Dutch and the Swiss governments, although the AHG has yet to make a final decision between The Hague or Geneva.

The chairman's text structures the OPBW along the lines of other recent international organizations such as the Organization for the Prohibition of Chemical Weapons (OPCW) and the CTBTO, the organization overseeing the Comprehensive Test Ban Treaty. Like them, the OPBW will consist of three main organs: the **Conference of the States Parties** which will be its principal decision-making body; the **Executive Council** which will oversee the day-to-day implementation of the Protocol; and the **Technical Secretariat** that will assist States Parties in Protocol implementation, service the policy-making organs, and conduct visits and investigations. The Organization will likely have an annual budget of around US$ 30 million, roughly half that of the OPCW.[11]

The Conference will consist of all members of the OPBW with each State Party having one vote. Its main functions are to oversee the implementation of the Protocol, to review, and take the necessary measures to ensure, compliance with the Protocol and the BWC, to redress and remedy any situation in contravention of the Protocol or the BWC and to oversee the Council and the Secretariat. In addition, the Conference will elect the members of the Council and appoint the Director-General. It will meet for annual sessions and in special sessions when requested. It will also meet at five-yearly intervals to review the implementation of the Protocol. The Conference will have two subsidiary bodies, the Confidentiality Commission and the Co-operation Committee. In cases of non-compliance the Conference can decide to restrict or suspend a States Party's rights and privileges, recommend "collective measures" to other States Parties, or bring the matter to the attention of the UN Security Council and UN General Assembly, if it is "particularly grave and urgent".

The Council will be made up of 51 States Parties serving two-year terms chosen from among the six regional groups as follows: 11 from Africa; 7 from East Asia and the Pacific; 7 from Eastern Europe; 9 from Latin America and the Caribbean; 12 from Western European and Others; and 5 from West and South Asia. The selection will be carried out by each regional group on the basis of a number of criteria, such as equitable geographic distribution, the importance of the biotech and pharmaceutical industries and the number of declared facilities, as well as political and security interests. As in the OPCW, the Council will be the primary forum in which routine implementation issues and the activities of the Secretariat are considered. It will facilitate consultation, clarification and co-operation among States Parties and co-operate with the National Authority in each State Party. In cases of non-compliance the Council can take a number of steps, including bringing the matter before the Conference, or even, in cases of "particular gravity and urgency", bringing the matter directly to the attention of the UN Security Council and the UN General Assembly.

The Secretariat will have a number of tasks related to the verification of the Protocol. It will receive, process and analyse the declarations submitted by States Parties and will also collect and assess epidemiological information. Upon receiving declarations, the Secretariat will process, prepare, conduct and report upon visits. When requested, it will also conduct field and facility investigations, assisted by outside experts in the case of the former. While conducting visits and investigations, staff can only use equipment which is commercially available and has been approved for use by the

[10] CWC Article IX.23.
[11] Graham Pearson, *An Optimum Organization*, Bradford Briefing Paper no 5 (January 1998).

Conference. Any other equipment can be refused entry by the visited State Party. It has been estimated that the Secretariat will consist of between 200-250 staff members, of whom about 70 would be specially designated to carry out visits and investigations.[12]

PROTECTION OF CONFIDENTIAL INFORMATION

In its work, it is likely that the OPBW will receive or collect information which States Parties consider confidential, either for reasons of national security or commercial propriety. The chairman's text includes a number of safeguards to ensure that such occasions are kept to a minimum and, when they do occur, that the OPBW is well equipped to protect such information. These provisions are modelled on those of the CWC, with which the chemical industry has expressed its satisfaction, but are even more rigorous.

The "general provisions" of the chairman's text state that countries "shall have the right to protect commercial proprietary information and national security information". The OPBW is also required to conduct its activities in "the least intrusive manner" possible. These general statements are followed up by more specific safeguards later in the text. The Director-General has primary responsibility for the protection of all confidential information received by the Secretariat. The Director-General is also required to establish and maintain stringent procedures governing the handling of such information within the Secretariat. In contrast to the CWC, which leaves the specifics of such procedures to be decided by the Conference, they are actually included in the chairman's text, in a very detailed Annex on Confidentiality.[13] All Secretariat staff are to sign a secrecy agreement and provision is made for the investigation of breaches of confidentiality and the waiver of legal immunity by the Director-General, if appropriate. In recognition of the importance of protecting confidential information, the text requires that the Secretariat includes a confidentiality unit under the direct responsibility of the Director-General and that the Executive Council establishes a sub-committee to monitor the application of the confidentiality procedures. Again, these provisions are a development based on experience in CWC implementation.

There are also extensive safeguards for the protection of confidential information during on-site visits. As already shown, the notification period for a randomly-selected transparency visit is 14 days. The visiting team will only consist of staff members specifically designated as such; at the designation phase each State Party can refuse to accept individual inspectors. Perhaps most significantly, the chairman's text state that "the nature and extent of all access inside the facility, and to the information it contains, shall be at the discretion of the visited State Party." There is no provision for visiting teams to take samples while conducting RSTVs. The chairman's text also includes strict safeguards to prevent confidential information being noted in the final report of the visit and gives the visited State Party the right to request that the report is not provided to other States Parties.

CONCLUSIONS

Much has happened in the three months since Ambassador Tóth released his text. The 15 EU member states, most recently at foreign minister level, have expressed strong support for the text and their commitment to the fifth Review Conference deadline.[14] There have been press reports aplenty that the US has already decided to reject the chairman's text and is just waiting for a diplomatically

[12] Graham Pearson, *An Optimum Organization*, Bradford Briefing Paper no 5 (January 1998), p 23; FAS Working Group on BW Verification, *The Structure and Cost of a BWC Organization*, (September 1998).
[13] The annexes form an "integral part" of the Protocol and are not subject to reservations.
[14] Council of the European Union, 11 June 2001, press release no. 9398/01 (Presse 226), "2356th Council meeting, General Affairs, Luxembourg, 11-12 June 2001".

opportune moment to announce its decision.[15] While not rejecting the text, in one of the few official reactions from the US administration, its Special Negotiator for Chemical and Biological Arms Control said: "We have serious substantive concerns with the text as Ambassador Toth presented it." On the subject of when the negotiations should finish he added: "We have always treated the November Review Conference as a target, not as a deadline".[16] Commentators and analysts have written both in support of and in opposition to the chairman's text.[17]

Many of these differences can be explained by the fact that "verification" means different things to different people. There is also disagreement on what constitutes a "sufficient" level of verification. While the chairman's text is clearly not as strong as some would wish it to be, indeed it has been described as "verification lite"[18], it does still bring benefits. According to one analyst: "The Protocol's compliance regime would effectively complement national intelligence, diplomacy and military capabilities. In serious situations the Protocol would provide a basis, broader than currently, for joint international action."[19] The chairman's text also brings the added value of providing for on-site visits, getting inspectors "on the ground". Professional, well-trained inspectors should be able to use this opportunity to clarify any ambiguities and gain a first-hand impression of the facilities in the States Parties.

The international community now appears to be faced with three scenarios: to accept the current text as it stands, weaknesses and all, perhaps creating a false sense of security; to set a fixed period in which to undertake to strengthen the text, as has been recently suggested[20]; or to abandon the whole enterprise after six years and risk damaging the BWC and sending the signal that the international community is not serious about preventing the proliferation of biological weapons. It is likely that decisions in Washington will play a large role in which scenario eventually emerges.

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[15] Lois Ember, *Chemical and Engineering News*, vol 79 no 17 p 9, "US nixes efforts to strengthen treaty"; Michael R Gordon and Judith Miller, *The New York Times* (internet edition), 20 May 2001, "US germ warfare review faults plan on enforcement".

[16] Donald A Mahley, 5 June 2001, "Testimony before the House Government Reform Committee, Subcommittee on National Security, Veterans Affairs and International Relations, The Biological Weapons Convention: Status and Implications".

[17] A collection of US views can be found in *Arms Control Today*, (May 2001), vol 31 no 4. Other publications include Amy Smithson, *House of Cards: The Pivotal Importance of a Technically Sound BWC Monitoring Protocol*, Stimson Center report no 37 (May 2001); Michael Moodie, *The BWC Protocol: A Critique*, CBACI Special Report no 1 (June 2001); Barbara Rosenberg, *The CBW Conventions Bulletin*, no 52 (June 2001), pp 1-3, "US policy and the BWC Protocol"; Graham Pearson, Malcolm Dando and Nicholas Sims, *The Composite Protocol Text: An Effective Strengthening of the Biological and Toxin Weapons Convention*, Bradford Evaluation Paper no 20 (April 2001).

[18] Oliver Meier, *Trust and Verify*, (May-June 2001), pp 1-2, "A biological weapons protocol: verification lite?"

[19] Barbara Rosenberg, *The CBW Conventions Bulletin*, no 52 (June 2001), pp 1-3, "US policy and the BWC Protocol".

[20] *The Economist*, 16 June 2001, p 13, "Stop the clock, support the ban".