

NATIONAL IMPLEMENTATION MEASURES : AN UPDATE

by Graham S. Pearson* & Nicholas A Sims†

Introduction

1. The Ad Hoc Group (AHG) is considering measures to strengthen the Biological and Toxin Weapons Convention (BTWC) through a legally binding instrument. It is evident that for such strengthening to be effective it will need to be implemented by States Parties through appropriate national measures. Consequently, Article X of the draft Protocol entitled National Implementation Measures is of vital importance in ensuring that the future Protocol achieves its objective of strengthening the BTWC.

2. Briefing Paper No 4 National Implementation Measures issued¹ in January 1998 took stock of the developments at the successive Review Conferences of the BTWC in respect of Article IV of the BTWC. It noted that Article IV of the Convention states that:

Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.

However, it was apparent from the successive Review Conferences that there was considerable variation in the measures taken by individual States Parties and it was far from clear that all States Parties had indeed taken necessary measures. The requirements of the Chemical Weapons Convention (CWC)² were considered and used to develop language for the future Protocol to strengthen the BTWC which would ensure that the requirement for effective national implementation of the Protocol was at least as strong, if not stronger than that required in the CWC.

3. In this Briefing Paper we consider the developments, between the ninth and twelfth sessions of the AHG, of the text in Article X (National Implementation Measures) of the draft BTWC Protocol and examine the implications of recent developments and analysis carried out by the Organization for the Prohibition of Chemical Weapons (OPCW) in regard to the national legislation for the implementation of the CWC thus far reported to the OPCW. Other

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¹Graham S Pearson & Nicholas A Sims, *National Implementation Measures*, Briefing Paper No. 4, University of Bradford, January 1998. Available on <http://www.brad.ac.uk/acad/sbtwc>

²Convention 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.nl/cwdoc.htm>

developments relating to legislation both nationally in the UK and internationally in respect of the International Convention for the Suppression of Terrorist Bombing which was opened for signature on 12 January 1998 and Rome Statute for the International Criminal Court adopted on 17 July 1998 are also considered before reconsidering possible language for the strengthening of Article X of the draft Protocol.

Ad Hoc Group Developments

4. The AHG consideration of the text for national implementation is being carried out through the Friend of the Chair on National Implementation and Assistance, Mr Ajit Kumar of India. Good progress has been made towards a text for Article X in which there are now fewer square brackets, indicating alternative language or pending agreement on the terminology to be adopted. The current version of the draft Protocol³ as it emerged from the eleventh session of the AHG is as follows:

1. *Each State Party shall, in accordance with its constitutional processes, take any necessary measures [including enacting penal legislation with respect to the obligations under the Protocol] to implement its obligations under this Protocol. [In particular, it shall:*

[(a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited [to a State Party] under this Convention[, including enacting penal legislation with respect to such activity];]

[(b) Prohibit natural and legal persons from undertaking any such activity anywhere under its control; and]

[(c) Prohibit, in conformity with international law, natural persons possessing its nationality from undertaking any such activity anywhere.]]

2. *Each State Party may, where requested, cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.*

3. *In order to fulfil its obligations under this Protocol [the Convention], each State Party shall designate or establish [a National Authority] and shall so inform the [Organization] upon entry into force of this Protocol for it. The [National Authority] shall serve as the national focal point for liaison with the [Organization] and with other States Parties.*

4. *Each State Party shall inform the [Organization] of the legislative and administrative measures taken pursuant to this Article.*

³United 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/41, Geneva, 16 July 1998.

5. *Each State Party, during the implementation of its obligations under this Protocol, shall take all necessary steps to ensure the safety of people and to protect the environment, and may cooperate as appropriate with other States Parties in this regard.*

6. *Each State Party undertakes to cooperate with the [Organization] in the exercise of all its functions and in particular to provide assistance to the Technical [Secretariat][Body].*

5. The current text still has the requirement for penal legislation within square brackets and has yet to incorporate some of the points proposed in the previous Briefing Paper particularly in respect of the role of the National Authority. The vital role of the National Authority in the implementation of the CWC was emphasised in Briefing Paper No 11⁴ *The CWC Verification Regime: Implications for the Biotechnological & Pharmaceutical Industry* and in the past 18 months since the CWC entered into force the importance of the National Authority in the effective implementation of the CWC has been very evident.

6. A further development has been the inclusion in Article III D. Declarations of the latest version of the draft Protocol of provisions requiring declarations of national legislation and regulations:

[(K) NATIONAL LEGISLATION AND REGULATIONS

24. *Each State Party shall submit to the Organization, not later than [180] days after this Protocol enters into force for it, a declaration containing the titles of legislation, regulations, orders or other legal measures that govern, regulate, provide guidance on or otherwise control:*

(a) Access to buildings or other structures in which pathogens or toxins are being produced, handled or stored;

(b) Access to buildings or other structures or areas in which an outbreak of infectious disease affecting humans, animals or plants is suspected or is known to be occurring.

25. *The State Party shall provide the Organization on request with copies of any legislation, regulations, directives, orders or other legal measures declared under paragraph 24. The State Party shall notify changes in such legislation within [90] days of their entry into force or their being promulgated within the State Party.*

26. *Copies of the legislation shall be provided, where possible, in one of the official languages of the United Nations.]*

⁴J P Perry Robinson, *The CWC Verification Regime: Implications for the Biotechnological & Pharmaceutical Industry*, Briefing Paper No 11, University of Bradford, Briefing Paper No. 11, July 1998. Available on <http://www.brad.ac.uk/acad/sbtwc>

These declarations are clearly intended to complement the visits and inspections elements of compliance measures and hence focus on the access to buildings rather than on the legislation to implement the Protocol and the Convention.

7. There is likewise language in Article III Compliance Measures F Visits and Investigations II Measures to Strengthen the Implementation of Article III [the non-transfer provision of the Convention] which requires States Parties to make declarations of the national laws, regulations and administrative measures it has adopted to implement Article III of the BTWC:

(b) (i) *Each State Party shall report to [the Organization] on the national laws and regulations it has adopted to implement Article III of the BTWC not later than [...] days after the entry into force of this Protocol for that State Party and whenever an amendment thereto is made.*

(ii) *Each State Party shall report to [the Organization] on its administrative and other national measures to implement Article III of the BTWC not later than [...] days after the entry into force of this Protocol for that State Party and whenever an amendment thereto is made.*

[(iii) Such reports shall contain detailed information. ...

8. In both Article III. D Declarations and Article III. F Visits and Investigations there is a clear intention that such declarations be provided within a specified number of days after entry into force of the Protocol for the State Party.

CWC Implementation Legislation

9. Recent publications^{5 6 7 8} from the OPCW have focussed attention on compliance by States Parties with Article VII of the CWC – the article which requires States Parties to adopt necessary measures to implement their obligations. Article VII requires that:

1. *Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:*

(a) *Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from*

⁵OPCW Synthesis, *Legislation, cooperation and legal assistance*, p 7, Issue 3/98, June 1998.

⁶Dr Walter Krutzsch and Lisa Tabassi, *Cooperation and Legal Assistance among States Parties under Article VII, Paragraph 2 of the Chemical Weapons Convention*, Paper presented at Pugwash Meeting no 234, Noordwijk, The Netherlands, 15 - 17 May 1998.

⁷John Gee, *Implementing the CWC: The First Year*, The Arena, Number 8, July 1998, CBACI.

⁸Organization for the Prohibition of Chemical Weapons, *Note by the Director-General: Compliance with Article VII: Legislation, Cooperation and Legal Assistance*, Conference of States Parties, C-III/DG.1, 11 June 1998. Available on the web at <http://www.opcw.nl/ciii/ciii-dg1.htm>

undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;

(b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and

(c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

2. *Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.*

The similarity to – and the differences from -- the language in Article X of the draft BTWC Protocol will be evident.

10. The note⁸ on compliance with Article VII of the CWC recently issued by the Director-General of the OPCW, for consideration at the Third Conference of States Parties in November 1998, starts by pointing out accurately that *“The Chemical Weapons Convention is not self-executing. Each State Party’s international obligations under the Convention **must be given direct internal legal effect.**”* [Emphasis added]. The same will be equally true for the BTWC Protocol. The OPCW note observes that:

“more than one year after entry into force of the Convention, out of 108 States parties, only 34 have notified the Secretariat of the legislative and administrative measures they have taken to implement the Convention”

and go on to note that of the texts submitted and reviewed,

“only 18 appear to be comprehensive enough for the State party to be able to enforce the Convention effectively in its jurisdiction. In only 13 of these texts has the penal legislation been extended to nationals extra-territorially, as required under Article VII, subparagraph 1(c).”

It is this apparent shortfall together with the need for States Parties to harmonise their national implementing legislation in order to be able to respond effectively to a request for legal assistance (under Article VII, paragraph 2) that has led to the attention being given by the OPCW to the national implementing legislation.

11. The importance of all States Parties enacting the necessary measures is to ensure that the CWC is indeed implemented in each State Party and, through the harmonization of their national measures, to prevent the creation of safe havens for offenders as well as to facilitate cooperation and legal assistance between them. Annex 1 to the OPCW note contains a comparative tabulation of the penal provisions, their extraterritorial application and legal assistance drawn from the legislation thus far provided by the States Parties to the Secretariat as is required in paragraph 5 of Article VII.

12. The OPCW note observes that a detailed analysis of the legislation might reveal inconsistencies, for example, in the definition of chemical weapons – and such inconsistencies could have a negative impact on the effective prosecution of these offences. If one State's definition is too narrow, the courts in that State will not be able to provide assistance in the full range of circumstances in which another State may require it. This is because they may not recognize the act in question as a prohibited act. Lack of agreement between jurisdictions as to what constitutes an offence could thereby create a loophole for activities hostile to the Convention. Our examination of the Annex to the OPCW note suggests that in some States the definition of prohibited activities in the national legislation uses language identical to that within the Convention whereas in other States it appears that the definition of prohibited activities in the national legislation is limited to the chemicals listed in the Schedules to the Convention. Such a failure to embrace the full range of chemical weapons as covered by the general purpose criterion of the CWC is a serious omission. The OPCW go on to observe that “*In most cases, the need to extend jurisdiction to nationals anywhere has not been considered.*” The note states clearly that “*Only comparable legislation concerning activities prohibited under penal law will provide a solid basis for purposeful interaction of the States Parties in the prosecution of such activities.*”

13. The OPCW note concludes that:

“The cooperation and legal assistance required from States parties under the Convention can only be realised if national legislation is similar in scope and is compatible. States Parties are being urged to (a) complete the legislative and administrative measures necessary to enforce the Convention domestically; (b) submit the texts of such measures to the Secretariat so that a comprehensive survey of legislation may be prepared; (c) review their legislation to see where it could be harmonised or completed; (d) check whether their domestic law and the treaties concerning legal assistance concluded with other States allow for the greatest degree of cooperation in this regard.”

14. It is apparent from the OPCW survey of the national implementation of the CWC that there is much that has yet to be done before there is the degree of conformity between the various States Parties necessary to build international confidence that the CWC is indeed soundly based upon the consistent framework of national legislation that will be essential for an effective regime.

Other Developments

15. In contrast to the experience outlined in the OPCW survey, it is interesting to observe that in some countries proposals are being put forward to consider how their national measures might be strengthened further beyond those already incorporated in their national legislation.

16. **UK Strategic Export Controls.** One such example is in the United Kingdom which has recently issued a white paper⁹ setting out proposals for a new legislative framework for

⁹Department of Trade and Industry, *Strategic Export Controls*, The Stationery Office, Cm 3989, July 1998. Also available at <http://www.dti.gov.uk/export.control/stratex/>

strategic export controls and improvements to export licensing procedures. The section addressing weapons of mass destruction notes that the UK Chemical Weapons Act 1996 which implemented the CWC in the UK made it an offence for any natural or legal person in the UK or any UK person overseas to develop, produce, use, possess or participate in the transfer of a chemical weapon anywhere in the world or to engage in military preparations or preparations of a military nature, intending to use a chemical weapon, anywhere in the world. It is noted that it is also an offence at common law to aid, abet, counsel or procure such activity, but not if that activity is carried out by a foreigner overseas as it is not an offence in UK law for a foreigner to undertake such activity overseas.

17. The white paper proposes that it should be made an offence for anyone in the UK or a UK person abroad to aid, abet, counsel or procure a foreigner overseas to develop, produce or use a chemical weapon. Consideration is also being given to whether it would be appropriate to make it an offence for anyone in the UK or a UK person abroad to aid, abet, counsel or procure a foreigner overseas to engage in military preparations or preparations of a military nature, intending to use a chemical weapon. As the provisions in UK law relating to biological weapons are currently not as comprehensive as those contained in the Chemical Weapons Act, the white paper states that the UK Government considers that there is a strong case for creating prohibitions in relation to biological weapons which are equivalent to the current prohibitions in the Chemical Weapons Act and the extension described above. In addition, the white paper outlines possible measures to prevent a UK person or company from providing a service or information which could assist a chemical or biological weapons programme. This might be achieved by making publication of controlled technology relevant to the development of chemical or biological weapons an offence as this would apply whatever the medium of publication, thereby embracing publication on the World Wide Web.

18. These moves to strengthen further the national implementation measures within the United Kingdom are welcomed. They underline the importance to all States Parties of enacting national legislation to implement the BTWC and its eventual Protocol. Legislation which was adequate at the time of its enactment (as was the United Kingdom's Biological Weapons Act 1974 which exactly reproduced the prohibitions contained in the BTWC itself) needs to be reviewed and, where necessary, strengthened.

19. **International Convention for the Suppression of Terrorist Bombing.** A recent international development was the opening for signature on 12 January 1998 of the International Convention for the Suppression of Terrorist Bombing which had been adopted by the United Nations General Assembly¹⁰. Article 2 sets out the aim of the Convention by stating that:

*1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally delivers, places, discharges or detonates an explosive or **other lethal device** in, into or against a place of public use, a State or government facility, a public transportation system or an infrastructure facility:...*

¹⁰United Nations General Assembly, International Convention for the Suppression of Terrorist Bombing, Resolution A/RES/52/164, 15 December 1997. Available at <http://www.un.org/ga/documents/gares/res52164.htm>

2. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1.

3. Any person also commits an offence if that person:

- (a) Participates as an accomplice in an offence as set out in paragraph 1 or 2;
or
- (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 2; or
- (c) In any other way contributes to the commission of one or more offences as set forth in paragraph 1 or 2 by a group of persons acting with a common purpose;....[Emphasis added]

Article 1 of the Convention makes it clear that

For the purposes of this Convention:...

3. "Explosive or other lethal device" means:...

- (b) A weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, **biological agents or toxins** or similar substances or radiation or radioactive material.[Emphasis added]

20. Article 5 states that:

Each State Party shall adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that the criminal acts within the scope of this Convention...are punished by penalties consistent with their grave nature.

Article 22 of the Convention states that it will enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. Clearly States intending to become States Parties will need to enact appropriate domestic legislation. There will be value in having effective national legislation to implement the BTWC and its eventual Protocol and in ensuring that the requirements therein are consistent with those required for the Terrorist Bombing Convention.

21. **International Criminal Court.** A further recent development is the adoption of the Rome Statute¹¹ of the International Criminal Court (ICC) on 17 July 1998. The Preamble to this states that the ICC is to be established "with jurisdiction over the most serious crimes of concern to the international community as a whole" which are detailed in Article 5 as being:

- "(a) The crime of genocide;*
- (b) Crimes against humanity;*

¹¹United Nations, *Rome Statute of the International Criminal Court*, A/CONF. 183/9, 17 July 1998. Also available at <http://www.un.org/icc/romestat.htm>

- (c) *War crimes;*
- (d) *The crime of aggression.*”

Article 8 in respect of war crimes states that:

“1. *The Court shall have jurisdiction in respect of war crimes in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.*

2. *For the purpose of this Statute, “war crimes” means:*

...(b) *Other serious violations of the laws and customs applicable in international armed conflict, within the framework of established international law, namely, any of the following acts:*

...(xvii) *Employing poison or poisoned weapons;*

(xviii) *Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;*

Article 126 states that the Statute will enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

Analysis

22. In considering language for Article X of the draft BTWC Protocol it would be prudent to consider the experience gained by the OPCW on the implementation of the CWC as well as the other developments outlined above which will clearly require appropriate national legislation. There would be advantages in utilising language in Article X that will encourage States Parties to adopt appropriate measures that will ensure effective implementation of the BTWC Protocol and will also strengthen the disincentives to the use of biological weapons whether by States or sub-State actors.

Strengthening Article X of the Rolling Text

23. As recommended in Briefing Paper No 4, it would be useful if the AHG were to strengthen the language of Article X so that this part of the BTWC Protocol is in every respect as strong as Article VII of the CWC. The next four paragraphs show how this might be done.

24. The language in paragraph 1 has in square brackets the requirement “[including enacting penal legislation with respect to the obligations under the Protocol]” which extends the requirement for penal legislation to cover all aspects of the Protocol. This language is preferred to leaving the requirement for penal legislation in paragraph 1 (a) because paragraph 1 (c) of Article X does not, as it stands, make explicit the extended reach of penal legislation. The rolling text includes the words “including enacting penal legislation with regard to such activity” in paragraph 1 (a) but does not extend it to paragraph 1 (c). The OPCW experience shows all too clearly the importance of including explicit language. If the requirement for

penal legislation is left in paragraph 1 (a) then it would be advisable in paragraph 1 (c) of Article X to follow the wording of paragraph 1 (c) of the CWC Article VII which reads:

(c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

25. As noted in Briefing Paper No 4, such a provision in Article X would accord with the Final Declaration of the Third Review Conference. In 1991 the invitation to *"each State Party to consider, if constitutionally possible and in conformity with international law, the application of such measures to actions taken anywhere by natural persons possessing its nationality"* was new to the BTWC review process. Hence, perhaps, the qualifying phrase *"if constitutionally possible"* and the use of the relatively weak *"consider"*. Since 1991, however, any reason to be tentative has disappeared. The equivalent CWC obligation has been approved through the successive stages of the Conference on Disarmament (CD) and UN General Assembly commendation (1992), opening for signature (1993) and entry into force (1997). Consequently the BTWC Protocol should have no difficulty in using comparable language. Indeed it has every reason to use it, in order to include the roving BW terrorist of any nationality. For this and other purposes, States Parties should be encouraged to review the adequacy of their existing anti-BW legislation, which they should update and strengthen wherever necessary.

26. The points made in Briefing Paper No 4 about strengthening the next five paragraphs of Article X (paragraphs 2, 3, 4, 5, and 6) and making these as strong as the equivalent paragraphs of CWC Article VII (paragraphs 2, 4, 5, 3 and 7 respectively) still stand. Two small changes need to be made. In paragraph 2 of Article X, *"Each State Party may, where requested, cooperate with other States Parties"* would be strengthened by the replacement of **may** by **shall**. Although the words *"where requested"* are additional to the CWC-derived language, they neither strengthen nor weaken this provision. In paragraph 5 of Article X, the use of **shall** in place of **may** in *"may cooperate as appropriate with other States Parties in this regard."* would also be advisable.

27. It can be argued that paragraph 5 of Article X also needs strengthening at an earlier point by changing *"shall take all necessary steps"* to language comparable to that in the CWC *"to assign the highest priority"*. The strengthened paragraph 5 would then read:

"5. Each State Party, during the implementation of its obligations under this Protocol, shall assign the highest priority to ensuring the safety of people and to protecting the environment, and shall cooperate as appropriate with other States Parties in this regard."

28. If the rolling text were amended as proposed in the above four paragraphs, and the square brackets removed, Article X would equate in strength with CWC Article VII. There is, however, a strong case for going further and making the national implementation article of the BTWC Protocol deliberately stronger than that of the CWC. There are four arguments for this.

29. The first argument follows from the interpretation of BTWC Article IV agreed by the Fourth Review Conference. Its Final Declaration (as noted in Briefing Paper No 4)

reaffirmed the commitment of States Parties to take the necessary measures under Article IV. Most significantly, it went on to declare that:

*These measures are to ensure the prohibition **and prevention** of the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention anywhere within their territory, under their jurisdiction or under their control, in order to **prevent** their use for purposes contrary to the Convention.* [Emphasis added]

It further defined the national implementation measures to be undertaken under Article IV as those which would:

...ensure... the effective fulfilment of their obligations under the Convention [Emphasis added].

30. The term **prevention** is absent from CWC Article VII but is coupled with **prohibition** in Article IV of the BTWC and in the relevant paragraphs of all four Final Declarations in the Review Conferences of 1980, 1986, 1991 and 1996. This in itself is an argument for adding the word to Article X of the BTWC Protocol. At present, the rolling text, following closely the language of the CWC in this respect, **prohibits** but does not **prevent**.

31. The amendments to the rolling text to achieve this would be to couple the two words in paragraph 1 (a):

*(a) Prohibit **and prevent** natural and legal persons.....*

and to do the same in paragraph 1 (b)

*(b) Prohibit **and prevent** natural and legal persons.....*

32. The criterion "*the effective fulfilment of their obligations under the Convention*" is the most recent collective interpretation placed by the States Parties on BTWC Article IV. It sets a very high standard for national implementation measures. It would therefore be advisable to incorporate this criterion into the first sentence of paragraph 1 of Article X thus:

*1. Each State Party shall, in accordance with its constitutional processes, take **all necessary measures** [including enacting penal legislation to **ensure the effective fulfilment** of its obligations under the Protocol] to **ensure the effective fulfilment** of their obligations under this Protocol.....*

The term "**all necessary measures**" is preferable to "**any**" in view of the requirements stated in the subparagraphs of paragraph 1 and in paragraph 4. "**Any**" was used in BTWC Article IV when no such requirements were conjoined, and should be replaced in the Protocol by "**all**".

33. The second argument is derived from the analysis, earlier in this Briefing Paper, of the survey of the national implementation of the CWC. The uneven response of States Parties to Article VII of the CWC suggests that more detail of the standards of implementation required needs to be included in the equivalent part of the BTWC Protocol if adequate national

implementation is to be ensured. Another point that emerges from the survey of OPCW experience is that the CWC requirement in Article VII paragraph 5 that:

Each State Party shall inform the Organization of the legislative and administrative measures taken to implement the Convention.

lacks the emphasis given elsewhere in the CWC to provide information within a specified time after entry into force for the State Party. As the BTWC Protocol will not be self executing, there will be advantages in incorporating similar language into paragraph 4 of Article X of the Protocol to that used in Article III requiring declarations of legislative measures.

34. The third argument arises from the experience of the BTWC as a multilateral treaty regime which has been in force since 1975. Unlike CWC Article VII, which was drafted as part of a new Convention, the Protocol which the AHG is negotiating will follow a quarter of a century **after** its Convention. This has implications for the rolling text. In the national implementation measures section of the rolling text, as in others, these implications arise from the experience of compliance with BWC obligations, which has been seriously defective. Even compliance with Article IV has been uneven.

35. The fourth argument is simply stated. If it is accepted that biological weapons present an even more formidable threat than chemical weapons, then the treaty provisions against them need to be made even stronger than those in the CWC against chemical weapons.

36. For **all** these reasons, the AHG would be well advised to strengthen the rolling text and go beyond the level of CWC Article VII in the ways proposed above, as well as in expanding the National Authority requirement.

National Authority

37. The present rolling text keeps close to CWC language in its only reference in paragraph 3 of Article X to the National Authority. This requires that each State Party must designate or establish one and inform the BTWC's international organization (assuming that there will be one) of what it has done. All that is required of the National Authority in Article X at present is -- as in CWC Article VII paragraph 4 -- that it "*shall serve as the national focal point for liaison with the [Organization] and with other States Parties.*"

38. It is a fair assumption that the eventual States Parties to the BTWC Protocol will, in almost all cases, have been party to the CWC since 1997. Consequently many will have had their CWC National Authority serving as the national focal point for liaison with the OPCW since the entry into force of the CWC on 29 April 1997. Some will have had a National Authority in being for even longer, having designated or established it some time before the CWC entered into force, for example as an outcome of their ratification and legislation processes.

39. BTWC States Parties participating in the AHG should therefore be encouraged to draw on the experience that most of them have been accumulating as CWC States Parties to inform

the National Authority provisions of the Protocol. Briefing Paper No 11¹² addresses the importance of the National Authority in the implementation of the CWC. States Parties should pool their experience to set standards of effectiveness for their future BTWC National Authority.

40. It is clear that the structure and resourcing of each National Authority and its operational location within governmental machinery are the responsibility of the State Party concerned. Consequently any proposal for a provision that was excessively detailed would be rejected as over-prescriptive. Nevertheless, it would be desirable and advisable to expand the provision in paragraph 3 of Article X with a set of criteria which every National Authority must satisfy in order to meet the standards set by the Protocol itself for the effectiveness of national implementation.

41. Every National Authority must possess statutory powers of investigation and a degree of statutory protection sufficient to ensure that other organs of government do not interfere in the effective performance of its functions. It must be sufficiently independent of other agencies within the machinery of government to command the confidence of the Organization and of the other States Parties, with which it shares responsibility for ensuring full compliance by all States Parties with their international BTWC obligations.

42. Every National Authority needs to retain access to the legislature, for example through parliamentary scrutiny of regular reports, specified in the legislation under which it is established and which guarantees its statutory powers.

43. Each National Authority must be provided with adequate staff and other resources for the effective performance of its functions.

44. All the information which demonstrates that these criteria remain satisfied must be made available as an annual reporting requirement through the Organization to the other States Parties, and, subject to any confidentiality constraints, to the general public. National Authorities should also be encouraged to make additional information available so that States Parties and the Organization, and as much as possible the public, can be made aware of good practice in national implementation. Such an expansion of paragraph 3 of Article X could be achieved by adopting the following language:

*3. In order to fulfil its obligations under this [Protocol][the Convention], each State Party shall designate or set up a [National Authority] and shall so inform the [Organization] upon entry into force of this Protocol for it. The [National Authority] shall serve as the national focal point for liaison with the [Organization] and with other States Parties. **Information shall be provided annually by each State Party to the Organization, to be made available by the Organization to the other States Parties and (subject to any confidentiality constraints) to the general public, which demonstrates that the National Authority continues to satisfy all the following criteria; namely the possession of:***

¹²J P Perry Robinson, *The CWC Verification Regime: Implications for the Biotechnological & Pharmaceutical Industry*, Briefing Paper No 11, University of Bradford, Briefing Paper No. 11, July 1998. Available on <http://www.brad.ac.uk/acad/sbtwc>

(a) statutory powers of investigation and a degree of statutory protection sufficient to ensure that other organs of government do not interfere in the effective performance of its functions;

(b) access to the legislature;

(c) adequate staff and other resources for the effective performance of its functions.

Each State Party may, in addition, transmit information to the Organization, to be made available by the Organization to other States Parties and (subject to any confidentiality constraints) to the general public, which helps promote wider awareness of good practice in national implementation of the international obligations assumed under this Protocol.

Article X of the Rolling Text

45. A general point in relation to Article X of the Protocol relates to whether this should refer to legislation to implement obligations "under the Protocol" or "under the Protocol and the Convention". Although it is clear that the benefits of the Protocol will only accrue to those States which become Parties to the Protocol, it is recognised that not all States Parties to the Convention have yet enacted their national implementation measures for the Convention. Consequently as the mandate of the Ad Hoc Group is *"to strengthen the effectiveness and improve the implementation of the Convention"*, it is recommended that the language in Article X should refer consistently to fulfilling obligations "under the Protocol and the Convention."

46. If the proposals made in this Briefing Paper were to be adopted, the full national implementation article (Article X) in the BTWC Protocol, with the minimum of other changes to the rolling text, would read as follows:

1. Each State Party to the Protocol shall, in accordance with its constitutional processes, take all necessary measures including enacting penal legislation to ensure the effective fulfilment of its obligations under this Protocol and the Convention. In particular, it shall:

(a) Prohibit and prevent natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under the Convention;

(b) Prohibit and prevent natural and legal persons from undertaking any such activity anywhere under its control; and

(c) Prohibit, in conformity with international law, natural persons possessing its nationality from undertaking any such activity anywhere.

2. *Each State Party shall, where requested, cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.*

3. *In order to fulfil its obligations under this Protocol and the Convention, each State Party shall designate or set up a National Authority and shall so inform the Organization upon entry into force of this Protocol for it. The National Authority shall serve as the national focal point for liaison with the Organization and with other States Parties. Information shall be provided annually by each State Party to the Organization, to be made available by the Organization to the other States Parties and (subject to any confidentiality constraints) to the general public, which demonstrates that the National Authority continues to satisfy all the following criteria; namely the possession of:*

(a) statutory powers of investigation and a degree of statutory protection sufficient to ensure that other organs of government do not interfere in the effective performance of its functions;

(b) access to the legislature;

(c) adequate staff and other resources for the effective performance of its functions.

Each State Party may, in addition, transmit information to the Organization, to be made available by the Organization to other States Parties and (subject to any confidentiality constraints) to the general public, which helps promote wider awareness of good practice in national implementation of the international obligations assumed under this Protocol and the Convention.

4. *Each State Party shall submit to the Organization, not later than 180 days after this Protocol enters into force for it, a declaration containing the titles of the legislative and administrative measures taken pursuant to this Article. The State Party shall provide the Organization on request with copies of any such legislative and administrative measures. The State Party shall notify changes in such legislation within 90 days of their entry into force or their being promulgated within the State Party.*

5. *Each State Party, during the implementation of its obligations under this Protocol and the Convention, shall assign the highest priority to ensuring the safety of people and to protecting the environment, and shall cooperate as appropriate with other States Parties in this regard.*

6. *Each State Party undertakes to cooperate with the Organization in the exercise of all its functions and in particular to provide assistance to the Technical Secretariat.*