

THE US REJECTION OF THE COMPOSITE PROTOCOL : A HUGE MISTAKE BASED ON ILLOGICAL ASSESSMENTS

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Introduction

1. The 24th session of the Ad Hoc Group negotiating a Protocol to strengthen the effectiveness and improve the implementation of the Biological and Toxin Weapons Convention (BTWC) opened on Monday 23 July 2001. This was just days after the G8 Foreign Ministers had announced in their communiqué¹ on Thursday 19 July 2001 that:

With a view to maintaining and strengthening strategic stability and international security in the face of the challenges of the 21st century, we place great importance on the existing regimes of multilateral treaties and export control arrangements designed to cope with the threats that the proliferation of weapons of mass destruction and their means of delivery can pose. In this context we welcome efforts to strengthen international arms control and non-proliferation regime and reaffirm our determination to promote compliance with and the universality of the fundamental treaties related to weapons of mass destruction....

and specifically stated in regard to the BTWC that:

We welcome efforts to agree on measures, including potential enforcement and compliance measures to strengthen the BTWC. We remain fully committed to pursue efforts to ensure that the BTWC is an effective instrument to counter the growing threat of biological weapons.

2. The Ad Hoc Group session opened with plenary statements on Monday and Tuesday 23 and 24 July 2001 on behalf of over 50 of the approximately 55 States engaged in the negotiation of the Protocol that the Chairman's composite Protocol text should form the basis for the political decisions to adopt the Protocol before the Fifth Review Conference later this year. On the morning of Wednesday 25 July, a further two States Parties spoke in support of the Protocol.

3. The United States then spoke saying that "*After extensive deliberation, the United States has concluded that the current approach to a Protocol to the Biological Weapons Convention,...is not, in our view, capable of achieving the mandate set forth for the Ad Hoc Group, strengthening confidence in compliance with the Biological Weapons Convention.*" They went on to say that "*We believe the objective of the mandate was and is important to international security, we will therefore be unable to support the current text, even with changes, as an appropriate outcome of the Ad Hoc Group efforts.*"

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¹Conclusions of the Meeting of the G8 Foreign Ministers, Rome, 18-19 July 2001. Available at <http://www.esteri.it/archivi/document/do190701b.htm>

4. This Evaluation Paper examines the United States statement in detail and analyses its various elements. It is concluded that these elements and arguments are based on illogical assessments and are incorrect and not valid. Several are based on alleged concerns that have no basis in the actual composite Protocol text. It is evident that the United States is indeed making a "stunning" mistake² and is failing to take all possible steps to strengthen the international norm totally prohibiting biological weapons and to obstruct the proliferation of biological weapons. The United States is urged to urgently reconsider its position. The other States Parties to the BTWC are urged to complete the negotiation of the Protocol this year whilst urging the United States to reconsider and to recognize that the Protocol does indeed achieve the mandate agreed by the United States and the other States Parties at the Special Conference³ in 1994, thereby substantially strengthening the international biological weapons prohibition and proliferation regimes.

The United States Statement

5. This ten page statement of 25 July 2001 has seven sections preceded by an introduction and followed by a conclusion:

- a. Introduction
- b. Objectives
- c. The Paradigm
- d. Biodefense Issues
- e. On-Site Activity Utility
- f. Constitutional and Ratification Issues
- g. Export Controls
- h. Disturbing Negotiation Positions
- i. Conclusion

This analysis considers each of these sections in turn. For clarity, the particular language from the statement that is evaluated is reproduced in ***bold italics***.

A. Introduction

6. This asserts that "***no nation is more committed than the United States to combating the BW threat.***" Indeed, the United States, along with the United Kingdom and the Russian Federation, are the co-Depositaries of the BTWC with the special political responsibilities that such status brings. An evaluation⁴ of the Article addressing the Depositary in the rolling text of the Protocol provides further information. For over a decade, the United States has made repeated strong statements about the dangers from biological weapons and the importance of combating this danger. Thus, almost 15 years ago, President George H.W.

²Barbara Hatch Rosenberg, *Allergic Reaction: Washington's Response to the BWC Protocol*, Arms Control Today, July/August 2001, pp.3-8. Available at http://www.armscontrol.org/act/2001_07_08/rosenbergjul_aug01.asp?print

³United Nations, *Special Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, Geneva 19-30 September 1994, Final Report, BWC/SPCONF/1, 1994. Available at <http://www.opbw.org>

⁴Graham S. Pearson and Nicholas A. Sims, *Article XXII: Depositary/ies*, University of Bradford, Department of Peace Studies, Evaluation Paper No 7, September 1999. Available at <http://www.brad.ac.uk/acad/sbtwc>

Bush addressed⁵ the General Assembly saying that *"But as always, questions of war and peace must be paramount to the United Nations. We must move forward to limit and eliminate weapons of mass destruction."* and going on to say *"We have not entered into an era of perpetual peace. The threat to peace that nations face may today be changing, but they have not vanished. In fact, in a number of regions around the world, a dangerous combination is now emerging: regimes armed with old and unappeasable animosities and modern weapons of mass destruction. That development will raise the stakes whenever war breaks out."*[Emphasis added] A year later in October 1990, President George H.W. Bush again spoke⁶ to the General Assembly shortly after the invasion of Kuwait by Iraq saying that *"We must also redouble our efforts to stem the spread of nuclear weapons, biological weapons and the ballistic missiles that can rain destruction on distant peoples."* After the Gulf war, in September 1991, President George H.W. Bush spoke⁷ to the General Assembly stressing the challenges of building peace and prosperity in a world leavened by the end of the Cold War and the resumption of history. He said *"The renewal of history also imposes an obligation to remain vigilant about new threats and old. We must expand our efforts to control nuclear proliferation. We must work to prevent the spread of chemical and biological weapons and the missiles to deliver them."*[Emphasis added]

7. Some four months later in January 1992, when the Security Council met for the first time at the level of Heads of State and Government level, President George H.W. Bush represented the United States and joined in the statement issued at the end of the meeting that said⁸ that *"The proliferation of all weapons of mass destruction constitute a threat to international peace and security. The members of the Council commit themselves to working to prevent the spread of technology related to the research for or production of such weapons and to take appropriate action to that end."*[Emphasis added]

8. The Clinton administration continued in the same vein with further strong statements to the General Assembly. In 1996, President Clinton said⁹ that the United States had six priority goals to further lift the threat of nuclear weapons destruction and the threat of weapons of mass destruction, and to limit their dangerous spread saying that *"... we must better protect our people from those who would use disease as a weapon of war, by giving the biological weapons convention the means to strengthen compliance, including on-site investigations when we believe such weapons may have been used or when suspicious outbreaks of disease occur. We should aim to complete this task by 1998."*[Emphasis added]

9. Similar concerns were echoed in 1994 by the Heads of State and Government participating in the North Atlantic Council meeting who in their final communiqué stated¹⁰ that *"Proliferation of weapons of mass destruction and their delivery means constitutes a threat*

⁵United Nations General Assembly, *Provisional Verbatim Record of the Fourth Meeting*, Monday 25 September 1989 at 10 am, A/44/PV.4, 25 September 1989.

⁶United Nations General Assembly, *Provisional Verbatim Record of the Fourteenth Meeting*, Monday 1 October 1990 at 9.30 am, A/45/PV.14, 5 October 1990.

⁷United Nations General Assembly, *Provisional Verbatim Record of the Fourth Meeting*, Monday 23 September 1991 at 10 am, A/46/PV.4, 25 September 1991.

⁸United Nations Security Council, *Note by the President of the Security Council*, S/23500 dated 31 January 1992.

⁹United Nations General Assembly, *Provisional Verbatim Record of the Sixth Meeting*, Tuesday 24 September 1996 at 10 am, A/51/PV.6, 24 September 1996.

¹⁰NATO, *Declaration of the Heads of State and Government participating in the meeting of the North Atlantic Council held at NATO Headquarters, Brussels, on 10-11 January 1994*, Press Communiqué M-1(94)3, 11 January 1994. Available at <http://www.nato.int>

to international security and is a matter of concern to NATO. We have decided to intensify and expand NATO's political and defence efforts against proliferation, taking into account the work already under way in other international fora and institutions. In this regard, we direct that work begin immediately in appropriate fora of the Alliance to develop an overall policy framework to consider how to reinforce ongoing prevention efforts and how to reduce the proliferation threat and protect against it." [Emphasis added] Six months later, an Alliance policy framework was issued¹¹ on proliferation of weapons of mass destruction. This stated that "Current international efforts focus on the **prevention** of WMD and missile proliferation through a range of international treaties and regimes. The most important norm-setting treaties are the nuclear non-proliferation treaty (NPT), the chemical weapons convention (CWC) and **the biological and toxin weapons convention (BTWC)**. The BTWC can be strengthened through efforts in the field of transparency and verification. The Allies **fully support** these efforts." [Emphasis added].

10. More recently, the US has been party to strong commitments to the Protocol notably in the Washington Summit Communiqué¹² of 24 April 1999 when the NATO Heads of State and Government said that "We are determined to achieve progress on a legally binding protocol including effective verification measures to enhance compliance and promote transparency that strengthens the implementation of the Biological and Toxin Weapons Convention." This was reiterated in the NATO Ministerial meeting in May 2000 when the communiqué¹³ stated that "We continue to attach **the utmost importance to full implementation of and compliance** with international disarmament and non-proliferation regimes. As we celebrate the 25th anniversary of the entry into force of the Biological and Toxin Weapons Convention (BTWC), we continue to regard as **a matter of priority** the conclusion of negotiations on appropriate measures, including possible verification measures and proposals to strengthen the convention, to be included as appropriate in a legally binding instrument. We reiterate **our commitment** to efforts to achieve such an instrument as soon as possible **before the 5th Review Conference of the BTWC in 2001.**" [Emphasis added]. This was reiterated using essentially identical language¹⁴ in the next Ministerial meeting in December 2000. This commitment was also affirmed in the G8 Final Communiqué¹⁵ in Okinawa in July 2000, which said that "We commit ourselves to work with others to conclude the negotiations on the Verification Protocol to strengthen the Biological Weapons Convention as early as possible in 2001."

11. More recently still, President George W. Bush in his inaugural address¹⁶ in January 2001 said that "We will confront weapons of mass destruction, so that a new century is spared new

¹¹NATO, *Alliance Policy Framework on Proliferation of Weapons Of Mass Destruction*, issued at the Ministerial Meeting of the North Atlantic Council held in Istanbul, Turkey on 9 June 1994, Press Release M-NAC-1(94)45, 9 June 1994. Available at <http://www.nato.int>

¹²Washington Summit Communiqué, *An Alliance for the 21st Century*, issued by the Heads of State and Government participating in the meeting of the North Atlantic Council in Washington, D.C. on 24th April 1999. Available at <http://www.nato.int/pr/1999/p99-064e.htm>

¹³Final Communiqué, ministerial meeting of the North Atlantic Council held in Florence on 24 May 2000. Available at <http://www.nato.int/pr/2000/p00-052e.htm>

¹⁴Final Communiqué, ministerial meeting of the North Atlantic Council held at NATO Headquarters on 14 and 15 December 2000. Available at <http://www.nato.int/pr/2000/p00-124e.htm>

¹⁵G8 Communiqué Okinawa 2000, 23 July 2000. Available at <http://www.g8kyushu-okinawa.go.jp>

¹⁶The White House, *President George W. Bush's Inaugural Address*, 20 January 2001. Available at <http://www.whitehouse.gov/press/text/inaugural-address.html>

horrors." Three weeks later, he said in an address¹⁷ to an audience including NATO ambassadors that "...we must prepare our nations against the dangers of a new era. The grave threat from nuclear, biological and chemical weapons has not gone away with the Cold War. It has evolved into many separate threats, some of them harder to see and harder to answer. And the adversaries seeking these tools of terror are less predictable, more diverse....We have no higher priority than the defense of our people against terrorist attack. **To succeed, America knows that we must work with our allies.** We did not prevail together in the Cold War only to go our separate ways, pursuing separate plans with separate technologies." [Emphasis added]. As recently as June 2001 prior to a visit to Europe he said¹⁸ that "Our United States and our allies ought to develop the capacity to address the true threats of the 21st century. The true threats are biological and information warfare."

12. The introduction to the US statement to the Ad Hoc Group rightly stresses the importance of countering **this complex and dangerous threat** from biological weapons **with a full range of effective instruments -- non-proliferation, export controls, domestic preparedness, and counterproliferation.** These all form part of the comprehensive web of deterrence that we have argued strongly is the vital counter to the proliferation of biological weapons.¹⁹ However, as we noted in Evaluation Paper No 21²⁰ in July 2001:

The Protocol is also important for its contribution to the web of deterrence which comprises:

- *A strong international and national prohibition regime reinforcing the norm that biological weapons are totally prohibited*
- *Broad international and national controls on the handling, storage, use and transfer of dangerous pathogens*
- *Preparedness including both active and passive protective measures and response plans that have been exercised*
- *Determined national and international response to any use or threat of use of biological weapons ranging from diplomatic sanctions through to armed intervention,*

which are together mutually reinforcing and lead a would-be possessor, whether a "rogue State" or a non-State actor to judge that acquisition and use of BW would not be valuable, would be detected and incur an unacceptable penalty. Any single element of the web of deterrence alone is insufficient -- all elements are vital and all need to be strengthened as they thereby reinforce the deterrent effect. The Protocol

¹⁷The White House, *Remarks by the President to the Troops and Personnel*, Norfolk Naval Air Station, Norfolk, Virginia, 13 February 2001. Available at <http://www.whitehouse.gov/news/releases/20010213-1.html>

¹⁸The White House, *Remarks by the President in Tax Celebration Event*, Barrett Farm, Dallas Center, Iowa, 8 June 2001. Available at <http://www.whitehouse.gov/news/releases/2001/06/20010608-2.html>

¹⁹See, for example, Graham S. Pearson, *The Vital Importance of the Web of Deterrence*, Sixth International Symposium on Protection against Chemical and Biological Warfare Agents, Proceedings, Stockholm, 10 - 15 May 1998, pp. 23-31. Graham S. Pearson, *Prospects for Chemical and Biological Arms Control: The Web of Deterrence*, *The Washington Quarterly*, Spring 1993, pp. 145 - 162.

²⁰Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims, *The Composite Protocol Text: An Evaluation of the Costs and Benefits to States Parties*, University of Bradford, Department of Peace Studies, Evaluation Paper No 21, July 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

through its strengthening of the international prohibition regime not only reinforces the norm that biological weapons are totally prohibited, its requirements also strengthen the international and national controls on the handling, storage, use and transfer of dangerous pathogens and the determined international response to any use or threat of use of biological weapons. In other words, the Protocol contributes to the strengthening of all the elements of the web of deterrence.

13. The introduction goes on to say that ***the United States has had serious issues with both individual proposals and the general approaches to some issues throughout the Protocol negotiations.*** In analysing the Working Papers submitted to the Ad Hoc Group it is evident that the US has been far from the forefront of the negotiations in putting forward new ideas and proposals. Table 1 shows that the US has put forward some 16 Working Papers out of the total of over 450 -- or about 3.5% -- in marked contrast to the 44 (or 10%) submitted by the UK and 27 (or 6%) submitted by the Russian Federation , the other two codepositaries of the BTWC and far below the 78 (or 17%) submitted by South Africa.

14. A more detailed examination of those working papers submitted by the United States is made in Table 2.

WP No	Date	Pages	Title	Content
AHG /23	13 Jul 95	2	Discussion of potential Article X issues	Sets out issues to be considered in regard to the implementation of Article X
25	1 Dec 95	3	Computer Networking as a means of Strengthening the BWC	Proposes computer networking as a means of implementing Article X
73	17 Jul 96	4	The role of epidemiology in unusual/suspicious outbreaks of disease	CDC paper addressing how epidemiologists investigate unusual disease outbreaks
176	21 Jul 97	2	Preamble	Proposes language for Preamble
285	24 Jun 98	1	Article III. Investigations	Proposes language relating to field investigations
294	9 Jul 98	3	Proposed elements of clarification visits	Proposes outline for clarification visits
296	10 Jul 98	2	WP by 29 States Parties	Reaffirms commitment to Protocol comprising declarations, visits, investigations & organization
306	15 Sep 98	1		Amended language for vaccine production facilities
314	24 Sep 98	3	Proposed text for Art III. F.III Investigations G	Proposes language on access and measures to guard against abuse during investigations
319	2 Oct 98	4	Proposed text for Art III Declarations Current Biological Defence Declaration	Proposes detailed language and definitions for declarations on current biological defence activities and facilities
320	5 Oct 98	2	Proposed Text for App F List of Agents and Toxins	Proposes a list of human, animal and plant pathogens
348	20 Jan 99	3	Determination of, and modification to, Field Investigation Area(s)	Proposes amendments regarding areas to be investigated in field investigations
378	29 Jun 99	2	Art III D. Declarations Annual Declarations (C) Current Defensive Programmes	Proposes further language for declarations of current defensive programmes
396	26 Jul 99	2	Joint WP with UK	Proposes amendments for Art III G Investigation of disease outbreaks

WP No	Date	Pages	Title	Content
410	10 Dec 99	3	Proposed changes to clarification visits	Proposes amendments to text regarding clarification visits
436	11 Dec 00	6	Impact on Declarations, Visited State Party, and Receiving State party when a Host Nation is involved	Proposes amendments to text regarding definitions and declarations relating to situations involving a host nation
441	22 Feb 01	5	Investigations	Proposes language for various paragraphs in Art III.G and Annex C. II and C. III
442	23 Feb 01	3	Annex C II Field Investigations	Proposes language for sampling and identification in field and facility investigations

This shows that the principal areas in which the United States has submitted working papers are those related to Article X measures, investigations, clarification visits and declarations of biological defence activities. The above working papers do not, however, give any sense of a State Party which is constantly reiterating a dissatisfaction with the approach adopted by the Protocol as is asserted in the United States statement of 25 July 2001.

15. It is also well known that the United States has frequently requested a weakening of these provisions of the Protocol because of concerns about their implications for the United States. If the United States indeed still has serious substantive difficulties with the provisions in the Protocol -- which have not changed substantively since the Ad Hoc Group transitioned in July 1997 to consideration of a rolling text as **all** the elements in that rolling text are still in the Chairman's composite Protocol text -- one would have expected the United States to have submitted working papers explaining why it has these difficulties and proposing solutions to overcome them.

16. The statement goes on to assert that the United States has *new, affirmative ideas for strengthening the Biological Weapons Convention*. No indication is, however, given of these ideas and it seems unlikely that there are indeed new practicable ideas that have not been considered during the past decade -- either during the VEREX process in which the national experts from **all** States Parties sought to identify **all** possible measures or during the Ad Hoc group negotiations when the diplomats and experts from over 50 States Parties have grappled with devising an effective and efficient Protocol to strengthen the effectiveness and improve the implementation of the Convention.

17. Although the US statement says that "*We believe that we can strengthen the Biological Weapons Convention through multilateral arrangements*", in rejecting the Protocol the United States is ignoring the reality that it has taken 10 years of multilateral negotiation by over 50 States Parties to reach this point when a Protocol is within reach. There is **no** prospect in the foreseeable future of any alternative multilateral arrangement that would be more effective than the Chairman's composite Protocol. The Australia Group, sometimes mistakenly proposed as a substitute, is a limited plurilateral grouping, lacking the fuller

multilateral character of the Ad Hoc group and of the organization that will be created by the Protocol. As is made clear in paragraph 26 below, it is not a multilateral arrangement.

18. The statement recognizes ***the substantive and political values many of the participants in the Ad Hoc Group attach to successful completion of the Protocol.*** It is evident that the United States does not share this widespread appreciation even though Ambassador Don Mahley in testimony two weeks earlier to a US Congressional subcommittee stated that *"If there is no sense during the Fifth Review Conference in November that a Protocol ... is in sight, we can expect a very troublesome Review Conference..."* and went on to say that *"This is another factor that the United States will take into consideration in its approach to the Protocol."*

19. The principal conclusion stated in the introduction to the US statement that ***"the current approach to a Protocol is not, in our view, capable of achieving the mandate set forth for the Ad Hoc Group..."*** requires careful consideration of the mandate and an evaluation of the extent to which the composite Protocol text achieves the mandate. Bradford Briefing Paper No 25²¹ in September 1999 examines the mandate to identify appropriate criteria against which the individual elements of the emerging Protocol could be evaluated, considers whether there are additional criteria which need to be included and then addresses why the CWC regime is relevant to the emerging BTWC Protocol regime before providing a comparative evaluation of both the emerging Protocol and the existing CWC regime against these criteria. It is concluded that the current draft Protocol contains the essential elements for a reliable and effective integrated regime. This evaluation was against the following criteria:

- Applicability (to all relevant facilities and activities)
- Protection of CPI (commercial proprietary information)
- Protection of NSN (legitimate national security needs)
- Avoid negative impact (on scientific research, international cooperation and industrial development)
- Reliable
- Cost-effective
- Non-discriminatory
- Non-intrusive (as possible consistent with effective implementation)
- Non-abuse
- Promotion of Protocol universality
- Increased transparency
- Enhanced confidence in compliance
- Deter non-compliance

20. In Briefing Paper No 25 the overall evaluation was summarised in a Table reproduced here for ease of reference.

²¹Graham S. Pearson & Malcolm R. Dando, *The Emerging Protocol: An Integrated Reliable and Effective Regime*, University of Bradford, Department of Peace Studies, Briefing Paper No 25, September 1999. Available at <http://www.brad.ac.uk/acad/sbtwc>

21. The overall conclusions of Briefing Paper No 25 were:

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

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

None of the subsequent developments in arriving at the Chairman's composite Protocol text changes this evaluation.

22. The US statement continues to say that **"Our overarching concern is the inherent difficulty of crafting a mechanism suitable to address the unique biological weapons threat"** and that the traditional approach that has worked well for many other types of weapons **"is not a workable structure for biological weapons"**. If this is indeed the case, one has to ask why the United States agreed to the conclusions of the Special Conference in 1994 at which Don Mahley said²² in regard to the mandate of the Ad Hoc Group that:

First, the commitments contained in the Convention, especially the obligations in Article I, were fully valid and must remain unchanged. The United States would strongly oppose any effort to amend the Convention, but it fully supported the preparation of a protocol containing a regime to strengthen it. Secondly,...all measures included in the protocol should be mandatory and legally binding. The measures set forth in the protocol should help strengthen the Convention by establishing an official benchmark for identifying discrepancies or ambiguities pertaining to facilities or activities and for seeking clarification, providing a mechanism for pursuing specific activities of concern and allowing for direct

²²United Nations, *Special Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, Geneva 19-30 September 1994, Final Report, BWC/SPCONF/1, 1994. See Part IV, pages 88-89.

*diplomatic engagement to resolve compliance concerns. Thirdly, the ad hoc committee should focus on developing a legally binding regime based on the measures proposed by VEREX Group and the conclusions as reported to the States parties. Fourthly, the selection process should consider both off-site measures, **such as mandatory declarations**, and on-site measures, **such as facility visits**, providing a solid foundation for the verification regime. [Emphasis added]*

In addition, the United States in Working Paper 10²³ submitted to the Special Conference proposed a mandate for the Ad Hoc Group which "*shall be to draft a protocol that provides for a regime with the following basic elements:*

- *The regime shall build upon measures such as those contained in the VEREX Final Report, plus any additional new measures the Group believes necessary.*
- *The regime should be mandatory and legally binding.*
- *The regime should provide or enhance openness and transparency of activities relevant to the BWC for all stages of potential biological and toxin warfare activities, from research through production, stockpiling, and weaponization.*
- *The regime should include off-site and on-site measures, including short-notice on-site measures.*
- *Any on-site measures should be designed to, among other things, strengthen confidence in information exchanged among States Parties or provide a mechanism for pursuing specific activities of concern.*
- *The regime should include commercial, academic and government facilities as legitimate potential objects of investigation, bearing in mind that all activities to strengthen confidence in compliance must include appropriate means to protect proprietary information, constitutional rights, and sensitive national security information not related to biological and toxin weapons activity.*
- *Activities associated with implementation of the regime should rely on existing organizational resources where possible to minimize costs, consistent with technical requirements. Efficient timely operation should be an important consideration in designing the regime.*

All of these proposals for the mandate were eventually incorporated into the mandate for the Ad Hoc Group agreed by the Special Conference.

23. At the Fourth Review Conference in November 1996, John D. Holum leading the US delegation which included Don Mahley as the Deputy Representative stated²⁴:

²³United States of America, *Consideration of VEREX Report*, Working Paper 10 in United Nations, *Special Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, Geneva 19-30 September 1994, Final Report, BWC/SPCONF/1, 1994. See Part III, pages 36-37.

²⁴United States, *Remarks of the Hon. John D. Holum, Director, United States Arms Control and Disarmament Agency to the Fourth Review Conference of the Biological Weapons Convention*, Geneva, 26 November 1996.

Of course, the most potent vehicle for strengthening the Convention is the Ad Hoc Group, established independently more than two years ago by a Special Conference of the States Parties....The Ad Hoc Group thus can bring the Convention into the 1990s, through a legally binding compliance protocol that provides for new off-site and on-site activities.

The protocol should strengthen compliance by making certain national information declarations mandatory -- a matter already debated thoroughly.

The Ad Hoc group should build upon the voluntary confidence building measures...

It is interesting, in the light of the United States statement of 25 July 2001 to recall how John Holum concluded his remarks to the Fourth Review Conference:

Arms control and science have given us means no less modern to combat them. But we must marshal great will and wisdom to do so. The choices we make here will be fateful.

We can wait for tragedy -- for biological weapons to surpass what other weapons have done in Tokyo, Oklahoma City, or the Gulf War.

*We can haggle -- playing international politics as usual, and **subordinating security to barter.***

Or we can act -- first with prudence, to protect the Convention, then with boldness and statesmanship, to make it stronger.

*I know **we will choose this third path** -- not just to renounce these weapons, but finally to banish them from the earth. [Emphasis added]*

24. Moreover, the United States was one of the 29 States who joined in July 1998, a year after the Ad Hoc Group had transitioned to negotiation of the rolling text of the Protocol, in submitting Working Paper No. 296²⁵ to the Ad Hoc Group. This stated that "*the above States Parties consider that the measures to strengthen compliance should include, inter alia, the following elements, and that discussion on these should focus on ensuring their efficiency, practicality and cost effectiveness. They include:*

- Declarations of a range of facilities and activities of potential relevance under the Convention, inter alia, so as to enhance transparency;

- Provisions for visits to facilities in order to promote accurate and complete declarations and thus further enhance transparency and confidence;

- Provision for rapid and effective investigations into concerns over non-compliance, including both facility and field investigations; and

²⁵Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Korea, Romania, Slovakia, Spain, Sweden, Switzerland, Turkey, United Kingdom and United States, Working Paper, BWC/AD HOC GROUP/WP.296, 10 July 1998. Available at <http://www.opbw.org>

- *A cost-effective and independent organization, including a small permanent staff, capable of implementing the Protocol effectively.*"

The Working Paper concludes by stating that *"They [the above States Parties] call upon the Ad Hoc Group as a whole to demonstrate leadership by intensifying its efforts towards the successful and early adoption of a legally-binding Protocol that will address the global threat posed by biological and toxin weapons."* The language in the US statement of 25 July 2001 is totally illogical when considered against this background..

25. The US statement goes on to state that *"We believe the objective of the mandate was and is important to international security, we will therefore be unable to support the current text, even with changes, as an appropriate outcome of the Ad Hoc Group efforts."* Given that the mandate was agreed by the United States and contained the proposals made by the United States, the composite Protocol text should be evaluated against the mandate -- and if this is done, then there is no doubt at all -- as shown in paragraphs 19 to 21 above -- that the composite Protocol text does indeed successfully meet the objective of the mandate.

26. The US statement continues to say that *the United States intends to develop other ideas and different approaches that we believe could help to achieve our common objective of effectively strengthening the Biological Weapons Convention.* As already noted in paragraph 16 above, no indication is, however, given of these ideas and it seems unlikely that there are indeed new practicable ideas that have not been considered during the past decade -- either during the VEREX process in which the national experts from **all** States Parties sought to identify **all** possible measures or during the Ad Hoc group negotiations when the diplomats and experts from over 50 States Parties have grappled with devising an effective and efficient Protocol to strengthen the effectiveness and improve the implementation of the Convention.

27. In the United States, there has been some consideration earlier this year in a House of Representatives subcommittee²⁶ of possible alternatives to the Protocol. These additional mechanisms all relate to the surveillance and reporting of disease through international or voluntary disease reporting systems. Whilst these disease surveillance and reporting systems are all helpful and provide information that is complementary to the Protocol, they are all **necessarily** voluntary in nature and cannot be **mandatory**. It would be unrealistic -- and could actually harm the health monitoring regime of the international community which depends critically upon participating States having confidence that, in reporting outbreaks of disease, they will not in some way be penalized -- if a situation were to be sought in which reporting to the WHO, FAO and OIE were to be made mandatory in order to enable a body associated with the Biological and Toxin Weapons Convention to use such data to try to determine whether some outbreak had been deliberate and thus in breach of the Convention. The Chairman's composite Protocol text requires the Technical Secretariat of the future Organization *inter alia* to collect, process and analyse relevant epidemiological information. Furthermore, the Technical Secretariat is also explicitly required to develop a framework for States Parties to support an international system for the global monitoring of emerging diseases in humans, animals and plants. It is **not** true, as has been alleged in testimony to the House subcommittee, to say that the Protocol does not have any provisions to create, expand or mandate systems to monitor disease occurrence.

²⁶See United States House of Representatives, Subcommittee on National Security, Veterans Affairs and International Relations, 5 June 2001 and 10 July 2001 hearings. Available at http://www.house.gov/reform/ns/web_resources/news_briefing_june_5.htm and [http://www.house.gov/reform/ns/web_resources/shays_pr_july_10 .htm](http://www.house.gov/reform/ns/web_resources/shays_pr_july_10.htm)

28. Insofar as the development of other ideas and different approaches by the United States is concerned, it has to be recognized that the rejection of the Protocol by the United States after almost seven years of negotiation will poison the water and any new proposals, no matter how meritable, associated with the United States will be dead on arrival and will be rejected by the international community. There is simply no prospect of any early strengthening of the biological weapons multilateral prohibition regime by any means other than the Protocol in the foreseeable future.

29. The statement then alleges that *there is no basis for a claim that the United States does not support multilateral instruments for dealing with weapons of mass destruction and missile threats* and goes on to say that the US *strongly support the Australia Group, and will be actively working to strengthen it*. However, the Australia Group²⁷ is not a multilateral instrument -- it is merely an informal consultative gathering of like-minded States who have chosen to harmonise their export controls in respect of dual-use materials and technology related to chemical and biological weapons. The support of the United States for true multilateral instruments for dealing with weapons of mass destruction is mixed -- the failure last year of the United States to achieve ratification of the Comprehensive Test Ban Treaty (CTBT) despite leading the way in signing it in September 1996, the ratification of the Chemical Weapons Convention, which saw the administration accepting conditions which have the effect of eroding the Convention, and the rejection of the Protocol to the BTWC at the eleventh hour can in no way be seen as evidence of United States support for multilateral instruments.

30. The introduction ends by undertaking to outline some of the reasons for reaching the conclusion announced by the United States. It is said that *many of these will not be new or surprising. They reflect positions that the United States has advanced repeatedly throughout the negotiations*. However, as noted above in paragraphs 13 and 14, the United States has only provided 16 of the over 450 working papers submitted to the Ad Hoc Group -- hardly a repeated advancement of US positions -- and has, on a number of occasions, endorsed the general approach to the Protocol, as noted, for example, in paragraphs 22 - 24 above.

B. Objectives

31. This section starts by stating that *one central objective of a Protocol is to uncover illicit activity*. However, the mandate for the Ad Hoc Group agreed by the United States and the other States Parties at the Special Conference²⁸ says **nothing** about uncovering illicit activity. The mandate is aimed at strengthening the effectiveness and improving the implementation of the Convention.

32. The section continues to refer to *regular on-site inspections of locations potentially able to conduct such activity, the shorter notice and the more intrusive, the better*. It is, however, evident that during the Ad Hoc Group negotiations the United States has **not** been advocating or promoting such an approach.

²⁷See information at <http://www.australiagroup.net>

²⁸United Nations, *Special Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, Geneva 19-30 September 1994, Final Report, BWC/SPCONF/1, 1994. See Part II. Final Declaration, on pp.9-11. Available at <http://www.opbw.org>

33. It is then stated that *"The provisions for on-site activity do not offer great promise of providing useful, accurate, or complete information to the international community."* Whilst it is always possible to argue that the provisions for on-site activity could be improved, what the United States is failing to do is to compare the provisions in the Protocol with what is currently available under the Convention alone. As was demonstrated in Evaluation Paper No 21²⁹, such a comparison shows that the Protocol provides significant benefits.

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

34. The statement goes on to say that when the US *examined the prospects of the most intrusive and extensive on-site activities physically possible ... we discovered that the results of such intrusiveness would still not provide useful, accurate or complete information.* This is hardly surprising as such a conclusion applies equally to the completeness of information under any on-site inspection under any arms control regime. It is, however, a sweeping conclusion that is misleading in its assertion that such on-site activities would not provide **useful** information. It is evident from past experience that on-site activities have provided and do provide useful information -- concerns can either be resolved or reinforced. It is also misleading to suggest that on-site activities need to be considered in isolation. They form a key element of an integrated regime comprising mandatory declarations, follow-up procedures and investigations which in the composite Protocol text provide a structured and elaborated framework for the provision of accurate information about the activities and facilities of the most relevance to the Convention. This brings immense benefits as was noted by Dr John Gee, Deputy Director General of the OPCW, addressing the success of the declarations made under the CWC, who said³⁰ that:

What is significant is the fact that declarations have been made and the key parts of each State Party's declarations are available to all other States Parties....This has been a considerable confidence-building measure....This process has answered a lot of questions that were out there prior to entry into force....all the other countries had to go on were press reports and intelligence estimates and so forth. The whole

²⁹Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims, *The Composite Protocol Text: An Evaluation of the Costs and Benefits to States Parties*, University of Bradford, Department of Peace Studies, Evaluation Paper No 21, July 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

³⁰John Gee, *The CWC at the Two-Year Mark: An Interview with Dr John Gee*, Arms Control Today, April/May 1999. Available at <http://www.armscontrol.org/ACT/aprmay99/jgam99.htm>

process of having declarations available to other States Parties has been a great success and a very substantial confidence-building measure.

If the situation with the Protocol in place is compared with the alternative of simply continuing with the Convention, it is impossible to see how a conclusion -- as has been stated recently in evidence to a Congressional subcommittee -- can be reached that "*a Protocol would not improve our ability to effectively verify compliance with the BWC either in terms of certifying that a country is in compliance with, or in violation of, its obligation*". Without the Protocol all that any country has to go on are press reports, intelligence estimates and so on; intelligence estimates have necessarily to be worst case assumptions and may well give undue credence to rumour and innuendo or simply fail to recognise perfectly legal reasons for an activity. Indeed, an analysis³¹ of the history of biological weapons programmes up to 1945, has shown that misperceptions can lead to the initiation of offensive biological weapons programmes. However, with the Protocol in place, there will also be mandatory declarations from States Parties with the means to clarify any ambiguities, uncertainties, anomalies or omissions, providing hard evidence as to activities and facilities within the State Party. Any inconsistencies between parts of declarations can be addressed by States Parties as well as by the future Organization leading to a more comprehensive and soundly based appreciation of the activities and facilities within the State Party.

35. The statement goes on to state that "*our assessment of the range of facilities potentially relevant to the Convention indicates that they number, at least in the case of the United States, in the thousands, if not the tens of thousands....Thus we had no hope that any attempt at a comprehensive declaration inventory would be accurate, timely or enduringly comprehensive.*" It is widely recognised that the range of facilities **potentially** relevant to the Convention is very large. The thrust of the Ad Hoc Group in its negotiation of the Protocol has been to focus on those facilities of **greatest** relevance to the Convention rather than on **all** facilities of potential relevance. In doing so, the Ad Hoc Group has built upon the requirements agreed by the United States and other States Parties at the Review Conferences in 1986 and in 1991 for the provision of information in accordance with the Confidence Building Measures. Working Papers by a number of other States Parties have shown that the numbers of most relevant facilities in European countries number in the tens rather than the hundreds. In Briefing Paper No 27³² it was recalled that the architecture of the declaration requirements is designed to ensure that the **most relevant** facilities are declared and **not** all possible facilities. It went on to note that a number of surveys of national microbiological activities have been reported to the AHG. The results showing the numbers of facilities to be declared for Canada³³, the Netherlands³⁴, United Kingdom³⁵, Italy³⁶ and the five Nordic Countries³⁷ can be summarised as follows:

³¹Erhard Geissler, John Ellis van Courtland Moon and Graham S. Pearson, *Lessons from the History of Biological and Toxin Weapons*, in Erhard Geissler and John Ellis van Courtland Moon (eds), *Biological and Toxin Weapons: Research, Development and Use from the Middle Ages to 1945*, SIPRI Chemical and Biological Warfare Studies, No. 18, Oxford University Press, 1999, pp. 255 - 276.

³²Graham S. Pearson, *The Emerging Protocol: A Quantified Evaluation of the Regime*, University of Bradford, Department of Peace Studies, Briefing Paper No 27, November 1999. Available at <http://www.brad.ac.uk/acad/sbtwc>

³³Canada, *Discussion Paper on Declarations: List of Agents and Combinations of Criteria*, BWC/AD HOC GROUP/WP. 6, 28 November 1995. Available at <http://www.opbw.org>

³⁴The Netherlands, *The Relevance and Effectiveness of (Combinations of) Criteria for Declaration*, BWC/AD HOC GROUP/WP.10, 28 November 1995. Available at <http://www.opbw.org>

³⁵United Kingdom, *Survey of Microbiological Facilities in the UK*, BWC/AD HOC GROUP/WP. 81, 23 July 1996. Available at <http://www.opbw.org>

	Canada	Netherlands	UK	Italy	5 Nordic Countries
Number of facilities to be declared	30 to 50	[Tens]	[Tens]*	40	50

* Based on recent discussions with the delegation.

Briefing Paper No 27 also noted that in May 1998, the Austrian/UK contribution³⁸ to the EU seminar for the pharmaceutical industry said that *"the number of facilities in individual EU countries that would need to be declared can probably be measured in tens rather than hundreds."* It is clear that numbers in the 10s are being considered for most European countries and this has been confirmed in recent discussions with delegations. Indeed, the Ad Hoc Group is to be congratulated in having crafted a declaration regime that is focussed on the most relevant facilities -- even though the United States has successfully argued for a reduction in the number of biological defence facilities and of production facilities subject to declaration and declaration follow-up procedures -- and these United States requests have been incorporated into the Chairman's composite Protocol text. It is thus illogical for the United States to reject the Protocol on the grounds that the declaration inventory will not be comprehensive or accurate. Once again, the United States has failed to compare what the Protocol would provide -- mandatory declarations backed up by transparency visits and clarification procedures -- with what the Convention alone can provide -- variable and patchy CBM responses individually interpreted by States Parties and no provision for seeking clarification.

36. The statement goes on to say that the United States *were forced to conclude that the mechanisms envisioned for the Protocol would not achieve their objectives, that no modification of them would allow them to achieve their objectives, and that trying to do more would simply raise the risk to legitimate United States activities.* This assertion is unsubstantiated by the facts -- the evaluation³⁹ of the Protocol against the objectives set in the agreed mandate for the Ad Hoc Group negotiation of the Protocol shows that the objectives have indeed been met and adequate safeguards for legitimate activities have been incorporated. Once again, the United States has failed to compare what the Protocol would provide with what is available from the Convention alone.

37. This section concludes by saying that the United States *are forced to conclude that an appropriate balance cannot be struck that would make the draft Protocol defensible as an instrument whose utility outweighs its risk.* This conclusion is an assertion that is

³⁶Italy, *National Survey in the Microbiological Activities*, BWC/AD HOC GROUP/WP. 146, 18 March 1997. Available at <http://www.opbw.org>

³⁷Denmark, Finland, Iceland, Norway and Sweden, *Results of a Facility Declaration Trial in the Five Nordic Countries*, BWC/AD HOC GROUP/WP. 173, 18 July 1997. Available at <http://www.opbw.org>

³⁸Austria and the United Kingdom, *Industry and Declarations*, UK Presidency and the European Commission: The BWC and the Pharmaceutical Industry, 13 May 1998.

³⁹Graham S. Pearson & Malcolm R. Dando, *The Emerging Protocol: An Integrated Reliable and Effective Regime*, University of Bradford, Department of Peace Studies, Briefing Paper No 25, September 1999. Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims, *The Composite Protocol Text: An Effective Strengthening of the Biological and Toxin Weapons Convention*, University of Bradford, Department of Peace Studies, Evaluation Paper No 20, April 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

unsubstantiated. It is, however, evident that if the Protocol is carefully evaluated⁴⁰ first on an Article by Article basis of the costs and benefits of the Chairman's composite Protocol and then between the costs and benefits of signing the composite Protocol and rejecting the composite Protocol, the conclusion reached in Evaluation Paper No 21 is that *signing the Protocol brings a net benefit to all States Parties and furthermore that:*

- a. In signing and ratifying the composite Protocol text, States Parties will be seen to have **taken all possible practicable** multilateral steps to **obstruct** the proliferation of biological weapons.*
- b. Signing and ratifying the composite Protocol text will **reduce** the risk of biological weapons proliferation and use. Rejection of the Protocol would send the opposite signal and it can be argued that the risk of biological weapons proliferation and use will be increased.*
- c. Signing and ratifying the composite Protocol text will bring significant benefits to the infrastructure of States Parties in the areas of combatting infectious disease, biosafety and good manufacturing practice and thereby **benefits in health, safety and prosperity** for all States Parties, both developing and developed.*
- d. Overall, signing and ratifying the composite Protocol text **enhances** the security of all States Parties. It provides **a net gain** to collective security. Rejection of the Protocol misses this opportunity and decreases collective security.*

The United States in their rejection of the Protocol are overstating the risks and are frequently considering worst case improbable scenarios.

C. The Paradigm

38. This section starts by stating that *another key objective for a Protocol ... would be to deter or complicate the ability of a rogue state to conduct an illicit offensive biological weapons program.* Once again, an objective is being asserted which does **not** appear in the mandate for the Ad Hoc Group agreed by the United States and the other States Parties at the Special Conference⁴¹. Nevertheless, it is accepted that because the aim of the Protocol is to strengthen the effectiveness and improve the implementation of the Convention, there is indeed an aim to deter non-compliance. This was taken into account in the evaluation described in paragraphs 19 to 21 above which demonstrated that the Protocol measures do indeed contribute to deterrence of non-compliance.

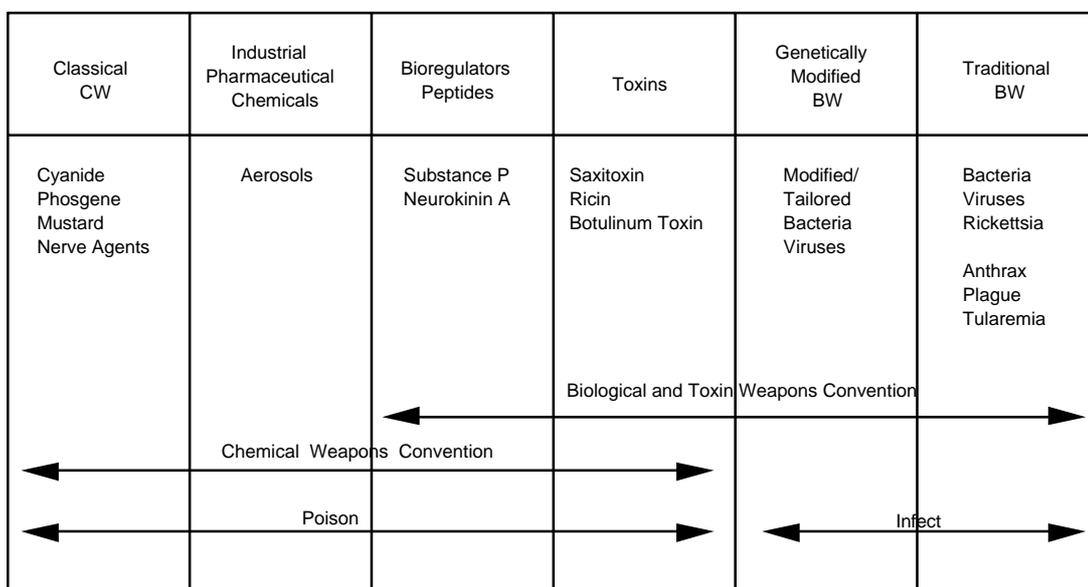
BTWC Protocol Regime Measure	Deterrence of non-compliance
Mandatory declarations	Moderate

⁴⁰Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims, *The Composite Protocol Text: An Evaluation of the Costs and Benefits to States Parties*, University of Bradford, Department of Peace Studies, Evaluation Paper No 21, July 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

⁴¹United Nations, *Special Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, Geneva 19-30 September 1994, Final Report, BWC/SPCONF/1, 1994. See Part II. Final Declaration, on pp.9-11. Available at <http://www.opbw.org>

Declaration follow-up procedures	
- randomly-selected visits	Good
- declaration clarification procedures	Good
- voluntary visits	Low
Measures to ensure submission of declarations	Good
Investigations	High
Article VII Measures	Moderate

39. The section goes on to note that *the most frequently cited paradigm ... has been the Chemical Weapons Convention....This is unfortunately, seriously flawed.* This assertion ignores the reality of the situation that there is, and rightly so, a deliberate overlap between the Biological and Toxin Weapons Convention and the Chemical Weapons Convention in that both conventions address toxins and all toxic substances produced by living organisms even when they are actually produced by synthesis. The two Conventions therefore have a significant area of overlap, both have general purpose criteria which embrace all possible agents, past, present and future, and both address dual use materials and technology.



It is now evident⁴² that chemistry and biology are coming closer together and that we are faced with a continuum -- after all biological agents are actually chemicals. It is consequently

⁴²See for example, Graham S. Pearson, *New Scientific and Technological Developments of Relevance to the Fifth Review Conference*, University of Bradford, Department of Peace Studies, Review Conference Paper No 3, July 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

dangerous to suggest a separation between biological and chemical agents. The CWC regime is thus the one of **greatest** relevance to the BTWC Protocol regime and it is incorrect to suggest that using the CWC as a paradigm for the BTWC Protocol is seriously flawed.

40. Indeed, as was noted in Evaluation Paper No 21⁴³:

It is hardly surprising that the BTWC Protocol regime has adopted some concepts where appropriate from the CWC regime. It is not, however, just a simple copy which ignores the fundamental differences between the two areas. The Protocol is, however, much more elaborated than the CWC and has been finely tailored to address the fundamental difference in the nature of biological agents as well as to capture the facilities of greatest relevance to the Convention. If we ignore the chemical weapon and chemical weapon production facility elements⁴⁴ of the CWC, then the basic architecture of the BTWC Protocol regime and the CWC regime is the same. The qualitative differences between the regimes are in the detail: the BTWC Protocol regime has built on the confidence-building measures agreed by all the States Parties at the Second Review Conference in 1986 and extended at the Third Review Conference in 1991. In respect of the monitoring of dual-purpose materials and facilities, the two regimes are very comparable, with the Protocol regime imposing a less onerous but more focussed burden in respect of declarations and visits whilst the international cooperation provisions are much more extensive than those of the CWC.

41. The section goes on to assert that ***in chemical [agent] manufacturing, ... such facilities, because of the toxicity and corrosiveness of the precursors, have recognizable infrastructure arguments.*** This is a deeply flawed assertion which reflects a Western mind-set in which agents were required to be stored for a retaliatory capability. Alternative concepts, such as those adopted by Iraq, produce agent when required for use and utilize different synthesis routes. In addition, the advent of the binary concept for chemical weapons in which less toxic precursors are mixed when required is ignored, as is the range of mid-spectrum agents, such as bioregulators and toxins, which fall under both Conventions and do not involve toxic and corrosive precursors. One of the key strengths of the Chemical Weapons Convention -- and of the BTWC -- is in their general purpose criteria which embrace all chemicals -- and biological agents -- that have no justification for permitted purposes.

⁴³Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims, *The Composite Protocol Text: An Evaluation of the Costs and Benefits to States Parties*, University of Bradford, Department of Peace Studies, Evaluation Paper No 21, July 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

⁴⁴This difference results because the CWC was negotiated when a number of States had admitted to having stockpiles of chemical weapons and to having chemical weapon production facilities which are required to be destroyed under the CWC. In contrast, when the BTWC was negotiated in the early 1970s the US had already announced that it would destroy its stockpile and no other State admitted to having stockpiles of biological weapons or to biological weapon production facilities. Consequently, Article II of the Convention makes no mention of production facilities and simply states that:

Each State Party to this Convention undertakes to destroy, or to divert to peaceful purposes, as soon as possible but not later than nine months after entry into force of the Convention, all agents, toxins, weapons, equipment and means of delivery specified in article I of the Convention, which are in its possession or under its jurisdiction or control. In implementing the provisions of this article all necessary safety precautions shall be observed to protect populations and the environment.

As the BTWC has been in force since 1975 and no State has admitted to a stockpile of biological weapons there are no provisions in the Protocol requiring the declaration and destruction under verification of such weapons.

42. It is then stated that *when setting up the CWC, we were able to require universal declaration for such facilities, and then establish an international regime that would visit each such facility on a regular and repeated basis.* When this statement is examined in detail, it does not stand up. First of all, there is no universal declaration regime. For example, facilities at which synthesis of Schedule 1 chemicals is carried out in aggregate quantities less than 100 gram per year per facility are not subject to declaration or to verification. Likewise, Schedule 2 facilities are not declared if they produce less than 1 kg of a chemical designated * in Schedule 2 A, less than 100 kg of other chemicals listed in Schedule 2 A or less than 1 tonne of a chemical listed in Schedule 2 B. Similar arguments apply in respect of Schedule 3 facilities and the DOC (discrete organic facilities). Moreover, it is well known that the CWC declaration regime relates solely to facilities that actually produce Scheduled chemicals -- identical facilities that could produce Scheduled chemicals but do not produce them are not declared or inspected. It is not correct to claim that there is universal declaration for such facilities.

43. The section goes on to suggest that *the Ad Hoc Group quickly recognized that no such cataloging was possible with respect to biology to biological facilities [sic]. Almost any facility that does biological work of any magnitude possesses the capability, under some parameters, of being diverted to biological weapons work. Trying to catalog them all would be tantamount to impossible. Likewise, visiting even those selected -- almost arbitrarily -- for declaration on the same universal and regular basis as the CWC would require an international organization of the size and possession of rare skills among its employees that no one in the Ad Hoc Group was willing to contemplate.* This is once again a misleading statement. As already noted above, in paragraph 33, the Ad Hoc Group has rightly focussed the Protocol measures on the **most** relevant facilities rather than **all** possible facilities. Insofar as the frequency of inspections under the BTWC Protocol and the CWC are concerned, this was examined in Briefing Paper No 27⁴⁵ in November 1999. This provided the following information on the CWC inspection requirements⁴⁶ together with the numbers of *inspectable* facilities:

Facility Type	Estimated <i>declarable</i> number (1998 Budget ⁴⁷)	Declared <i>inspectable</i> number (1998 Report ⁴⁸)	Assumed <i>inspectable</i> number (2000 Budget ⁴⁹)	Inspection duration	Number inspected per year per plant site	Number inspected per year per State Party
Schedule chemicals	1 40	24	35	As required	Not limited	Not limited

⁴⁵Graham S. Pearson, *The Emerging Protocol: A Quantified Evaluation of the Regime*, University of Bradford, Department of Peace Studies, Briefing Paper No 27, November 1999. Available at <http://www.brad.ac.uk/acad/sbtwc>

⁴⁶United Nations, *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, Corrected version in accordance with Depository Notification C.N.246.1994.Treaties-5 and the corresponding Proces-Verbal of Rectification of the Original of the Convention, issued on 8 April 1994. Available at <http://www.opcw.org/cwc/cwc-eng.htm>

⁴⁷Organisation for the Prohibition of Chemical Weapons, Conference of the States Parties, *Programme and Budget 1998*, Second Session, 1 - 5 December 1997, C-II/6, 6 December 1997.

⁴⁸Organization for the Prohibition of Chemical Weapons, *Annual Report 1998*.

⁴⁹Organization for the Prohibition of Chemical Weapons, Conference of the States Parties, *Programme and Budget 2000*, Fourth Session, 28 June - 2 July 1999, C-II/DEC.23, 2 July 1999.

Schedule chemicals	2	400	119	178	96 hours*	2	Not limited
Schedule chemicals	3	500	329	429	24 hours*	2	3 + 5% sites ≤ 20
DOCs/PSFs		6 - 15,000	3,314	5,500	24 hours*	2	3 + 5% sites ≤ 20

* As specified in the Convention. Extensions may be agreed between the inspection team and the inspected State Party.

The number of inspections per year per State Party for plant sites producing Schedule 3 chemicals or DOCs is a combined limit. The Convention states in respect of Schedule 3 plant sites that *"the combined number of inspections shall not exceed three plus 5 per cent of the total number of plant sites declared by a State Party under both this Part and Part VIII of this Annex [the part relating to DOCs], or 20 inspections, whichever of these two figures is the lower."* Consequently, for a State Party with a combined total of Schedule 3 and DOCs plant sites of 20, the limit would be a total of 3 + 5% of 20 = 4 inspections. If it had a combined total of 100 such plant sites, the limit would be 3 + 5% of 100 = 8 inspections. It is noted that the combined ceiling of 20 visits for Schedule 3 and DOCs plant sites will only come into effect when the State Party has in excess of 340 Schedule 3 and DOC plant sites.

44. Briefing Paper No 27 also noted that the numbers of inspections under Article VI *Activities Not Prohibited Under This Convention* planned⁵⁰ by the OPCW for 1999 and 2000 are as follows:

Facility/Plant Site	Expected number of inspections in 1999	Anticipated inspectable sites as of 31 Dec 1999	Planned number of inspections for 2000	Intensity* (%) in 2000
Schedule 1				
SSSF	7	7	7	100
Other	10	28	18	64
Total Schedule 1	17	35	25	70
Schedule 2				
Initial	49	57	57	100
Routine	3	121	10	8
Total Schedule 2	52	178	67	38
Schedule 3	7	429	34	8
DOC/PSF	0 †	5500	6	0.1
Overall Total	76	--	132	--

Notes

* Intensity is calculated by dividing the number of inspections by the number of inspectable sites and multiplying by 100.

† The Convention specifies that inspections of DOC/PSF plant sites shall start at the beginning of the fourth year after entry into force -- they therefore started in May 2000.

⁵⁰Organization for the Prohibition of Chemical Weapons, Conference of the States Parties, *Programme and Budget 2000*, Fourth Session, 28 June - 2 July 1999, C-II/DEC.23, 2 July 1999.

The intensity of randomly-selected transparency visits under the Protocol regime -- assuming the same number of facilities declared globally of 2,500 as in Briefing Paper No 27 -- would be 3.6, corresponding to about half of the intensity of 8% planned for Schedule 3 facilities under the CWC but significantly better than the intensity of 0.1% planned for discrete organic chemical (DOC) facilities.

45. Insofar as the size of the Organization to implement the Protocol is concerned, the United States has been keen to see the size and budget kept small because of the sizeable contribution that would be made by the United States towards that budget. Indeed, there was language in earlier versions of the rolling text that limited the contribution of any one State Party to the cost of the future Organization to 25%.

46. The statement goes on to say that *what we are left with, then, is a regime that contemplates -- at best -- declaration of an almost random-selected set of facilities from among those actually relevant to a potential proliferator.* This is simply untrue -- the facilities to be declared under the Protocol are those that are **most** relevant to the Convention. They build upon and go beyond the facilities that are the subject of the Confidence Building Measures agreed at the Second Review Conference and extended at the Third Review Conference. It is noteworthy that Ambassador Donald Lowitz, the leader of the United States delegation to the Second Review Conference in 1986 in his final remarks said⁵¹ that:

"Recognizing the norm established by the Convention, the United States had joined in recommending several measures intended to strengthen that norm, particularly within the context of Article V. He trusted that those measures would be fully implemented by all parties to the Convention and would thus lead to greater international transparency and openness with regard to the Convention."

It is also evident from the record of the Second Review Conference that the United States cosponsored⁵² language relating to the Confidence-Building Measure on activities relating to protection against biological and toxin weapons. Likewise at the Third Review Conference, Michael Moodie providing final remarks on behalf of the United States said⁵³ that:

*In his Government's view, the key to the success of the Convention was confidence. The Conference had agreed on a package of confidence-building measures that would **significantly increase** the transparency and openness of biological activities related to the Convention; those efforts represented **a remarkable step forward** and their test would be whether all States parties lived up to their commitment to participate actively in them. [Emphasis added]*

⁵¹United Nations, *Second Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, 8 - 26 September 1986, Final Document, Geneva 1986, BWC/CONF.II/9. See BWC/CONF.II/SR.10, pp. 4-5.

⁵²United Nations, *Second Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, 8 - 26 September 1986, Final Document, Geneva 1986, BWC/CONF.II/9, pp. 19-20.

⁵³United Nations, *Third Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, 9 - 27 September 1991, Final Document, Geneva 1992, BWC/CONF.III/23, p 214.

The US statement of 25 July 2001 is thus inconsistent with the approach taken by the United States at the Second and Third Review Conferences where there was no suggestion that the Confidence-Building measures were addressing a randomly-selected set of facilities.

47. The statement goes on to state that *"the overwhelming bulk of such activity would take place on the territory of those States Parties least likely to be proliferation candidates."* This remark indicates a misconception of global dynamics. There is **no** prospect in the multilateral world of the 21st century for a regime which is not equable across all States Parties, both developing and developed. The Protocol is being negotiated by the States Parties to the BTWC and it is illogical to contemplate the establishment of a regime which is focussed on those States which are perceived to be *proliferation candidates*. This demonstrates once again the failure of the United States to recognise that the whole thrust of the Protocol is to build confidence between States Parties who are **all** committed to strengthening the norm against biological weapons. It is needlessly divisive to suggest that the States Parties can be allocated into two categories -- those who are *proliferation candidates* and those who are not.

48. The statement goes on to assert that the *required emphasis on the wrong targets from among the susceptible population simply does not provide anything remotely resembling a deterrent function on a proliferator, even a non-state actor*. This continues to reflect a misunderstanding of the aim of the Protocol -- to increase transparency and thereby build confidence between States Parties. The entry into force of the composite Protocol text and its implementation by States Parties will over time strengthen the effectiveness of the Convention thereby bringing benefits to the collective security of **all** the States Parties. A state contemplating proliferation would be unlikely to become a State Party to the Protocol as that state could not be certain that its prohibited activities would not be exposed through the implementation of the Protocol. In any event, a State Party to the Protocol has increased the costs should it subsequently decide to violate the Convention.

49. The suggestion that the Protocol will not deter a non-state actor is misleading. As the United States well knows, the Convention and the Protocol are between States Parties. What is important in respect of non-State actors are the provisions in the Convention and especially in the Protocol for each State Party to take national measures, including penal legislation, to implement the treaties. Furthermore, the emphasis in the Protocol to improving infrastructure -- and thus controls on national and international transfers of dual-purpose biological agents and equipment -- directly contribute to safety and security within States Parties by making it more difficult for non-State actors to obtain biological agents. Indeed, this is one area where the United States has shown leadership with its select agent programme⁵⁴ requiring registration of facilities using such agents and control of transfers of such agents. However, the United States appears not to have recognized that, through the composite Protocol, other States Parties can be helped to introduce comparable national controls bringing benefits to all States Parties as any use by non-State actors is unlikely to be confined in its impact to a single state.

⁵⁴United States, Federal Register, Department of Health and Human Services, *Additional Requirements for Facilities Transferring or Receiving Select Agents*, Rules and Regulations, Volume 61, No. 207, Thursday 24 October 1996, 55190 - 55200. The US select agent programme and its requirements are addressed in Graham S. Pearson, *Article X: Further Building Blocks*, University of Bradford, Department of Peace Studies, Briefing Paper No 7, March 1998. Available at <http://www.brad.ac.uk/acad/sbtwc>

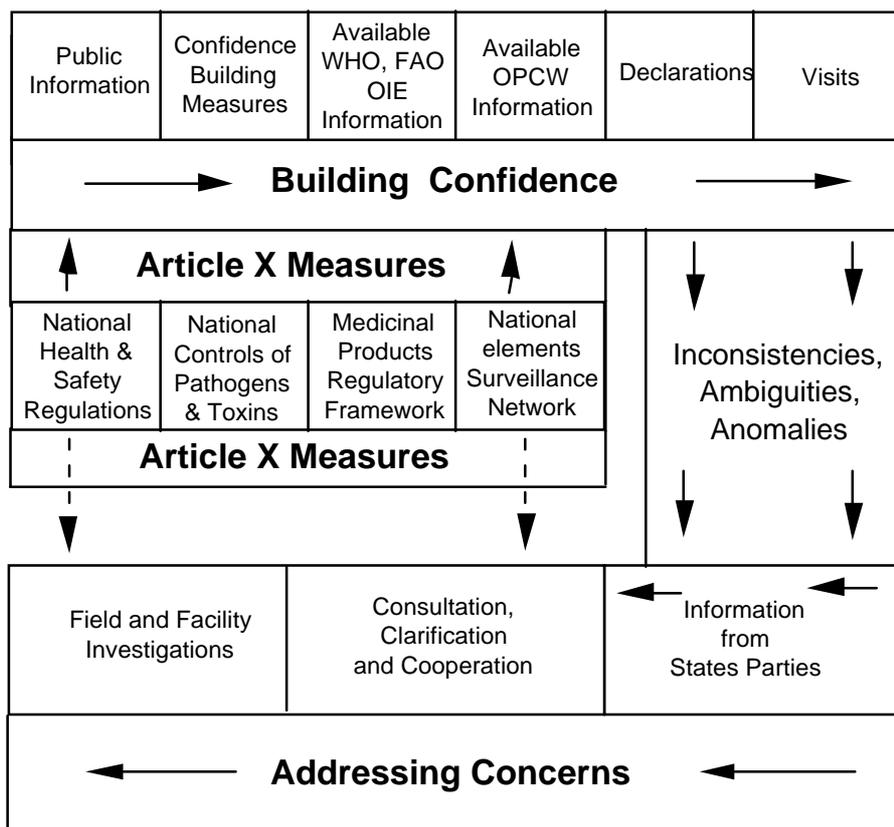
50. The statement goes on to state that *we therefore conclude that the conceptual approach used in the current negotiating effort fails to address the objective we have sought throughout the negotiations.* It is clear from the previous statements of the United States -- notably in 1994 at the Special Conference, in 1996 at the Fourth Review Conference and in 1998 in Working Paper No 296 addressed in paragraphs 22 to 24 above -- that the United States in its statement of 25 July 2001 is arguing the direct opposite of what it had previously argued.

51. The statement then argues that *if we are to find an appropriate solution, we need to think "outside the box". It will require new and innovative paradigms to deal with the magnitude of biological activity that can be a threat, the explosively changing technology in the biological fields, and the varied potential objectives of a biological weapons program.* This statement is contrary to the appreciation that the developments in biotechnology are actually an argument for a Protocol sooner rather than later. As the editorial⁵⁵ addressing the CWC and BWC: Yesterday, Today, Tomorrow pointed out in *The CBW Conventions Bulletin* in December 2000 "*Considering that biological weapons and the potential of future biotechnology for hostile misuse pose a danger to humanity..., the need to develop a positive and cooperative verification culture worldwide is particularly great.*" However, in addition, this assertion ignores the fact that in the Ad Hoc Group negotiations of the Protocol, considerable effort has been put into the measures to achieve full and effective implementation of Article X of the Convention. These measures are elaborated in Article 14 *Scientific and Technological Exchange for Peaceful Purposes and Technical Co-operation* of the Chairman's composite Protocol text. Analyses⁵⁶ of these provisions have shown that these measures make a significant contribution to both increasing transparency and to building confidence as well as to providing information that can help to resolve inconsistencies, ambiguities and anomalies as shown in the following schematic taken from Briefing Paper No 25⁵⁷:

⁵⁵*The CWC and the BWC: Yesterday, Today, Tomorrow*, The CBW Conventions Bulletin, No. 50, December 2000, pp. 1 - 2.

⁵⁶See, for example, Graham S. Pearson, *Article VII Measures: Optimizing the Benefits*, University of Bradford, Department of Peace Studies, Briefing Paper No 22, July 1999 and Graham S. Pearson, *Article X: Specific Measures to Achieve Implementation*, University of Bradford, Department of Peace Studies, Briefing Paper No 9, July 1998. Available at <http://www.brad.ac.uk/acad/sbtwc>

⁵⁷Graham S. Pearson & Malcolm R. Dando, *The Emerging Protocol: An Integrated Reliable and Effective Regime*, University of Bradford, Department of Peace Studies, Briefing Paper No 25, September 1999. Available at <http://www.brad.ac.uk/acad/sbtwc>



It is evident that the Ad Hoc Group has indeed been thinking "outside the box" -- and, more to the point, has actually crafted innovative measures in the Chairman's composite Protocol text that do deal constructively with enhancing safety and security of biological activities. Interestingly, this analogy of the box was used in the analysis⁵⁸ of a Workshop held in May 2000 which demonstrated the effectiveness of measures in the Protocol to implement Article X of the Convention provides over time increased transparency and builds confidence.

52. Finally, the statement in this section concludes that *we simply cannot try to patch or modify the models we have used elsewhere*. As already noted earlier in paragraphs 37 & 38, this conclusion ignores the reality of the overlap of the scope of the Chemical Weapons Convention and the Biological and Toxin Weapons Convention which rightly both cover toxins and all toxic substances produced by living organisms even when they are actually produced by synthesis. The composite Protocol has successfully built upon and utilized concepts from a wide range of previous models -- indeed, the United States position appears to be encapsulated by the words *we simply cannot try*.

D. Biodefense Issues

53. The statement says "*As we have stated repeatedly, any Protocol needed to ensure that the ability to protect against those who would violate the norm of abolishing biological weapons was not impaired.*" This is a case where the United States appears to fear a non-existent danger -- the composite Protocol text in Article 13, paragraph 2, states that:

⁵⁸Graham S. Pearson, *Maximizing the Security Benefits from International Cooperation in Microbiology and Biotechnology*, University of Bradford, Department of Peace Studies, Briefing Paper No 29, July 2000. Available at <http://www.brad.ac.uk/acad/sbtwc>

2. *Nothing in this Protocol shall be interpreted as impeding the right of any State Party to conduct research into, develop, produce, acquire, transfer or use means of protection against bacteriological (biological) and toxin weapons, for purposes not prohibited under the Convention.*

This language is identical to that in Article X, paragraph 2 of the Chemical Weapons Convention which states that:

2. *Nothing in this Protocol shall be interpreted as impeding the right of any State Party to conduct research into, develop, produce, acquire, transfer or use means of protection against chemical weapons, for purposes not prohibited under the Convention.*

The concerns expressed in the statement are thus ill-founded.

54. The statement then goes on to ***recognize that finding a balance of protection and disclosure has been especially difficult in the biodefense arena.*** Although it is noted that the composite Protocol text includes a number of elements the United States has demanded, it goes on to state that ***there are still several provisions in the current proposals we believe would be inimical to legitimate national security efforts.*** It is difficult to understand what is causing this concern to the United States as no details are provided here of what provisions in the Protocol are so inimical. What is evident, however, is that the provisions in the Protocol have been negotiated by all the States Parties active in the Ad Hoc Group and all those with active biological defence programmes have taken a keen interest in the provisions in the Protocol but without expressing the view that these are inimical to their legitimate security interests. There is no requirement for the declarations of biological defence activities or facilities to disclose any vulnerabilities or for any national security information to be provided. When one considers that the United States is already far more open about its biological defence programme⁵⁹ than any other country in the world, one has to wonder what the basis is for the US assertions in the US statement of 25 July 2001.

55. The statement then goes on to argue that the area of biodefense is subject to the same inherent flaw described earlier. It is asserted that ***the exclusions in declarations would permit a potential proliferator to conceal significant efforts in legitimately undeclared facilities. Conversely, if we try to make the declarations comprehensive enough to capture all biodefense activity, the level of risk to legitimate and sensitive national security information becomes truly unbearable.*** The argument here is interesting in that the United States acknowledges that it has the most extensive biodefense program described by any participant in the Ad Hoc Group negotiations, yet whilst the other States Parties are content with the provisions in the Protocol requiring the declaration of national biological defence programmes and facilities, it is the United States which has expressed concern and has argued for the adoption of a more complex declaration regime in which only the larger biodefense facilities are declared with smaller ones only being listed with minimal declaration requirements and no follow-up through declaration follow-up procedures. Consequently, the problems which the United States identifies in the provisions for biodefense are ones created by the United States.

⁵⁹See for example, US Department of Defense Nuclear/Biological/Chemical (NBC) Defense: Annual Report to Congress available at <http://www.defenselink.mil/pubs/chembio02012000.pdf>

56. As noted earlier, in paragraph 35, it is widely recognised that the range of facilities **potentially** relevant to the Convention can be very large. The thrust of the Ad Hoc Group in its negotiation of the Protocol has been to focus on those facilities of **greatest** relevance to the Convention rather than on **all** facilities of potential relevance. This same approach has been followed in respect of biodefence programmes and activities. In doing so, the Ad Hoc Group has built upon the requirements agreed by the United States and other States Parties at the Review Conferences in 1986 and in 1991 for the provision of information in accordance with the Confidence Building Measures. Indeed, the Ad Hoc Group is to be congratulated in having crafted a declaration regime that is focussed on the most relevant facilities -- even though the United States has successfully argued for a reduction in the number of biological defence facilities and of production facilities subject to declaration and declaration follow-up procedures -- and these United States requests have been incorporated into the Chairman's composite Protocol text. It is thus illogical for the United States to reject the Protocol on the grounds that the declaration inventory will not be comprehensive or accurate. Yet again, the United States has failed to compare what the Protocol would provide -- mandatory declarations backed up by transparency visits and clarification procedures -- with what the Convention alone can provide -- variable and patchy CBM responses individually interpreted by States Parties and no provision for seeking clarification.

E. On-Site Activity Utility

57. The statement refers to *the dysfunction of concentrating on-site activity in places that would largely be irrelevant to possible biological weapons concerns. This alone detracts seriously from any value for the objectives of the Ad Hoc Group.* This reiterates a serious misperception of the aim of the Protocol, as already noted above in paragraphs 47 and 48, which recognized that there is **no** prospect in the multilateral world of the 21st century for a regime which is not equitable across all States Parties, both developing and developed. The Protocol is being negotiated by the States Parties to the BTWC and it is illogical to contemplate the establishment of a regime which is focussed on those States which are perceived to be *possible biological weapons concerns*. This demonstrates once again the failure of the United States to recognise that the whole thrust of the Protocol is to build confidence between States Parties who are **all** committed to strengthening the norm against biological weapons. It is needlessly divisive to suggest that the States Parties can be allocated into two categories -- those who are *possible biological weapons concerns* and those who are not. It is worth recalling in this context that under the Chemical Weapons Convention less than 40 per cent of the States Parties are directly affected by the routine compliance verification activities⁶⁰ -- presumably the same *dysfunction* referred to in the US statement of 25 July 2001 applies equally to the CWC.

58. The statement goes on to say that *the activities outlined to take place on a regular basis, transparency visits, actually risk damage to innocent declared facilities.* The same argument was advanced prior to the entry into force of the Chemical Weapons Convention in regard to the routine inspections of Scheduled chemical facilities. This has been shown to be not the case. As noted previously, the purpose of transparency visits is to increase transparency and build confidence -- their aim is to promote the consistency of declarations and **not** to catch out States Parties.

⁶⁰Organization for the Prohibition of Chemical Weapons, *Annual Report 2000*. Available at http://www.opcw.org/cvi/Annual_Report_Index.htm

59. It then adds that such transparency visits *would almost have no chance of discovering anything useful to the BWC if they took place at a less-than-innocent facility*. This ignores the fact that if a State Party chose to carry out prohibited activities at a declared facility, the State Party would never be completely certain that during a transparency visit -- or through a declaration clarification procedure -- these prohibited activities would not be exposed or that suspicions would be raised because of inconsistencies observed by the visiting team or the future Organization in its analysis of the information available to it. There is, as already noted, a significant deterrent element in the composite Protocol regime that contributes to the overall benefits from the regime.

60. The statement then goes on to assert that through transparency visits *proprietary or national security information may be at risk, and/or the activity may serve to misdirect world attention into non-productive channels*. This assertion ignores the fact that a number of States Parties have carried out practice transparency visits⁶¹ and shown that such transparency visits **as formulated in the composite Protocol text** present minimal risk to either proprietary or national security information. Several of these practice transparency visits have been carried out in the presence of observers from other States Parties.

WP No.	Date	State Party	Type of facility
76	18 Jul 96	UK/Brazil	Vaccine and serum production facility
77	18 Jul 96	Australia	Biological production facility
251	17 Dec 97	UK	Industrial facility
258	9 Jan 98	UK	Pharmaceutical research facility
298	21 Aug 98	Denmark, Finland, Iceland, Norway and Sweden	Biopharmaceutical production facility
310	23 Sep 98	Austria	Pharmaceutical facility
345	14 Jan 99	Iran	Vaccine and serum production facility
371	10 Jun 99	Switzerland	Industrial production facility
398	24 Aug 99	Germany	Industrial production facility
414	17 Mar 00	Spain	Biodefence facility
437	13 Dec 00	Australia	Biodefence facility

The statement also is at variance with testimony⁶² provided by Ambassador Don Mahley in September 2000 to a Congressional subcommittee in which he testified that:

The Chemical Weapons Convention inspections already conducted on both Department of Defense facilities and at commercial firms have thus far demonstrated our ability to fulfill the obligations of the Chemical Weapons Convention without sacrificing sensitive national security or commercial proprietary information. We are using the lessons and experience learned to explore ways to

⁶¹A useful summary of these practice visits is provided in Barbara Hatch Rosenberg, Testimony before the SubCommittee on National Security, Veteran Affairs and International Relations, House Committee on Government Reform, Hearing on the Biological Weapons Convention Protocol: Status and Implications, 5 June 2001. available at http://www.house.gov/reform.ns/107th_testimony/testimony_of_barabara_hatch_rosen.htm

⁶²Donald A. Mahley, Testimony before the House Government Reform Committee SubCommittee on National Security, Veteran Affairs and International Relations, The Biological Weapons Convention Protocol: Status and Implications, 13 September 2000. Available at http://www.house.gov/reform.ns/floor/testimony_of_ambassador_donald_a.htm

achieve an equal level of protection in biological activities and we are confident we can do so by the time any BWC Protocol is in place. [Emphasis added]

Given that the composite Protocol provisions for transparency visits are far less intrusive than those of the Chemical Weapons Convention for routine inspections, the basis for the remarks in the United States statement of 25 July 2001 is not at all apparent.

61. The assertion that world attention may be misdirected into non-productive channels is without foundation. There is no evidence from the implementation of the Chemical Weapons Convention that, despite similar expressions of alarm in the United States prior to entry into force, of any such misdirection of world attention. The provisions in the composite Protocol text to prevent abuse of the provisions are at least as strong as those in the Chemical Weapons Convention and it is hard to see what conditions would result in such misdirection of world attention. Certainly, the recent United States statement of 25 July 2001 can be argued as misdirecting world attention away from the vital importance of seizing the opportunity **now** to significantly strengthen the BTWC regime through the adoption of the Protocol -- and thereby help prevent the danger of proliferation of biological weapons.

62. The statement goes on to say that although a number of safeguards have been inserted into procedures to protect information not relevant to the BWC, *those safeguards are insufficient to eliminate unacceptable risks to proprietary or national security information.* The basis for this assertion is not evident given the fact the composite Protocol text already contains more provisions to safeguard commercial and national security information than did the Chemical Weapons Convention when it emerged from the negotiations in Geneva. It is also at variance with the points made in the previous paragraph and is also contradictory to the fact that when the spectrum of chemical and biological agents is concerned in the context of the Chemical Weapons Convention then facilities producing toxins, bioregulators and other mid-spectrum agents are already subject to the provisions of the Chemical Weapons Convention apparently without creating such *unacceptable risks.*

63. The United States have repeatedly expressed great concern about the potential loss of commercial proprietary information through randomly selected visits to declared industrial facilities. As was noted in Evaluation Paper No 21⁶³, given that the maximum number of randomly-selected transparency visits that any State Party can receive in a year is 7, this means that for the maximum number of such visits in any year to a State Party with a large number of declared facilities is only 7 in total to **all** the facilities declared by that State Party - - whether biological defence, maximum containment (BL-4), high containment, plant pathogen containment, work with listed agents and toxins or production. The burden on the industry nationally in a country with a large number of declared facilities is unlikely to be more than perhaps four visits per year -- lasting no longer than 2 days each and with no more than four members in a visiting team. This burden pales into insignificance when compared to other national and international regulatory body inspections of such industrial facilities. In the United States, the Food and Drug Administration (FDA) makes some 22,000 inspections

⁶³Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims, *The Composite Protocol Text: An Evaluation of the Costs and Benefits to States Parties*, University of Bradford, Department of Peace Studies, Evaluation Paper No 21, July 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

each year of about a third of the US firms inspectable by the FDA⁶⁴. A further handful of visits -- totalling 7 at the most -- is hardly a significant additional burden to an already highly regulated industry. These visits are, however, sufficient to meet the transparency objectives set for them in the Protocol.

64. The statement continues by asserting that *our concern, however, is not for the United States alone. We simply cannot agree to make ourselves and other countries subject to such risks when we can find no corresponding benefit in impeding proliferation efforts around the globe.* This assertion ignores the fact that the European Union and the other States Parties engaged in negotiating the Protocol have examined the risks and have concluded that the provisions in the Chairman's composite Protocol text provide adequate safeguards and that the benefits arising from the Protocol far outweigh the risks. The United States needs to reexamine its assessments.

F. Constitutional and Ratification Issues

65. In this section the statement notes that the United States has made the Ad Hoc Group *aware of the constraints we [the United States] face in achieving ratification of an international agreement.* This is a curious argument as it is known that there has been a reluctance of the executive branch to engage the legislative branch at an early stage during the past seven years of the Ad Hoc Group negotiations -- a reluctance that may well stem from the tension that was apparent when the Chemical Weapons Convention was submitted to the Senate for advice and consent to ratification and resulted in the executive branch undertaking to meet 28 conditions in regard to the implementation of the Chemical Weapons Convention. In Evaluation Paper No 6⁶⁵, we pointed out that whatever may or may not be the international legal standing of such conditions, they constitute a political fact; and they demonstrate that devices other than reservations may be employed openly to reinterpret obligations, thereby **weakening the treaty regime**, in ways that other States Parties may find disconcerting but can do nothing to remedy. For this reason, we recommended that Article XXI of the rolling text should provide a comprehensive overall ban on reservations as follows:

ARTICLE XXI

RESERVATIONS

The Articles of and the Annexes and Appendices of this Protocol shall not be subject to reservations. In addition, no exceptions or conditions, however phrased or named, including interpretative statements or declarations, which purport to exclude or modify the legal effect of the provisions of the Articles and the Annexes and Appendices of this Protocol in their application to any State, may be made by any State upon signing, ratifying or acceding to this Protocol.

The reluctance to engage the legislative branch during the negotiation of the Protocol is in marked contrast to other States Parties where the opportunity has been taken to make appropriate parliamentary bodies aware of the ongoing negotiations of the Protocol and of the likely benefits that will accrue in countering the proliferation of biological weapons from

⁶⁴Food and Drug Administration, *Food and Drug Administration FY 2001 Congressional Budget Request*. Available at <http://www.fda.gov>

⁶⁵Graham S. Pearson & Nicholas A. Sims, *Article XXI: Reservations*, University of Bradford, Department of Peace Studies, Evaluation Paper No 6, September 1999. Available at <http://www.brad.ac.uk/acad/sbtwc>

such a Protocol. For example, the Foreign Affairs Committee of the UK House of Commons in its report⁶⁶ of 25 July 2000 concluded that:

The Biological and Toxin Weapons Convention (BTWC) is an integral part of the web of deterrence against states developing and stockpiling WMD. To be effective it should have an equally stringent verification regime to that of the Chemical Weapons Convention. We endorse the Government's view that an effective BTWC Protocol requires a package of complimentary measures -- declarations, visits and investigations. Whilst recognising the need to take account of legitimate concerns about protecting commercial proprietary information, we believe that national security requirements demand that the BTWC contains the strongest verification regime that can be agreed. The Government has played a positive role in arguing for such a regime. We recommend that the Government reiterate this position and push for an early conclusion to the negotiations.

It is interesting to note that the same report also made a recommendation:

We recommend that the Government use the UK's position as close ally of the USA to convince it that a strong verification procedure for biological and toxin weapons which does not affect commercial confidentiality is a viable and achievable role.

It is disappointing to find that the executive branch in the United States is not maintaining a sustained campaign to inform the legislative branch of the developments in the multilateral community and is thereby taking steps to ensure that when a Protocol is submitted for advice and consent that the Senate is then in an informed situation that can judge the Protocol on its merits. Indeed, recent testimonies⁶⁷ to a House Subcommittee by State Department officials have been less than helpful as they have foreshadowed the US statement of 25 July 2001 rejecting the Protocol.

66. This section goes on to say that *we have explicitly recognized that some of the conditions necessary to satisfy these requirements would theoretically allow abuse. For our own part, the United States does not use such devices in an abusive fashion.* It is indeed a sad day when a co-Depositary of a Convention feels it necessary to explain that for ratification of a legally binding instrument, it will have to agree to conditions that could be abused -- and not to recognize that such conditions **weaken the regime** to no one's advantage.

G. Export Controls

⁶⁶House of Commons, Foreign Affairs Committee, *Weapons of Mass Destruction*, Eighth Report, 25 July 2000, page xiii, paragraph 18. Available at <http://www.parliament.uk/commons/selcom/fac>

⁶⁷See, for example, Dr O. J. Sheaks, Assistant Secretary of State for Verification and Compliance, Testimony before the Subcommittee on National Security, Veteran Affairs and International Relations, Committee on Government Reform, US House of Representatives, 5 June 2001 and Dr. Edward Lacey, Principal Deputy Assistant Secretary of State for Verification and Compliance, Testimony before the Subcommittee on National Security, Veteran Affairs and International Relations, Committee on Government Reform, US House of Representatives, 10 July 2001. Available at http://www.house.gov/reform.ns/107th_testimony/testimony_of_dr_lacey.htm

67. This section commences by saying that some of the participants in these negotiations have viewed *the issue as much from the perspective of technological development as from direct security enhancement measures. Whilst the United States agrees with the concept that global technological development in biotechnology helps create a more secure environment, we view this as a subordinate element to the compliance-enhancements of any Protocol to the Biological Weapons Convention.* Whilst this may well be the view of the United States, it has to be recognised that for many States, the benefits of the Protocol lie in the technical cooperation and development areas. It is also interesting to note that the first two working papers submitted by the United States to the Ad Hoc Group dealt with BTWC Article X issues (AHG/23, WP. 25) and the third addressed the role of epidemiology (WP. 73). It was only the fourth working paper by the United States in July 1997 that could be considered to have addressed security enhancement in proposing language for the Preamble to the Protocol (WP. 176). The importance of technical cooperation and development has been recognized by most of the delegations who see the two pillars of security and development as being complementary and which together provide the incentives necessary to achieve universality. Indeed, as already mentioned above, the measures in Article 14 directly contribute over time to improved health, safety, security and prosperity for all States Parties, large or small., developed or developing.

68. The statement then continues to somewhat obliquely address export controls by first referring to a statement by another delegation suggesting the dissolving of any parallel export control regimes after the Protocol enters into force and goes on to say *We also take seriously the threat of biological weapons proliferation. A Protocol should be, if it were properly focussed and implemented, another instrument in the set of tools countering proliferation of weapons of mass destruction. Never has the argument been made successfully that it would have become the single answer to the proliferation problem. To insist that other effective tools be forfeited in order to establish a Protocol is an indication of the wide gap between demands and possible solutions still existing in these negotiations.* This assertion is not about what is in the Chairman's composite Protocol text - - but about what another delegation has said in a statement. This is no basis for a statement rejecting the composite Protocol. After all, it has to be recognized that what the composite Protocol text actually states in Article 7 is that:

*Each State Party shall ... review and, if necessary, amend or **establish** any legislation, regulatory or administrative provisions to regulate the transfer of agents, toxins, equipment and technologies relevant to Article III of the Convention...*[Emphasis added]

Consequently, the Protocol requirement is to **establish** legislation, regulatory or administrative proposals to regulate the transfer of agents, toxins, equipment and technologies -- a far cry from the assertion that an effective tool has to be forfeited. The United States appears not to recognize that there are many other States Parties to the BTWC who have seriously addressed their implementation of Article III of the Convention -- and who see the composite Protocol text as being in their national interests. This appears to be another instance where the United States is making assertions about a non-existent situation.

69. This section also includes language which says that *the Ad Hoc Group product, or the international organization -- affectionately known as the OPBW -- envisioned by the current draft Protocol, is an appropriate substitute for those other organizations. In fact, we fear that the inevitable competition of alternative international organizations with overlapping mandates could actually impede the effectiveness of those other already*

existing organizations. The basis for this assertion is far from clear as it is very clear from Article 1 General Provisions of the composite Protocol that:

In implementing the provisions of this Protocol, the States Parties and the Director-General shall, when appropriate, take into account existing agreements and competencies of other relevant international organizations and agencies as well as the activities of the States Parties in order to avoid duplication and to ensure an effective and co-ordinated use of resources.

The experience from the implementation of the Chemical Weapons Convention has shown that the States Parties through the Executive Council and the Conference of States Parties exercise a high degree of control of the programme and the resources allocated to the various elements of it. Once again, it appears that the United States is making an assertion about a non-existent situation.

70. The statement then goes on to say that *global political situations would indicate that the very countries trying hard to argue for compensation to agree to security enhancement are those most likely to have a biological weapons threat to their own security.* This assertion is at variance with the remarks frequently made about the vulnerability of the United States to biological weapons such as the remarks made⁶⁸ by President Bush in June 2001 that *"Our United States and our allies ought to develop the capacity to address the true threats of the 21st century. The true threats are biological and information warfare."* In any event, a difference in view between the United States and other States Parties on the relative importance assigned to security measures and to technical development measures in the Protocol is no basis for rejection of the Protocol. It has to be recognized that the Protocol is an integrated package of measures that together will strengthen the effectiveness and improve the implementation of the Convention -- and that different States Parties will see different elements of that package as being of particular value to their nations. Overall, the goal is to achieve universal adherence to the Protocol and to the Convention.

71. The statement goes on to say that *the United States believes very strongly in employing all available means to enhance international security. One of the things we will not allow is any degradation of those tools we already have to fight a serious challenge to security.* As already pointed out in paragraph 65 above, there is **nothing** in the composite Protocol that degrades any of the tools that are already available to fight this serious challenge to security. Rather the United States through its **rejection** of the Protocol has degraded one of the key tools available to fight the threat of biological weapons -- the multilateral prohibition regime of the BTWC which is the currently the weakest of all the regimes prohibiting or controlling weapons of mass destruction. The composite Protocol provides a valuable and effective strengthening of the BTWC regime which would significantly counter the threat of biological weapons.

72. This section concludes by saying that *it is the responsibility of us all ... to inhibit or prevent biological weapons being in the hands of any state or party whatsoever, by both national and international means....Efforts to constrain, impede or eliminate such efforts will be unacceptable to the United States now and at any time in the foreseeable future. Those who think there is any flexibility on this point in the United States are sadly*

⁶⁸The White House, *Remarks by the President in Tax Celebration Event*, Barrett Farm, Dallas Center, Iowa, 8 June 2001. Available at <http://www.whitehouse.gov/news/releases/2001/06/20010608-2.html>

mistaken, and should abandon any such pursuits. This vehement statement appears to be quite unwarranted as, has already been pointed out, there is **nothing** in the composite Protocol that constrains, impedes or eliminates the efforts of the United States to implement Article III of the BTWC -- rather the opposite in that the Protocol requirement is for States Parties to **establish** legislation, regulatory or administrative proposals to regulate the transfer of agents, toxins, equipment and technologies.

H. Disturbing Negotiating Positions.

73. The relevance of the negotiating positions of other States Parties to the rejection of the composite Protocol by the United States is not evident. The statement says that ***the mandate of the Ad Hoc Group clearly states that any Protocol must not abridge, diminish or otherwise weaken the Biological Weapons Convention. We must wonder, though, when we are asked to consider provisions that would constrict the potential scope of the prohibitions in the Convention by fixing the meaning of terms in the Convention itself.*** The United States have not been alone in insisting that the provisions in the Protocol do not amend the prohibitions in the Convention and that view has been incorporated into the composite Protocol text. As there are no definitions in the composite Protocol text that fix the meaning of terms in the Convention itself, the United States is once again expressing concern about negotiating positions -- not about what is actually in the composite Protocol. Whilst the United States is undoubtedly correct in emphasising the fact that the Protocol does not amend the basic prohibitions and obligations in the Convention, this emphasis is simply not relevant to the rejection of the composite Protocol by the United States.

74. The statement goes on to say that ***we have long held that seeing the actual effects of a biological weapons program would be one of the less ambiguous issues in evaluating potential threat. While less ambiguous, such efforts are not unambiguous. It therefore seems to us that being able to examine such effects, including disease outbreaks, was an important capability for any Protocol regime. Attempts to restrict such investigations do not seem in the best interests of all parties.*** The statement is in direct contradiction to the proposals made by the United States in two of its working papers in February 2001 -- for example in WP.441, the United States proposed that in the Annex on Field Investigations the investigation team should be restricted to an ability to observe visually areas ***external to buildings or other structures*** [US proposed addition in bold] and in WP.442 in relation to sampling and analysis, the United States proposed restricting the right of the investigation team to analyse samples taken during a field investigation by language that ***the receiving State Party shall have the right to take measures...such as requiring the use of specific tests or analysis using locally available resources or, if necessary, refuse a sample.*** These proposals clearly restrict such investigations -- and according to the US statement of 25 July 2001, *do not seem in the best interests of all parties.*

I. Conclusion

75. The statement says that ***we agree with the assessment that it was time to move from the rolling text to a composite text in an effort to formulate compromise solutions to outstanding issues. We have analyzed those efforts from both a political and substantive perspective...*** The composite Protocol text is entirely based on the rolling text with compromises adopted where necessary to address the remaining differences in views.

Consequently, one has to ask why the United States had to wait until the eleventh hour to make the statement of 25 July 2001 as there is **nothing new** in the composite Protocol other than solutions to the remaining differences -- and those solutions have taken into consideration the views of **all** States Parties, including the United States, expressed to the Chairman during the nine months of informal bilateral consultations that led up to the issuing of the composite Protocol text. It is illogical for the United States in its statement of 25 July 2001 to reject the approach to the Protocol after almost seven years of negotiation during which the United States has spoken strongly in favour of the approach to the Protocol both at the Special Conference and subsequently at the Fourth Review Conference and elsewhere as already noted in paragraphs 22 to 24 above.

76. The statement continues to say that *the United States does believe that many, if not all, of the difficulties I have outlined today are things the participants in this room have heard, repeatedly, over the last six years. These are not new ideas the United States has just now formulated -- they are long-standing concerns.* This is simply not borne out by the record -- the United States working papers have been much fewer in number than many other participants in the Ad Hoc Group negotiations, and those working papers have not addressed the difficulties outlined in the statement of 25 July 2001. Indeed, as noted in paragraph 15 above, it is well known that the United States has frequently requested a weakening of the provisions of the Protocol because of concerns about their implications for the United States. Indeed, if the United States had had serious substantive difficulties with the provisions in the Protocol -- which have not changed substantively since the Ad Hoc Group transitioned in July 1997 to consideration of a rolling text as **all** the elements in that rolling text are still in the Chairman's composite Protocol text -- one would have expected the United States to have submitted working papers explaining why it has these difficulties and proposing solutions to overcome them.

77. The statement then says that *because the difficulties with this text are both serious and, in many cases inherent in the very approach used in the text, more drafting and modification of this text would, in our view, still not yield a result we could accept.* This is yet another illogical conclusion as the work of the Ad Hoc Group throughout has been -- and rightly so -- firmly focussed on the mandate agreed by the States Parties including the United States at the Special Conference. This mandate contains the elements proposed by Don Mahley of the United States at the Special Conference for the mandate (see paragraph 22 above) and endorsed by the United States in the statement made to the Fourth Review Conference (see paragraph 23) and in the working paper No 296 cosponsored with 28 other States Parties in July 1998 (see paragraph 24).

78. The statement continues to say that *some have argued both publicly and privately that not having this Protocol will weaken the BWC itself. The United States categorically rejects that supposition.* Whilst the United States may make such a categorical assertion, this does not change the reality of the situation. In rejecting the Protocol the United States is disregarding over a decade of effort around the world that has aimed at strengthening the prevention of biological weapons. Although the BTWC totally prohibits biological weapons, it is the weakest of all the prohibition regimes and for that reason, biological weapons today present the greatest danger of all weapons of mass destruction. The United States exhortations throughout the statement of 25 July 2001 and elsewhere that it takes the challenge of biological weapons seriously and the importance it ascribes to the global ban on biological weapons established by the BTWC have a hollow ring indeed when it is realized that the United States has rejected the opportunity to significantly strengthen the effectiveness of that Convention through the Protocol. The United States is showing to the

world that it is not prepared to explore every avenue or to go the last mile to strengthen the regime prohibiting biological weapons. The net effect and reality is that if the United States rejection of the Protocol results in the failure of the Ad Hoc Group to complete the negotiations of the Protocol this will **undoubtedly** weaken the Biological and Toxin Weapons Convention as it will send the unequivocal message that the States Parties do not care enough about the weaknesses of the Convention to strengthen it through the Protocol.

79. The statement then concludes by saying that ***the United States will, therefore, work hard to improve -- not lessen -- global efforts to counter both the BW threat and the potential impact such weapons could have on civilization. And we would reply to those who cry that not having this Protocol weakens the global norm against BW that there is no reason for that kind of reaction to occur.*** The United States is failing to recognize what the consequences of its rejection of the composite Protocol at the eleventh hour will mean. The opportunities to strengthen the regimes against weapons of mass destruction do not occur annually but rather in decades. The negotiation of the Protocol has been the only ongoing arms control negotiation over the past six years and to reject this now means that it will be unlikely that there will be any further opportunity to strengthen the biological weapons regime for another decade. It is all very well for the United States to argue that it will work hard to improve global efforts -- however, the fact is that the rejection of the Protocol by the United States will poison the water and any new proposals, no matter how meritable, associated with the United States will be dead on arrival and will be rejected by the international community. The United States in rejecting the Protocol at the eleventh hour has effectively isolated itself from the multilateral community -- and any multilateral efforts by the United States in the foreseeable future will be regarded with much suspicion as the rejection signals yet again that the United States is more concerned about itself than about the global community.

Analysis

80. The United States statement of 25 July 2001 makes a number of assertions and exhortations which do not stand up to detailed analysis. It is evident that the United States in rejecting the Protocol is making a **huge mistake** -- and more to the point -- one that is based on illogical assessments. It is primarily evaluating the Protocol against some national standards -- and not against the Protocol mandate that the United States not only agreed to but was instrumental in drawing up having proposed many of the elements. The fact of the matter is that the end result of the rejection of the Protocol by the United States is that it will not be trusted by other States Parties as a state that lives up to its earlier promises and official statements at the highest level. The damage that this mistrust will cause to international security when it involves the world's leading power will be incalculable.

81. At the same time as, or shortly after, the United States statement of 25 July 2001, a number of statements have been made by very senior members of the United States administration which indicate there are misunderstandings and misappreciation of the composite Protocol by the administration. For example, the Deputy Secretary of Defense Paul Wolfowitz on 28 July 2001 said⁶⁹ that *"What is at issue is a 210-page document which I doubt any other head of state has even bothered reading which in the name of making the treaty more enforceable would actually allow Libyan and Iraqi inspectors to start poking around American pharmaceutical companies. It's ill conceived, and that's the problem."*

⁶⁹Deputy Secretary Wolfowitz interview with CNN, 28 July 2001, 1730.

and the United States Ambassador to the United Kingdom said⁷⁰ *"After long analysis, we have concluded that the protocol will not do the intended job. We believe, in fact, that it will make the world a more dangerous place. People would labour under a false sense of security: our defences would be exposed.... Many nations believe that the proposed protocol is badly flawed, but argue that a bad agreement is better than nothing at all."* These statements are incorrect -- there is no provision in the Protocol for national inspectors to carry out visits and there is nothing to suggest that the Protocol would make the world a more dangerous place -- rather the rejection of the Protocol would make the world a more dangerous place. As to many nations agreeing that the proposed protocol is badly flawed, this is not borne out by the statements on 23, 24 and 25 July 2001 by over 50 of the approximately 55 States Parties engaged in the negotiations of the Protocol. Whilst many States Parties would have liked to see differences in the compromises adopted in the composite Protocol, these States Parties realise, and rightly so, that the composite Protocol text has been skillfully crafted so as to provide a Protocol that will achieve the objectives of the mandate -- the effective strengthening and improved implementation of the Convention.

82. The nub of the United States rejection of the Protocol appears to be encapsulated in the State Department briefing⁷¹ of 25 July 2001 which said *"The protocol, which was proposed, adds nothing new to our verification capabilities. And it was the unanimous view in the United States government that there were significant risks to US national interests and that is why we could not support the protocol. Implementation of such a protocol would have caused problems...for our biological weapons defense programmes, would have risked intellectual property problems for our pharmaceutical and biotech industries and risked the loss of integrity and utility to our very rigorous multilateral export control regimes."* These assertions, as demonstrated above in this Evaluation Paper are all incorrect.

83. First, the assertion that the composite Protocol adds nothing new to our verification capabilities is simply not true. The Protocol requires mandatory declarations of the activities and facilities of greatest relevance to the Convention, the declaration follow-up procedures through the randomly-selected transparency visits promote the consistency of declarations and address any ambiguity, uncertainty, anomaly or omission through the tiered declaration clarification procedures, have measures to ensure the submission of declarations and also provide for field and facility investigations of compliance concerns. To assert that these add nothing new to our verification capabilities fails completely to recognize that there are no such provisions under the Convention alone which is completely lacking in any verification capabilities.

84. Second, the assertion that the Protocol would cause problems for the biological weapons defense programs of the United States is at complete variance with the assessments of all the other States Parties engaged in the negotiations who also have biological weapons defence programmes. Nor is there anything in the Protocol that requires the provision of any national security information in the declarations of biological weapons defence programmes. Indeed, Article 13 explicitly states that *Nothing in this Protocol shall be interpreted as impeding the right of any State Party to conduct research into, develop, produce, acquire, transfer or use means of protection against bacteriological (biological) and toxin weapons, for purposes not prohibited under the Convention.* This is identical language to that in the

⁷⁰William S Farish, Ambassador, Embassy of the United States of America, London, *The US and the world*, Letter to the Editor, *The Independent*, 28 July 2001.

⁷¹ Philip T. Reeker, U.S. Department of State, Daily Press Briefing, Wednesday, 25 July 2001. Available at <http://www.state.gov/r/pa/prs/dpb/2001/index.cfm?docid=4288>

Chemical Weapons Convention -- and the United States has not protested that that Convention would cause problems for its chemical weapons defence programmes.

85. Third, the assertion that the Protocol would have risked intellectual property problems for the US pharmaceutical and biotech industries ignores the fact that the Protocol contains stronger provisions for the protection of commercial proprietary information than did the Chemical Weapons Convention when that emerged from its negotiations in Geneva. Furthermore, there are no requirements for the provision of commercial proprietary information in any of the mandatory declarations. Furthermore, this assertion ignores the fact that under the Chemical Weapons Convention these same pharmaceutical and biotech industries may be subjected to inspections -- recognising that there is a continuum between chemical and biological agents and that toxins are covered, rightly, by both Conventions. The frequency of visits to such facilities in the United States is necessarily seven or less per year -- a minute fraction of the numbers of inspections carried out by regulatory agencies in the United States.

86. Fourth, the assertion that the Protocol would have risked the loss of integrity and utility to the US very rigorous multilateral export control regimes is simply not true. Indeed, the Protocol includes provisions in Article 7 that require *each State Party...to review and, if necessary, amend or establish any legislation, regulatory or administrative provisions to regulate the transfer of agents, toxins, equipment and technologies relevant to Article III of the Convention....* There are thus clear benefits -- both in countering proliferation and limiting the availability of materials and equipment for bioterrorism -- for the international community and the United States from this requirement for **all** States Parties to **establish** the regulation of such transfers.

Conclusions

87. Conclusions can be drawn from this evaluation of the United States statement of 25 July 2001 for both the United States and for all the other States Parties engaged in the Ad Hoc Group negotiations of the Protocol.

Conclusions for the United States

88. This evaluation has shown that the rejection of the Chairman's composite Protocol text and of the approach adopted in the Protocol by the United States is based on illogical assessments. The rejection is a **huge mistake**. The United States is urged to **reconsider** its position. It should especially take note of the comparison between what the Protocol regime will provide and what is available under the Convention alone.

89. In making this comparison, it is important to remember that the BTWC with its basic prohibitions and obligations has been **in force** for over 25 years and that the Protocol is to strengthen the effectiveness and improve the implementation of the Convention. The Protocol makes **no** changes to the basic prohibitions and obligations. The Protocol regime is supplementary and additional to the Convention. It does not undermine the prohibitions in Article I, but rather the Protocol safeguards Article I -- a long standing objective of the United States and many other States Parties.

90. A tabulation of the principal measures in the regime, compared with the procedures of the BTWC alone, clearly brings out the **significant benefits** from the Protocol which are **not available from the Convention alone**.

BTWC and its Protocol Regime	BTWC alone
Mandatory declarations -- measures to ensure submission	Confidence-Building Measures -- patchy and variable (if made)
Declaration follow-up procedures -- analysis of declarations -- randomly-selected transparency visits	None -- none -- none
Declaration clarification procedures -- clarification visits	None -- none
Voluntary assistance visits	None
Non-compliance concerns -- Consultations >>> Investigations	Art V consultation procedures Art VI complaint to UN Security Council
Field investigation	Possible UN Secretary-General investigation if invited by State Party concerned
Facility investigation	None
Transfer procedures	None
Assistance -- provisions detailed	Art VII assistance if UN Security Council decides a Party has been exposed to danger
International Cooperation -- elaborated in detail -- Cooperation Committee	Art X provisions -- no implementation procedures -- none
Organization -- CoSP, ExC & Technical Secretariat	None
National implementation -- Penal legislation required -- National Authority	Art IV National implementation -- No penal legislation requirement -- None

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

Principal benefits from the BTWC and its Protocol Regime compared to the BTWC alone.

BTWC and its Protocol Regime	BTWC alone
Measures to increase transparency and build confidence	Suspicious not addressed -- and over time reduce international confidence in the regime
Procedures to address non-compliance concerns	Art V consultations (no teeth) Art VI complaints to UN SC (not used)

International cooperation and assistance provisions enhancing infrastructure, transparency and building confidence	No action despite aspirations at successive Review Conferences
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92. The above comparisons show that the Protocol regime brings significant and worthwhile benefits to the United States and to **all** States Parties -- both developed and developing -- over and above the provisions to uphold the basic prohibitions and obligations of the BTWC, which remain unchanged. In addition, the Protocol will be effective, over time, in building confidence between States Parties that other States Parties are indeed in compliance with the Convention, thereby reinforcing the norm that work on biological weapons, whether directed against humans, animals or plants, is totally prohibited. The international cooperation and assistance provisions address a genuine need to counter outbreaks of disease and through improvements in infrastructure in areas such as biosafety and good manufacturing practice to meet internationally accepted standards bring benefits for health and safety as well as for prosperity. The Protocol as a whole thus brings improved health, safety, security and prosperity to all States Parties.

93. In addition the United States needs to reevaluate the gains and costs of signing the Composite Protocol compared to the costs and gains of rejecting the Protocol. In Evaluation Paper No 21⁷², a tabular comparison was provided of the gains and costs of signing compared to rejecting the composite Protocol text which is reproduced below for ease of reference. Overall conclusions are then drawn about the net value of signing the Composite Protocol -- and the net costs of rejecting it. Before examining the detail in the Table, it is important to recognise that there are areas where the interests of States Parties will remain the same whether or not they sign the Protocol. First, there is no change to the total prohibition as all States Parties to the Convention have already committed themselves to this undertaking. Second, there is no change in the intelligence priorities of any State Party for collection and analysis of potential threats. The main impact of signing the Protocol will be to make available to all States Parties, an additional body of information which can be used nationally in guiding the employment of national intelligence resources.

94. The overall conclusions that emerge from examination of the Table are the following:

- a. In signing and ratifying the composite Protocol text, States Parties will be seen to have **taken all possible practicable** multilateral steps to **obstruct** the proliferation of biological weapons.
- b. Signing and ratifying the composite Protocol text will **reduce** the risk of biological weapons proliferation and use. Rejection of the Protocol would send the opposite signal and it can be argued that the risk of biological weapons proliferation and use will be increased.
- c. Signing and ratifying the composite Protocol text will bring significant benefits to the infrastructure of States Parties in the areas of combatting infectious disease, biosafety and good manufacturing practice and thereby **benefits in health, safety and prosperity** for all States Parties, both developing and developed.

⁷²Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims, *The Composite Protocol Text: An Evaluation of the Costs and Benefits to States Parties*, University of Bradford, Department of Peace Studies, Evaluation Paper No 21, July 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

d. Overall, signing and ratifying the composite Protocol text **enhances** the security of all States Parties. It provides a **net gain** to collective security. Rejection of the Protocol misses this opportunity and decreases collective security.

95. In evaluating the composite Protocol text, it has to be remembered that the BTWC with its basic prohibitions and obligations has been **in force** for over 25 years and that the Protocol is to strengthen the effectiveness and improve the implementation of the Convention. It is evident from the analysis of the principal costs and benefits on an Article by Article basis of the composite Protocol that the Protocol will bring significant and worthwhile benefits to **all** States Parties -- both developed and developing. Furthermore, a consideration in a wider perspective shows that signing and ratifying the composite Protocol will bring a **net gain** for all States Parties. The Protocol will be effective, over time, in increasing transparency and building confidence between States Parties that other States Parties are indeed in compliance with the Convention, thereby reinforcing the norm that work on biological weapons, whether directed against humans, animals or plants, is totally prohibited. The Protocol will bring improved health, safety, security and prosperity to **all** States Parties.

The Costs and Gains from the Composite Protocol

SIGN COMPOSITE PROTOCOL	REJECT COMPOSITE PROTOCOL
GAINS	COSTS
<p>Reinforcement of international norm that biological weapons totally prohibited</p> <p>Deterrence of would-be violator significantly enhanced</p> <p>Increased transparency of activities in other States through mandatory declarations</p> <p>Anomalies, uncertainties and omissions in declarations can be addressed</p> <p>Mechanisms established to address non-compliance concerns through investigations</p> <p>All States required to enact penal legislation -- reduced possibility of bioterrorism</p> <p>All States required to establish transfer controls -- reduced possibility of agent/equipment acquisition by States or by non States actors</p>	<p>No reinforcement of international norm that biological weapons totally prohibited</p> <p>Risk that norm is weakened as State Party seen to have declined opportunity to strengthen</p> <p>Perception that biological weapons unimportant</p> <p>Would-be violator encouraged by continued international inaction on BTWC</p> <p>Confidence-building measure submissions if the State decides to submit</p> <p>No means of addressing anomalies, uncertainties and omissions</p> <p>Continuing ineffective/unused provisions (take concerns to UN Security Council)</p> <p>No requirement for penal legislation</p> <p>No requirement for establishment of transfer controls</p>
COSTS	GAINS
<p>Costs of Protocol implementation -- Modest.</p> <p>International organization half size of OPCW</p> <p>National authority could be colocated with that for CWC</p> <p>-- additional data collection modest compared to that for existing CBMs</p>	<p>Avoidance of cost of Protocol implementation</p>
OVERALL CONCLUSIONS	OVERALL CONCLUSIONS
<p>State Party has taken all possible multilateral steps to prevent biological weapons -- collective security augmented by strengthening effectiveness of the BTWC</p> <p>Reduced risk of BW proliferation</p> <p>Reduced risk of BW use</p> <p>State Party security enhanced</p>	<p>State Party lack of interest in multilateral world community -- sets State Party at variance with collective security objectives of the rest of the world</p> <p>Continuing (increased?) BW proliferation risk</p> <p>Continuing (increased?) risk of BW use</p> <p>Opportunity missed</p>

Conclusions for the Other States Parties engaged in the Protocol negotiations

96. The other States Parties should recognize that the product of their work over a decade of negotiations embodied in the Chairman's composite Protocol text would **indeed** provide an **effective strengthening** of the Biological and Toxin Weapons Convention.⁷³ They should also recognize that the basis for the rejection of the Protocol by the United States at the eleventh hour is **unsound** as it is based on misperceptions and illogical assessments. Consequently, the rejection by the United States should **not** be seen as providing any basis for the other States Parties to abandon the negotiations for a Protocol to strengthen the effectiveness and improve the implementation of the Convention. Rather, it should be recognized that the United States has regrettably during the past decade failed to see the benefit of multilateral agreements in many areas ranging from the Convention on Biological Diversity which has 181 States Parties⁷⁴ but not yet the United States, the International Criminal Court, the Kyoto Protocol and the Land Mines Convention. The Protocol to the BTWC is but the latest in what is becoming an ever longer list of international treaties on which the United States has chosen to go a different way.

97. Whilst it would undoubtedly have been preferable to achieve a Protocol with the support of the United States, there is **no** basis to simply abandon efforts because of the United States statement rejecting the Protocol. It has to be remembered that there is nothing new in the Ad Hoc Group hearing an individual State Party express its views about the Protocol and the negotiations. The United States statement of 25 July 2001 is but one statement in a series of statements that have been made during this session of the Ad Hoc Group. What is **more** to the point is that there is clearly a majority view expressed by over 50 States Parties -- including the other two co-Depositaries -- out of the 55 or so States Parties engaged in the Ad Hoc Group that the Chairman's composite Protocol text should form the basis for the political decisions to adopt the Protocol by the Fifth Review Conference later this year. Given that the United States statement of 25 July 2001 is so clearly based on illogical assessments, the other States Parties should not give it any more credibility than it deserves. This Evaluation Paper has shown that it consists of many assertions which do not stand up to detailed consideration.

98. Consequently, a single US statement, especially one that is so flawed and based on such illogical assessments, is no cause for the other States Parties to abandon their political commitment to strengthening the BTWC through the composite Protocol. It is evident to all those that have closely followed the negotiations in Geneva that the composite Protocol is both a **worthy** and **well worthwhile** product which is supported by all -- or all but one -- delegations.

99. It has always been evident during the negotiations that the United States were not showing leadership but rather participating reluctantly with objectives that are unrealistic in the global world of the 21st century. Although following the US statement of 25 July 2001 there have been some suggestions that the composite Protocol text should be put onto the shelf for the time being, one has to ask the question -- **for what purpose?** It is very clear that if at some future date -- a couple of months, a couple of years or a decade or more hence -- the United States indicates that it is ready to give further consideration to a Protocol to

⁷³Graham S. Pearson, Malcolm R. Dando & Nicholas A. Sims, *The Composite Protocol Text: An Effective Strengthening of the Biological and Toxin Weapons Convention*, University of Bradford, Department of Peace Studies, Evaluation Paper No 20, April 2001. Available at <http://www.brad.ac.uk/acad/sbtwc>

⁷⁴Parties to the Convention on Biological Diversity, as of 9 August 2001. Available at <http://www.biodiv.org/world/parties.asp?lg=0>

strengthen the Convention, it would be unrealistic not to expect the other States Parties at that time not to want to reexamine the provisions in the composite Protocol text and there will then be extensive unravelling of what is **an excellent package** of measures in the Chairman's composite text resulting in a **net loss** of the benefits for health, safety, security and prosperity that are available from the Protocol. The United States statement that it intends to develop other ideas and different approaches to effectively strengthen the Convention ignores the reality that by having withdrawn from the Protocol at the eleventh hour, the United States has effectively killed any favourable multilateral consideration of any ideas, however meritable, that it may bring forward at some subsequent date. Any new proposals, no matter how meritable, associated with the United States will be dead on arrival and will be rejected by the international community. There is simply no prospect of any early strengthening of the biological weapons multilateral prohibition regime by any means other than the Protocol in the foreseeable future.

100. The other States Parties should go ahead **now** to take the Chairman's composite Protocol text to the United Nations General Assembly and start to bring the Protocol into force. After all, given that 65 States Parties have to ratify to achieve entry into force and it took the Chemical Weapons Convention, which had the same requirement for 65 States Parties to ratify, four years to enter into force, the Protocol is likely to require at least four years to reach this point. This provides time for both the States Parties and for the Provisional Technical Secretariat to work on persuading the United States that the Protocol is indeed in the best interests of both the United States and international collective security.

101. The Ad Hoc Group has essentially three options:

A. To abandon the decade of effort to strengthen the BTWC through a Protocol and send the message to the world that, even though the United States statement is based on unsound arguments, the other States Parties do not have the political will and conviction to help themselves make a significant step forward by adopting the Protocol to strengthen the norm against biological weapons. In other words, despite a history of the United States choosing to go a different way in other recent multilateral fora, the other States Parties judge that the absence of the United States from this negotiation makes it too difficult to reach agreement and that the States Parties simply do not care enough about the danger from biological weapons.

B. To suspend negotiations for a period -- which might be two months, two years or a decade. Realistically, however, this option will result in unravelling of the Protocol text and will achieve the same overall result of abandoning the effort to strengthen the BTWC through a Protocol.

C. To recognize that in the Chairman's composite Protocol text, the Ad Hoc Group has indeed successfully crafted a Protocol that will effectively strengthen the effectiveness and improve the implementation of the Convention and to take this forward through a resolution to the General Assembly co-sponsored by all those States Parties who spoke on 23, 24 and 25 July 2001 in favour of the early completion of the Protocol.

The latter option provides real benefits for all States Parties -- both developing and developed -- and would enhance global security. In parallel, the United States should be encouraged to reconsider its position and join the Protocol -- but, if the United States does not, then the rest

of the world should not miss the opportunity that the Protocol provides for a safer, more secure world.

102. It has long been recognized that there is a window of opportunity **now** for the completion and adoption of the Protocol to the BTWC. Although the United States regrettably is failing to see the benefits of the Protocol for the United States or for global security, the other States Parties should have the courage of their convictions and take the Chairman's composite Protocol text forward. History will show that in so doing the other States Parties have taken a significant step forward to make the world a safer more secure place for all mankind.