

ARTICLE IV: CONFIDENTIALITY PROVISIONS

by Graham S. Pearson* & Nicholas A Sims†

Introduction

1. The Ad Hoc Group (AHG) is considering measures to strengthen the Biological and Toxin Weapons Convention (BTWC) through a legally binding instrument. The pace of the AHG negotiations has quickened during the past year and there is now a clear political will to see the negotiation of the Protocol completed as soon as possible before the Fifth Review Conference in 2001. It is now evident that several Articles in the draft Protocol are now largely agreed and will not develop significantly from their current form although a certain amount of restructuring may be agreed at a later stage.

2. In Evaluation Paper No 1 in July 1999 it was concluded¹ that *"the majority of the Articles in the draft Protocol have now reached the stage when they have had multiple readings and are unlikely to change significantly during the coming months as the negotiations enter the end-game. It is therefore timely to commence the production of a series of Evaluation Papers which will consider Article by Article the current state of each Article of the Protocol."* By the end of January 2000, Evaluation Papers had been prepared for 17 of the 23 Articles, over two-thirds of all the Articles of the Protocol. This Evaluation Paper continues this series by considering Article IV Confidentiality Provisions and the associated Annex E Confidentiality Provisions on which the AHG has made good progress with the current rolling text for Article IV containing 4 sets of square brackets and Annex E containing a further 6 sets of square brackets.

Article IV Confidentiality Provisions

3. In January, the text² for the Preamble had developed further from its earlier versions and now was as follows:

ARTICLE IV

CONFIDENTIALITY PROVISIONS

1. The Organization shall conduct its activities provided for under this Protocol in the least intrusive manner consistent with the timely and efficient accomplishment of their objectives. It shall request only the information and data necessary to fulfil its responsibilities under this Protocol and shall use this data and information only for the purpose of this Protocol. It shall avoid, to the extent possible, any access to information and data not related to the aims of this Protocol. It shall take every

* Graham S. Pearson is a Visiting Professor of International Security in the Department of Peace Studies at the University of Bradford, Bradford, West Yorkshire BD7 1DP, UK.

† Nicholas A. Sims is a Senior Lecturer in International Relations in the Department of International Relations at the London School of Economics and Political Science, University of London, Houghton Street, London WC2A 2AE, UK.

¹Graham S. Pearson, *The Strengthened BTWC Protocol: An Overall Evaluation*, Evaluation Paper No. 1, University of Bradford, July 1999. Available on <http://www.brad.ac.uk/acad/sbtwc>

²United Nations, *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/50 (Part I), 11 February 2000, Geneva.

precaution to protect the confidentiality of information on civil and military activities and facilities in the implementation of this Protocol and, in particular, shall abide by the confidentiality provisions set forth in this Protocol.

2. *Each State Party shall treat as confidential and afford special handling to information and data that it receives in confidence from the Organization in connection with the implementation of this Protocol. It shall treat such information and data exclusively in connection with its rights and obligations under this Protocol and in accordance with the provisions set forth in this Protocol.*

3. *Each State Party shall have the right to take measures as it deems necessary to protect confidential information in accordance with the provisions of the Protocol.*

4. *The Director-General shall have the primary responsibility for ensuring the protection of all confidential information which comes into possession of the Technical Secretariat. Based on guidelines provided for within this Protocol, the Director-General shall establish and maintain a stringent regime governing the handling of confidential information by the Technical Secretariat including measures to protect confidential information obtained in the course or as a result of on-site activities as well as the necessary procedures to be followed in case of breaches or alleged breaches of confidentiality to ensure effective protection against unauthorized disclosure. This regime shall be approved and periodically reviewed by the Conference of the States Parties.*

5. *States Parties shall be entitled to receive in accordance with the relevant provisions of this Protocol the following data:*

(a) *The initial and annual declarations provided by States Parties on a reciprocal basis in accordance with paragraph 2, subsection II and paragraph 4, subsection III of Article III, section D. If declarations contain information that has been classified by the declaring State Party in accordance with paragraph 5 of Annex E, section I, all States Parties receiving that information shall treat it in accordance with paragraph 12 of Annex E, section I;*

(b) *Reports on the activities of the Technical Secretariat as compiled and issued by the Director-General;*

(c) *Reports on investigations as well as observations and comments on these reports, if any, from the receiving States Parties in accordance with Annex D. [If necessary, the information contained in these reports shall be edited to ensure that they contain no confidential information];*

(d) *Reports on visits in accordance with Article III, section D, subsection II. [If necessary, the information contained in these reports shall be edited to ensure that they contain no confidential information];*

(e) *Annual declarations required under Article VII;*

(f) *Other information to be supplied to all States Parties in accordance with the provisions of this Protocol.*

6. *The Director-General shall impose appropriate disciplinary measures on staff members of the Technical Secretariat who violated their obligations to protect confidential information. In case of breaches of confidentiality, the immunity of [the Director-General and] the staff members of the Technical Secretariat [as well as the immunity of the Organization] may be waived in accordance with the provisions on privileges and immunities contained in Article IX of this Protocol and the agreement referred to in paragraph 49 of that Article.*

7. *Any State Party to this Protocol which considers that it has been affected by a breach of confidentiality or that its natural or legal persons have suffered from damage through such a breach may seek to settle the dispute in accordance with the provisions set forth in Article XII. In case a dispute related to confidentiality cannot be settled between the States Parties or between States Parties and the Organization directly, a commission for the settlement of disputes related to confidentiality (hereinafter referred to as “Confidentiality Commission”), set up as a subsidiary organ of the Conference in accordance with Article IX, paragraph 22 (f), shall consider the case. The Confidentiality Commission shall have the powers and functions as set forth in this Protocol. The Commission shall be appointed by the Conference. Rules governing its composition and its operating procedures shall be adopted by the Conference.*

4. In addition to Article IV Confidentiality Provisions, Annex E of the Draft Protocol also addresses Confidentiality Provisions, and, for completeness, this is also considered in this evaluation:

E. CONFIDENTIALITY PROVISIONS

I. GENERAL PRINCIPLES FOR THE HANDLING OF CONFIDENTIAL INFORMATION

(A) THE CONFIDENTIALITY REGIME

1. *In order to establish and maintain the regime governing the handling of confidential information pursuant to Article IV (hereinafter referred to as “the Confidentiality Regime”), an appropriate unit of the Technical Secretariat (hereinafter referred to as “the Confidentiality Unit”) under the direct responsibility of the Director-General shall be charged with overall supervision of the administration of confidentiality provisions.*

2. *The Confidentiality Regime shall be considered and approved by the Conference. The Organization shall not process, handle or distribute information or data supplied to it in confidence by States Parties until the regime has been approved by the Conference.*

3. *Subsequently, the Director-General shall report annually to the Conference on the implementation of the Confidentiality Regime by the Technical Secretariat.*

(B) THE ESTABLISHMENT OF A CLASSIFICATION SYSTEM

4. *A classification system shall be introduced, which shall provide for clear criteria ensuring the inclusion of information into appropriate categories of confidentiality and the justified durability of the confidential nature of information. While providing for the necessary flexibility in its implementation, the classification system shall protect the right of States Parties providing confidential information. The classification system shall be considered and approved by the Conference pursuant to Article IX, paragraph 22 (i).*

5. *Each State Party from which information was received or to which information refers shall have the right, in consultation with the Confidentiality Unit as the State Party may consider appropriate, to classify such information in accordance with the classification system. Any such classification shall be binding for the Organization.*

(C) *CRITERIA FOR CLASSIFICATION AS CONFIDENTIAL*

6. *The essential factors to be considered in determining the classification of an item of information are as follows:*

(a) *The degree of potential damage which its disclosure could cause to a State Party, a natural or legal person of a State Party, or to the Protocol or the Organization; and*

(b) *The degree of potential advantage its disclosure could offer to a State, or to a natural or legal person.*

(D) *ACCESS TO CONFIDENTIAL INFORMATION*

7. *Access to confidential information shall be regulated in accordance with its classification and shall be on a need-to-know basis.*

8. *Not less than 30 days before an employee is given clearance for access to confidential information that refers to activities on the territory or in any other place under the jurisdiction or control of a State Party, the State Party concerned shall be notified of the proposed clearance. The proposal shall be regarded as accepted unless the State Party declares within 30 days its non-acceptance in writing. Individuals on the list of designated personnel as provided for in Annex D, section I, paragraphs 1 to 16 after acceptance by States Parties, shall be deemed to have fulfilled this requirement.*

9. *If necessary to fulfil its obligations under this Protocol, the Technical Secretariat may grant access to information and data classified as confidential to [entities or individuals] [experts or other natural persons] not on the staff of the Technical Secretariat [or other legal persons] or to States Parties [or other legal persons] only on specific approval by the Director-General accompanied by explicit consent of the State Party concerned as well as - in case of natural persons - on the basis of an individual secrecy agreement and in conformity with the procedures of the Confidentiality Regime.*

10. *Each access to confidential information at the Technical Secretariat shall be recorded on file when accessing and exiting. This record shall be retained for 10*

years.

11. *To the greatest extent consistent with the effective implementation of the provisions under this Protocol, confidential information shall be handled and stored by the Technical Secretariat in a form that precludes direct identification of the facility to which it pertains.*

(E) HANDLING OF SENSITIVE INFORMATION ON THE PREMISES OF STATES PARTIES

12. *Each State Party shall protect information which it receives from the Organization according to the level of confidentiality established for that information. Upon request, a State Party shall provide details on the manner in which information provided to it by the Organization is handled.*

(F) OBLIGATIONS FOR INTENDED RELEASE OF CONFIDENTIAL INFORMATION

13. *No confidential information obtained by the Technical Secretariat in connection with the implementation of this Protocol shall be published or otherwise released, except as follows:*

(a) *Any information may be released with the express consent of the State Party from which the information was received and the State Party to which the information refers;*

(b) *Information classified as confidential shall be released by the Organization only through procedures which ensure that the release of information only occurs in strict conformity with the needs of this Protocol. Such procedures shall be considered and approved by the Conference pursuant to Article IX, paragraph 22 (i).*

II. CONDITIONS OF STAFF EMPLOYMENT RELATING TO THE PROTECTION OF CONFIDENTIAL INFORMATION

(A) GENERAL REQUIREMENTS

1. *Conditions of staff employment shall be such as to ensure that access to and handling of confidential information shall be in conformity with the procedures established by the Director-General in accordance with this Protocol and its Annexes.*

2. *Each position in the Technical Secretariat shall be governed by a formal position description that specifies, inter alia, the scope of access to confidential information, if any, needed in that position.*

3. *In the discharge of their functions, staff members of the Technical Secretariat shall only request information and data which are necessary to carry out their duties and avoid to the extent possible any access to information and data unrelated to the discharge of their duties. They shall not make any records of such information collected incidentally and not related to the requirements of their duties.*

(B) *INDIVIDUAL SECRECY AGREEMENTS*

4. *The Director-General and the other members of the staff shall enter into individual secrecy agreements with the Technical Secretariat in which each staff member shall agree not to disclose during the period of employment and for an unlimited period after termination of the staff member's functions, to any unauthorized State, organization or person any confidential information coming to the staff member's knowledge in the performance of official duties, unless the information has been declassified or officially released by the Organization.*

(C) *CODE OF CONDUCT*

5. *No staff member shall, except with explicit approval of the Director-General:*

(a) *Issue statements to the press, radio or other media of public information;*

(b) *Accept or keep speaking engagements;*

(c) *Take part in film, theatre, radio or television productions or presentations;*

(d) *Submit articles, books or other material for publication;*

related to the activities of the Organization.

6. *In order to avoid unauthorized disclosures, staff members shall be appropriately advised and reminded about confidentiality considerations and of the possible penalties that they would incur in the event of improper disclosure.*

7. *In evaluating the performance of staff members of the Technical Secretariat, specific attention shall be given to the employee's record regarding protection of confidential information.*

[(D) *OBLIGATIONS OF OBSERVERS AND THE REQUESTING STATE PARTY SENDING AN OBSERVER*

[8. *The requesting State Party shall ensure that an observer sent in accordance with Annex D, section I, subsection D, complies with and is individually bound by all relevant provisions of this Protocol. If any confidential information is disclosed to or acquired by the observer, in addition to and without diminishing the observer's own individual responsibility, the requesting State Party shall also become responsible for the handling and protection of that information in accordance with this Protocol.]]*

III. PROCEDURES IN CASE OF BREACHES OR ALLEGED BREACHES OF CONFIDENTIALITY

(A) *OBLIGATION FOR INQUIRY*

1. *The Director-General shall establish procedures to be followed in case of breaches or alleged breaches of confidentiality, which shall be considered and approved by the Conference pursuant to Article IX, paragraph 22 (i). The Director-General shall also implement decisions of the Conference of States Parties amending the procedures related to the issue of breaches or alleged breaches of confidentiality.*

2. *The Director-General shall promptly initiate an inquiry when there is indication that obligations concerning the protection of confidential information have been violated. The Director-General shall also promptly initiate an inquiry if an allegation concerning a breach of confidentiality is made by a State Party.*

3. *In case of an allegation of a breach of confidentiality, States Parties and/or staff members which are named in the allegation or which might be involved in the alleged breach shall be informed of that allegation immediately. The Director-General shall hold consultations with the concerned States Parties in the course of the inquiry.*

4. *States Parties shall, to the extent possible, cooperate with and support the Director-General in conducting an inquiry of any breach or alleged breach of confidentiality and in taking appropriate action in accordance with applicable laws and regulations in case a breach has been established.*

5. *An inquiry shall result in a written report, which shall remain confidential and be subject to the application of the need-to-know principle. The Director-General shall, upon request, provide the report to the States Parties concerned. The results of the inquiry shall be reported to the Conference of the States Parties in a form from which specific confidential material has been removed to ensure that confidential information connected with a breach is not further disclosed beyond its authorized scope of access, and to respect those elements of the privacy of the individual staff members not relevant to the case.*

(B) *INTERIM MEASURES*

6. *The Director-General may take interim measures any time after the commencement of the inquiry in order to prevent further damage. These measures may include withdrawal of personnel concerned from specific functions, denial of access to certain information and, in serious cases, temporary suspension, pending completion of procedures contained in this section.*

(C) *MEASURES IN CASE OF BREACHES OR ALLEGED BREACHES*

7. *In case of a breach or an alleged breach of confidentiality by an agent or official of a State Party or by a staff member of the Technical Secretariat, consultations shall be held between the States Parties concerned or between the Organization and States Parties concerned to address the case. If such consultations are not concluded to the satisfaction of the parties involved within 60 days, each State Party shall have the right to initiate the proceedings of the Confidentiality Commission to consider the case. The Commission shall seek to settle the case through mediation, inquiry, conciliation, arbitration or other peaceful means. The*

Commission may request the Director-General to submit the result of the inquiry to the extent possible.

8. *When the inquiry pursuant to paragraph 2 establishes that there has been a breach of confidentiality by a staff member of the Technical Secretariat, Article IV, paragraph 6, and section E of Article IX shall apply.*

The Friend of the Chair for Confidentiality Issues has provided text in Part II for the few remaining paragraphs containing square brackets in both Article IV and in Annex. In February 2000, the Part II text³ was as follows:

It is proposed to merge paragraph 5 with paragraph 2 of Article IV and paragraph 12 of Annex E, section I. Paragraph 2 of Article IV and subsection (E) of Annex E, section I would consequently be deleted.

5. *States Parties shall be entitled to receive in accordance with the relevant provisions of this Protocol the following data:*

(a) *The initial and annual declarations provided by States Parties on a reciprocal basis in accordance with paragraph 2, subsection II and paragraph 4, subsection III of Article III, section D. ~~If declarations contain information that has been classified by the declaring State Party in accordance with paragraph 5 of Annex E, section I, all States Parties receiving that information shall treat it in accordance with paragraph 12 of Annex E, section I;~~*

(b) *Reports on the activities of the Technical Secretariat as compiled and issued by the Director-General;*

(c) *Reports on investigations as well as observations and comments on these reports, if any, from the receiving States Parties in accordance with Annex D. ~~[If necessary, the information contained in these reports shall be edited to ensure that they contain no confidential information;]~~*

(d) *Reports on visits in accordance with Article III, section D, subsection II. ~~[If necessary, the information contained in these reports shall be edited to ensure that they contain no confidential information;]~~*

(e) *Annual declarations required under Article VII;*

(f) *Other information to be supplied to ~~all~~ States Parties in accordance with the provisions of this Protocol.*

Each State Party shall treat information which it receives from the Organization in accordance with the level of confidentiality established for that information and shall treat it exclusively in connection with its rights and obligations under this Protocol and in accordance with the provisions set forth in this Protocol.

³United 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/50 (Part II), 15 February 2000, Geneva.

It is proposed to insert a new paragraph 5 bis:

5 bis *The relevant organs and subsidiary organs of the Organization shall be entitled to receive from the Technical Secretariat information and data necessary for the performance of the functions entrusted to them by the provisions of this Protocol. The provision of any confidential information shall be strictly limited to the minimum necessary for the performance of these functions and shall be in conformity with the procedures of the Confidentiality Regime.*

ANNEX E. CONFIDENTIALITY PROVISIONS

I. GENERAL PRINCIPLES FOR THE HANDLING OF CONFIDENTIAL INFORMATION

(D) ACCESS TO CONFIDENTIAL INFORMATION

9. *If necessary to fulfil its obligations under this Protocol, the Technical Secretariat may grant access to information and data classified as confidential to ~~entities or individuals~~ ~~[experts or other natural persons]~~ not on the staff of outside the Technical Secretariat ~~[or other legal persons]~~ or to States Parties ~~[or other legal persons]~~. Such access shall be strictly limited to the minimum necessary and shall be granted only on specific approval by the Director-General accompanied by explicit consent of the State Party concerned as well as ~~in case of natural persons~~ on the basis of ~~an individual~~ a specific secrecy agreement and in conformity with the procedures of the Confidentiality Regime.*

5. It is useful to compare the Confidentiality Provisions for the Protocol with those for the Chemical Weapons Convention (CWC)⁴

ANNEX ON THE PROTECTION OF CONFIDENTIAL INFORMATION ("CONFIDENTIALITY ANNEX")

A. General Principles for the Handling of Confidential Information

1. *The obligation to protect confidential information shall pertain to the verification of both civil and military activities and facilities. Pursuant to the general obligations set forth in Article VIII, the Organization shall:*

(a) Require only the minimum amount of information and data necessary for the timely and efficient carrying out of its responsibilities under this Convention;

(b) Take the necessary measures to ensure that inspectors and other staff members of the Technical Secretariat meet the highest standards of efficiency, competence, and integrity;

⁴ Organization for the Prohibition of Chemical Weapons, *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, Available on the web at <http://www.opcw.nl>

(c) Develop agreements and regulations to implement the provisions of this Convention and shall specify as precisely as possible the information to which the Organization shall be given access by a State Party.

2. *The Director-General shall have the primary responsibility for ensuring the protection of confidential information. The Director-General shall establish a stringent regime governing the handling of confidential information by the Technical Secretariat, and in doing so, shall observe the following guidelines:*

(a) Information shall be considered confidential if:

(i) It is so designated by the State Party from which the information was obtained and to which the information refers; or

(ii) In the judgement of the Director-General, its unauthorized disclosure could reasonably be expected to cause damage to the State Party to which it refers or to the mechanisms for implementation of this Convention;

(b) All data and documents obtained by the Technical Secretariat shall be evaluated by the appropriate unit of the Technical Secretariat in order to establish whether they contain confidential information. Data required by States Parties to be assured of the continued compliance with this Convention by other States Parties shall be routinely provided to them. Such data shall encompass:

(i) The initial and annual reports and declarations provided by States Parties under Articles III, IV, V and VI, in accordance with the provisions set forth in the Verification Annex;

(ii) General reports on the results and effectiveness of verification activities; and

(iii) Information to be supplied to all States Parties in accordance with the provisions of this Convention;

(c) No information obtained by the Organization in connection with the implementation of this Convention shall be published or otherwise released, except, as follows:

(i) General information on the implementation of this Convention may be compiled and released publicly in accordance with the decisions of the Conference or the Executive Council;

(ii) Any information may be released with the express consent of the State Party to which the information refers;

(iii) Information classified as confidential shall be released by the Organization only through procedures which ensure that the release of information only occurs in strict conformity with the needs of this Convention. Such procedures shall be considered and approved by the

Conference pursuant to Article VIII, paragraph 21 (i);

(d)The level of sensitivity of confidential data or documents shall be established, based on criteria to be applied uniformly in order to ensure their appropriate handling and protection. For this purpose, a classification system shall be introduced, which by taking account of relevant work undertaken in the preparation of this Convention shall provide for clear criteria ensuring the inclusion of information into appropriate categories of confidentiality and the justified durability of the confidential nature of information. While providing for the necessary flexibility in its implementation the classification system shall protect the rights of States Parties providing confidential information. A classification system shall be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i);

(e)Confidential information shall be stored securely at the premises of the Organization. Some data or documents may also be stored with the National Authority of a State Party. Sensitive information, including, inter alia, photographs, plans and other documents required only for the inspection of a specific facility may be kept under lock and key at this facility;

(f) To the greatest extent consistent with the effective implementation of the verification provisions of this Convention, information shall be handled and stored by the Technical Secretariat in a form that precludes direct identification of the facility to which it pertains;

(g)The amount of confidential information removed from a facility shall be kept to the minimum necessary for the timely and effective implementation of the verification provisions of this Convention; and

(h)Access to confidential information shall be regulated in accordance with its classification. The dissemination of confidential information within the Organization shall be strictly on a need-to-know basis.

3. The Director-General shall report annually to the Conference on the implementation of the regime governing the handling of confidential information by the Technical Secretariat.

4. Each State Party shall treat information which it receives from the Organization in accordance with the level of confidentiality established for that information. Upon request, a State Party shall provide details on the handling of information provided to it by the Organization.

B. Employment and Conduct of Personnel in the Technical Secretariat

5. Conditions of staff employment shall be such as to ensure that access to and handling of confidential information shall be in conformity with the procedures established by the Director-General in accordance with Section A.

6. Each position in the Technical Secretariat shall be governed by a formal position description that specifies the scope of access to confidential information, if

any, needed in that position.

7. *The Director-General, the inspectors and the other members of the staff shall not disclose even after termination of their functions to any unauthorized persons any confidential information coming to their knowledge in the performance of their official duties. They shall not communicate to any State, organization or person outside the Technical Secretariat any information to which they have access in connection with their activities in relation to any State Party.*

8. *In the discharge of their functions inspectors shall only request the information and data which are necessary to fulfil their mandate. They shall not make any records of information collected incidentally and not related to verification of compliance with this Convention.*

9. *The staff shall enter into individual secrecy agreements with the Technical Secretariat covering their period of employment and a period of five years after it is terminated.*

10. *In order to avoid improper disclosures, inspectors and staff members shall be appropriately advised and reminded about security considerations and of the possible penalties that they would incur in the event of improper disclosure.*

11. *Not less than 30 days before an employee is given clearance for access to confidential information that refers to activities on the territory or in any other place under the jurisdiction or control of a State Party, the State Party concerned shall be notified of the proposed clearance. For inspectors the notification of a proposed designation shall fulfil this requirement.*

12. *In evaluating the performance of inspectors and any other employees of the Technical Secretariat, specific attention shall be given to the employee's record regarding protection of confidential information.*

C. *Measures to Protect sensitive Installations and prevent Disclosure of Confidential Data in the Course of on-site Verification Activities*

13. *States Parties may take such measures as they deem necessary to protect confidentiality, provided that they fulfil their obligations to demonstrate compliance in accordance with the relevant Articles and the Verification Annex. When receiving an inspection, the State Party may indicate to the inspection team the equipment, documentation or areas that it considers sensitive and not related to the purpose of the inspection.*

14. *Inspection teams shall be guided by the principle of conducting on-site inspections in the least intrusive manner possible consistent with the effective and timely accomplishment of their mission. They shall take into consideration proposals which may be made by the State Party receiving the inspection, at whatever stage of the inspection, to ensure that sensitive equipment or information, not related to chemical weapons, is protected.*

15. *Inspection teams shall strictly abide by the provisions set forth in the relevant Articles and Annexes governing the conduct of inspections. They shall fully respect*

the procedures designed to protect sensitive installations and to prevent the disclosure of confidential data.

16. *In the elaboration of arrangements and facility agreements, due regard shall be paid to the requirement of protecting confidential information. Agreements on inspection procedures for individual facilities shall also include specific and detailed arrangements with regard to the determination of those areas of the facility to which inspectors are granted access, the storage of confidential information on-site, the scope of the inspection effort in agreed areas, the taking of samples and their analysis, the access to records and the use of instruments and continuous monitoring equipment.*

17. *The report to be prepared after each inspection shall only contain facts relevant to compliance with this Convention. The report shall be handled in accordance with the regulations established by the Organization governing the handling of confidential information. If necessary, the information contained in the report shall be processed into less sensitive forms before it is transmitted outside the Technical Secretariat and the inspected State Party.*

D. Procedures in cases of Breaches or alleged Breaches of Confidentiality

18. *The Director-General shall establish necessary procedures to be followed in case of breaches or alleged breaches of confidentiality, taking into account recommendations to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).*

19. *The Director-General shall oversee the implementation of individual secrecy agreements. The Director-General shall promptly initiate an investigation if, in his judgement, there is sufficient indication that obligations concerning the protection of confidential information have been violated. The Director-General shall also promptly initiate an investigation if an allegation concerning a breach of confidentiality is made by a State Party.*

20. *The Director-General shall impose appropriate punitive and disciplinary measures on staff members who have violated their obligations to protect confidential information. In cases of serious breaches, the immunity from jurisdiction may be waived by the Director-General.*

21. *States Parties shall, to the extent possible, cooperate and support the Director-General in investigating any breach or alleged breach of confidentiality and in taking appropriate action in case a breach has been established.*

22. *The Organization shall not be held liable for any breach of confidentiality committed by members of the Technical Secretariat.*

23. *For breaches involving both a State Party and the Organization, a "Commission for the settlement of disputes related to confidentiality", set up as a subsidiary organ of the Conference, shall consider the case. This Commission shall be appointed by the Conference. Rules governing its composition and operating procedures shall be adopted by the Conference at its first session.*

6. As might be expected, the Comprehensive Test Ban Treaty (CTBT)⁵ has less language addressing confidentiality provisions because, unlike the BTWC Protocol and the CWC, it is not a regime for monitoring dual-purpose technology and equipment. However, its basic provisions relating to confidentiality are similar to those in both the CWC and the BTWC Protocol.

Evaluation

7. The Confidentiality Provisions for the Protocol generally reflect the comparable provisions in the CWC. However, the Protocol has a separate Article IV entitled Confidentiality Provisions together with Annex E Confidentiality Provisions whereas the CWC has paragraphs in various Articles relating to confidentiality and a Confidentiality Annex. Article IV and Annex E are considered in turn.

Article IV Confidentiality Provisions

8. The first paragraph of Article IV, which is out of square brackets, is similar to the CWC Article VIII The Organization, paragraph 5 which states:

5. The Organization shall conduct its verification activities provided for under this Convention in the least intrusive manner possible consistent with the timely and efficient accomplishment of their objectives. It shall request only the information and data necessary to fulfil its responsibilities under this Convention. It shall take every precaution to protect the confidentiality of information on civil and military activities and facilities coming to its knowledge in the implementation of this Convention and, in particular, shall abide by the provisions set forth in the Confidentiality Annex.

and also similar to the CTBT Article II, paragraph 6 which states:

5. The Organization shall conduct its verification activities provided for under this Treaty in the least intrusive manner possible consistent with the timely and efficient accomplishment of their objectives. It shall request only the information and data necessary to fulfil its responsibilities under this Convention. It shall take every precaution to protect the confidentiality of information on civil and military activities and facilities coming to its knowledge in the implementation of this Treaty and, in particular, shall abide by the confidentiality provisions set forth in this Treaty.

9. There are three differences in the Protocol language: the first is the removal of the word "verification" from before "activities" in the first line, thereby reflecting the general trend in the Protocol which seeks to avoid using the word "verification". The second sentence in the Protocol is extended by the words "and shall use this data and information only for the purpose of this Protocol." An additional third sentence has also been added "It shall avoid, to the extent possible, any access to information and data not related to the aims of this Protocol." Both of these changes reflect the increased concern in the BTWC Protocol negotiation about confidentiality provisions and ensuring that the information obtained by the Organization is only used for the purpose of the Protocol. There is a danger that there might be unnecessary and undue constraints thereby placed upon the future Organization which would impair its efficient and effective operation. Our judgement is that the balance in this paragraph is such that the Organization will be able to operate effectively. The final sentence

⁵*Comprehensive Nuclear-Test-Ban Treaty.* Available at <http://www.ctbto.org/ctbto/pdf/cbten.pdf>

is identical to the final sentences in the corresponding CWC and CTBT paragraphs.

10. The second paragraph of Article IV, which is out of square brackets, is closely similar to that in the CWC Article VII National Implementation Measures paragraph 6 which states:

6. Each State Party shall treat as confidential and afford special handling to information and data that it receives in confidence from the Organization in connection with the implementation of this Convention. It shall treat such information and data exclusively in connection with its rights and obligations under this Convention and in accordance with the provisions set forth in the Confidentiality Annex.

and to the CTBT Article II The Organization paragraph 7 which states:

7. Each State Party shall treat as confidential and afford special handling to information and data that it receives in confidence from the Organization in connection with the implementation of this Treaty. It shall treat such information and data exclusively in connection with its rights and obligations under this Treaty.

There are no differences between the Protocol language and that in the CWC and CTBT.

11. The third paragraph of Article IV, which is out of square brackets, is similar to that in the CWC Article IX Consultations, Cooperation and Fact-Finding paragraph 11 which in regard to challenge inspections states that the inspected State Party shall have:

(c) The right to take measures to protect sensitive installations, and to prevent disclosure of confidential information and data, not related to this Convention.

and is closely similar to the CTBT Article IV Verification paragraph 7 which states:

7. Each State Party shall have the right to take measures to protect sensitive installations and to prevent disclosure of confidential information and data not related to this Treaty.

The Protocol language after the phrase *to take measures* adds the words *as it deems necessary* and makes it clear that these measures are *to protect confidential information* rather than, as in the CWC and the CTBT, *to prevent disclosure of confidential information*.

12. The first two sentences of the fourth paragraph, which is out of square brackets, are similar to the CWC Confidentiality Annex paragraph 2 which states:

The Director-General shall have the primary responsibility for ensuring the protection of confidential information. The Director-General shall establish a stringent regime governing the handling of confidential information by the Technical Secretariat, and in doing so, shall observe the following guidelines:

The Protocol language makes explicit that the Director-General's responsibility is to ensure the protection of ***all confidential information that comes into the possession of the Technical Secretariat***. It goes on to make it explicit that the stringent confidentiality regime to be established by the Director-General shall be *based on guidelines provided for within* the Protocol and it further elaborates that the regime is include *measures to protect confidential*

information obtained in the course or as a result of on-site activities as well as the necessary procedures to be followed in cases of breaches or alleged breaches of confidentiality to ensure effective protection against unauthorized disclosure. Finally, the Protocol language states that the regime *shall be approved and periodically reviewed by the Conference of the States Parties.* This paragraph again shows the trend noted in Evaluation Paper No 14 on *Article IX The Organization*⁶ that the Protocol language *showed signs of becoming over specified with the future Organization being unduly constrained* although the Conference of the States parties and the Executive Council of the BTWC Organization *will have more than enough control over the Technical Secretariat through their annual approval of the programme and the budget of the Organization.*

13. The fifth paragraph, which is out of square brackets apart from two clauses in subparagraphs (c) and (d), sets out the data which the States Parties shall be entitled to receive under the Protocol. This has some similarity to, yet is different from, the guidelines in the CWC Confidentiality Annex paragraph 2 which in its paragraph (b) states that:

(b) All data and documents obtained by the Technical Secretariat shall be evaluated by the appropriate unit of the Technical Secretariat in order to establish whether they contain confidential information. Data required by States Parties to be assured of the continued compliance with this Convention by other States Parties shall be routinely provided to them. Such data shall encompass:

(i) The initial and annual reports and declarations provided by States Parties under Articles III, IV, V and VI, in accordance with the provisions set forth in the Verification Annex;

(ii) General reports on the results and effectiveness of verification activities; and

(iii) Information to be supplied to all States Parties in accordance with the provisions of this Convention;

The Protocol language sets out a detailed listing of what data States Parties shall be entitled to receive and, as such, is a useful improvement over the corresponding CWC text. The Part II text proposes the removal of the final sentences in subparagraphs (a), (c) and (d) relating to classified and confidential information and adds a final sentence to the end of paragraph 5 requiring States Parties to treat information it receives from the Organization in accordance with the level of confidentiality established for that information. We support the Part II proposals for the fifth paragraph and for the additional paragraph *5bis* (and the consequential deletions) which ensures that the relative organs and subsidiary organs of the Organization will receive the information and data necessary for them to carry out their functions.

14. The sixth paragraph, which contains two remaining sets of square brackets, requires in its first sentence the Director-General to impose appropriate disciplinary measures on members of the Technical Secretariat who violated their obligations to protect confidential information. It then goes on to consider the waiver of immunity with a cross reference to the provisions on waivers and immunities in Article IX The Organization. The Protocol language is similar to

⁶Ian R. Kenyon, Graham S. Pearson & Nicholas A. Sims, *The Strengthened BTWC Protocol: Article IX: The Organization*, Evaluation Paper No. 14, University of Bradford, January 2000, para 84, p. 64. Available on <http://www.brad.ac.uk/acad/sbtwc>

the provision in the CWC Confidentiality Annex paragraph 20 stating;

20. *The Director-General shall impose appropriate punitive and disciplinary measures on staff members who have violated their obligations to protect confidential information. In cases of serious breaches, the immunity from jurisdiction may be waived by the Director-General.*

However, the Protocol language omits the word *have*; we recommend that the word *have* should be inserted in the Protocol language before the word *violated*. The remaining sets of square brackets refer to whether the immunity of the Director-General and of the Organization can be waived in accordance with the provisions in Article IX The Organization; the removal of these square brackets within Article IV is dependent on the outcome of the negotiations relating to the language in Article IX.. As we concluded in Evaluation Paper No 14⁷ on *Article IX: The Organization*, our view is that if there were ever to be circumstances under which consideration was to be given to whether to waive the immunities of the Organization then its future existence would be brought into such disrepute that it would cease to be effective. Likewise, the inclusion of language relating to the waiver of the immunity of the Director-General is tantamount to embodying in the Protocol a statement of a lack of confidence in the Director-General. Such a statement is unnecessary as the Conference of the States Parties is sovereign and can do anything within the legal confines of the Protocol including waiving the immunity of the Director-General should a case arise in which such a waiver was warranted. Whilst the IAEA regime for the protection of Safeguards information recognises the possibility of IAEA liability in cases of breaches of confidentiality committed by staff members, we note that the 1997 Additional Protocol⁸ in Article 15 requires a confidentiality regime that includes procedures in cases of breaches or alleged breaches of confidentiality, this does not specify the possibility of an IAEA organizational liability. We also note that the new Part II text⁹ issued in February 2000 for *Article IX: The Organization* proposes language in paragraph 52 making it clear that *the Conference shall take the decision on the waiver of the immunity of the Organization and of the Director-General of the Organization*. Our recommendation is nevertheless that the language in Article IV relating to the waiver of the immunities of the Director-General and of the Organization should be deleted. It should be recalled that there is **no** parallel provision in either the CWC or the CTBT -- and it is not required in the Protocol.

15. The seventh, and final, paragraph, which is out of square brackets, addresses the settlement of a dispute relating to a breach of confidentiality. There is no directly comparable paragraph in the CWC although the CWC Confidentiality Annex contains a section entitled *D. Procedures in case of Breaches or Alleged Breaches of Confidentiality* which includes a paragraph establishing a "*Commission for the settlements of disputes related to confidentiality*". The language in the seventh paragraph is unexceptionable, although it is noted that the third sentence states that "*The Confidentiality Commission shall have the powers and functions as set forth in this Protocol.*" although the final sentence, which closely

⁷Ian R. Kenyon, Graham S. Pearson & Nicholas A. Sims, *The Strengthened BTWC Protocol: Article IX: The Organization*, Evaluation Paper No. 14, University of Bradford, January 2000, para 83, p. 64. Available on <http://www.brad.ac.uk/acad/sbtwc>

⁸International Atomic Energy Agency, *Model Protocol Additional to the Agreement(s) between State(s) and the International Atomic Energy Agency for the Application of Safeguards*, INFCIRC/540, September 1997. Available at <http://www.iaea.org/worldatom/infcircs/inf501-600.html>

⁹United 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/50 (Part II), 15 February 2000, Geneva.

parallels the corresponding CWC language, states that "*Rules governing its composition and operating procedures shall be adopted by the Conference.*" However, unlike the CWC, the Protocol language has shortened this sentence, by omitting the words "*at its first session.*" The two sentences can be reconciled by interpreting the *powers and functions* of the Confidentiality Commission as those stated in Annex E, section III, paragraph 7 (which we discuss at paragraph 33 below). Everything else about the Commission, including *rules governing its composition and operating procedures*, is to be decided by the Conference, not necessarily at its first session, but in the course of its proceedings.

Annex E Confidentiality Provisions

16. This comprises three sections:

- I. General Principles for the Handling of Confidential Information
- II. Conditions of Staff Employment Relating to the Protection of Confidential Information, and
- III. Procedures in Case of Breaches or Alleged Breaches of Confidentiality.

These broadly correspond to the first two and the last of the CWC Confidentiality Annex sections:

- A. General Principles for the Handling of Confidential Information
- B. Employment and Conduct of Personnel in the Technical Secretariat
- C. Measures to Protect Sensitive Installations and Prevent Disclosure of Confidential Data in the Course of On-Site Verification Activities, and
- D. Procedures in Case of Breaches or Alleged Breaches of Confidentiality.

In the Protocol, the measures to protect sensitive installations and to prevent disclosure of confidential data are incorporated into *Article III Compliance Measures G. Investigations Section (G) [[Managed] Access and Measures to Guard Against Abuse During Conduct of Investigations]*. In evaluating Annex E, each part is considered in turn. All Protocol Annex E text is out of square brackets unless otherwise stated.

17. *I. General Principles for the Handling of Confidential Information.* This comprises 13 paragraphs divided into six subsections in contrast to the four paragraphs in the corresponding CWC Confidentiality section. The first subsection (A) *The Confidentiality Regime* has in its second paragraph (2) a provision which states that:

The Confidentiality Regime shall be considered and approved by the Conference. The Organization shall not process, handle or distribute information or data supplied to it in confidence by States Parties until the regime has been approved by the Conference.

Although the CWC requires that information classified as confidential shall be released by the Organization only through procedures which shall be considered and approved by the Conference (Confidentiality Annex, para 2 (c) (iii)), there is no prohibition on the Organization from *processing* or *handling* information supplied to it in confidence. Such a provision appears unduly limiting and is one which could severely limit the BTWC Protocol Organization from functioning effectively until such time as a confidentiality regime was approved. There is much to be said for adding to the end of the first sentence the words "*at its first session.*" and to delete the words "*process, handle or*" from the second sentence.

18. The second subsection (B) *The Establishment of a Classification System* has in its first paragraph (4) language closely similar to that in the second, third and fourth sentences of the CWC Confidentiality Annex, para 2 (d). The second paragraph (5) about the rights of the State Party providing the classified material to determine its classification has no parallel in the CWC.

19. The third subsection (C) *Criteria for Classification as Confidential* sets out the essential factors to be considered in determining the classification of an item of information using language which is closely similar to that in the OPCW Policy on Confidentiality¹⁰ which states in *Part V OPCW Classification System for Confidential Information* that:

1.2. *The essential factors to be considered in determining the level of sensitivity of an item of information are as follows:*

(a) *The degree of potential damage which its disclosure could cause to a State Party, any other body of a State Party including a commercial firm, or to any national of a State Party, or to the Convention or the Organization; and*

(b) *The degree of potential particular or selective advantage its disclosure could offer to an individual, a State, or any other body, including a commercial firm.*

These factors correspond to the factors used in determining the confidentiality of information.

20. The fourth subsection (D) *Access to Confidential Information* contains provisions which broadly reflect those in the CWC. The first paragraph (7) corresponds to the Confidentiality Annex paragraph 2(h) and the second paragraph (8) to the Confidentiality Annex paragraph 11. The third paragraph (9) has no corresponding paragraph in the CWC although the OPCW Policy on Confidentiality¹¹ in paragraph 2.12 of Part VI addresses *Granting of Access to Other Authorised Recipients Associated with the Organization* which is similar although **without** a requirement for the *explicit consent of the State Party concerned* as the OPCW Policy requires that:

the Secretariat shall notify a State Party of any such access of those authorised entities or individuals to confidential information in relation to the territory of the State Party or any other place under the jurisdiction or control of the State Party.

The tighter language in the Protocol requiring explicit consent of the State Party is surprising as there has been a general acceptance that the future BTWC Protocol Organization will be mean and lean -- and therefore it will not have all the necessary expertise to carry out investigations. It will consequently need to rely, probably to a significantly greater extent than the OPCW, on ad hoc experts as investigation assistants (see *Article IX The Organization*, paragraph 36 (h)). A requirement for explicit consent will prevent such ad hoc experts from being fully utilized; our recommendation is that language akin to that of the OPCW Policy on Confidentiality should be adopted instead.

¹⁰Lisa Woollomes Tabassi, *OPCW: The Legal Texts*, Organization for the Prohibition of Chemical Weapons, TMC Asser Press, The Hague, 1999, OPCW Policy on Confidentiality, pp.209-251. Part V, para 1.2, p.217.

¹¹Lisa Woollomes Tabassi, *OPCW: The Legal Texts*, Organization for the Prohibition of Chemical Weapons, TMC Asser Press, The Hague, 1999, OPCW Policy on Confidentiality, pp.209-251. Part VI, para 2.12, p.226.

21. There are currently four remaining square brackets in the third paragraph (9) relating to the terminology to be used in "*the Technical Secretariat may grant access to information and data classified as confidential to [entities or individuals] [experts or other natural persons] not on the staff of the Technical Secretariat [or other legal persons] or to States Parties [or other legal persons]*". We note the proposals in the February 2000 Part II text and recommend that the word *authorised* as in the OPCW Policy on Confidentiality, *authorised entities or individuals*, be inserted prior to *entities and individuals*. However, the phrase *accompanied by the explicit consent of the State Party concerned* should be deleted as this would prevent ad hoc experts being utilized as investigation assistants which is precisely when their use is essential for an effective Protocol.

22. The fifth paragraph (10) requires the record of each access to confidential information to be retained for 10 years. There is no comparable provision in the CWC although the OPCW Confidentiality Policy in paragraph 4.7 requires that records should be made of each staff member who had access to the item of confidential information, and the date and time of access. The final paragraph (11) requiring storage in a format that precludes direct identification of the facility to which it pertains has identical language to that in the CWC Confidentiality Annex paragraph 2 (f).

23. The fifth subsection (E) *Handling of Sensitive Information on the Premises of States Parties* uses language that is closely similar to that in the CWC Confidentiality Annex paragraph 4 although the Protocol language uses the words "*shall protect*" rather than the CWC "*shall treat*".

24. The final subsection (F) *Obligations for the Intended Release of Confidential Information* uses language that is closely similar to that in the CWC Confidentiality Annex paragraph 2 (c). The Protocol language in the chapeau is preferred to that in the CWC as the Protocol uses the words "*No confidential information*" instead of "*No information*". The Protocol paragraph 13 (a):

(a) Any information may be released with the express consent of the State Party from which the information was received and the State Party to which it refers.

is, as usual, tighter than the corresponding CWC language as the Protocol includes the additional words "*the State Party from which the information was received and*". Paragraph 13 (b) is the same as that in the CWC.

25. II. *Conditions of Staff Employment relating to the Protection of Confidential Information*. This comprises four sub-sections. The text is all out of square brackets with the exception of the final subsection (D) and its paragraph (8) relating to the obligations of an observer. The first subsection (A) *General Requirements* in its three paragraphs has language closely similar to the CWC Confidentiality Annex paragraphs 5, 6 and 9 respectively. Protocol paragraphs 1 and 2 have essentially identical language to paragraphs 5 and 6 respectively. Paragraph 3 is closely similar to paragraph 9 with the Protocol language being broader in that it refers to "*staff members of the Technical Secretariat*" whilst the CWC refers to "*inspectors*". In addition, the Protocol language also specifically requires staff members to "*avoid to the extent possible any access to information and data unrelated to the discharge of their duties.*"

26. The second subsection (B) *Individual Secrecy Agreements* in its single paragraph (4)

contains language which goes beyond that in the CWC Confidentiality Annex paragraph 7 as the Protocol language requires the Director-General and other members of the staff to enter into individual secrecy agreements with the Technical Secretariat. In going beyond the CWC Confidentiality Annex, the Protocol reflects the requirement in the OPCW Confidentiality Policy¹² in *Part IV Basic Responsibilities on Confidentiality* for individual secrecy agreements. The Protocol language also varies from that in the CWC by specifying that the staff member shall not disclose any confidential information to "*any unauthorized State, organization or person*" whilst the CWC language omits the "*unauthorized*" qualification.

27. The third subsection (C) Code of Conduct comprises three paragraphs, the first of which has no parallel in the CWC while the second (6) and third (7) are essentially identical to the CWC Confidentiality Annex paragraphs 10 and 12 with the Protocol language broadened to "staff members". The first paragraph states that no staff member shall, except with the explicit approval of the Director-General, issue statements, accept or keep speaking arrangements, take part in film, theatre, radio or television presentations or submit articles or books for publication that are related to the activities of the Organization. This is much more restrictive than any provision of either the CWC Confidentiality Annex or of the OPCW Confidentiality Policy. The closest is in the OPCW Confidentiality Policy in *Part VII Procedures for the Release of Information by the OPCW* which addresses the release of any information which the OPCW holds. This includes a section 2 entitled *Public Release of Information*¹³ with the following language:

2.1 The Director-General may publicly release information that is not designated as confidential ... and that falls into one of the following categories:

(a) general information on the implementation of the Convention which does not contain material relating specifically to any State Party. This excludes specific information about inspection activities being conducted in or planned for a State Party. The types of information which may be released publicly under this provision shall be set out in a list approved by the Conference; this list could include details of declaration requirements and formats, generic or model documentation, summary information about the overall verification programme, and verification technology and methodology applied in on-site inspections:

(b) factual organisational information about the Organization, except for information that relates to the security of the Organization, or to personnel matters and the privacy of the staff of the Secretariat; or

(c) information referring to a State Party, which is unclassified and which that State Party has specifically requested or consented to be publicly released.

2.2 The Director-General shall consider and decide upon individual requests for the public release of information, provided that it falls within the terms of the preceding paragraph. Requests going beyond these parameters shall be referred to the

¹² Lisa Woollomes Tabassi, *OPCW: The Legal Texts*, Organization for the Prohibition of Chemical Weapons, TMC Asser Press, The Hague, 1999, OPCW Policy on Confidentiality, pp.209-251. Part IV, para 1.3.2 (c), p.215.

¹³ Lisa Woollomes Tabassi, *OPCW: The Legal Texts*, Organization for the Prohibition of Chemical Weapons, TMC Asser Press, The Hague, 1999, OPCW Policy on Confidentiality, pp.209-251. Part VII, section 2, p.236.

Executive Council or Conference for decision.

2.3 All contact between Secretariat staff members and the media shall be subject to this Policy ... and the OPCW Media and Public Affairs Policy. The Director-General shall issue an administrative directive governing media policy, in accordance with these public release policy guidelines..

The OPCW Media and Public Affairs Policy was approved at the first Conference of the States Parties.¹⁴ This policy applies to *contacts with the news media or with any individual who is not employed or contracted by the Organisation nor authorised by a State Party in relation to the implementation of the Convention.* It states that its Principles and Objectives shall be:

To the extent needed to facilitate the achievement of the object and purpose of the Convention, the implementation of the Media Policy shall assist the news media and the general public in understanding the tasks and the activities of the Organisation. It shall promote the image of the OPCW as an accessible international organisation which provides balanced, timely and objective information. It will not be overtly promotional and active, but will avoid being merely reactive.

The Media Policy also includes as an Annex an *Indicative List of Areas in which Information may be Routinely Provided by the OPCW to the Newsmedia and to the General Public.* It is thus clear that the Protocol language in Annex E is being much more restrictive. Our view is that this paragraph is unduly and unnecessarily restrictive as it could well result in the future BTWC Protocol Organization being perceived as a secretive organization and certainly one whose benefits for global security and peace and international cooperation are little recognised. Such a perception will not be in the long term interests of the Protocol regime, of the future Organization or of its States Parties. We recommend that paragraph 5 be amended to parallel the OPCW Policy on Confidentiality guidelines on the public release of information and requiring the Director-General to prepare a Media and Public Affairs Policy for approval by the Conference at its first session. We propose such language in the recommended text for Annex E in paragraph 36 below.

28. The final subsection remains in square brackets and is *(D) Obligations of Observers and the Requesting State Party sending an Observer.* This single paragraph (8) has no parallel in the CWC Confidentiality Annex but does reflect and uses similar language to that in the provisions made in the OPCW Confidentiality Policy Part IV Section 2.2 *Responsibility of Observers.*¹⁵ This paragraph is currently in square brackets pending consideration of the corresponding section relating to observers, which is also in square brackets, in Annex D Investigations. Our view is that observers provide an important additional benefit to the regime and consequently these square brackets should be removed.

29. *III. Procedures in case of Breaches or Alleged Breaches of Confidentiality.* This has three subsections and contains text which is free from square brackets throughout. The first subsection *(A) Obligation for Inquiry* has five paragraphs which are similar to some of the paragraphs in the CWC Confidentiality Annex *D. Procedures in Case of Breaches or Alleged*

¹⁴ Lisa Woollomes Tabassi, *OPCW: The Legal Texts*, Organization for the Prohibition of Chemical Weapons, TMC Asser Press, The Hague, 1999, OPCW Media and Public Affairs Policy, pp.252-4.

¹⁵ Lisa Woollomes Tabassi, *OPCW: The Legal Texts*, Organization for the Prohibition of Chemical Weapons, TMC Asser Press, The Hague, 1999, OPCW Policy on Confidentiality, pp.209-251. Part IV, para 2.2, p.217.

Breaches of Confidentiality paragraphs 18 to 23. The first paragraph (1) in its first sentence is essentially identical to the CWC Confidentiality Annex paragraph 18 although the Protocol language omits the word "necessary" in front of "procedures". The second sentence has no parallel in the CWC and is largely a redundant statement in that it requires the Director-General to implement decisions of the Conference of the States Parties amending the procedures relating to breaches or alleged breaches.

30. The second paragraph (2) on the initiation of an inquiry uses language that is broadly similar to that in the second and third sentences of the CWC Confidentiality Annex paragraph 19 although the Protocol language replaces the CWC words "*if, in his judgement, there is sufficient indication*" by the more limiting "*when there is indication*". The Protocol therefore might be read as removing the ability of the Director-General to exercise his judgement as to whether a sufficient indication has occurred that the obligations relating to the protection of confidential information have been violated. Unlike the OPCW where the Director-General has to decide whether or not a prima facie case exists or not, there is no parallel provision in the Protocol. We recommend that the word *sufficient* should be added to *when there is indication* so as to make it clear that there has to be an exercise of judgement. The amended sentence leaves no doubt that the exercise of judgement belongs to the Director-General.

31. The third paragraph (3) has no parallel in the CWC Confidentiality Annex but does reflect language in the OPCW Confidentiality Policy¹⁶ *Part IX Breach Procedures* paragraph 3.4 and 3.7. The fourth paragraph (4) uses closely similar language to that in the CWC Confidentiality Annex paragraph 21 although the Protocol language requires States parties to "*take appropriate action in accordance with applicable laws and regulations*" instead of the CWC simpler language to "*take appropriate action*". The final paragraph (5) requiring a written report has no parallel in the CWC but reflects some of the language in the OPCW Confidentiality Policy in *Part IX Breach Procedures Section 5 Report of Investigations* paragraph 5.1¹⁷.

32. The second subsection (*B Interim Measures*) with its single paragraph (6) has no parallel in the CWC Confidentiality Annex but reflects provisions in the OPCW Confidentiality Policy *Part IX Breach Procedures Section 4 Interim Action* paragraph 4.1¹⁸.

33. The final subsection (*C Measures in case of Breaches or Alleged Breaches*) has two paragraphs. The first paragraph (7) concerning the right of a State Party to initiate the proceedings of the Confidentiality Commission has no parallel in the CWC Verification Annex or in the OPCW Confidentiality Policy, although this policy does in paragraph 5.4 of *Part IX: Breach Procedures* include provision for a State Party, after *all reasonable attempts have been made to resolve the issue through consultations*, to request the convening of the Confidentiality Commission¹⁹. Furthermore, should the Director-General decide, after consultations, that *obstacles or delays cannot be expediently overcome*, then the Director-General in his report may request that the Confidentiality Commission be convened. In

¹⁶ Lisa Woollomes Tabassi, *OPCW: The Legal Texts*, Organization for the Prohibition of Chemical Weapons, TMC Asser Press, The Hague, 1999, OPCW Policy on Confidentiality, pp.209-251. Part IX, para 3.4, 3.7, p.240.

¹⁷ Lisa Woollomes Tabassi, *OPCW: The Legal Texts*, Organization for the Prohibition of Chemical Weapons, TMC Asser Press, The Hague, 1999, OPCW Policy on Confidentiality, pp.209-251. Part IX, para 5.1, p.242.

¹⁸ Lisa Woollomes Tabassi, *OPCW: The Legal Texts*, Organization for the Prohibition of Chemical Weapons, TMC Asser Press, The Hague, 1999, OPCW Policy on Confidentiality, pp.209-251. Part IX, para 4.1, p.241.

¹⁹ Lisa Woollomes Tabassi, *OPCW: The Legal Texts*, Organization for the Prohibition of Chemical Weapons, TMC Asser Press, The Hague, 1999, OPCW Policy on Confidentiality, pp.209-251. Part IX, para 5.4, p.242.

neither case is there any indication of any time limit unlike the Protocol language laying down that if such conclusions are not concluded to the satisfaction of the parties involved within 60 days, then each State Party shall have the right to initiate the proceedings of the Confidentiality Commission. The Commission will have been appointed by the Conference under Article IV, paragraph 7 (addressed in this Evaluation Paper at paragraph 15 above). The final sentence in this paragraph (7) stating that "*The Commission may require the Director-General to submit the result of the inquiry to the extent possible*" is ambiguous coming as it does after a sentence referring to the Confidentiality Commission carrying out an inquiry. We assume that the reference is to the inquiry carried out by the Director-General under paragraph 2. The phrase *to the extent possible* could be read as referring back to paragraph 5 and the need-to-know principle. However, we consider that for maximum efficiency and effectiveness, the Confidentiality Commission should receive the full report of the inquiry carried out by the Director-General as this is the logical starting point for the work of the Confidentiality Commission. We therefore recommend the final sentence be amended to read "*The Commission may require the Director-General to submit the **report of the inquiry carried out in accordance with paragraph 2 above.***"

34. The final paragraph (8) states that when an inquiry establishes that "*there has been a breach of confidentiality by a staff member of the Technical Secretariat, Article IV, paragraph 6 and Section E of Article IX shall apply.*" These references are to those provisions relating to waiver of immunity. There is no comparable provision in the CWC Confidentiality Annex or in the OPCW Confidentiality Policy. In the CWC Confidentiality Annex paragraph 20, it states that "*The Director-General shall impose appropriate punitive and disciplinary measures on staff members who have violated their obligations to protect confidential information. In cases of serious breaches, the immunity from jurisdiction may be waived by the Director-General.*" In the OPCW Confidentiality Policy *Part IX Breach Procedures*²⁰, it is made clear in paragraph 9.1 that "*Waiver of immunity is to be considered only in the event of a serious breach, when individual responsibility has been established and damage has been suffered as a result thereof...*" The Protocol language stating that *Article IV, paragraph 6 and Section E of Article IX shall apply* could be read as requiring a waiver of immunity in the event of *any* breach of confidentiality which would be unnecessarily punitive. After all, it is noted that the OPCW Confidentiality Policy includes provisions under which decisions relating to disciplinary action or to waiver of immunity may be subject to review or appeal. It would be prudent to modify the final paragraph to make it clear that the waiver provisions *may* apply where appropriate. Our recommendation is that this paragraph be amended to read "*When the inquiry pursuant to paragraph 2 establishes that there has been a breach of confidentiality by a staff member of the Technical Secretariat, Article IV, paragraph 6 and Section E of Article IX **may apply where appropriate.***"

Strikethrough Text for Article IV and Annex E

35. It is recommended that Article IV should read as follows:

ARTICLE IV

CONFIDENTIALITY PROVISIONS

1. *The Organization shall conduct its activities provided for under this Protocol*

²⁰ Lisa Woollomes Tabassi, *OPCW: The Legal Texts*, Organization for the Prohibition of Chemical Weapons, TMC Asser Press, The Hague, 1999, OPCW Policy on Confidentiality, pp.209-251. Part IX, para 9.1, p. 243.

in the least intrusive manner consistent with the timely and efficient accomplishment of their objectives. It shall request only the information and data necessary to fulfil its responsibilities under this Protocol and shall use this data and information only for the purpose of this Protocol. It shall avoid, to the extent possible, any access to information and data not related to the aims of this Protocol. It shall take every precaution to protect the confidentiality of information on civil and military activities and facilities in the implementation of this Protocol and, in particular, shall abide by the confidentiality provisions set forth in this Protocol.

~~2. Each State Party shall treat as confidential and afford special handling to information and data that it receives in confidence from the Organization in connection with the implementation of this Protocol. It shall treat such information and data exclusively in connection with its rights and obligations under this Protocol and in accordance with the provisions set forth in this Protocol.~~

3. Each State Party shall have the right to take measures as it deems necessary to protect confidential information in accordance with the provisions of the Protocol.

4. The Director-General shall have the primary responsibility for ensuring the protection of all confidential information which comes into possession of the Technical Secretariat. Based on guidelines provided for within this Protocol, the Director-General shall establish and maintain a stringent regime governing the handling of confidential information by the Technical Secretariat including measures to protect confidential information obtained in the course or as a result of on-site activities as well as the necessary procedures to be followed in case of breaches or alleged breaches of confidentiality to ensure effective protection against unauthorized disclosure. This regime shall be approved and periodically reviewed by the Conference of the States Parties.

5. States Parties shall be entitled to receive in accordance with the relevant provisions of this Protocol the following data:

(a) *The initial and annual declarations provided by States Parties on a reciprocal basis in accordance with paragraph 2, subsection II and paragraph 4, subsection III of Article III, section D. ~~If declarations contain information that has been classified by the declaring State Party in accordance with paragraph 5 of Annex E, section I, all States Parties receiving that information shall treat it in accordance with paragraph 12 of Annex E, section I;~~*

(b) *Reports on the activities of the Technical Secretariat as compiled and issued by the Director-General;*

(c) *Reports on investigations as well as observations and comments on these reports, if any, from the receiving States Parties in accordance with Annex D. ~~[If necessary, the information contained in these reports shall be edited to ensure that they contain no confidential information];~~*

(d) *Reports on visits in accordance with Article III, section D, subsection II. ~~[If necessary, the information contained in these reports shall be edited to ensure that they contain no confidential information];~~*

- (e) Annual declarations required under Article VII;
- (f) Other information to be supplied to all States Parties in accordance with the provisions of this Protocol.

Each State Party shall treat information which it receives from the Organization in accordance with the level of confidentiality established for that information and shall treat it exclusively in connection with its rights and obligations under this Protocol and in accordance with the provisions set forth in this Protocol.

5 bis The relevant organs and subsidiary organs of the Organization shall be entitled to receive from the Technical Secretariat information and data necessary for the performance of the functions entrusted to them by the provisions of this Protocol. The provision of any confidential information shall be strictly limited to the minimum necessary for the performance of these functions and shall be in conformity with the procedures of the Confidentiality Regime.

6. *The Director-General shall impose appropriate disciplinary measures on staff members of the Technical Secretariat who **have** violated their obligations to protect confidential information. In case of breaches of confidentiality, the immunity of ~~the Director-General and~~ the staff members of the Technical Secretariat ~~as well as the immunity of the Organization~~ may be waived in accordance with the provisions on privileges and immunities contained in Article IX of this Protocol and the agreement referred to in paragraph 49 of that Article.*

7. *Any State Party to this Protocol which considers that it has been affected by a breach of confidentiality or that its natural or legal persons have suffered from damage through such a breach may seek to settle the dispute in accordance with the provisions set forth in Article XII. In case a dispute related to confidentiality cannot be settled between the States Parties or between States Parties and the Organization directly, a commission for the settlement of disputes related to confidentiality (hereinafter referred to as “Confidentiality Commission”), set up as a subsidiary organ of the Conference in accordance with Article IX, paragraph 22 (f), shall consider the case. The Confidentiality Commission shall have the powers and functions as set forth in this Protocol. The Commission shall be appointed by the Conference. Rules governing its composition and its operating procedures shall be adopted by the Conference.*

36. It is recommended that Annex E should read as follows:

E. CONFIDENTIALITY PROVISIONS

I. GENERAL PRINCIPLES FOR THE HANDLING OF CONFIDENTIAL INFORMATION

(A) THE CONFIDENTIALITY REGIME

1. *In order to establish and maintain the regime governing the handling of confidential information pursuant to Article IV (hereinafter referred to as “the*

Confidentiality Regime”), an appropriate unit of the Technical Secretariat (hereinafter referred to as “the Confidentiality Unit”) under the direct responsibility of the Director-General shall be charged with overall supervision of the administration of confidentiality provisions.

*2. The Confidentiality Regime shall be considered and approved by the Conference. The Organization shall not ~~process, handle or~~ distribute information or data supplied to it in confidence by States Parties until the regime has been approved by the Conference **at its first session.***

3. Subsequently, the Director-General shall report annually to the Conference on the implementation of the Confidentiality Regime by the Technical Secretariat.

(B) THE ESTABLISHMENT OF A CLASSIFICATION SYSTEM

4. A classification system shall be introduced, which shall provide for clear criteria ensuring the inclusion of information into appropriate categories of confidentiality and the justified durability of the confidential nature of information. While providing for the necessary flexibility in its implementation, the classification system shall protect the right of States Parties providing confidential information. The classification system shall be considered and approved by the Conference pursuant to Article IX, paragraph 22 (i).

5. Each State Party from which information was received or to which information refers shall have the right, in consultation with the Confidentiality Unit as the State Party may consider appropriate, to classify such information in accordance with the classification system. Any such classification shall be binding for the Organization.

(C) CRITERIA FOR CLASSIFICATION AS CONFIDENTIAL

6. The essential factors to be considered in determining the classification of an item of information are as follows:

(a) The degree of potential damage which its disclosure could cause to a State Party, a natural or legal person of a State Party, or to the Protocol or the Organization; and

(b) The degree of potential advantage its disclosure could offer to a State, or to a natural or legal person.

(D) ACCESS TO CONFIDENTIAL INFORMATION

7. Access to confidential information shall be regulated in accordance with its classification and shall be on a need-to-know basis.

8. Not less than 30 days before an employee is given clearance for access to confidential information that refers to activities on the territory or in any other place under the jurisdiction or control of a State Party, the State Party concerned shall be notified of the proposed clearance. The proposal shall be regarded as accepted unless the State Party declares within 30 days its non-acceptance in writing.

Individuals on the list of designated personnel as provided for in Annex D, section I, paragraphs 1 to 16 after acceptance by States Parties, shall be deemed to have fulfilled this requirement.

9. *If necessary to fulfil its obligations under this Protocol, the Technical Secretariat may grant access to information and data classified as confidential to ~~authorised~~ entities or individuals ~~[experts or other natural persons]~~ not on the staff of outside the Technical Secretariat ~~[or other legal persons]~~ or to States Parties ~~[or other legal persons]~~. **Such access shall be strictly limited to the minimum necessary and shall be granted** only on specific approval by the Director-General ~~accompanied by explicit consent of the State Party concerned~~ as well as ~~in case of natural persons~~ on the basis of ~~an individual~~ **a specific** secrecy agreement and in conformity with the procedures of the Confidentiality Regime.*

10. *Each access to confidential information at the Technical Secretariat shall be recorded on file when accessing and exiting. This record shall be retained for 10 years.*

11. *To the greatest extent consistent with the effective implementation of the provisions under this Protocol, confidential information shall be handled and stored by the Technical Secretariat in a form that precludes direct identification of the facility to which it pertains.*

~~(E) HANDLING OF SENSITIVE INFORMATION ON THE PREMISES OF STATES PARTIES~~

~~12. Each State Party shall protect information which it receives from the Organization according to the level of confidentiality established for that information. Upon request, a State Party shall provide details on the manner in which information provided to it by the Organization is handled.~~

~~(F) OBLIGATIONS FOR INTENDED RELEASE OF CONFIDENTIAL INFORMATION~~

13. *No confidential information obtained by the Technical Secretariat in connection with the implementation of this Protocol shall be published or otherwise released, except as follows:*

(a) *Any information may be released with the express consent of the State Party from which the information was received and the State Party to which the information refers;*

(b) *Information classified as confidential shall be released by the Organization only through procedures which ensure that the release of information only occurs in strict conformity with the needs of this Protocol. Such procedures shall be considered and approved by the Conference pursuant to Article IX, paragraph 22 (i).*

II. CONDITIONS OF STAFF EMPLOYMENT RELATING TO THE PROTECTION OF CONFIDENTIAL INFORMATION

(A) GENERAL REQUIREMENTS

1. *Conditions of staff employment shall be such as to ensure that access to and handling of confidential information shall be in conformity with the procedures established by the Director-General in accordance with this Protocol and its Annexes.*
2. *Each position in the Technical Secretariat shall be governed by a formal position description that specifies, inter alia, the scope of access to confidential information, if any, needed in that position.*
3. *In the discharge of their functions, staff members of the Technical Secretariat shall only request information and data which are necessary to carry out their duties and avoid to the extent possible any access to information and data unrelated to the discharge of their duties. They shall not make any records of such information collected incidentally and not related to the requirements of their duties.*

(B) INDIVIDUAL SECRECY AGREEMENTS

4. *The Director-General and the other members of the staff shall enter into individual secrecy agreements with the Technical Secretariat in which each staff member shall agree not to disclose during the period of employment and for an unlimited period after termination of the staff member's functions, to any unauthorized State, organization or person any confidential information coming to the staff member's knowledge in the performance of official duties, unless the information has been declassified or officially released by the Organization.*

(C) CODE OF CONDUCT

5. ~~*No staff member shall, except with explicit approval of the Director-General:*~~
 - ~~*(a) Issue statements to the press, radio or other media of public information;*~~
 - ~~*(b) Accept or keep speaking engagements;*~~
 - ~~*(c) Take part in film, theatre, radio or television productions or presentations;*~~
 - ~~*(d) Submit articles, books or other material for publication;*~~

~~*related to the activities of the Organization.*~~

The Director-General may publicly release information that is not designated as confidential and that falls into one of the following categories:

- (a) General information on the implementation of the Protocol which does not contain information relating specifically to any State Party. This excludes specific information about inspection activities being conducted in or planned for a State Party. The types of information which may be released publicly under this provision shall be set out in a list approved by the Conference;***

(b) Factual organizational information about the Organization, except for information that relates to the security of the Organization, or to personnel matters and the privacy of the staff of the Secretariat; or

(c) Information referring to a State Party, which is unclassified and which that State Party has specifically requested or consented to be publicly released.

All contact between the Technical Secretariat staff members and the media or any individual who is not employed or contracted by the Organization nor authorised by a State Party in relation to the implementation of the Protocol shall be subject to a Media and Public Affairs Policy which the Director-General shall submit to the Conference for approval at its first session.

6. In order to avoid unauthorized disclosures, staff members shall be appropriately advised and reminded about confidentiality considerations and of the possible penalties that they would incur in the event of improper disclosure.

7. In evaluating the performance of staff members of the Technical Secretariat, specific attention shall be given to the employee's record regarding protection of confidential information.

¶(D) OBLIGATIONS OF OBSERVERS AND THE REQUESTING STATE PARTY SENDING AN OBSERVER

¶8. The requesting State Party shall ensure that an observer sent in accordance with Annex D, section I, subsection D, complies with and is individually bound by all relevant provisions of this Protocol. If any confidential information is disclosed to or acquired by the observer, in addition to and without diminishing the observer's own individual responsibility, the requesting State Party shall also become responsible for the handling and protection of that information in accordance with this Protocol.¶

III. PROCEDURES IN CASE OF BREACHES OR ALLEGED BREACHES OF CONFIDENTIALITY

(A) OBLIGATION FOR INQUIRY

1. The Director-General shall establish procedures to be followed in case of breaches or alleged breaches of confidentiality, which shall be considered and approved by the Conference pursuant to Article IX, paragraph 22 (i). The Director-General shall also implement decisions of the Conference of States Parties amending the procedures related to the issue of breaches or alleged breaches of confidentiality.

*2. The Director-General shall promptly initiate an inquiry when there is **sufficient** indication that obligations concerning the protection of confidential information have been violated. The Director-General shall also promptly initiate an inquiry if an allegation concerning a breach of confidentiality is made by a State Party.*

3. In case of an allegation of a breach of confidentiality, States Parties and/or

staff members which are named in the allegation or which might be involved in the alleged breach shall be informed of that allegation immediately. The Director-General shall hold consultations with the concerned States Parties in the course of the inquiry.

4. *States Parties shall, to the extent possible, cooperate with and support the Director-General in conducting an inquiry of any breach or alleged breach of confidentiality and in taking appropriate action in accordance with applicable laws and regulations in case a breach has been established.*

5. *An inquiry shall result in a written report, which shall remain confidential and be subject to the application of the need-to-know principle. The Director-General shall, upon request, provide the report to the States Parties concerned. The results of the inquiry shall be reported to the Conference of the States Parties in a form from which specific confidential material has been removed to ensure that confidential information connected with a breach is not further disclosed beyond its authorized scope of access, and to respect those elements of the privacy of the individual staff members not relevant to the case.*

(B) *INTERIM MEASURES*

6. *The Director-General may take interim measures any time after the commencement of the inquiry in order to prevent further damage. These measures may include withdrawal of personnel concerned from specific functions, denial of access to certain information and, in serious cases, temporary suspension, pending completion of procedures contained in this section.*

(C) *MEASURES IN CASE OF BREACHES OR ALLEGED BREACHES*

7. *In case of a breach or an alleged breach of confidentiality by an agent or official of a State Party or by a staff member of the Technical Secretariat, consultations shall be held between the States Parties concerned or between the Organization and States Parties concerned to address the case. If such consultations are not concluded to the satisfaction of the parties involved within 60 days, each State Party shall have the right to initiate the proceedings of the Confidentiality Commission to consider the case. The Commission shall seek to settle the case through mediation, inquiry, conciliation, arbitration or other peaceful means. The Commission may request the Director-General to submit the result of the inquiry to the extent possible.*

8. *When the inquiry pursuant to paragraph 2 establishes that there has been a breach of confidentiality by a staff member of the Technical Secretariat, Article IV, paragraph 6, and section E of Article IX **may shall** apply **where appropriate**.*