THE BTWC PROTOCOL:

IMPROVING THE IMPLEMENTATION OF ARTICLE III OF THE CONVENTION

by Graham S. Pearson

Introduction

1. Briefing Papers No. 12[1] and 13[2] in October 1998 provided some building blocks for consideration in respect of the provisions relating to Article III of the Biological and Toxin Weapons Convention in the Protocol being negotiated by the Ad Hoc Group. Those two Briefing Papers examined some of the current national export controls and regulations for transfers of hazard materials and the international initiatives that are ongoing to strengthen these around the world. It was noted that there is an increasing awareness world-wide, both from security considerations and from public health and environmental concerns, of the need to control the use, storage and transfer of hazardous materials. Those Briefing Papers were intended as building blocks which might be considered from a point of view of strengthening the BTWC as well as contributing to the implementation of Article III.

2. Now that the negotiation of the Protocol is reaching an advanced stage it is timely to consider how the implementation of Article III of the Convention might be improved thereby strengthening the BTWC.

3. This Briefing Paper considers the undertakings placed on States Parties in Article III and takes note of the relevant language in the Final Declaration of the Fourth Review Conference. Attention is then given to the development of the provisions in the draft Protocol relating to Article III of the Convention and consideration given to the objectives that should be sought in strengthening the BTWC through improved implementation of Article III. The transfer regime for the Chemical Weapons Convention (CWC) which includes controls of two toxins is analysed. The emerging Protocol transfer regime compared with the CWC regime to identify possible developments in the Protocol provisions for improving the implementation of Article III of the Convention.

Article III of the Convention

4. Article III of the Biological and Toxin Weapons Convention (BTWC)[3] states that:

> *Each State Party to this Convention undertakes not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in Article I of the Convention.*

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[1]Graham S. Pearson, *Article III : Some Building Blocks*, Briefing Paper No. 12, University of Bradford, October 1998. Available on http://www.brad.ac.uk/acad/sbtwc

[2]Graham S. Pearson, *Article III : Further Building Blocks*, Briefing Paper No. 13, University of Bradford, October 1998. Available on http://www.brad.ac.uk/acad/sbtwc

[3]United Nations, *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, Resolutions adopted by the General Assembly, Official Records: Twenty-Sixth Session, 2826 (XXVI), 16 December 1971.

5. The Final Declaration[4] of the Fourth Review Conference of the BTWC held on 25 November to 6 December 1996 stated in respect of Article III that:

> *"The Conference notes the importance of Article III and welcomes the statements which States that have acceded to the Convention have made to the effect that they have not transferred agents, toxins, weapons, equipment, or means of delivery, specified in Article I of the Convention, to any recipient whatsoever and have not furnished assistance, encouragement, or inducement to any State, group of States or international organizations to manufacture or otherwise acquire them.* ***The Conference affirms that Article III is sufficiently comprehensive to cover any recipient whatsoever at international, national or subnational levels.***
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> *The Conference notes that a number of States Parties stated that they have already taken concrete measures to give effect to their undertakings under this Article, and in this context also notes statements made by States Parties at the Conference about the legislative or administrative measures they have taken since the Third Review Conference. The Conference calls for appropriate measures by all States Parties.* ***Transfers relevant to the Convention should be authorized only when the intended use is for purposes not prohibited under the Convention.***
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> *The Conference discussed the question whether multilaterally-agreed guidelines or multilateral guidelines negotiated by all States Parties to the Convention concerning the transfer of biological agents, materials and technology for peaceful purposes for any purpose whatsoever might strengthen the Convention. In the development of implementation of Article III, the Conference notes that* ***States Parties should also consider ways and means to ensure that individuals or subnational groups are effectively prevented from acquiring, through transfers, biological agents and toxins for other than peaceful purposes.*** *The Conference notes that these issues are being considered as part of the ongoing process of strengthening the Convention.*
>
> *The Conference reiterates that the provisions of this Article should not be used to impose restrictions and/or limitations on the transfers for purposes consistent with the objectives and the provisions of the Convention of scientific knowledge, technology, equipment and materials under Article X."* [Emphasis added]

6. It is to be noted that the third paragraph of the Fourth Review Conference Final Declaration replaced the single sentence in the Third Review Conference Final Declaration[5] which stated simply that:

> *"The implementation of this Article with respect to such transfers should continue to be the subject of multilateral consideration."*

The expanded consideration by the Fourth Review Conference reflected both the ongoing consideration by the Ad Hoc Group (AHG) addressing measures to strengthen the

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[4]United Nations, *The Fourth Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,* Geneva 25 November - 6 December 1996, Final Report, BWC/CONF.IV/9, Geneva, 1996.

[5]United Nations, *The Third Review Conference 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*, Geneva, 9–27 September 1991, Final Report, BWC/CONF.III/23, Geneva 1992.

effectiveness and the implementation of the Convention and the concern expressed by the G7 Heads of State and Government in June 1996 in their declaration on terrorism[6] when they stated that *"Special attention should be paid to the threat of utilization of nuclear, biological and chemical materials, as well as toxic substances, for terrorist purposes."*

Ad Hoc Group

7. The Ad Hoc Group in its sessions has included consideration of measures to improve the implementation of Article III of the Convention. Although there have been relatively few Working Papers addressing Article III of the Convention, two such Working Papers were WP.126[7] by India in March 1997 which proposed language for guidelines to ensure compliance with obligations under Article III of the Convention and WP. 184[8] by Austria in July 1997 which proposed language to strengthen implementation of Article III of the Convention. This language was incorporated into the first[9] version[10] of the draft Protocol which emerged from the July 1997 session of the AHG contained some language under *Article III D Declarations [J. Transfers* for the annual declaration by States Parties of all transfers of listed agents, toxins, equipment or means of delivery, under *Article III F. [Visits and Investigations]* a section *II [Measures to Strengthen the Implementation of Article III]* with some three pages of text, a blank page for an *Annex C [Measures to Strengthen the Implementation of Article III]* and within *Annex D Investigations* a blank page with four subheadings under a heading *[[III Investigations Where There is a Concern that a Transfer has Taken Place in Violation of Article III of the Convention]*.

8. Subsequently, there has been relatively little attention given to Article III of the Convention. Another Working Paper, WP. 232[11] by India, Indonesia and Mexico in October 1997 proposed further language relating to guidelines for transfers which was incorporated into the section *[Measures to Strengthen the Implementation of Article III]* within Article III of the Protocol. There was then a gap of some two years before another Working Paper relating to Article III of the Convention was issued. WP.407[12] by the NAM and Other States in October 1999 stressed the importance of all the provisions of the Convention, including Article III. It went on to state that, *in this context, the Group notes that transfers relevant to the Convention should be only allowed to take place for purposes not prohibited by the Convention.* Furthermore, it stated that *The Group is cognizant of the fact that biological*

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[6]United Nations, Letter dated 5 July 1996 from the Permanent Representative of France to the United Nations addressed to the Secretary-General, A/51/208, S/1996/543, 12 July 1996.

[7]India, *Guidelines to ensure Compliance with Obligations under Article III of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BTWC),* BWC/AD HOC GROUP/WP. 126, 5 March 1997.

[8]Austria, *(H) Measures to Strengthen the Implementation of Article III of the BWC,* BWC/AD HOC GROUP/WP. 184, 23 July 1997.

[9]An earlier version of the Protocol was that prepared by the Chairman and issued immediately prior to the July 1997 session as United 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/35, 9 June 1997, Geneva.

[10]United 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/36, 4 August 1997, Geneva.

[11]India, Indonesia and Mexico, Measures to Strengthen the Implementation of Article III of the Biological and Toxin Weapons Convention, BWC/AD HOC GROUP/WP. 232, 3 October 1997.

[12]NAM and Other States, Statement on Behalf of the Group of the Non-Aligned Movement and Other States, Measures to Strengthen the Implementation of Article III of the Convention, BWC/AD HOC GROUP/WP. 407, 8 October 1999.

agents, toxins, equipments and technologies relevant to the Convention can be put to dual use applications and acknowledges the potential proliferation risks that this may entail. The Group emphasises that such concerns would be best addressed through multilaterally negotiated, non-discriminatory and legally binding mechanisms to be incorporated into the future Protocol which are open to participation by all States Parties to the BTWC. In this context, the Group also underlines the need for effective national export control mechanisms in accordance with obligations of Article III of the Convention. It is encouraging to note that at the subsequent AHG session in November/December 1999, the UK provided a non-paper which seeks to further elaborate the provisions within the Protocol relating to implementation of Article III of the Convention.

Draft Protocol, December 1999

9. The language for the draft Protocol which emerged from the November/December 1999 session contained the following provisions relating to the implementation of Article III of the Convention. These include measures for the declaration of transfers, guidelines for transfers, provisions for an investigation where there is a concern that a transfer has taken place in violation of Article III of the Convention, and for a Confidence-Building Measure.

10. **Declarations.** Article *III Compliance Measures D. Declarations I. Submission of Declarations* under *Annual Declarations* contains the following language[13] on transfers:

> *[(I) TRANSFERS*
>
> *24. Each State Party shall declare, in accordance with paragraphs 1 to 3 above, all international transfers during the previous calendar year of agents and/or toxins, equipment [or means of delivery] listed in Annex A.]*

Paragraphs 1 to 3 set out the requirement that *Each State Party shall declare to the Organization all activities and facilities listed below...* and the date by which such annual declarations shall be made.

11. **Transfer Guidelines.** A subsequent section of Article III is Section *[F. [MEASURES TO STRENGTHEN THE IMPLEMENTATION OF ARTICLE III]* which contains the following language[14]:

[F. [MEASURES TO STRENGTHEN THE IMPLEMENTATION OF ARTICLE III]

[1. States Parties[, in order to ensure compliance with Article III of the Convention,] shall only transfer [among themselves] dual-use microbial and other biological agents, toxins and equipment for purposes not prohibited by the Convention, in accordance with the following guidelines.]

OR

[13]United Nations, *Outcome of discussions by the Fiend of the Chair on Measures to Promote Compliance, Addendum, Article III, D. Declarations I. Submission of Declarations*, BWC/AD HOC GROUP/L.71/Add.3, 6 December 1999.

[14]United Nations, *Outcome of discussions by the Fiend of the Chair on Measures to Promote Compliance, Addendum, Article III, [F. [MEASURES TO STRENGTHEN THE IMPLEMENTATION OF ARTICLE III]*, BWC/AD HOC GROUP/L.71/Add.4, 3 December 1999.

[1. To further ensure that transfers of items specified in this paragraph are consistent with Article III of the Convention, no State Party shall authorise transfers to any recipient whatsoever unless that State Party has, where appropriate, assured itself that such items will only be used for prophylactic, protective, or other peaceful purposes:

(a) Fermenters or bioreactors with a total internal volume of [25][50][100] litres or more;

(b) Aerosol chambers designed or intended for use for the dissemination of aerosols of microorganisms or toxins;

(c) Equipment designed or intended for use in experimental aerobiology studies to generate aerosols of microorganisms or toxins;

(d) Aerosol analytical equipment to determine the size of particles up to 20 microns in diameter.]

2. In pursuance of paragraph 1, and recognizing that most of the agents, toxins, equipment and technologies are of a dual-use nature and with the objective of preventing dual-use items from being utilized for purposes prohibited by the Convention, the guidelines shall be as follows:

(a) Any request made by a State Party for the procurement of a specific agent/toxin reagent shall be accompanied by information on purpose, quantity required, site or facility for proposed use, quantity to be produced at the site or facility, place where intended to be stored and end-use certificate;

(b) Any request for transfer or procurement of equipment envisaged to be declared under CBMs, for use by a State participating in the compliance regime in a BL4 facility, including details of its proposed application and the site/facility for intended use, shall be intimated to the Organization;

(c) Any transfer of technology related to delivery systems, aerosol dispersion of toxins and pathogens, stabilization of agents/toxins to environmental stress shall be intimated to the Organization;

(d) Transfer of agents, equipment and material shall not be allowed to non-States Parties of the compliance regime under the Convention without prior approval of the Organization.]

[3. In fulfilment of the obligation in paragraph 1 above each State Party shall take into account as appropriate the stated end-use of the transfer and any supporting information; the nature and implementation in the State Party requesting the transfer of the measures specified in paragraph 6 of this Section; and the extent to which these measures are effective in fulfilling the obligations of Articles III and IV of the Convention.]

[4. No transfer of microbial or other biological agents and toxins, whatever their origin or method of production, or equipment or material which is capable of using such agents or toxins for purposes which would contravene Article I of the Convention, shall be allowed to States Parties of the Convention and the Protocol.]

[5. (a) To ensure compliance with Article III of the BTWC, each State Party shall only authorize transfers to any recipient whatsoever, of microbial or other biological agents, or toxins whatever their origin or method of production, or equipment which is capable of using such agents or toxins [if that State Party has determined that these will be used] solely for prophylactic, protective or other peaceful purposes.

(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 Convention 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 Convention 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. If available, the information contained in these reports may be subject to examination during a visit under the Article I investigation procedures of this Protocol.]

[(c) Each State Party, in implementing these measures, shall ensure that they do not impede the peaceful economic and technological development of States.]]

[6. Each State Party shall notify the Technical Secretariat on the national laws, regulations and administrative measures it has developed to implement Article III and IV of the Convention not later than 180 days after entry into force of the Protocol for that State Party. Each State Party shall submit to the Technical Secretariat annually any modifications or additions made to such national laws, regulations and administrative measures during the previous calendar year.]

[7. <u>Transfer guidelines</u>

(a) [The provisions of the Convention shall not be used to impose][and States Parties shall not maintain among themselves] restrictions and/or limitations on the transfer of scientific knowledge, technology, equipment and materials for purposes not prohibited under the Convention.

(b) In order to promote transparency in the biological trade, the States Parties may agree on arrangements for exchanging the end-user certificate related to biological exports in a manner that will entail no restrictions or impediments on access to biological materials, equipment or technological information by all States Parties. This would replace all existing ad hoc regulations in the biological trade at the time of entry into force of the Protocol for States Parties.

(c) An end-user certificate may be required from the recipients stating, in relation to the transferred biological agents or toxins and equipment (to be identified as relevant by the Ad Hoc Group), the following:

(i) That they will only be used for purposes not prohibited under this Convention for the States not party to the Convention;

(ii) That they will not be retransferred without receiving the authorization from the supplier(s);

(iii) Their types and quantities;

(iv) Their end-use(s); and

(v) The name and address(es) of the end-user(s).

(d) States Parties shall resolve suspicions arising from such transfers through the process of consultation and clarification in accordance with Article V of the Convention.]]

12. The draft Protocol[15] also contains an Annex C which currently has a blank page under the heading of:

[MEASURES TO STRENGTHEN THE IMPLEMENTATION OF ARTICLE III].

13. **Investigations.** Although there is mention in two places of investigations where there is a concern that a transfer has taken place in violation of Article III, there is no specific language to elaborate such investigations. In Article III Compliance Measures, G. Investigations there is a heading under (A) TYPES OF INVESTIGATION for field and facility investigations as well as for

[(c) Investigations where there is a concern that a transfer has taken place in violation of Article III of the Convention.]

Provision is also made in Annex D Investigations which has four subheadings under the heading of:

[IV. [INVESTIGATIONS WHERE THERE IS A CONCERN THAT A TRANSFER HAS TAKEN PLACE IN VIOLATION OF ARTICLE III OF THE CONVENTION]

14. **Confidence-Building Measures.** Annex G of the draft Protocol[16] contains various Confidence-Building Measures which include:

III. DATA ON TRANSFERS AND TRANSFER REQUESTS AND ON PRODUCTION

[15]United 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/47 (Part I), 15 October 1999, Geneva.

[16]United 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/47 (Part I), 15 October 1999, Geneva.

As this measure is under consideration as a mandatory one in the Compliance Measures Friend of the Chair discussions, it should be further studied in the light of the outcome of those discussions.

1. Collection and survey of national export and import data (e.g. government and industrial production statistics, culture collection records and other relevant information going beyond declaration requirements and to be provided voluntarily by States Parties).

2. Collection

2.1 States Parties are requested to provide relevant information.
2.2 BTWC Organization is to collect relevant information from publicly available sources.
2.3 Confidentiality concerns need to be considered.

3. Survey

3.1 Management, categorization and synthesis.
3.2 To be carried out by personnel with specific expertise, relying on information technology.
3.3 Survey will have to be focused.

4. Sources of information

4.1 Trade publications.
4.2 Specific statistical data.
4.3 Regulations and other measures (including control).

5. Information to be collected and surveyed

5.1 Key identifiers (triggers) should be used.

5.1.1 Same triggers as for transfer and production declarations.
5.1.2 Other possible triggers (e.g. for data collection under paragraph 2.2).

5.2 Information on

5.2.1 Suppliers and recipients.
5.2.2 Agents.
5.2.3 Equipment.

6. Modalities

6.1 States Parties are requested to provide information on an annual basis (collection of national data might require national regulation).
6.2 Organization is to collect and survey information continuously.
6.3 Information is to be provided

6.3.1 In one of the United Nations official languages.
6.3.2 In accordance with agreed format.
6.3.3 Preferably in computerized format (floppy disk).

Chemical Weapons Convention

15. As the Chemical Weapons Convention regime is the one of closest relevance to the Protocol regime, it is useful to consider the provisions within the CWC relating to transfers. The basic prohibition is stated in Article I:

> *Each State Party to this Convention* ***undertakes never under any circumstances****:*
>
> > *(a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or* ***transfer, directly or indirectly, chemical weapons to anyone;*** *[Emphasis added]*

16. In Article ***VI Activities not Prohibited under this Convention*** each State Party has *the right, subject to the provisions of this Convention, to develop, produce, otherwise acquire, retain,* ***transfer*** *and use* ***toxic chemicals and their precursors for purposes not prohibited*** *under this Convention.* [Emphasis added]. This Article then goes on to require that:

> *Each State Party shall adopt the necessary measures to ensure that toxic chemicals and their precursors are only developed, produced, otherwise acquired, retained,* ***transferred****, or used within its territory or in any other place under its jurisdiction or control for purposes not prohibited under this Convention. To this end, and in order to verify that activities are in accordance with obligations under this Convention, each State Party shall subject toxic chemicals and their precursors listed in Schedules 1, 2 and 3 of the Annex on Chemicals, facilities related to such chemicals, and other facilities as specified in the Verification Annex, that are located on its territory or in any other place under its jurisdiction or control, to verification measures as provided in the Verification Annex.*

17. More detailed requirements are then set out for the different scheduled chemicals:

> *3. Each State Party shall subject chemicals listed in Schedule 1 (hereinafter referred to as "Schedule 1 chemicals") to the prohibitions on production, acquisition, retention,* ***transfer*** *and use as specified in Part VI of the Verification Annex. It shall subject Schedule 1 chemicals and facilities specified in Part VI of the Verification Annex to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with that Part of the Verification Annex.*
>
> *4. Each State Party shall subject chemicals listed in Schedule 2 (hereinafter referred to as "Schedule 2 chemicals") and facilities specified in Part VII of the Verification Annex to data monitoring and on-site verification in accordance with that Part of the Verification Annex.*
>
> *5. Each State Party shall subject chemicals listed in Schedule 3 (hereinafter referred to as "Schedule 3 chemicals") and facilities specified in Part VIII of the Verification Annex to data monitoring and on-site verification in accordance with that Part of the Verification Annex.*

18. Declaration requirements are also stated:

7. Not later than 30 days after this Convention enters into force for it, each State Party shall make an initial declaration on relevant chemicals and facilities in accordance with the Verification Annex.

8. Each State Party shall make annual declarations regarding the relevant chemicals and facilities in accordance with the Verification Annex.

19. The detailed requirements are specified in the Verification Annex. The provisions relating to Schedule 1 chemicals are in Part VI of the Annex and state that:

1. A State Party shall not produce, acquire, retain or use Schedule 1 chemicals outside the territories of States Parties and ***shall not transfer such chemicals outside its territory except to another State Party.***

2. A State Party shall not produce, acquire, retain, ***transfer*** *or use Schedule 1 chemicals unless:*

(a) The chemicals are applied to research, medical, pharmaceutical or protective purposes; and

(b)The types and quantities of chemicals are strictly limited to those which can be justified for such purposes; and

(c)The aggregate amount of such chemicals at any given time for such purposes is equal to or less than 1 tonne; and

(d)The aggregate amount for such purposes acquired by a State Party in any year through production, withdrawal from chemical weapons stocks and transfer is equal to or less than 1 tonne.

B. Transfers

3. A State Party may ***transfer*** *Schedule 1 chemicals* ***outside its territory only to another State Party and only for research, medical, pharmaceutical or protective purposes*** *in accordance with paragraph 2.*

4. Chemicals ***transferred shall not be retransferred to a third State****.*

5. Not less than 30 days before any ***transfer*** *to another State Party both States Parties shall notify the Technical Secretariat of the* ***transfer.***

6. Each State Party shall make ***a detailed annual declaration regarding transfers during the previous year.*** *The declaration shall be submitted not later than 90 days after the end of that year and shall for each Schedule 1 chemical that has been transferred include the following information:*

(a) The chemical name, structural formula and Chemical Abstracts Service registry number, if assigned;

> *(b) The quantity* ***acquired from other States or transferred to other States Parties.*** *For each* ***transfer*** *the quantity, recipient and purpose shall be included.*[Emphasis added].

There is also a requirement for annual declaration of transfers within the State Party

> *19. Each State Party shall, for each facility, make a detailed annual declaration regarding the activities of the facility for the previous year. The declaration shall be submitted not later than 90 days after the end of that year and shall include:..*
>
> > *(v) The quantity* ***transferred to other facilities within the State Party.*** *For each* ***transfer*** *the quantity, recipient and purpose should be included;* [Emphasis added].

20. The provisions for Schedule 2 chemicals are in Part VII of the Annex and require that:

> *1. The initial and annual declarations to be provided by each State Party pursuant to Article VI, paragraphs 7 and 8, shall include* ***aggregate national data*** *for the previous calendar year on the quantities produced, processed, consumed,* ***imported and exported*** *of each Schedule 2 chemical, as well as* ***a quantitative specification of import and export for each country involved.*** [Emphasis added]

Furthermore:

> *8. Declarations of a plant site...shall also include the following information on each Schedule 2 chemical above the declaration threshold:*
>
> > *... and*
> >
> > *(e) The purposes for which the chemical was or will be produced, processed or consumed:*
> >
> > > *(i) Processing and consumption on site with a specification of the product types;*
> > > *(ii) Sale or* ***transfer within the territory*** *or to any other place under the jurisdiction or control of the State Party, with a specification whether to other industry, trader or other destination and, if possible, of final product types;*
> > > *(iii)* ***Direct export,*** *with a specification of the States involved; or*
> > > *(iv) Other, including a specification of these other purposes.* [Emphasis added].

In respect of transfers, the requirements are as follows:

> ***C. Transfers to States not party to this Convention***
>
> *31. Schedule 2 chemicals shall* ***only be transferred to or received from States Parties.*** *This obligation shall take effect three years after entry into force of this Convention.*

32. During this interim three-year period, each State Party shall require an end-use certificate, as specified below, for ***transfers of Schedule 2 chemicals to States not Party to this Convention.*** *For such* ***transfers****, each State Party shall adopt the necessary measures to ensure that* ***the transferred chemicals shall only be used for purposes not prohibited under this Convention.*** *Inter alia, the State Party shall require from the recipient State a certificate stating, in relation to the transferred chemicals:*

(a) That they will only be used for purposes not prohibited under this Convention;
(b) That ***they will not be re-transferred****;*
(c) Their types and quantities;
(d) Their end-use(s); and
(e) The name(s) and address(es) of the end-user(s). [Emphasis added]

21. The provisions for Schedule 3 chemicals are in Part VIII of the Annex and require that:

1. The initial and annual declarations to be provided by each State Party pursuant to Article VI, paragraphs 7 and 8, shall include ***aggregate national data*** *for the previous calendar year on the quantities produced, processed, consumed,* ***imported and exported*** *of each Schedule 3 chemical, as well as* ***a quantitative specification of import and export for each country involved.*** [Emphasis added]

In respect of transfers the requirement is as follows:

C. Transfers to States not party to this Convention

26. When ***transferring Schedule 3 chemicals to States not Party to this Convention****, each State Party shall adopt the necessary measures to ensure that* ***the transferred chemicals shall only be used for purposes not prohibited under this Convention.*** *Inter alia, the State Party shall require from the recipient State a certificate stating, in relation to the transferred chemicals:*

(a) That they will only be used for purposes not prohibited under this Convention;
(b) That ***they will not be re-transferred;***
(c) Their types and quantities;
(d) Their end-use(s); and
(e) The name(s) and address(es) of the end-user(s).

27. Five years after entry into force of this Convention, the Conference shall consider the need to establish ***other measures regarding transfers of Schedule 3 chemicals to States not party to this Convention.*** [Emphasis added].

It should be noted that in respect of transfers of Schedule 2 and 3 chemicals, the Conference of States Parties has subsequently agreed[17] that in the case of transfers to States not party to the Convention the importer will be obliged to specify names and addresses of the actual end-

[17]Organization for the Prohibition of Chemical Weapons, *Decision: Paragraph 32 of Part VII and Paragraph 26 of Part VIII of the Verification Annex of the Convention*, Conference of the States Parties, C-III/DEC. 6, 17 November 1998.

users of the imported chemicals. An importer or trader will not be accepted as the intended end-user.

22. **Analysis.** It will be recalled that the different Schedules to the CWC reflect the different risks to the Convention. As was noted in Briefing Paper No 11[18], for the purposes of the Article VI declarations, the CWC Annex on Chemicals sets out three schedules, which together list 43 species or families of chemical: 12 in Schedule 1 (including saxitoxin and ricin, as well as blister and nerve gases and intermediates thereof), 14 in Schedule 2, and 17 in Schedule 3 (including hydrogen cyanide, which as a toxic agent of biological origin is a toxin within the meaning of the Biological and Toxin Weapons Convention). Of the 43, 27 are precursors and 16 are toxicants. Each of the chemicals has been scheduled because it is deemed to pose a risk to the object and purpose of the Convention, the chemicals in Schedule 1 a *ÒhighÓ* risk, and those in Schedule 2 a *ÒsignificantÓ* risk. The scheduling also reflects the degree of industrial application of the listed chemicals, those in Schedule 3 being ones *Òproduced in large commercial quantitiesÓ* and those in Schedule 1 *Òhaving little or no use for purposes not prohibited under this ConventionÓ*. The three schedules are in fact negotiated lists, though criteria for adding new chemicals to them, or removing existing ones, are also specified in the Annex on Chemicals. Two categories of declaration are triggered by each schedule, one having to do with the chemicals *per se*, the other with facilities associated with them. The amount of detail required is greatest for Schedule 1 and smallest for Schedule 3, this reflecting the differing stringency of the control regime associated with each schedule. The facilities to be declared are ones in which more than threshold quantities of the chemicals are produced or, for chemicals on Schedules 1 and 2, processed or consumed.

23. It is thus evident that the regime relating to the transfer of Scheduled chemicals likewise reflects the risk to the Convention with the strictest control regime applying to Schedule 1 chemicals. The different regimes can usefully be summarised:

Chemicals	**Transfers within State Party**	**Transfer to other States Parties**	**Transfers to States not party to the Convention**
Schedule 1	Detailed annual declarations	Notification 30 days before transfer	Prohibited
		Detailed annual declarations	

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

		Retransfer prohibited	
Schedule 2	Annual declaration of sale or transfer within State	Aggregate national data of quantities imported and exported	Prohibited three years after entry into force of the Convention
		Annual declaration of direct export	End-use certificate during interim period
			Retransfer prohibited
Schedule 3		Aggregate national data of quantities imported and exported	End-use certificate
			Retransfer prohibited
			Review five years after entry into force of Convention

24. It has become apparent that the transfer regime under the CWC has provided a stimulus to States to become States Parties particularly if they are engaged in trade in chemicals.[19] The Director-General of the OPCW in his address[20] on 19 October 1999 to the First Committee of the United Nations General Assembly made this clear when he answered the question posed by States that are not yet party to the CWC by saying that:

> *"What is in it for my country - particularly as we neither possess, nor have we ever possessed, chemical weapons and, though we may have some industry in the chemical and related fields, it is neither significant nor advanced compared to other countries?"*
>
> *I take this opportunity now to inform those States which are not yet party to the Convention that each and every State has much to gain from the Convention. Its serves both political and humanitarian goals and security needs, as well as national and multilateral requirements in fields as diverse as trade, the environment, economic development, and international co-operation.*
>
> *The global and individual security benefits are clear....*
>
> ***But the Chemical Weapons Convention also contains provisions regarding trade, both in terms of economic development and in terms of restrictions on trade in chemicals which pose a threat to the object and purpose of the Convention. The OPCW and its Member States are concerned that these present trade provisions, including additional restrictions which will come into force very soon, will inexorably impact on the import of certain fundamental chemicals by States which are not party to the Convention.*** *This is of particular concern because these non-member states are, without exception, all developing countries where the need to import chemicals for use in pharmaceutical, agricultural and basic products such as textiles is absolutely essential. While much of the world is apparently spellbound by the symbolism of 1 January 2000, the OPCW is focusing on the practical implications*

[19]John Gee, *The CWC at the Two-Year Mark: An Interview with Dr John Gee,* Arms Control Today, April/May 1999. pp. 3-9.

[20]José M. Bustani, Statement by José M. Bustani, Director-General of the OPCW, to the First Committee of the United Nations General Assembly, 19 October 1999. Available at http://www.opcw.nl/dgspeech.htm

of 29 April 2000 - the date, only six months away, when the next group of restrictions on trade in chemicals listed in one schedule of the Convention will take effect.

During my bilateral consultations with non-Member States it has become increasingly clear to me that many are not aware of the extent to which these import controls will affect them. They are frequently blissfully unaware that many of the chemicals or mixtures of chemicals which they import for use in pharmaceuticals, pesticides, and even for such mundane items such as inks and dyes, will be affected by the export controls which will be imposed by the States Parties to the Convention, which include in their ranks all of the world's major producers of chemicals. It is for this reason that I have written to the Foreign Ministers of all signatory and non-signatory States, informing them of these provisions and of the imperatives which they represent for acceding to the Convention at the earliest opportunity.

Amongst the questions which these States need to ask themselves are the following: Can my industry afford not to have access to the chemicals which fall within the purview of the Convention? Is it still true that I can afford not to join the Convention? At the economic level, the Convention will also provide a boost for any country with a chemical trade or with various chemical and related industries. Additional restrictions against non-Member States will be considered in the near future. For example, in April 2002 Member States will consider whether to extend trade restrictions to the chemicals listed under Schedule 3 of the Convention. Such actions will have a severe impact on the import by non-Member States of some essential chemicals, including many with a wide range of commercial applications. [Emphasis added]

25. It is thus apparent that the regime under the OPCW relating to the transfer of scheduled chemicals has a significant effect both on States Parties and on States not yet party to the CWC. Furthermore, the Director General's recent statement that *these present trade provisions, including additional restrictions which will come into force very soon, will inexorably impact on the import of certain fundamental chemicals by States which are not party to the Convention,* makes it evident that the forthcoming review of the Schedule 3 chemicals regime is likely to see this strengthened. Over time, the OPCW regime will build confidence between States Parties to the CWC that chemicals are not being misused for purposes prohibited under that Convention.

Transfer Regime under the BTWC Protocol

26. As the mandate for the Ad Hoc Group is to *strengthen the effectiveness and improve the implementation of the Convention* it is necessary to address how the implementation of Article III of the Convention might be improved under the Protocol. It is appropriate to consider what is required for a regime that will over time build confidence that transfers of biological agents and toxins as well as of relevant equipment are not being misused for purposes prohibited under the Convention and thereby give States Parties to the Protocol confidence that Article III of the Convention is being implemented.

27. Given that the undertaking in Article III is *not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in Article I of the Convention,* it is appropriate to examine what steps might be taken to provide confidence that this undertaking

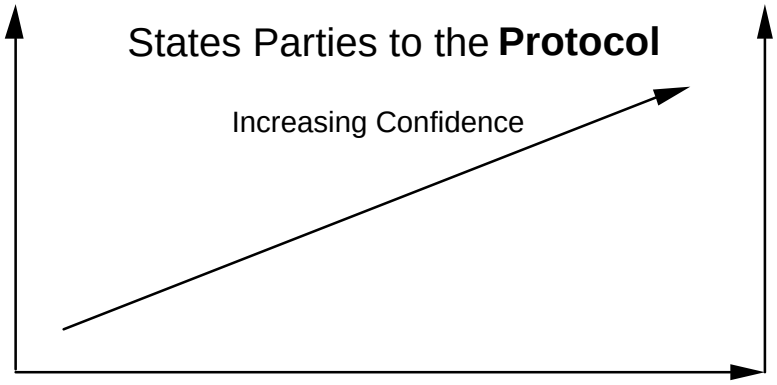
is being met. Consideration can then be given to how such confidence might be gained under the BTWC Protocol bearing in mind the model of the obligations within the CWC in regard to transfers of Schedule 1, 2 and 3 chemicals.

28. In making this analysis, it is important to recognize that the BTWC Protocol regime is not one that stands alone without regard to the national environment relating to biological agents and equipment. There are increasing concerns around the world about the possibility that sub-State actors or terrorist groups make seek to use biological materials and equipment as weapons to achieve their aims. Furthermore, it has to be recognised that increasingly countries are concerned about public, animal and plant health, about the environment and about trade in an increasing variety of goods as all States are keen to live in a safer, more prosperous world.

29. To an increasing extent States are establishing the national infrastructure and controls to ensure that biological agents and equipment are handled, used and transferred only to approved facilities, which increasingly are inspected by national agencies on a regular basis, so that public confidence can be built that the public and their environment are not being put at unnecessary risk through uncontrolled handling, use and transfer. Similar infrastructure and controls are also being sought by States who wish to deny the availability of such agents and materials to sub-State actors or terrorist groups. Furthermore, trade depends on the regular supply of quality goods which need to be inspected and checked to ensure that they are free from harmful contaminants. The recent concerns in Europe about genetically-modified foods reflect similar concerns about genetically-modified organisms which led to the entry into force of the Convention for Biological Diversity which opened for signature at the Earth Summit in Rio de Janeiro in 1992. It is thus clear that increasingly States are developing the necessary national infrastructure and controls to build public confidence within that State that the public and the environment are not at risk from biological agents and equipment. The Protocol regime can, and should, be seen as contributing nationally to a safer, more prosperous world.

30. It follows that as all States are increasingly introducing infrastructure and controls of dual-use materials and equipment for public health and safety reasons as well as to facilitate trade, the approach to be followed under a Protocol regime should be towards controlled transfers between States Parties to the Protocol with the onus being placed on the State Party making the transfer satisfying itself -- as it is the sovereign responsibility of that State Party to make the decision whether or not to make a particular transfer -- that the situation in the receiving State Party is such that the transfer is only for permitted purposes and will not be retransferred. There can be no certainty that one State Party to the Protocol will always approve a transfer to another State Party to the Protocol -- as this is a sovereign decision for the State Party making the transfer -- although over a number of years after entry into force of the Protocol **for the State Party** receiving the transfer the State Party making the transfer should gain greater confidence that the transfer will only be for permitted purposes and will not be misused -- and thus the likelihood that the transfer will be approved will increase. This can be illustrated graphically.

Trade in Dual Use Biological Material and Equipment
by States Parties **to the Protocol** with



31. Insofar as the Protocol regime is concerned, as biological agents can readily be grown and transferred to others, confidence needs to be gained that a transfer to a State Party to the Protocol is:

a. **only** being used for permitted purposes;

a. **not** being retransferred, without approval, to another facility within the receiving State Party; or

b. **not** being retransferred, without approval, to another State Party to the Protocol.

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

32. The question of whether transfers should be permitted to States that are not party to the Protocol needs further consideration. Should such transfers be permitted, then consideration needs to be given to the specific circumstances under which such transfers might be carried out in such a way as to give confidence to the exporting State Party to the Protocol that the transfer is indeed only for permitted purposes.

33. The three requirements to enable a State Party to the Protocol to have confidence that a transfer to another State Party to the Protocol is compliant with Article III of the Convention are now considered in turn.

34. **Transparency.** Confidence that the facility with a State Party that received a transfer is using this for peaceful purposes could be achieved in several ways. If the facility is one which meets the requirements in *Article III. D. Declarations I Submission of Declarations* for declarations under the Protocol, then the provisions in the Protocol for *II. Follow-Up After Submission of Declarations* would apply and confidence could be gained both through the infrequent Randomly-Selected Visits and the Declaration Clarification Procedures. If,

however, the transfer is to a facility that does not meet the requirements for declarations, then alternative approaches could be taken to provide transparency that the transfer is for peaceful purposes: these could range from a requirement that the declaration of the transfer should, as in the CWC scheduled chemical transfer declarations, include information on the quantity, recipient and purpose. Such transfer declarations would then be subject to the *Follow-Up After Submission of Declarations Procedures* which could include not only the Declaration Clarification Procedures but also infrequent Randomly-Selected Visits if it was determined that facilities receiving a transfer were regarded as a declared facility. Another approach would be for the State Party receiving the transfer to invite the Organization to make a voluntary visit to the facility receiving the transfer. However, it is important to recognize that neither of these approaches are viable **unless** the State Party receiving the transfer has demonstrated to the Organization, and thus to other States Parties, that it has **national** controls in place and in operation **both** for internal transfers **and** for interstate transfers.

35. **National controls within a State Party.** The State Party to the Protocol needs to demonstrate to the Organization, and thus to other States Parties, that it has in place and in operation national infrastructure and controls of those facilities within the State Party which handle, store, use and transfer biological agents and equipment. Such infrastructure and controls are increasingly required for public health and safety, protection of the environment as well as the denial of such agents and equipment to sub-State actors and terrorist groups. Further information on such national infrastructure and controls was provided in Briefing Paper No 7 *Article X: Further Building Blocks*[21] which included an outline of the provisions in *Section 511 Enhanced Penalties and Control of Biological Agents* within the US *Antiterrorism and Death Penalty Act 1996.*[22] This set out the requirement that the Secretary of Health and Human Services shall

> *"establish and maintain a list of each biological agent that has the potential to pose a severe threat to public health and safety"*

In addition to ensure the regulation of transfers of listed biological agents, *"the Secretary shall, through regulations...provide for:*

> *(1) the establishment and enforcement of safety procedures for the transfer of biological agents listed .... including measures to ensure -*
>
> *(A) proper training and appropriate skills to handle such agents; and*
>
> *(B) proper laboratory facilities to contain and dispose of such agents;*
>
> *(2) safeguards to prevent access to such agents for use in domestic or international terrorism or for any other criminal purpose;*
>
> *(3) the establishment of procedures to protect the public safety in the event of a transfer or potential transfer of a biological agent in violation of the safety procedures established under paragraph (1) or the safeguards established under paragraph (2); and.*
>
> *(4) appropriate availability of biological agents for research, education and other legitimate purposes."*

[21]Graham S. Pearson, *Article X: Further Building Blocks,* Briefing Paper No. 7, University of Bradford, March 1998. Available on http://www.brad.ac.uk/acad/sbtwc

[22]United States, Public Law 104-132, Antiterrorism and Effective Death Penalty Act of 1996, 24 April 1996.

The final rule to achieve this was published in the Federal Register of 24 October 1996[23] with an effective date of 15 April 1997; this includes the following elements:

Registration of facilities
Request for agents
Verification of registration
Transfer
Inspections

All transfers of select agents must comply with the complete documentation and registration requirements on or after that date. The list of select agents was reproduced on pages 17 and 18 of Briefing Paper No 7[24] with the comment that *It will be noted that, unsurprisingly, this list contains all the micro-organisms generally included in lists of possible biological warfare agents.*

36. **National controls of interstate transfers.** The State Party to the Protocol needs to demonstrate to the Organization, and thus to other States Parties, that it has in place and in operation national infrastructure and controls of transfers of biological agents and equipment across its borders. Such infrastructure and controls are required not only to implement Article III of the BTWC but also to safeguard public health and safety and to protect the environment as it is increasingly recognised that outbreaks of disease know no frontiers. Consequently, a transfer to a neighbouring country may well result in danger to the originating country should the receiving country not have appropriate infrastructure and controls. Likewise, sub-State actors or terrorists may choose to operate from a neighbouring country if it perceives that it is easier to acquire the biological agents and equipment that it needs there. There is therefore much to be said for the multilateral harmonization of **both** national controls **within** States and of **interstate** transfers.

37. **Transfers to States not party to the Protocol.** It was noted above that the question of whether transfers should be permitted to States that are not party to the Protocol needs further consideration. It is noted that under the CWC, transfers to non-States Parties of certain Scheduled chemicals are increasingly subject to export controls and, in many cases, are prohibited. As many of these are chemicals which States import for use in pharmaceuticals, pesticides and such mundane items as inks and dyes, it is clear that humanitarian considerations did not prevent the negotiators of the CWC from adopting a stringent regime. Moreover, the difficulties in resolving the problems that have arisen with the provisions in the CWC regarding the transfer of bioassay kits, containing minute quantities of saxitoxin, needed to diagnose the presence of Paralytic Shell Poisoning (PSP) which occurs globally in some 30 countries have not suggested that States Parties to the CWC are willing to make changes for humanitarian reasons.

38. Furthermore, it is recalled that two toxins -- saxitoxin and ricin -- are included in Schedule 1 of the CWC and are therefore subject to the full rigours of the transfer regime for Schedule 1 chemicals -- with both transfer to non States Parties and retransfer between States

[23]United States, Federal Register, Department of Health and Human Services, *Additional Requirements for Facilities Transferring or Receiving Select Agents,* Rules and Regulations, Volume 61, No. 207, Thursday 24 October 1996, 55190 - 55200.

[24]Graham S. Pearson, *Article X: Further Building Blocks,* Briefing Paper No. 7, University of Bradford, March 1998. Available on http://www.brad.ac.uk/acad/sbtwc

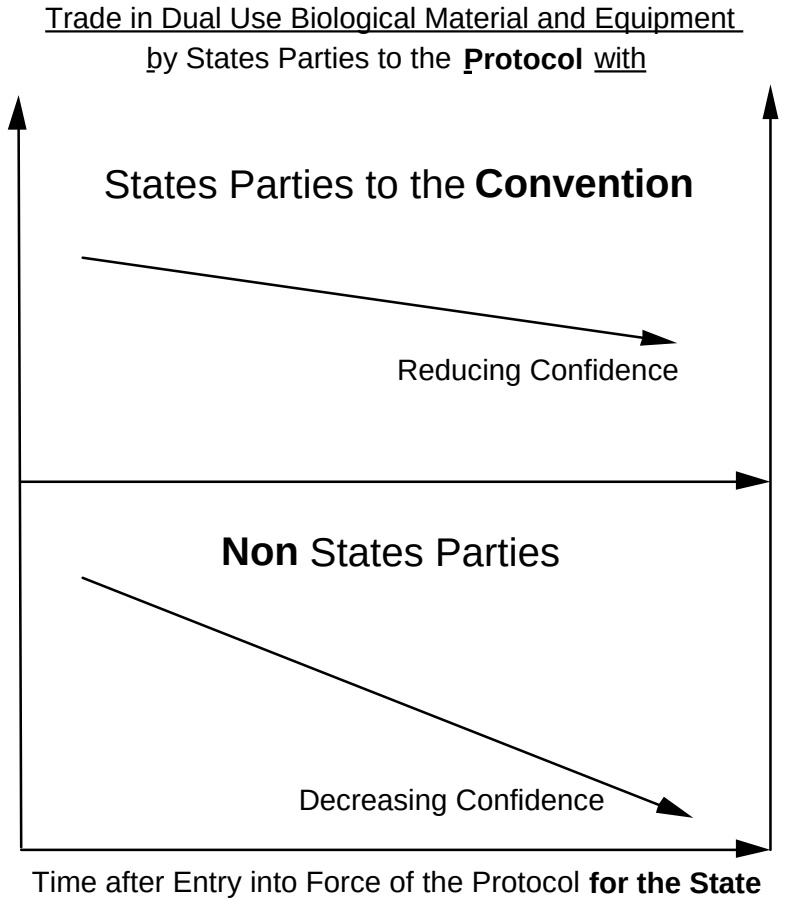
Parties prohibited. It would therefore be logical that the BTWC Protocol regime for toxins should at least be consistent with that for saxitoxin and ricin under the CWC.

39. There are two particular cases of transfer to States **not party to the Protocol** which need to considered:

a. Transfers to States Party to the Convention but not to the Protocol

b. Transfers to States not party to the Convention.

There are several options which could be considered for transfer to States not party to the Protocol. Transfers could be totally prohibited to non States Parties although consideration would need to be given to whether possible exceptions might be made, on a case by case basis, on humanitarian grounds. Alternatively, transfers could be permitted to non States Parties with the prior approval of the Organization or could be permitted to non States Parties provided that the State Party to the Protocol has determined that the transferred items would only be used for purposes permitted under the BTWC. In addition, there are options as to when such prohibitions might come into effect -- this could be at a number of years after entry into force of the Protocol or at a number of years after entry into force of the Protocol for the State Party. Afterall, when the Protocol has been in force for a number of years, the States who are party to the Protocol will have **less** confidence about transfers to those States which are not party to the Protocol. This can be illustrated graphically:



40. On balance, there is much to be said for a regime in which transfers to non States Parties to the Protocol are prohibited with provision for exceptions to be made, on a case by case

basis, for humanitarian reasons. This might with advantage come into effect a number of years after the entry into force of the Protocol as this would provide a clear incentive for States to become party to the Protocol.

41. **Analysis of the draft Protocol Transfer Regime.** The current Protocol language contains a number of different elements:

a. The requirement under *Declarations [(I) Transfers* for each State Party to make annual declarations of *all international transfers during the previous calendar year of agents and/or toxins, equipment [or means of delivery] listed in Annex A.* Annex A includes the lists of pathogens and toxins in *I. Lists and Criteria (Agents and Toxins)* and a list of equipment in *II. List of Equipment.*

b. The *Measures to Strengthen the Implementation of Article III* of the Convention which include proposed language for transfer guidelines, notification to the Organization of national laws, regulations and administrative measures to implement Articles III and IV of the Convention, and requirements for end-user certificates.

c. Headings for investigations should there be concerns that a transfer has taken place in violation of Article III of the Convention.

d. Language for a possible Confidence-Building Measure *Data on Transfers and Transfer Requests and on Production* which is derived from the corresponding VEREX measure.

This analysis concentrates on the first two elements: declarations of transfers and measures to strengthen the implementation of Article X as these have received the most attention from the AHG. The other two elements -- investigations and the CBM -- may be subsumed into other provisions in the Protocol and thus not be taken further as such.

42. *Declarations of transfers.* An important element of the BTWC Protocol regime will be increased transparency about transfers of dual-purpose biological agents and toxins and equipment. Consequently, an annual declaration of all international transfers of the biological agents and toxins listed in Annex A and of the equipment listed in Annex A will contribute to building confidence in compliance. The burden imposed by such a declaration requirement will not be large as States Parties to the Protocol may well already be collecting this information under their existing national system. They may also be collecting such information already either:

a. as a State Party to the CWC in regard to ricin and saxitoxin which are Schedule 1 chemicals for which annual detailed declarations of transfers are required and also appear on the list of biological agents and toxins in Annex A of the Protocol

or under

b. the import/export mechanism established by the UN Security Council in respect of Iraq[25].

[25]The world-wide system of notification of exports to and imports into Iraq which includes a wide range of dual purpose goods is described in Graham S. Pearson, *Article III: Further Building Blocks,* Briefing Paper No. 13, University of Bradford, October 1998. Available on http://www.brad.ac.uk/acad/sbtwc.

43. There is also a case for considering whether States Parties should provide a declaration on denials of transfers; several states currently produce annual reports on strategic export controls in which details of licensing decisions are provided.[26] For example, in the United Kingdom, an Annual Report on Strategic Export Controls is already produced which is available on the web.[27] This provides information on licensing decisions during the preceding year indicating both approvals and denials. In a listing by the importing State, information is given on the Standard Individual Export Licences (SIELs) showing whether the SIEL was approved or refused with a reference to the appropriate Military List category or to the dual-use goods category (more detailed information on the UK and the EU export controls regime was provided in Briefing Paper No 12[28]). In addition, a table (2B on pages 103/4) lists the Open Individual Export Licenses (OIELs) issued during the previous year by country under the specific dual-use goods category. From the point of view of transfers relevant to the BTWC Protocol, it is noted that there is information in the UK Annual Report relating to the following dual-use categories:

a. 1C351 Human pathogens, zoonoses and toxins*

b. 1C352 Animal pathogens*

* Briefing Paper No 12, paragraph 17, provides a complete listing of the specific pathogens, zoonoses and toxins covered by 1C351 and of animal pathogens covered by 1C352

It should be noted that each individual SIEL or OIEL will be for a specified pathogen or pathogens on the 1C351 or 1C352 list and that in the case of the more restricted SIELs specific quantities and a specific end-user may well be specified.

44. The latest report covering decisions made in 1998 shows that

a. 92 OIELs for 1C351 were issued or amendments approved for import to 79 named countries and

b. 14 OIELs for 1C352 were issued or amendments approved for import to 14 named countries.

Examination of the country listings shows that, for example, the more restrictive SIELs were approved in 1998 for a pathogen or pathogens on the 1C351 human pathogens, zoonoses or toxins list for a number of countries ranging from Iran, Jordan, The Netherlands, South Africa, Sri Lanka and the United States of America.

45. This UK Annual Report states that it reflects the UK Government's *continuing commitment to transparency and accountability* in their policy on exports of goods controlled for strategic reasons. In respect of policy issues relating to Strategic Export Controls, the

[26]An example is the United Kingdom Foreign Office, the Department of Trade and Industry, the Ministry of Defence, Second Annual Report on Strategic Export Controls, 3 November 1999. Available on the web at http://www.fco.gov.uk/news/newstext.asp?2956

[27]United Kingdom, Foreign Office, the Department of Trade and Industry, the Ministry of Defence, Second Annual Report on Strategic Export Controls, 3 November 1999. Available on the web at http://www.fco.gov .uk/news/newstext.asp?2956

[28]Graham S. Pearson, *Article III : Some Building Blocks*, Briefing Paper No. 12, University of Bradford, October 1998. Available on http://www.brad.ac.uk/acad/sbtwc

report notes that the EU on 8 June 1998 adopted a Code of Conduct on Arms Exports and that the EU had recently published[29] a review of the first year's operation of the Code. That EU review stated that *"The Code has ushered in a new degree of transparency between governments in arms transactions"* and added that *"the Code has been embraced by others beyond the Union, with the associated countries of central and eastern Europe and Cyprus, the EFTA countries members of the EEA and Canada all agreeing to align themselves with its principles."* The review includes a table of the total number of licences issued and the number of notified denials. It is thus evident that information on licences and denials are being more widely shared.

46. Such annual reports such as that already produced by the UK add significantly to increasing transparency and building confidence between States. They demonstrate unequivocally that the State issuing such an annual report has an export system in place and that that system is functioning as well as providing transparency on licensing decisions.

Measures to strengthen the implementation of Article III.

47. The current Protocol language[30] contains within square brackets a number of different options. There are alternatives as to what transfers will be allowed:

a. States Parties shall only transfer among themselves dual-use microbial agents, toxins and equipment according to the following guidelines. (para 1)

b. No State Party shall authorize transfers of specified items of equipment to any recipient whatsoever unless that State Party has, where appropriate, assured itself that such items will only be used for permitted purposes. (Alternative para 1).

c. Transfer of agents and equipment shall not be allowed to non-States Parties without the prior approval of the Organization. (para 2 (d))

d. No transfer of agents and equipment shall be allowed to non-States Parties of the Convention and the Protocol. (para 4)

48. There is thus a perception that transfers of biological agents and toxins and equipment should be allowed between States Parties to the Protocol provided that certain information is provided to the supplying State Party and to the Organization. The final decision on whether to make the transfer will, however, remain a sovereign right of the State making the transfer. The information to be provided to the supplying State Party and the Organization in the current text includes the following:

a. Reports to the Organization by the State Party of the national laws, regulations and administrative and other national measures that the State Party has adopted to implement Article III of the Convention. (para 5 (b) (i) and (ii))

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[29]European Union, *Annual report in Conformity with Operative provision 8 of the European Union Code of Conduct on Arms Exports (1999/C 315/01)*, Official Journal of the European Communities, C.315/1, 3 November 1999. Available on the web at http://europa.eu.int/eur-lex/en/oj/index.html

[30]United Nations, *Outcome of discussions by the Fiend of the Chair on Measures to Promote Compliance, Addendum, Article III, [F. [MEASURES TO STRENGTHEN THE IMPLEMENTATION OF ARTICLE III]*, BWC/AD HOC GROUP/L.71/Add.4, 3 December 1999.

b. Notification to the Organization by the State Party of the national laws, regulations and administrative measures that the State Party has adopted to implement Article III and IV of the Convention. (para 6)

c. Information on purpose, quantity required, site or facility for proposed use, quantity to be produced at the site or facility, place where intended to be stored and end-use certificate. (para 2 (a)) The text does not specify who this information shall be provided to -- the implication is that it is to be provided by the requesting State Party to the supplying State Party.

d. Any request for transfer or procurement of equipment envisaged to be declared under CBMs, for use by a State Party in a BL 4 facility, including details of its proposed application and the site/facility for intended use, shall be intimated to the Organization. (para 2 (b))

e. Any transfer of technology related to means of delivery, aerosol dispersion of toxins and pathogens, stabilization of agents/toxins to environmental stresses shall be intimated to the Organization. (para 2 (c))

f. An end-user certificate may be required from the recipients stating, in relation to the transferred biological agents or toxins and equipment, the following:

(i) That they will only be used for purposes not prohibited under this Convention for the States not party to the Convention;

(ii) That they will not be retransferred without receiving the authorization from the supplier(s);

(iii) Their types and quantities;

(iv) Their end-use(s); and

(v) The name and address(es) of the end-user(s). (para 7 (c)) The text does not specify who this information shall be provided to -- the implication is that it is provided by the requesting State Party to the supplying State Party.

49. Consideration is given in turn to the various elements:

a. National laws, regulations and administrative measures

b. Information relating to particular transfers.

c. Dual-use microbial agents, toxins and equipment.

d. Transfers to States not party to the Protocol.

e. Humanitarian exceptions.

50. *National laws, regulations and administrative measures.* There is language requiring that information shall be provided by each State Party to the Organization of the national

laws, regulations and administrative measures that the State Party has adopted to implement Article III and IV of the Convention. Insofar as the detailed information is concerned, the current Protocol text has yet to distinguish clearly between information to be provided by the requesting State Party to the supplying State Party and information to be provided to the Organization. It will be recalled that under the CWC the requirement is for a detailed annual declaration of transfers of Schedule 1 chemicals -- which include ricin and saxitoxin -- and for a declaration of the aggregate national data on the quantities imported and exported of each Schedule 2 and Schedule 3 chemical. End-user certificates are required for transfers of Schedule 2 and 3 chemicals to States not party to the Convention; such certificates are to be provided by the receiving State to the supplying State Party and shall provide the following information:

(a) That they will only be used for purposes not prohibited under this Convention;

(b) That ***they will not be re-transferred;***

(c) Their types and quantities;

(d) Their end-use(s); and

(e) The name(s) and address(es) of the end-user(s).

The end-user certificate requirement in the Protocol is thus the same as that in the CWC although the terminology for item (a) is much clearer in the CWC than in the Protocol as the Protocol language adds the confusing phrase *for the States not party to the Convention* which adds nothing since the Convention only applies to its States Parties and not to States not party!

51. The information to be provided under the Protocol by each State Party to the Organization of the national laws, regulations and administrative measures that the State Party has adopted to implement Article III and IV of the Convention is strongly supported as evidence that such laws, regulations and measures have been enacted **and are being implemented** will be an important measure that builds confidence among States Parties that the Convention is being implemented by each State Party. The experience of the CWC that State Parties have been slow to provide such information to the OPCW provides a compelling argument that the provision of information under the Protocol should be given the force of a declaration with all the measures to ensure submission of declarations available to ensure that timely submission is achieved. Afterall, it has to be recognized that the BTWC Protocol, like the CWC, is not self implementing. They will only be effective regimes if the States Parties implement them nationally **through national laws, regulations and measures** which are vital for the Protocol and the CWC to be effective.

52. Evidence that the laws, regulations and measures are indeed being implemented can come from annual reports produced by the National Authorities within States Parties. An example is provided by the UK National Authority under the CWC annual reports[31] which contain a section entitled "Operation of Licensing and Trade Controls relating to the CWC".

[31]Department of Trade and Industry, *1997 Annual Report of the Operation of the Chemical Weapons Act 1996 by the Secretary of State for Trade and Industry*, February 1998. Department of Trade and Industry, *1998 Annual Report of the Operation of the Chemical Weapons Act 1996 by the Secretary of State for Trade and Industry*, April 1999.

This section notes that the UK Chemical Weapons Act 1996 to implement the CWC contains a number of provisions to control Schedule 1 chemicals -- which include ricin and saxitoxin -- in accordance with the CWC. These provisions cover production, possession and use and associated reporting requirements which are implemented through three different types of licence:

a. An Open General Licence which permits those registered under it to produce, have in their possession and use up to an aggregate of 5 grams of any Schedule 1 chemical in a calendar year. The chemicals must be intended for pharmaceutical, medical or research purposes and must be of a type and quantity demonstrably consistent with that purpose. 29 companies and organizations had registered to use the OGL by the end of 1997.

b. An Individual Possession and Use Licence is required if either possession or use of the Schedule 1 chemical exceeds 5 grams in a calendar year. An application for such a licence must detail the chemicals, their quantities, the location at which they will be held or used and the purposes (limited to pharmaceutical, medical, research or protective purposes) for which they are required.

c. An Individual Production Licence is required to produce a Schedule 1 chemical. The application must detail the chemical to be produced and the purpose of production.

In addition, any person wishing to import a Schedule 1 chemical must apply to the National Authority for an Import Licence. The application must detail the chemical to be imported, the quantity of chemical, the proposed date of shipment, the consignor, the country of origin of the chemical and the purpose for which it is to be imported. Information is provided in the annual reports of the National Authority on the number of licences issued for individual production, for individual possession and use and for import.

53. *Information relating to particular transfers.* It is very clear that the requesting State Party needs to provide information to the supplying State Party on the nature of the biological agent or toxin and equipment to be transferred, the purpose for which it is required, the site or facility at which it is to be stored and used. The question that needs to be considered relates to what information should be provided to the Organization about transfers. The draft Protocol identifies two such areas

d. Any request for transfer or procurement of equipment envisaged to be declared under CBMs, for use by a State Party in a BL 4 facility, including details of its proposed application and the site/facility for intended use, shall be intimated to the Organization. (para 2 (b))

e. Any transfer of technology related to means of delivery, aerosol dispersion of toxins and pathogens, stabilization of agents/toxins to environmental stresses shall be intimated to the Organization. (para 2 (c))

In addition, if there were to be a Confidence-Building Measure (CBM) under the Protocol based on the current language in the Protocol Annex G then it is probable that information on transfers would be provided on a regular basis -- although much would depend on whether the provision of information under the CBM was to be mandatory or voluntary. If it were to be the latter, the value of the information provided would be very limited because the

information provided by States Parties would be very varied and insufficient to build confidence.

54. There is much to be said for the provision of data relating to transfers of agents and equipment **to the Organization** as well as to the supplying State Party as this will both increase transparency and will also assist the Organization in gaining an appreciation of the activities within States Parties. Such provision of information would also be compatible with the language for annual declarations of transfers of agents and/or toxins and equipment listed in Annex A. Provision of such data to the Organization will also enable the Organization to be effective in carrying out its reviews into the implementation of the Protocol for which it will need to both survey the national laws, regulations and national measures adopted by States Parties and also the implementation of the measures taken to strengthen the implementation of Article III of the Convention.

55. *Dual-use microbial agents, toxins and equipment.* The draft Protocol has several options regarding which transfers should be controlled and reported:

> a. Annual declarations of agents and/or toxins and equipment listed in Annex A (D. Declarations (I) Transfers, para 24)

Article III Section F contains a number of different options ranging from

> b. microbial or other biological agents or toxins and equipment capable of using such agents or toxins (para 5 (a))
>
> c. a list of specific equipment -- fermenters or bioreactors, aerosol chambers, experimental aerobiology equipment, aerosol analytical equipment (alternative para 1 (a) - (d))
>
> d. equipment to be used in a BL-4 facility (para 2 (b))
>
> e. technology related to means of delivery, aerosol dispersion of toxins and pathogens, stabilization of agents/toxins to environmental stresses (para 2 (c))

56. Although the obligation arising from Article III of the Convention is all-embracing, the measures to be undertaken under the protocol to improve the implementation of Article III need to be based on measures that apply to particular agents and equipment. It would be unsatisfactory -- and would result in an inconsistent situation -- if the measures are ambiguous leaving it to States Parties to individually decide which agents and equipment to control. There is much to be said for language under which transfer are controlled of *agents and/or toxins and equipment listed in Annex A.* The States Parties to the Protocol can then at a later date amend the list in Annex A should they so decide on a consensus basis.

57. A further option that could be adopted would be to distinguish between different groups of agents and equipment and to have different regimes for list A items and another for list B items in a similar way to that in which the CWC has different regimes for Schedule 1, 2 and 3 chemicals. It would be possible to have a list A which comprised the equipment currently listed in the Protocol under Article III. F in alternative paragraph 1:

> <u>List A</u>

(a) Fermenters or bioreactors with a total internal volume of [25][50][100] litres or more;

(b) Aerosol chambers designed or intended for use for the dissemination of aerosols of microorganisms or toxins;

(c) Equipment designed or intended for use in experimental aerobiology studies to generate aerosols of microorganisms or toxins;

(d) Aerosol analytical equipment to determine the size of particles up to 20 microns in diameter.

and a list B which included the agents listed in Annex A:

List B

Agents and toxins as listed in Annex A.

The control regime for List A might be tighter and come into force sooner as there would be less justification for exceptions on humanitarian grounds than for List B items.

58. *Transfers to States not Party to the Protocol.* There are two principal categories of States not party to the Protocol that need to be addressed:

a. States Parties to the Convention but not to the Protocol, and

b. States not party to the Convention (or the Protocol).

The draft Protocol currently contains language that primarily relates to the second category, non-States Parties:

c. *No transfer of agents and equipment shall be allowed to non-States Parties of the Convention and the Protocol.* (para 4)

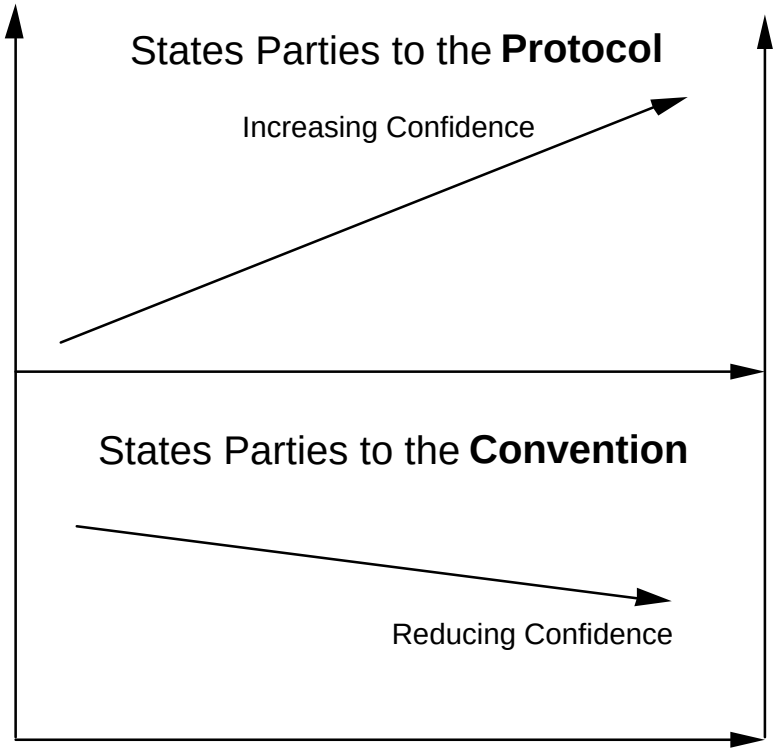
d. *Transfer of agents and equipment shall not be allowed to non-States Parties without the prior approval of the Organization.* (para 2 (d))

As noted earlier in this Briefing Paper, there is much to be said for a regime in which transfers to **non** States Parties to the Protocol and the Convention are prohibited with provision for exceptions to be made, on a case by case basis, for humanitarian reasons. This might with advantage come into effect a number of years after the entry into force of the Protocol as this would provide a clear incentive for States to become party to the Protocol.

59. The question that needs to be addressed is whether transfers should be permitted to States Parties to the Convention but not to the Protocol. As States Parties to the Protocol have undertaken obligations which will over time build transparency and increase confidence in compliance, it is clear that transfers between States Parties to the Protocol are likely over time to increasingly be permitted as the supplying State Party gains confidence that the transfer is indeed for permitted purposes. However, the situation regarding transfers to States that are party to the Convention but not to the Protocol are likely over time to become more difficult as the supplying State Party will have much less transparency about activities in the receiving

State Party and will wonder why the State which is party to the Convention has not yet become a party to the Protocol. The graphical representation used earlier and reproduced below shows the likely developments in these two cases. The State requesting the transfer should be required to provide both the supplier State Party and the Organization with a declaration of the requesting State's national laws, regulations and measures relating to biological agents and/or toxins and equipment. In addition, the requesting State should provide an end-user certificate to both the supplying State Party and to the Organization. This end-use certificate should undertake not to retransfer any of the transferred items. Other measures could be required such as visits paid for by the requesting State to enable the supplying State to be confident that the materials or equipment will indeed be used for permitted purposes.

Trade in Dual Use Biological Material and Equipment
by States Parties to the **Protocol** with



60. In addition, there is much to be said for adopting a similar provision to that in the CWC regarding transfers of Schedule 3 chemicals in which these are allowed but the Convention states that:

> *27. Five years after entry into force of this Convention, the Conference shall consider the need to establish* ***other measures regarding transfers of Schedule 3 chemicals to States not party to this Convention.***

For the Protocol the language could take the form of several options such as:

> i. *Five years after entry into force of this Protocol, transfers of biological materials or equipment as specified in Annex A to States not party to the Protocol shall be*

prohibited, except for humanitarian reasons with the prior approval of the Organization, unless the Conference of States Parties decides otherwise.

ii. *Five years after entry into force of this Protocol, the Conference of States Parties shall decide whether transfers of biological materials or equipment as specified in Annex A to States not party to the Protocol shall be prohibited, except for humanitarian reasons with the prior approval of the Organization.*

iii. *Five years after entry into force of this Protocol, the Conference of States Parties shall consider the need to establish other measures regarding transfers of biological materials or equipment as specified in Annex A to States not party to the Protocol shall be prohibited, except for humanitarian reasons with the prior approval of the Organization.*

These options could be further elaborated if the controlled agents and equipment were, as suggested in paragraph 57 above, divided into two lists. The time at which the regime for list A came into effect might be after, say, 5 years and the regime for list B after, say, 10 years. Inclusion of such language in the Protocol would provide a clear incentive to a greater or lesser extent for States not party to the Protocol to become State Parties.

61. *Humanitarian exceptions.* The draft Protocol language has long contained a footnote concerning the possible humanitarian implications of a prohibition of transfers. Given the experience of the CWC in respect of saxitoxin transfers for humanitarian purposes, there would be merit in making provision for exceptions to be approved for humanitarian purposes by the Organization. This could be achieved by modifying the current Protocol language:

Transfer of agents and equipment shall not be allowed to non-States Parties without the prior approval of the Organization. (para 2 (d))

along the following lines:

Transfer of agents and equipment shall be allowed to non-States Parties to the Protocol ***only for humanitarian reasons*** *with the prior approval of the Organization.*

61. There is also a case, again based on the CWC saxitoxin experience, for explicitly allowing retransfer of agents to non States Parties for humanitarian reasons with the prior approval of the Organization. This could be achieved by language along the following lines:

Retransfer of agents and equipment shall be allowed to non-States Parties to the Protocol only for humanitarian reasons with the prior approval of the Organization.

Analysis

62. The outcome of the above analysis of the **current Protocol language** can usefully be summarised in tabular form in a similar way to that used above to summarise the CWC regime. However, in order to facilitate the comparison it is useful to first reproduce the CWC regime summary:

Chemicals	Transfers within State Party	Transfer to other States Parties	Transfers to States not party to the Convention
Schedule 1	Detailed annual declarations	Notification 30 days before transfer	Prohibited
		Detailed annual declarations	
		Retransfer prohibited	
Schedule 2	Annual declaration of sale or transfer within State	Aggregate national data of quantities imported and exported	Prohibited three years after entry into force of the Convention
		Annual declaration of direct export	End-use certificate during interim period
			Retransfer prohibited
Schedule 3		Aggregate national data of quantities imported and exported	End-use certificate
			Retransfer prohibited
			Review five years after entry into force of Convention

The BTWC Protocol regime as currently formulated in the draft Protocol can be summarised as follows:

Material	Transfers to other States Parties to the Protocol	Transfer to States Parties to the Convention	Transfers to States not party to the Convention
Agents and toxins and equipment listed in Annex A	Annual declarations of transfers	Detailed annual declarations by supplier State Party of transfers	Prohibited except for humanitarian purposes with prior approval of Organization
	Declaration of national laws, regulations and measures	Declaration of national laws, regulations and measures to supplier State Party and to Organization	Retransfer prohibited
	End-user certificate	End-user certificate to supplier State Party and to Organization	
	Retransfer to another State Party to the Protocol only with prior approval of supplier State Party	Retransfer prohibited	

		Review five years after entry into force of Protocol	

63. The comparison with the CWC regime -- which it will be recalled already applies to two toxins: ricin and saxitoxin are Schedule 1 chemicals -- shows some discrepancies. The BTWC Protocol regime, as summarized in the Table above, would be incompatible with the CWC regime in that retransfers would be permitted in the Protocol regime with the prior approval of the supplier State Party and be forbidden under the CWC regime. The problems encountered in the CWC regime regarding transfers of saxitoxin for humanitarian purposes suggests that there would be particular merit in the Protocol regime permitting retransfer to another State Party to the Protocol with the prior approval of the supplier State Party. This retransfer permission might come into force a number of years after entry into force of the Protocol for the State Party -- as those years would have provided time during which the receiving State Party will have demonstrated its implementation of the Protocol regime. There is a strong case for the CWC adopting a change that would permit retransfer of Schedule 1 chemicals for humanitarian purposes -- and such a change might well be adopted to bring the CWC regime into harmony with the Protocol regime in this respect.

Possible Developments for the BTWC Protocol

64. It is now possible to identify from this Briefing Paper a number of possible options which could be incorporated into the Protocol to further develop the provisions to strengthen the implementation of Article III of the Convention thereby improving **both** national security and safety through national controls of the use, storage and transfer of agents and equipment and interstate controls of transfers. In addition, this would over time provide a clear incentive for all States to become party to the Protocol.

65. These additional options are shown in **bold** in an amended version of the BTWC Protocol regime tabulation:

Material	**Transfers to other States Parties to the Protocol**	**Transfer to States Parties to the Convention**	**Transfers to States not party to the Convention**
Agents and toxins and equipment listed in **List A and List B in** Annex A	Annual declarations of transfers **and denials**	Detailed annual declarations by supplier State Party of transfers **and denials**	Prohibited except for humanitarian purposes with prior approval of Organization
	Declaration of national laws, regulations and measures	Declaration of national laws, regulations and measures to supplier State Party and to Organization	Retransfer prohibited
	End-user certificate	End-user certificate to supplier State Party and to Organization	
	Retransfer to another State Party to the Protocol only with prior approval of supplier State Party	Retransfer prohibited	
	Retransfer to a non-State Party to the Protocol only with prior approval of the Organization	**Prohibit/Review transfers of List A items five years after entry into force of Protocol**	
		Prohibit/Review transfers of List B items ten years after entry into force of Protocol	

66. Consideration can now be given to how the language in the draft Protocol might be developed. This language essentially occurs in three places:

a. Annual Declarations of Transfers in Article III. D.

b. Measures to strengthen the implementation of Article III of the Convention in Article III.F

c. Confidence-Building Measure III. Data on Transfers and Transfer Requests and on Production in Annex G.

although there are also headings for language in three other places in the Protocol:

d. Annex C which has a heading of: Measures to strengthen the implementation of Article III [of the Convention]

e. Article III G. Investigations includes a heading for (c) Investigations where there is a concern that a transfer has taken place in violation of Article III of the Convention.

f. Annex D Investigations has a heading for IV. Investigations where there is a concern that a transfer has taken place in violation of Article III of the Convention.

67. Consideration in this Briefing Paper is limited to those parts of the Protocol where text is currently present. In respect of declarations of transfers in Article III. D , it is suggested that the language might be developed as follows:

> *24. Each State Party shall declare, in accordance with paragraphs 1 to 3 above, all international transfers* ***and denials*** *during the previous calendar year of agents and/or toxins* ***and*** *equipment ~~[or means of delivery]~~ listed in Annex A.*

68. Insofar as Article III. F Measures to strengthen the implementation of Article III of the Convention is concerned, this might usefully be developed so as to address in separate sections the three different categories of transfers:

a. to States Parties to the Protocol

b. to States Parties to the Convention but not to the Protocol, and

c. to non-States Parties

The point needs to be recognized that the State Party to the Protocol making the transfer has the final decision as to whether to go ahead and make the transfer. The Protocol should set out certain standards to be observed for all transfers in a particular category. The individual State Party to the Protocol may decide to adopt more stringent standards. Consideration could also be given to whether to consider one regime for equipment (List A) and a second regime for agents and toxins (List B).

69. As to the proposed Confidence-Building Measure, it is suggested that it would be preferable to adopt a mandatory annual declaration under Article III. D and to consider whether the language in Annex G should be drawn upon to develop a format in Annex A for the annual declarations of transfers and denials.

Conclusions

70. This Briefing Paper has considered the obligation placed on States Parties by Article III of the Convention and noted the language in the Final Declaration of the Fourth Review Conference which agreed *that* ***States Parties should also consider ways and means to ensure that individuals or subnational groups are effectively prevented from acquiring, through transfers, biological agents and toxins for other than peaceful purposes*** and noted that *these issues are being considered as part of the ongoing process of strengthening the Convention.* The provisions in the draft Protocol relating to Article III of the Convention have been examined as has the transfer control regime under the CWC which has different requirements for Schedule 1, 2 and 3 chemicals. The CWC control regime already applies to two toxins -- ricin and saxitoxin -- and the importance of harmonizing the Protocol transfer regimes in the Protocol and the CWC was recognized. The increasing transparency being provided by States into transfer decisions and denials is welcomed.

71. It is recognized that the BTWC Protocol regime is not one that stands alone without regard to the national environment relating to biological agents and equipment. There are increasing concerns around the world about the possibility that sub-State actors or terrorist groups make seek to use biological materials and equipment as weapons to achieve their aims. Furthermore, countries are increasingly concerned about public, animal and plant health, about the environment and about trade in an increasing variety of goods as all States are keen to live in a safer, more prosperous world.

72. As all States are increasingly introducing infrastructure and controls of dual-use materials and equipment for public health and safety reasons as well as to facilitate trade, the approach to be followed under a Protocol regime should be towards controlled transfers between States Parties to the Protocol with the onus being placed on the State Party making the transfer satisfying itself -- as it is the sovereign responsibility of that State Party to make the decision whether or not to make a particular transfer -- that the situation in the receiving State Party is such that the transfer is only for permitted purposes and will not be retransferred. There can be no certainty that one State Party to the Protocol will always approve a transfer to another State Party to the Protocol -- as this is a sovereign decision for the State Party making the transfer -- although over a number of years after entry into force of the Protocol **for the State Party** receiving the transfer the State Party making the transfer should gain greater confidence that the transfer will only be for permitted purposes and will not be misused -- and thus the likelihood that the transfer will be approved will increase.

73. To permit a transfer, the State will need to have confidence that the transfer to a State Party to the Protocol is:

a. **only** being used for permitted purposes;

b. **not** being retransferred, without approval, to another facility within the receiving State Party; or

c. **not** being retransferred, without approval, to another State Party to the Protocol.

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

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