103D CONGRESS
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SENATE

REPORT
103–390

U.S. CAPABILITY TO MONITOR COMPLIANCE WITH THE CHEMICAL WEAPONS CONVENTION

REPORT

OF THE

SELECT COMMITTEE ON INTELLIGENCE UNITED STATES SENATE

together with

ADDITIONAL VIEWS

SEPTEMBER 30 (legislative day, SEPTEMBER 12), 1994.—Ordered to be printed

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Mr. DECONCINI, from the Select Committee on Intelligence, submitted the following

REPORT

INTRODUCTION

A. Background

On September 3, 1992, after some twenty-five years of negotiations, members of the Conference on Disarmament in Geneva concluded the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction—more commonly known as the Chemical Weapons Convention, or CWC. This convention was endorsed by the United Nations on November 30, 1992, and was opened for signature in Paris on January 13, 1993. The United States and 129 other countries signed the CWC in that month, and a total of 157 countries have signed it to date.

The conclusion and signing of the CWC were achieved during the administration of President George Bush. On November 23, 1993, President Clinton endorsed the Convention and formally submitted it to the Senate for its advice and consent to ratification. The delay in submitting the CWC to the Senate was consistent with the intent of the drafters, who built into the Convention a minimum 2-year delay between its opening for signature and its entry into force. This period is to be used by States Parties to prepare for implementation of the verification regime and to pass implementing legislation to facilitate that regime and criminalize violations of the Convention. It is also being used by the Preparatory Commission in the Hague to prepare for initial implementation and to reach agreement on many technical provisions that were left to it by the Conference on Disarmament. The CWC will enter into force 180 days after the 65th instrument of ratification is deposited at The Hague. To date, 14 countries have ratified the Convention, another

34 have indicated that they will ratify it by January, and 29 others are actively pursuing ratification. Additional countries are reportedly waiting for the United States to ratify the Convention before they take action.

The CWC is accompanied by an Annex on Chemicals, a lengthy Annex on Implementation and Verification (known as the "Verification Annex"), an Annex on the Protection of Confidential Information, a Resolution Establishing the Preparatory Commission for the Organization for the Prohibition of Chemical Weapons (OPCW) and a Text on the Establishment of a Preparatory Commission. Article XVII of the CWC states that "[t]he Annexes form an integral part of this Convention. Any reference to this Convention includes the Annexes." The Annexes, as well as the Convention itself, are thus before the Senate for advice and consent to ratification. The Preparatory Commission documents, by contrast, were adopted by the Conference on Disarmament and do not require ratification.

B. The scope of the Committee's effort

The Senate Foreign Relations Committee has formal responsibility for reviewing all treaties before they are acted upon by the full Senate. The Senate Select Committee on Intelligence has prepared this Report, in both classified and public versions, to support the ratification process by providing both the Foreign Relations Committee and the Senate as a whole the Intelligence Committee's assessment of the monitoring and counterintelligence issues raised by this Convention.

This Report is the culmination of the Committee's work over many years of monitoring the progress of the CWC negotiations. In its annual Intelligence Authorization Acts, the Committee has also addressed and supported CWC monitoring capabilities, as well as the broader U.S. capability to monitor other countries' development and use of chemical weapons. The Committee has been particularly supportive of interagency coordination and cooperation to develop new monitoring technologies and to generate effective U.S. policy and action to halt the proliferation of all weapons of mass destruction.

In preparation of Senate consideration of the CWC, Committee staff held two on-the-record staff briefings (and several less formal sessions) and reviewed numerous documents, including a National Intelligence Estimate on U.S. monitoring capabilities, written statements from several Executive branch agencies, and the Executive branch responses to over 130 questions for the record. Committee staff also visited U.S. Government and industry facilities and attended conferences to gain a more detailed knowledge of how information bearing upon other countries' compliance with CWC can be obtained, especially through on-site inspections.

On May 17, 1994, the Committee held a closed hearing on the CWC, focused on issues relating to monitoring and verification of compliance, the implications of any successful evasion of CWC provisions by States Parties, CWC implementation, and the Convention's counterintelligence and security implications. Testimony was taken at this hearing from the Honorable John D. Holum, Director of the U.S. Arms Control and Disarmament Agency; Ambassador

Stephen J. Ledogar, U.S. Representative to the Conference on Disarmament; Major General David McIlvoy, Deputy 1–5 (Director for Strategic Plans and Policy) for International Negotiations, the Joint Staff; Mr. John Lauder, Special Assistant to the Director of Central Intelligence for Arms Control; Major General John Landry, USA, National Intelligence Officer for General Purpose Forces; Dr. Theodore M. Prociv, Deputy Assistant to the Secretary of Defense (Atomic Energy) (Chemical/Biological Matters); and the Honorable William A. Reinsch, Under Secretary of Commerce for Export Administration. A written statement was submitted by Brigadier General Gregory G. Govan, USA, Director of the Department of Defense On-Site Inspection Agency.

C. The nature of this Report

Part I of this Report is structural and legal, dealing with the CWC text and its implications for verification and possible compliance disputes. Part II examines U.S. capabilities to monitor the various CWC provisions, and some cheating scenarios that might, in fact, be feasible. Parts III and IV deal with two elements of uncertainty: improvements in U.S. monitoring and verification that could be achieved through new technological developments or U.S. cooperation with the OPCW in on-site inspections; and CWC provisions that are subject to technical elaboration by the Preparatory Commission of the OPCW or to bilateral U.S.-Russian agreement. Part V deals with U.S. preparedness to implement the verification provisions of the CWC (primarily the on-site inspection regime) and the legal and security challenges posed by international inspection not only of U.S. Government sites, but also of both defense and non-defense industry.

Throughout the Committee's efforts, experts in the U.S. Government have been generous with their time and insight. In addition, the Henry L. Stimson Center and other organizations have made available to the staff of several Senate committees an impressive array of experts from the U.S. Government, the Provisional Technical Secretariat of the OPCW, U.S. industry and the academic community. These have all made a valuable contribution to the Committee's work.

The Report of the Committee draws heavily on three works that deserve recognition. The Intelligence Community's National Intelligence Estimate was a straightforward analysis of the strengths and limitations of U.S. monitoring capabilities. The U.S. Arms Control and Disarmament Agency (ACDA), in accordance with Section 37 of the Arms Control and Disarmament Act, submitted an interagency report of March 18, 1994, on "Chemical Weapons Convention Verification," a similarly straightforward analysis that did not quarrel with the findings of the Intelligence Community. ACDA also attached to that report a "Chemical Weapons Convention Verifiability Assessment" of January 18, 1994, prepared for it by the EAI Corporation and written by people with many years of relevant experience in ACDA, the Department of the Army, academe and U.S. industry. These studies and various internal Executive branch documents were of invaluable assistance to the Committee in understanding complex CWC issues and evaluating the promise and risk inherent in ratification of the Convention.

I. IMPLICATIONS OF THE CWC TEXT FOR MONITORING AND VERIFICATION

Like most recent arms control agreements, the Chemical Weapons Convention (CWC) is lengthy and complex. Counting its three annexes, the document runs to 186 pages. A novel complication is that, pursuant to Articles XV and XXII, the 48-page Convention text may be amended only by consensus and is not subject to reservations. (The CWC's annexes will be subject to both amendments and technical changes, as well as to reservations not "incompatible with its object and purpose.")

A. Basic provisions

Most of the obligations incurred by States Parties to the CWC are listed in Article I of the Convention, entitled General Obligations:

> 1. Each State Party to this Convention undertakes never under any circumstances:
>
> (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
>
> (b) To use chemical weapons;
>
> (c) To engage in any military preparations to use chemical weapons; and
>
> (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.
>
> 2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.
>
> 3. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party, in accordance with the provisions of this Convention.
>
> 4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.
>
> 5. Each State Party undertakes not to use riot control agents as a method of warfare.
>
> Aside from these general obligations, each State Party undertakes:
>
> to submit declarations regarding its chemical weapons and CW-related facilities (pursuant to Article III);
>
> to permit on-site inspection of its chemical weapons, CW facilities (including destruction facilities) and suspect facilities (pursuant to paragraphs 3–5 of Article IV and various provisions in Articles V and IX);
>
> to enact legislation penalizing "any activity prohibited to a State Party under this Convention" (pursuant to paragraph 1 of Article VII); and

beginning three years after the CWC enters into force, not to transfer to, or receive from, a non-State Party any "Schedule 2" chemicals, i.e., those that could be used as a chemical weapons or a precursor thereto, and that have industrial uses, but are not produced "in large commercial quantities" for such purposes (pursuant to paragraph 31 of Part VII of the Verification Annex).

States Parties are obligated to obtain end-use certificates from non-States Parties to which Schedule 2 chemicals are transferred during the first three years after the CWC enters into force (pursuant to paragraph 32 of Part VII of the Verification Annex). They must also obtain end-use certificates from non-States Parties to which they transfer "Schedule 3" chemicals, i.e., those chemical weapons or precursors that *are* produced "in large commercial quantities for purposes not prohibited under" the CWC (pursuant to paragraph 26 of Part VIII of the Verification Annex).

Most of the CWC's length is devoted to specifying the many declarations and on-site inspections that make up the Convention's verification system. The strengths and weaknesses of that system are discussed in Part II of this Report. An Intelligence Community summary of the CWC is attached to this Report at Appendix A.

B. CWC provisions that could lead to verification or compliance problems

Considering its great length and complexity, the CWC has relatively few provisions that have been cited as poorly worded or likely to result in compliance disputes. The Committee pursued several issues of treaty interpretation in its hearing and in questions for the record, and the answers provided by the Executive branch were generally reassuring. The Committee's questions for the record and the Executive branch's answers on these and some other points are attached to this Report at Appendix B.

The one-ton limit

Paragraph 1 of Article VI of the CWC permits States Parties "to develop, produce, otherwise acquire, retain, transfer and use toxic chemicals and their precursors for purposes not prohibited under this Convention." Paragraph 2(c) of Part VI of the CWC Verification Annex permits retention of up to 1 metric ton of Schedule 1 chemicals (e.g., nerve agents or blister agents) for such purposes.

Two important consequences flow from this approach. On the one hand, any exception to a complete ban on toxic chemicals makes the monitoring and verification challenge more difficult. On the other hand, as the Committee noted during its hearing on the CWC, such a low limit as 1 metric ton—combined with the complete ban, in paragraph 1 of Article I, on actual chemical weapons—virtually rules out using one's stockpile of toxic chemicals to deter the use of chemical weapons by threatening retaliation in kind.

There was very likely no alternative to permitting some retention of toxic chemicals, given the need to continue developing protective measures and the widespread use of some toxic chemicals for

peaceful, industrial purposes. As noted below, the United States insisted upon the exemption for law enforcement purposes. The Executive branch took this position with the understanding, moreover, that a verification price would have to be paid.

The concern expressed by members of the Committee that the 1-ton limit rules out a deterrent threat to retaliate in kind was readily acknowledged by the Executive branch. Testimony from both civilian and military officials, as well as answers to Committee questions for the record, emphasized that the U.S. Government originally favored retaining 500 metric tons of toxic agent under the CWC (at least until all CW-capable countries joined the Convention), as agreed with Russia in the Bilateral Destruction Agreement of 1990 (Article VI, paragraphs 1–2). President Bush decided in 1991, however, to rely upon conventional military power to deter the use of chemical weapons. This decision was based partly upon the conclusion that no agreement would be possible on any other basis, and partly on the Desert Storm experience against Iraq, in which unspecified threats of harsher military action appeared to have deterred Iraq from using its chemical munitions.

The law enforcement exemption

An issue that may warrant concern relates to the inclusion of "[l]aw enforcement including domestic riot control purposes" among the "Purposes Not Prohibited Under this Convention" in paragraph 9 of Article II of the CWC. As noted earlier, paragraph 1 of Article VI permits a State Party "to develop, produce, otherwise acquire, retain, transfer and use toxic chemicals and their precursors for purposes not prohibited under this Convention." The basic problem is that while "riot control agents" are defined in the CWC, other "law enforcement purposes" are not defined. This issue was raised in a "Chemical Weapons Convention Verifiability Assessment" issued by the EAI Corporation in January, 1994, under contract to the U.S. Arms Control and Disarmament Agency. Professor Matthew Meselson of Harvard University, one of the co-authors of the EAI assessment, has also raised this issue in public statements.

The definition of "Chemical Weapons" in paragraph 1 of Article II of the CWC includes "[t]oxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes." The "types and quantities" clause is clearly intended to be a safeguard, by subjecting a State Party claiming this exemption to some obligation to demonstrate that its holdings of toxic chemicals are indeed for law enforcement purposes and not merely an excuse for holding CW agents or munitions. The Executive branch response to a question for the record from the Committee cites this clause and states: "The Administration believes that the CWC adequately addresses this issue." The Committee believes, however, that the lack of a definition of "law enforcement purposes" could in fact lead to compliance disputes.

In response to further questions for the record, the Executive branch explained that "[t]he use of lethal chemicals against humans in the conduct of an internal armed conflict such as a civil war would not constitute a law enforcement or other permitted purpose, and therefore would not be permissable [sic] under the

CWC." Also not permitted would be such use "to conduct an armed conflict that might arise in the course of a peacekeeping operation." The use of lethal chemicals against humans to combat a terrorist incident such as a hostage situation—and, therefore, the production and storage of such chemicals for such use—would appear to be permissible, however, subject to the "types and quantities" clause.

The Executive branch summarized the relevant negotiating record as follows:

> During the CWC negotiations, the only law enforcement use of lethal chemicals that was discussed was for capital punishment.
>
> If the Convention prohibited the use of toxic chemicals for law enforcement, it would ban the use of chemicals for capital punishment, i.e., gas chambers and lethal injection. The U.S. chose not to permit such a provision in the Convention.

Because law enforcement needs for toxic chemicals "could vary given a state's size and domestic security needs," no quantitative limit or standard was set regarding such needs (although there is a total limit on each state's stockpile of 1 metric ton for all purposes not prohibited by the Convention). As a result, the Executive branch reports that "[a]ssessing whether the types and quantities of toxic chemicals are consistent with law enforcement purposes will be decided on a case-by-case basis."

The use of riot control agents

Paragraph 5 of Article I of the CWC states: "Each State Party undertakes not to use riot control agents as a method of warfare." This provision prompted questions as to whether the CWC would bar the use of such agents (sometimes known as "RCAs") in such circumstances as peacekeeping operations, counterterrorist operations, defensive military use, to control rioting prisoners of war, to counter the use of civilians as screens in an armed attack, in missions to rescue downed aircrews and passengers or escaping prisoners, or to protect convoys outside immediate combat areas from such hazards as riots, terrorists or paramilitary units. The Vice Chairman of the Committee raised several of these questions in December, 1993, and the Committee asked follow-up questions for the record in May, 1994.

The Executive branch conducted a review of the impact of the CWC on Executive order 11850, which governs the use of riot control agents, the results of which were communicated to the Senate in June, 1994. That review concluded that since "[t]he CWC applies only to the use of RCAs in international or internal armed conflict," it does not bar their use in "normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counterterrorist and hostage rescue operations, and noncombatant rescue operations conducted outside such conflicts." The Executive branch further concluded that using riot control agents "solely against noncombatants for law enforcement, riot control, or other noncombat purposes" was permissible even in an armed conflict, and hence that its use against rioting prisoners or to protect

convoys would also be permitted, so long as this occurred outside of immediate combat areas.

The Executive branch response to the Committee's questions for the record went on to state, however:

> The CWC does prohibit the use of RCAs solely against combatants. In addition, according to the current international understanding, the CWC . . . also precludes the use of RCAs even for humanitarian purposes in situations where combatants and noncombatants are intermingled, such as the recue [sic] of downed air crews, passengers and escaping prisoners and situations where civilians are being used to mask or screen attacks. However, were the international understanding of this issue to change, the U.S. would not consider itself bound by this position.

The Executive branch intends to issue a new Executive order on the use of riot control agents once the Senate gives its advice and consent to ratification of the CWC. The Department of Defense will also explore "non-chemical, non-lethal alternatives to RCAs for use in situations where combatants and noncombatants are intermingled."

The possible impact of the CWC (and the U.S. interpretation of it) on U.S. military options involving the use of riot control agents is beyond the purview of the Select Committee on Intelligence. The Committee believes, however, that if the CWC is ratified, a new Executive order is indeed needed, to minimize the risk of American use of riot control agents in ways that would raise compliance questions. Given the importance of determining whether combatants are involved in a given case, one particularly difficult situation may be future peacekeeping operations in which there are incidents with armed groups with varying levels of military organization.

The "schedules" of chemicals

The drafters of the CWC faced a daunting challenge in determining what toxic agents and precursor chemicals to limit and how to verify compliance with such limits. While some chemical weapons use agents that have no known peaceful uses, many toxic agents—and even more precursors—have industrial uses as well. Some are routinely manufactured in large quantities. Worst of all, new toxic agents and/or chemical production processes could well be devised in the future. Indeed, many modern "binary" chemical weapons are based upon selecting two relatively stable and non-toxic chemicals that can be stored separately until the last minute—or, in binary munitions, until the weapon is fired. The drafters had the task, moreover, of designing a verification scheme that would provide both broad scope and, as necessary, access to detailed information, while still minimizing both the burden on industry and the risk of disclosing either national secrets or confidential business information such as proprietary chemical processes or marketing data.

The solution that was reached was to divide the chemicals and facilities of interest into four classes:

> Schedule 1—chemical weapons and similar agents (including nerve gases and blister agents) or final stage precursors with

"little or no use for purposes not prohibited under this Convention;" [1]

Schedule 2—other chemical weapons or precursors "not produced in large commercial quantities for purposes not prohibited under this Convention;" [2]

Schedule 3—other chemical weapons (including phosgene and hydrogen cyanide) or precursors that "may be produced in large commercial quantities for purposes not prohibited under this Convention;" [3]

Other chemical production—plant sites that produce over 200 metric tons per year of "unscheduled discrete organic chemicals," or other comprise one or more plants that produce over 30 metric tons per year of such a chemical "containing the elements phosphorus, sulfur or fluorine." [4]

To cope with the risk that new toxic agents or precursors could be developed in the future, the CWC's Annex on Chemicals can be changed by consensus or by a two-thirds vote of the Conference of States Parties. Data declarations on "other chemical production facilities" may even enable the OPCW to notice any major increased production of a chemical that could have CW applications. But inspections of Schedule 3 and "other chemical production" facilities and of non-declared areas of Schedule 2 facilities, as well as challenge inspections, are all subject to limitations on chemical sampling that explicitly or implicitly enable the host country to bar sampling for non-scheduled chemicals.[5]

In all likelihood, therefore, the OPCW will *not* have its attention drawn to new chemical weapons or precursors by virtue of its on-site inspections. Rather, it will have to rely upon open scientific inquiry and either declarations or concerns submitted by States Parties. This is true despite the Executive branch's assurance to the Committee that "work is ongoing to identify rugged, portable equipment that can be used to detect non-scheduled, highly toxic chemicals during challenge inspections."

The EAI Corporation verifiability assessment submitted to ACDA argues that the CWC covers *too many* chemical plants and that therefore, in order not to burden industry unduly:

> * * * the minimum reporting and production limits have been set well above what constitutes a militarily significant amount of agent, removing potentially dangerous sites from the possibility of routine surveillance and its deterrent effect.

The Executive branch confirms "that the CWC does not intend, nor pretend, to be able to provide an exact material accountancy of every relevant chemical. This would be not only impossible, but an unbearable burden on industry." Rather, the CWC's approach is merely "to deter potential violators by making it more difficult to cheat without possible detection." This is done by subjecting facilities to more intense routine scrutiny if they produce agents with fewer non-prohibited uses:

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[1] Annex on Chemicals, paragraph A.1.
[2] Annex on Chemicals, paragraph A.2.
[3] Annex on Chemicals, paragraph A.3.
[4] Verification Annex, Part IX, paragraph A.1.
[5] Article XV, paragraphs 4 and 5; Article VIII, paragraph 18.

> This provision removes [from routine verification] mere research or pilot production in a batch process, and it also reduces or eliminates the verification burden on small business. Because of the small annual amounts of precursor chemicals produced by these facilities, any resulting undeclared production of such chemicals was judged to be inconsequential to the object and purpose of the CWC.

The above judgment is open to debate. Thus, the Deputy Director for International Negotiation, J–5 (Joint Staff Strategic Plans and Policy), testified to the Committee that while some uses of CW would require thousands of tons of agent, others might require only hundreds of tons or less; and even a ton of agent could be effective as a weapon of terror. In addition, experts have noted that even a small rate of covert production could yield a militarily significant stockpile over a period of years.

The CWC reflects the U.S. Government's attempt to strike a balance between the competing national interests of verification and both defense and industrial security. The EAI Corporation study does not offer an alternative approach. With 157 signatures on the CWC, moreover, the question before the Senate is not whether this is the best possible agreement, but whether it is sufficiently better than no Convention at all. The Select Committee on Intelligence is not in a position to second-guess the whole scheme of scheduled chemicals and their associated levels of verification. The Committee does recommend, however, that the Executive branch work to foster OPCW procedures that would permit on-site inspectors to identify and record the presence of non-scheduled chemicals, while taking extraordinary steps, if necessary, to protect any business information thereby acquired.

Compliance, verification and enforcement

The Executive branch's answer (earlier in this Report) to the Committee's question regarding the effect on verification of the 1-ton exception makes use of an argument that appears in many official statements on the CWC: that, while U.S. monitoring and verification capabilities may not suffice to demonstrate that a State Party is violating the CWC, those capabilities plus international inspections may well suffice to raise international suspicions regarding that country's conduct. At that point, it is up to the State Party in question to demonstrate, to the satisfaction of the other States Parties to the CWC, that it is, in fact, in compliance. Thus, Article IX includes several provisions requiring a questioned State Party to provide information that would resolve another country's doubts. And if a challenge inspection is mounted, paragraph 42 of Part X of the Verification Annex comes into play:

> If the inspected State Party provides less than full access to places, activities, or information, it shall be under the obligation to make every reasonable effort to provide alternative means to clarify the possible non-compliance concern that generated the challenge inspection.

The Executive branch argues further that "the CWC provisions will increase not only the risk of detection but also the political price of non-compliance, thus serving to deter potential CWC violators." The Director of ACDA noted in testimony to the Committee

that the CWC will establish in international law a world-wide norm against chemical weapons that does not exist today. Moreover, if a country should fail to join the CWC or should later withdraw from it, States Parties may not transfer to it either Schedule 1 or (three years after the CWC enters into force) Schedule 2 chemicals.[6]

The comfort that one takes from this line of reasoning will depend in part upon one's confidence that the United States, the OPCW and/or the international community will act upon its suspicions, in the absence of definitive proof that a State Party is violating the CWC. Recent international efforts to ensure North Korea's compliance with the Non-Proliferation Treaty offer cause for both hope and concern in this regard. The Committee urges the Executive branch to adhere to an arms control verification policy that does not require agencies to prove a country's non-compliance before issues are raised (either bilaterally or in such international fora as the OPCW or the United Nations) and appropriate unilateral actions are taken.

Article VII, paragraph 1 of the CWC requires each State Party to enact legislation penalizing violations of the Convention. Implementing legislation that would create a criminal statue for the United States is pending before Congress. The Committee asked the Executive branch whether the CWC provides "for personal responsibility and accountability on the part of senior government officials or other citizens of a State Party if they should violate the CWC and not be prosecuted by that Stat." The Executive branch replied that "individuals may also be subject to prosecution by other States, e.g., if the individuals' actions amount to war crimes." It also confirmed that States Parties are responsible for prohibiting all actions on their territory or under their jurisdiction, including the actions of non-citizens or of terrorist groups. "It is understood that for a State Party to 'prohibit' activities it must enact *and enforce* legislation governing the conduct of private individuals and non-government entities."[7]

The CWC and the Australia group

Paragraph 2 of Article XI of the CWC requires States Parties not to "maintain among themselves any restrictions, including those in any international agreements, incompatible with the obligations undertaken under this Convention, which would restrict or impede trade * * *" or the "use this Convention as grounds for applying any measures other than those provided for, or permitted, under this Convention." It also requires States Parties "to review their existing national regulations in the field of trade in chemicals in order to render them consistent with the object and purpose of this Convention." This prompted the Committee to ask the Executive branch for clarification regarding the effect of the CWC upon export restrictions imposed by the Australia Group.

The Executive branch's response notes that:

> Australia Group members * * * in August 1992 * * * committed to review their control measures with a view of

[6] Verification Annex, Part VI, paragraph 3, and Part VII, paragraph 31.
[7] Emphasis added.

removing them for CWC States Parties in full compliance with their obligations under the Convention.

It adds, however, that Group members successfully resisted pressures for CWC language that would require the lifting or relaxation of export controls:

> The various provisions preserve the right of States Parties to maintain or impose export controls for foreign policy or national security reasons.

The response continues as follows:

> The United States and other Australia Group members, while remaining committed to the August 1992 statement and full implementation of Article XI of the CWC, have also made clear their view that the export control and nonproliferation measures they have undertaken as AG members are fully consistent with all of the requirements of the CWC and, indeed, help AG members to fulfill their obligations under Article I of the CWC to "never under any circumstances * * * assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party * * *.

Despite the eminent logic of the Executive branch's reasoning, the Committee believes it likely that some States Parties to the CWC will assert contrary interpretations of the Convention. The Committee trust that the United States and other Australian Group members will prepare to counter such arguments both publicly and in international fora.

One or more positive note, the CWC requires States Parties to control transfers to or from states that are not parties to the Convention. The Committee understands, that, as a result, a number of CWC signatories have enacted CWC Schedule-based export controls.

C. The CWC amendment process

Paragraph 3 of Article XV provides as follows:

> 3. Amendments shall enbter into force for all States Parties 30 days after deposit of the instruments of ratification or acceptance by all the States Parties referred to under subparagraph (b) below:
>
> (a) When adopted by the Amendment Conference by a positive vote of a majority of all States Parties with no State Party casting a negative vote; and
>
> (b) Ratified or accepted by all those States Parties casting a positive vote at the Amendment Conference.

Pursuant to this provision, it would be possible for an amendment to be adopted without being submitted to the Senate for advice and consent—or, indeed, over the objection of the Senate. This could happen if the United States were to abstain, or simply not to vote, when the matter was decided in the Amendment Conference. (By contrast, a U.S. vote in favor of an amendment would

make U.S. ratification a precondition to entry into force—and a U.S. vote against an amendment would defeat the proposal before any States Parties could ratify it.)

In response to a question submitted by the Vice Chairman of the Committee, the Executive branch provided the following assurance:

> On this point, it should be stressed that the United States will present at all Amendment Conferences and will cast its vote, either positive or negative, on all proposed amendments made at such conferences, thus ensuring the opportunity for the Senate to consider any amendment approved by the Amendment Conference.

The Executive branch's assurance would indeed remove any concern regarding the constitutional role of the Senate, but even a written answer to a Senator's question is not binding. The Committee recommends that the Senate consider making its consent to ratification of the CWC conditioned upon a binding obligation upon the President to abide by this commitment.

II. U.S. MONITORING CAPABILITIES

The Committee's assessments and conclusions regarding monitoring and verification of the CWC draw upon the first two sources cited in the Introduction to the Report: the National Intelligence Estimate (NIE) on U.S. monitoring capabilities and the U.S. Arms Control and Disarmament Agency (ACDA) report on "Chemical Weapons Convention Verification." During its hearing on the CWC and in subsequent written questions for the record, the Committee explored in detail the findings and conclusions of these reports.

The Committee reviewed a number of studies conducted by outside organizations, including the January 18, 1994, "Chemical Weapons Convention Verifiability Assessment" prepared by former ACDA assistant director Manfred Eimer and five others (for the EAI Corporation) under contract to ACDA and the August, 1991, unclassified final draft of a report on "Noncompliance Scenarios: Means By Which Parties to the Chemical Weapons Convention Might Cheat," prepared by former ACDA assistant director Kathleen C. Bailey and six others under contract to the Defense Nuclear Agency. The Committee has also consulted with a broad spectrum of experts on arms control verification and chemical weapons.

A. Overall monitoring evaluations

The NIE makes clear that monitoring the CWC will be an extremely difficult task and that the Intelligence Community has poor confidence in its ability to monitor the most stressing aspects of the CWC. The Intelligence Community expects little improvement in this situation, moreover, for the next several years. The NIE cites three reasons for its pessimism:

(a) the large number sites worldwide involved in chemical production subject to the Convention;

(b) most of the products and production facilities subject to the agreement are dual-use, with legitimate commercial applications; and

(c) most activity prohibited by the CWC is easily concealed or disguised.

The pessimism of the Intelligence Community's evaluation of U.S. monitoring capabilities has moderated slightly in the year since the NIE was issued. At the Committee's hearing on the CWC, the chief of the DCI's Arms Control Intelligence Staff testified:

> U.S. negotiators have balanced effective verification provisions with protection of constitutional rights, sensitive information, and proprietary concerns. They have also reconciled the interests of the dozens of states that participated in the Convention's negotiation. The Intelligence Community is proud of its participation throughout this process. Despite the Community's cautions about our degree of confidence for each of the monitoring tasks, we see the Convention as a net plus in our efforts to assess and warn of potential chemical warfare threats to the United States. Over the years, the accumulation of data provided by the OPCW will assist in our monitoring task.

The Committee understands, moreover, that the work of the Preparatory Commission in The Hague has evidenced a seriousness of purpose that was not assured when the CWC was completed.

With certain qualifications, the Executive branch has confirmed the monitoring concerns raised by the NIE. According to ACDA's report on CWC verification:

> The verification provisions of the CWC, in combination with national intelligence means * * * are insufficient to detect, with a high degree of confidence, all activities prohibited under the Convention. The larger and more systematic the violations, the higher the probability that, over time, evidence of these would surface. The * * * existence of a program with the scope and size of the former Soviet Union's would be difficult to completely conceal under the Convention.

Given the size of the former Soviet Union's CW stockpile, at least 40,000 metric tons of agent and possibly much more, the reference to it in the ACDA report is not overly reassuring. It is true, however, that most illegal CW production scenarios—with the possible exception of those that posit the use of non-scheduled chemicals—involve annual production rates no greater than 100–1,000 metric tons.

The Committee does not believe that a single, all-encompassing judgment can be made regarding the verifiability of the CWC or U.S. capability to monitor compliance with the Convention. In some areas our confidence will be significantly higher than others. Like the Executive branch, however, the Committee largely accepts the Intelligence Community's pessimistic assessment of U.S. capability to detect and identify a sophisticated and determined violation of the Convention, especially on a small scale.

The Committee also believes that if such cheating occurs, U.S. and international monitoring will, at times, be sufficient to raise well-founded questions. In order to maintain the effectiveness of the Convention and to deter potential violators, the United States and the OPCW must pursue such questions vigorously, even to the point of seeking international sanctions if a State Party does not

adhere to the principle set forth in paragraph 11 of Article IX of the CWC, that "the inspected State Party shall have the right and the obligation to make every reasonable effort to demonstrate its compliance with this Convention." U.S. verification policy and investment in monitoring technologies should start from the principle that monitoring can contribute to effective international action even if it cannot conclusively demonstrate a country's violation of the Convention.

B. Verifying data declaration and monitoring CW destruction and conversion requirements

Verifying data declarations

Pursuant to Articles III and VI of the CWC, States Parties must declare all chemical weapons and associated production and storage facilities, plus facilities that produce more than a set amount of chemicals that could be used as precursors for chemical weapons, even if those facilities are legitimate commercial entities. Such declarations will be made initially and annually. Parties are then subject to routine inspections to monitor the destruction of chemical agents, the closure or conversion of CW facilities, and the operation of listed commercial facilities.

Assessing the veracity of this large volume of declared information will be a significant task. The U.S. Intelligence Community already possesses a data base against which to compare these declarations, but its knowledge is clearly incomplete. Assessing available data declarations is an easier monitoring task than detecting prohibited activity. Where discrepancies suggest deception, however, assessing data declarations would involve the same challenges as detecting prohibited activity. Such challenges are likely, as only a few countries have acknowledged their chemical weapons programs.

Although the data declarations will provide considerable information on routine activities at declared sites, OPCW information is likely to be provided to the U.S. Government. If the data declarations are, in fact, informative, and if routine inspections of declared facilities are effective, the OPCW's verification of compliance regarding declared facilities may thus come in exceed U.S. monitoring or verification capabilities. Since routine activities at declared sites are not the most likely locations for CWC violations, however, the Intelligence Community feels that the contribution of the data declaration regime of the CWC to U.S. monitoring capabilities will not be significant.

ACDA's report on CWC verification states that data declarations:

> * * * can provide a benchmark for assessing compliance with the CWC. If declarations are forthcoming, reasonably accurate and verified through on-site inspection, they can contribute to confidence building in [sic] a State Party's compliance with the CWC.

But the ACDA report also predicts:

> The U.S. will be able to verify the veracity of declarations with a degree of confidence which will vary with the

State Party, the specific type of declaration, the effectiveness of the inspection regime and the availability of parallel intelligence.

Routine inspections will be the primary means by which the OPCW monitors the accuracy of data declarations. Declared facilities will also be subject to short-notice challenge inspections, in which the inspectors must be taken to the site within 24 hours of their arrival at the point of entry to the country, pursuant to paragraph 15 of Part X of the Verification Annex. Challenge inspections of declared facilities will also take longer and involve more monitoring activities than will routine inspections. ACDA believes that inspections will give it high confidence of compliance with the CWC in terms of declared stocks and facilities. ACDA has warned Congress that routine CWC inspections are not designed to detect noncompliant, undeclared activity. But the U.S. Intelligence Community believes that, overall, the provisions of the CWC contribute significantly to confirming the information provided about declared munitions, bulk storage, and production sites.

Verifying destruction and conversion

Destruction of declared CW facilities and agent stocks will be subject to substantial inspection. Pursuant to Part IV (A) of the Verification Annex, declared stocks will be inspected, marked and sealed during an initial inventory; subjected to "systematic verification" through inspections and on-site instruments during storage; and then monitored, sampled and analyzed (to provide a detailed record of the nature and purity of each country's CW agents) at the time of destruction.

Intelligence analysts have greater confidence in U.S. ability to monitor compliance with these provisions than they have regarding the rest of the CWC, assuming the OPCW successfully exercises the inspection rights that the CWC gives it. The covert diversion of declared CW materials would appear to be one of the more difficult cheating scenarios to implement without getting caught, and ACDA's report to CWC verification does not even include this among its eight major violation scenarios.

Intelligence analysts consider the monitoring of continued compliance at a converted production facility to be more like detecting prohibited activity at any other declared chemical plant. Part V, paragraph 71(a) of the CWC Verification Annex does require, however, that a converted plant not be used "[f]or any activity involving production, processing, or consumption of Schedule 1 chemical or a Schedule 2 chemical." If all traces of any such chemicals from pre-CWC years are removed in the conversion process, then the task for future inspectors should be easier, as any indication of a Schedule 1 or Schedule 2 chemical will suffice to suggest a violation. Paragraph 71(b) of the Verification Annex strongly suggests, moreover, that no production of highly toxic chemicals should be permitted at a converted CW facility, and paragraph 15 of Article V of the Convention permits the use of "monitoring with on-site instruments" in addition to on-site inspections. On the whole, therefore, monitoring of compliance at a converted CW production facility should be more effective than at a sophisticated non-CW chemical plant.

The strategic import of the destruction of declared CW stocks and destruction or conversion of declared CW facilities is dependent both on the amount that will be destroyed and on what might be hidden away or covertly produced at a later date. While the Executive branch is reasonably confident of its ability to monitor compliance with CWC provisions relating to the destruction or conversion of declared CW stocks and facilities, it was unable to provide a specific estimate of the amount of destruction that would likely take place. Instead, an answer to a question for the record from the Committee expresses the expectation "that States Parties will destroy that which they declare" and that "[t]he CWC verification provisions will provide impetus for accurate declarations in that they increase the risk of detection of clandestine activities."

According to the Executive branch, some countries have shown signs of an intent to comply with the CWC and destroy existing CW stockpiles. Some countries probably hope to complete destruction of their CW stocks before the CWC enters into force; some of those may intend then to submit false initial data declarations, so as to never admit to having a CW program. Several countries that probably have chemical weapons continue to deny any such program, and until the CWC enters into force, there is no requirement for them to declare CW programs.

Yet the risk of violations in which some existing CW stocks are not declared remains a real one. Thus, the lack of forthrightness in Russia's recent Wyoming MOU Phase II data declarations and the accusations of dissident scientists suggest that Russia may be trying to maintain an offensive CW capability. A few other countries also appear to be considering this option.

Of course, any CW destruction will have some useful results, ranging from lowered risk of environmental disasters to—in the case of Russia's 40,000 metric tons of declared CW agent—elimination of what is believed to be by far the world's largest CW stockpile. Dissident Russian scientists allege rampant (and possibly environmentally dangerous) destruction of CW agent that was in excess of the officially declared stockpile in the Russian data declaration under Phase I of the Wyoming MOU. If these charges are accurate, then while Russia may have submitted false data on its CW stockpile, it may not intend to keep its undeclared CW agent.

The fact remains that the stockpiling of undeclared CW agent or munitions is probably the easiest significant CWC violation to undertake. For a country that has already produced this materiel, stockpiling requires little more than a storage area. Especially if the country is willing to forego stringent physical security, such storage could be in a small, nondescript facility.

The Committee believes it likely that some countries that ratify the CWC will seek to retain an offensive chemical weapons capability. While it is unlikely that they would do so by diverting declared CW stocks, the covert stockpiling of undeclared agent or munitions could well occur. Monitoring such illicit behavior will be the single most challenging task for the CWC verification regime and U.S. monitor.

C. Detecting prohibited production or acquisition of CW agents or precursors

As noted earlier, ACDA's CWC verification report asserts that "the existence of a program *with the scope and size of the former Soviet Union's* would be difficult to completely conceal under the Convention."[8] If this is true, however, so is the Intelligence Community's concern that "challenge inspections at undeclared sites can be thwarted * * * by using the delays and managed access rules allowed by the Convention." In general, the Intelligence Community has poor confidence in its ability to detect prohibited activity.

ACDA's report on CWC verification attempts to bound this problem and to place it in a larger context. Although it largely repeats the Intelligence Community's conclusion of poor confidence in U.S. ability to detect most instances of cheating, the ACDA report states only that "definitive evidence" can be denied to challenge inspectors, and only by "abusing" the managed access rules. The ACDA report also adds a conclusion from the EAI Corporation study, that:

> * * * when a CW program is taken in its entirety (e.g., research, development, testing, production, weaponization, storage, military training, etc.), the probability of detecting noncompliant activity is significantly enhanced.

Nonetheless, there are ample means by which a determined country could cheat. The NIE on U.S. monitoring capabilities and the ACDA report on CWC verification identify several means by which a determined country could develop and produce covert CW agents in violation of the CWC. These are listed in the classified version of this Report. For all these cheating scenarios, the Executive branch projects a poor capability of detection if the cheating is done in a sophisticated manner, especially if it is on a small scale.

For a country that envisions merely fighting its neighbors, moreover, rather than World War III and the conquest of Western Europe, as small an amount of CW agent as 100 tons or less may be a sufficient stockpile.[9] used in a terrorist mode, even a ton of agent could have politically or militarily significant consequences. Thus, a country that wanted to develop an illegal CW capability need not undertake a program on a scale anything like that of the United States or the former Soviet Union.

The detection challenge for U.S. intelligence

The classified version of this Report discusses the likely effectiveness of different types of intelligence collection for CWC monitoring. The value of even the occasional CW-related intelligence success lies in the possibility that policy makers could use information relating to an apparent CWC violation to pursue effective action (e.g., bilateral or multilateral consultations or protests, a challenge inspection, or unilateral or concerted countermeasures). Such action might not only prevent or halt a CWC violation, but also send a message to other States Parties that violators *can* be caught.

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[8] Emphasis added.
[9] See Bailey, et al., pp. 28–32.

Even if a potential CWC violator did not think that detection was likely, proof that there was a real risk of being caught could weigh heavily in a State party's calculations. Thus, the inability to rely upon intelligence collection for *consistent* detection of CWC violations does not mean that one should stop trying; a few publicized successes could increase significantly the CWC's effectiveness. Admittedly, this assumes the ability to use classified information in an appropriate forum (or else to find less sensitive information for such use) and both the ability and the will to press the case to a successful conclusion; those assumptions are discussed later in this part of the Report.

The Executive branch has hopes that the CWC's entry into force, by establishing a world-wide norm against the development or possession of chemical weapons, will increase the willingness of people to expose their own country's CW prorams. Press revelations over the last two years regarding CW activities in Russia and Bulgaria give some reason to hope that foreign media will, indeed, be more willing to embarrass their governments when such programs constitute a violation of a ratified international convention.

We cannot expect that the existence of a new international norm will suffice to embolden the media in those countries where a free press is not permitted. Open sources are therefore unlikely to expose a rogue state's CW program unless there are foreign connections in democratic countries (e.g., exporters or shippers of suspect materiel) that may be made public. But some countries with possible CW programs do have sufficient freedom of the press that some public revelations might actually occur.

D. The role of on-site inspections

Routine and challenge inspections of declared or undeclared R&D, production or storage facilities will play a major role in CWC verification, even if their contribution to compliance monitoring is limited by restrictions on sharing information with States Parties. As noted above, however, both the Intelligence Community and ACDA have warned that a determined violator of the Convention could use the timelines and managed access rules to prevent international inspectors from demonstrating its CWC violations. The study of noncompliance scenarios by Kathleen Bailey, et al., adds the possibility that clever chemists could fool the inspectors by diluting the tell-tale chemicals, masking them with other chemicals that would produce larger returns in gas chromatography analysis, or converting them to less suspicious substances during a washing procedure. Such scenarios often assume that the target State Party knows what chemical analysis protocols will be used by the inspectors, but it is not clear that States Parties will not have access to that information. Finally, as discussed in part I of this Report, even incriminating evidence could be explained away as the result of permitted production of scheduled chemicals

Two significant (and related) arguments have been adduced to buttress the case that inspections will still make a major contribution. The first is that inspectors will know when something fishy is going on at a site, even if they cannot pin it down definitively. The second is that host country efforts to avoid detection will, in

themselves, be both evident and sufficient grounds for comment in the inspectors' report to the OPCW.

This blending of hope and pessimism is evident in the conclusions regarding inspections in the EAI Corporation study:

> Routine inspection procedures are adequate for the verification of declarations and other reporting to a high degree. Routine inspection procedures are not designed to detect a violator determined to circumvent the CWC, but *may provide a means to identify potential indicators of cheating.*
>
> Challenge inspection provisions *may provide a means of identifying probable non-compliance,* but restrictions on facility access and sampling and analysis limit the potential degree of verification.[10]

Lieutenant Colonel Karen M. Jansen, a U.S. Army Chemical Corps officer and former UNSCOM inspection team leader in Iraq, has written similarly on the lessons of the Iraq inspections for CWC verification:

> Some question the merits of challenge inspections and whether the OPCW could ever realistically expect to catch a cheater. UNSCOM proved that a cheater can be caught. Iraq tried to hide calutrons and all other aspects of a uranium enrichment and nuclear weapons design program. Its attempt to retain a number of SCUD missile warheads, launchers, and chemical weapons, evidenced by their exclusion in the initial declaration, was uncovered. UNSCOM also caught Iraq attempting to retain chemical bomb-casing manufacturing machinery by keeping it in a sugar factory in Mosul.
>
> Admittedly, the truly no-notice nature of the UNSCOM inspections contributed to this success. But the key element was gaining access to the site. It is not true that inspections must be no-notice whatsoever in order to have a chance of detecting a violation. And it is certainly not true that a verification exercise in which the inspectee intentionally reveals nothing is likely to be futile. Iraq had months to clean up the many sites that were obvious candidates for inspection. But a trained inspector will not have difficulty knowing when something is not quite right. We could determine which facilities had legitimate enterprises and which had significant evidence to indicate a coverup or a situation for which the explanations given were not entirely convincing. Suspicious activities can be readily discerned, and it is then up to the inspected state party to demonstrate its professed compliance.
>
> Furthermore, I would argue that it is shortsighted to demand a "smoking gun" as a measure of success in catching a cheater. The inspections centering on the Iraqi biological warfare program did not uncover the smoking gun many had expected or hoped for—that of weaponized biological agents. The facts in evidence and an assessment of the

[10] Emphasis added.

findings did provide, however, a picture of where the Iraqis were in this effort, along with a reasonable determination of where they were headed. At the very least, identifying a situation for which there remains serious doubt will focus the OPCW's monitoring effort and thwart a would-be proliferator's efforts.

Finally, there is the assertion that the OPCW will not get anywhere with a non-cooperative party. Iraq undoubtedly has earned that distinction. Ingeniously deceptive, Iraq put obstacles in the road every step of the way. In spite of those obstacles, however, the objectives of the inspections and the aims of the Security Council resolution were accomplished.[11]

By contrast, the NIE on U.S. monitoring capabilities reached a much more pessimistic conclusion regarding the lessons of the inspections in Iraq:

The continuing UN inspection activity in Iraq illustrates the capabilities—but also the limitations—inherent even in an intrusive inspection regime. * * * Beginning in mid-1991 and continuing to the present, UNSCOM teams have conducted on-site inspections (including many repeat visits to some sites) with no restrictions on taking photographs or samples, or on reviewing documents on site.

* * * Iraq has provided details on the construction and filling of various types of chemical munitions, agent production and testing activities, and precursors. Inspections have provided detailed information on CW facilities and on activities and capabilities at CW sites. * * *

Despite their successes, however, these inspections have clearly demonstrated that even intrusive inspections—far more intrusive than those provided for by the CWC—may be ineffective in uncovering CW-related activity that a country is determined to conceal * * *. We are unlikely to determine from further inspections an accurate accounting of the types and quantities of all CW agents and munitions produced or stockpiled by Iraq.

Intelligence analysts note that the U.N. inspections in Iraq represent the optimum condition an inspection team could hope to encounter. By comparison, the "managed access" provision of the CWC inspection regime, considerations for commercial and political sensitivities, and the heavy global workload of the OPCW after the CWC enters into force combine to limit significantly the utility of CWC inspections.

Clearly, the glass can be seen as half full or half empty. The UNSCOM inspections in Iraq may represent a high point not only in the ability to demand broad and instant access, but also in the extent and efficiency of U.S. support. On the other hand, they also represent a case in which the target country has been determined to resist effective inspection and has been constantly on notice of the need to hide its activities.

[11] Karen M. Jansen, "Disarming Iraq: Lessons for the Chemical Weapons Convention," in Brad Roberts, editor, "Ratifying the Chemical Weapons Convention" (Center for Strategic and International Studies, Washington; 1994), pp. 82–83.

CWC inspections will surely be more limited than UNSCOM inspections. But target countries may not all be as determined or sophisticated as Iraq in their cheating schemes; inspection equipment is likely to improve over the years; and even evidence of limited cheating may suffice to prompt international intervention. The Committee believes that, if the international inspectorate is determined, well trained, and well equipped, and if U.S. or other States Parties provide accurate and timely leads to the OPCW, there may well be some occasions in which on-site inspection will produce evidence of CWC violations. It will be vital, however, that the OPCW not lose sight of that objective.

The detailed issues of acceptance of information from States Parties, inspector training and equipment, and rules regarding the use of equipment during inspections are among the many matters left to the OPCW Preparatory Commission (and eventually to the Conference of States Parties) to decide. As the EAI Corporation study comments, "[o]pportunities for sampling and analysis under the CWC inspection provisions and the efficacy of the methods and laboratories * * * are critical factors in enhancing the degree of treaty verifiability." The varying progress in these areas is described in Part IV of this Report. Part III of this Report includes a discussion of U.S. technology development programs, some of which are intended to lead to improved equipment for use by on-site inspectors.

To the extent that CWC provisions and detailed OPCW rules give the inspected state the ability to frustrate an on-site inspection, this reflects largely the interplay of different U.S. interests noted at the beginning of this part of the Report. As the Executive branch commented in one answer for the record, "[t]he challenge inspection regime contained in the final agreement largely reflects the regime proposed by the U.S."

The Executive branch has been unwilling to predict that on-site inspection will result in even occasional discoveries of violations. Rather, it has emphasized that on-site inspection can deepen one's suspicion regarding the target country even in the absence of hard evidence of a violation:

> * * * the CWC does not intend, nor pretend, to be able to provide an exact material accountancy of every relevant chemical * * *. Instead, the verification regime is designed *to deter* potential violators by making it *more difficult* to cheat without possible detection.[12]
>
> The Administration believes it is unlikely that under any challenge inspection regime, a violator would *deliberately* allow a "smoking gun" to be found * * *. Nevertheless, challenge inspections will contribute significantly to our compliance judgments. The inspection team report will contain not only the factual findings about the compliance of the inspection but also an assessment of the degree and nature of access and cooperation granted * * *. A basic tenet of the CWC is that the burden of proof, i.e., the requirement, as well as the right, to make every effort to satisfy compliance concerns, rests with the inspected State

[12] Emphasis added.

Party. Its ability or inability to do so will facilitate compliance judgments by other States Parties to the Convention.[13]

It is difficult to judge whether inspectors' instincts and their sense of the level of inspected state cooperation will, in fact, translate into effective warnings to the OPCW in the absence of clear evidence of a violation of the Convention. The "nature and extent of cooperation" may prove to be a difficult criterion to quantify or use as the basis for meaningful conclusions. It is also hard to know whether OPCW officials will share such warnings with States Parties or write them off as alarmist reactions to difficult experiences. Lt. Col. Jansen makes the point that the OPCW will at least have the advantage, compared to the International Atomic Energy Agency, of having largely the single purpose of monitoring compliance.[14] Although the CWC calls on States Parties to promote chemical industry, the OPCW will not have any significant responsibility in that regard. As noted at the beginning of this part of the Report, the Committee considers it imperative that both the United States and the OPCW operate on the principle that international action need not depend upon having incontrovertible proof of a violation—for, by the time such proof is obtained, many lives could be lost.

E. Monitoring compliance with the ban on CW use

Article I of the CWC bans both the use of chemical weapons (paragraph 1(b)) and the use of riot control agents (or RCA's) as a method of warfare (paragraph 5). The provisions of the Verification Annex, Part IX, that govern investigations of alleged use of chemical weapons, or of riot control agents as a method of warfare, are not encumbered by the managed access rules that pertain to routine or challenge inspections. Thus, "[t]he inspection team shall have the right to collect samples of types, and in quantities it considers necessary" (paragraph 16); the OPCW is expected to field an inspection team within 24 hours of receiving a request (paragraph 12); the team may include international experts as well as members of the international inspectorate (paragraphs 7–8); and if a State not Party to the CWC is involved (either as the accused party or because the incident occurred on that state's territory), the OPCW "shall put its resources at the disposal of the Secretary-General of the United Nations" if so requested (paragraph 27).

The Executive branch does not have absolute confidence that the OPCW would be able to find evidence of CW use. Clearly, the speed and the thoroughness with which inspectors could obtain samples and information on the scene would affect the OPCW's ability to investigate allegations of CW use. If CW use should occur on territory effectively controlled by the aggrieved party, however, OPCW access should not be difficult to obtain. If the accused party should delay or block access to affected sites or individuals, that would, in itself, constitute a violation of the CWC pursuant to paragraph 7 of Article VII, as well as a strong suggestion that the accused party had something to hide.

[13] Emphasis in original.
[14] Roberts, p. 80.

The EAI Corporation study submitted by ACDA with its verification report is fairly optimistic in tone:

> The CWC provisions for investigation of [an] allegation of use are defined adequately to accomplish verification, if implementing procedures, including sampling and analysis, are applied in a timely fashion to provide the technical foundation for unambiguous findings.

The EAI Corporation study recommends that samples of each State Party's CW agents "be archived by the OPCW" for possible later comparison to samples from an investigation of use, and that the United States "provide the OPCW with the methods and data to assure high quality analytical capabilities are available for alleged use situations." The Executive branch reports that the OPCW will, in fact, maintain an archive of the characteristics of declared CW agents as they are destroyed. The Preparatory Commission decided against retaining samples of the chemical agents, for safety reasons. Judging from the record of UNSCOM inspections in Iraq, U.S. assistance to OPCW investigations of alleged CW use is likely to include both information and, if necessary, equipment. Some of the R&D programs discussed in Part III of this Report may well make a contribution to OPCW capabilities in this area.

U.S. intelligence has not given a specific monitoring confidence regarding this aspect of the CWC, but is optimistic that the difficulty of avoiding detection will induce States Parties not to violate it.

The Committee believes that OPCW investigators, if not blocked from gaining needed access to sites and affected persons, should be able to determine whether chemical weapons have been used in a particular case. The more difficult question is whether the OPCW and all States Parties, in a case of apparent CW use, will take effective enforcement action. While the case of the Iran-Iraq war does not give one great confidence in the courage of governments, the public outcry over the world's lack of action in that case was one factor that led to the signing of the CWC. There is cause for some hope, therefore, that if chemical weapons are again used, this time enforcement will follow.

F. The role of enforcement

The enforcement of arms control agreements serves two basic functions: it is essential to the correction of violations, be they inadvertent or intentional; and it can serve to deter potential violators, by establishing a real penalty for noncompliance. The penalty for noncompliance may be tangible or largely political, e.g., public exposure of the violator. But without some penalty, deterrence is minimal and enforcement can at best correct those violations that the international community happens to discover. Without the will to enforce an agreement in the face of violations, moreover, an agreement can gradually or precipitously lose its force.

The Executive branch asserts that the overall CWC verification regime and the possible penalties under the CWC "increase not only the risk of detection but also the political price of non-compliance, thus serving to deter potential CWC violators." This is seen

as a major benefit flowing from the CWC, as evidenced in the testimony of the Director of ACDA:

> So the CWC does what any good verification regime seeks to do—[to] detect significant violations to be sure—but *most importantly, to prevent violations through deterrence.* It adopts a global rule against any chemical weapons activity which we don't now have. It makes discovery of those programs more likely and *it makes the consequences of discovery more painful.* The declarations, inspections and sanctions together provide a web of detection and deterrence that will advance U.S. interests.[15]

The basic enforcement powers of the OPCW are set forth in Article XII of the Convention. Paragraph 2 permits the Conference of States Parties, on the recommendation of the Executive Council, to "restrict or suspend the State Party's rights and privileges under this Convention until it undertakes the necessary action to conform with its obligations under this Convention." Paragraph 3 allows the Conference to "recommend collective measures to States Parties in conformity with international law." And paragraph 4 permits the Conference to bring an issue to the attention of the United Nations General Assembly and the Security Council.

The principal "rights and privileges" under the CWC that could be restricted or suspended are voting rights, the right to request a challenge inspection, the right to receive information, and the right to have one's nationals serve as members of the Technical Secretariat. These rights are not insubstantial, but the prospective loss of them is unlikely to deter a State Party that truly believes it needs chemical weapons to protect its national interest. For such states, the collective measures that the OPCW or the United Nations might adopt are much more relevant. Judging from the cases of Iraq and North Korea, such measures could include political ostracism and economic sanctions.

Collective measures in defense of the CWC will likely require both firm OPCW leadership and strong support from the major powers. Specifically, it is hard to imagine any such measures being adopted unless the United States asserts itself to build the necessary consensus for such action. One major factor in the success of CWC enforcement will therefore be the criteria by which the Executive branch decides when the United States should press a particular compliance issue. If the U.S. Government should decide to require air-tight proof of a violation before pressing the matter in the OPCW Executive Council or other fora, then enforcement may often prove difficult to achieve.

Unlike the case in old-style U.S.-Soviet arms control agreements, however, a violator of the CWC may well be a country that is far less powerful than the former Soviet Union and lacks major patrons among the States Parties to the Convention. Especially in such circumstances, strong and effective enforcement measures may well be feasible. As Lt. Col. Jansen has noted, "[a] crisis shakes the international community out of its lethargy, grabs its

[15] Emphasis added.

attention, and galvanizes it into action."[16] And even crises like the Gulf War and the nuclear stand-off in North Korea, for all the dangers they pose, are less threatening to world stability and more amenable to collective action than were most crises during the Cold War.

There is much justification with regard to the CWC, therefore, for a policy of raising compliance issues as soon as there is a legitimate question and pressing for action whenever the State Party in question does not provide satisfactory access or explanations. There is also reason to hope that investment in monitoring and inspection capabilities will contribute to useful action by the world community.

The Committee believes that the deterrent effect of the CWC is extremely difficult to predict. Countries that are uncertain about the value of chemical weapons may well be both reassured by wide ratification of the CWC and loath to risk discovery of a CW program that they see as providing only marginal gain. Given the nature and secrecy of many of the states of greatest concern, however, the CWC may not deter those most committed to having an offensive CW capability, although it will likely be more effective in deterring the actual use of chemical weapons.

The Committee also believes that a strong U.S. commitment to the enforcement of the CWC will be essential to the effectiveness of the Convention. It may in fact be possible to achieve a measure of both enforcement and deterrence, but only if the United States is prepared to make compliance with the CWC a major element of its foreign policy stance toward each State Party to the Convention.

G. The Special Case of Russian compliance

On September 23, 1989, at Jackson Hole, Wyoming, the United States and the Soviet Union signed a Memorandum of Understanding (the "Wyoming MOU") in which they agreed to "conduct a bilateral verification experiment and data exchange related to the prohibition of chemical weapons." This agreement was to be carried out in two phases.[17] In Phase I, the sides agreed to "exchange general data on their chemical weapons capabilities and carry out a series of visits to relevant facilities." In Phase II, the sides agreed to "exchange detailed data and perform on-site inspections to verify the accuracy of those data." The overall intent of the Wyoming MOU was "to facilitate the process of negotiation, signature and ratification of a comprehensive, effectively verifiable and truly global convention on the prohibition and destruction of chemical weapons."

Pursuant to the Wyoming MOU, on June 1, 1990, at Washington, D.C., the United States and the Soviet Union signed an "Agreement on Destruction and Non-Production of Chemical Weapons and on Measures to Facilitate the Multilateral Convention on Banning Chemical Weapons" (known as the Bilateral Destruction Agreement, or BDA). In the BDA, the sides agreed:

> (a) to cooperate regarding methods and technologies for the safe and efficient destruction of chemical weapons;

[16] Karen M. Jansen, in Roberts, p. 82.
[17] Section I, paragraphs 1–4.

(b) not to produce chemical weapons;

(c) to reduce their chemical weapons stockpiles to equal, low levels;

(d) to cooperate in developing, testing, and carrying out appropriate inspection procedures; and

(e) to adopt practical measures to encourage all chemical weapons-capable states to become parties to the multilateral convention.[18]

When the Wyoming MOU and the BDA were signed, there was still a Soviet Union and there was little expectation of quick agreement on a CWC. To a degree, world events have passed these agreements by. To the extent, however, that Russia impedes the implementation of these agreements or submits questionable data declarations, the good faith of the country with the world's largest stock of chemical weapons must be questioned. U.S. policy and actions regarding Wyoming MOU and BDA implementation and compliance are also important, as they may be seen as a preview of CWC enforcement standards.

Data declarations under the Wyoming memoraudum of understanding

The Wyoming MOU calls for actions that are to occur in two phases:

> In Phase I, the two sides shall exchange general data on their chemical weapons capabilities and carry out a series of visits to relevant facilities. In Phase II, the two sides shall exchange detailed data and perform on-site inspections to verify the accuracy of those data.[19]

Phase I of the MOU appears to have been carried out more or less as planned. The Phase II data exchange, which should have occurred in the spring of 1992, did not take place until fully two years later, pursuant to implementing procedures that were agreed in Moscow on January 14, 1994. Russian foot-dragging on Phase II implementation was due to a variety of reasons relating to more than the Wyoming MOU data decisions. These included concerns over the cost of Phase II MOU inspections; dissatisfaction with conversion and destruction provisions in the BDA and the CWC; and a lack of interagency leadership or coordination in Moscow.

Russian foot-dragging on Phase II data declarations may also have been due to a realization that "on-site inspections to verify the accuracy of those data" could prove embarrassing. Major questions had been raised regarding the Phase I data that the Soviet Union provided. After the fall of the Soviet Union, moreover, Russian "whistleblowers" charged that the Soviet data were purposely misleading. While Executive branch personnel doubt that this was a major factor, dissident claims of secret CW destruction suggest a possible Russian effort to eliminate undeclared stocks before inspectors could find them.

As stated by the Department of State, the Phase II data provided by Russia continue to raise serious questions not only as to their accuracy, but also regarding Russia's commitment to abide by BDA

[18] Section I, paragraph 1.
[19] Section I, paragraph 2.

or CWC obligations. Information provided to the Committee on Russia's Wyoming MOU Phase I and Phase II data declarations suggests significant shortcomings in those declarations. Thus, in 1989, pursuant to its Phase I obligations, the Soviet Union declared an aggregate quantity of chemical weapons in the amount of 40,000 agent tons. Both previous U.S. intelligence estimates and subsequent public statements by three Russian scientists contradicted this declaration. Moreover, press reports quote a State Department spokesman noting that Russia has yet to admit to a program that both U.S. officials and dissident Russians believe it has, to develop binary CW agents.[20] The classified version of this Report includes a more detailed discussion of discrepancies in Russia's data declarations.

Many U.S. analysts believe that omissions in Russia's MOU data declarations have implications for how Russia will interpret various provisions of the CWC and the BDA. Some think that Russia will try to maintain an offensive CW capability regardless of the provisions in any agreements it signs. Others think Russian data discrepancies may reflect simple confusion, fighting between bureaucracies (some of which may want to maintain an offensive CW capability) for control over Russian CW policy, and the lack of a single institution with the authority to compel full and consistent data declarations. As is discussed in Part IV of this Report, moreover, Russia is determined for economic reasons to convert many CW production facilities, rather than destroy them. Another possibility is that Russian policy makers with an interest in the conversion issue may intend, until it is settled, to hold back on all of Russia's CW arms control commitments.

The Committee views with great concern Russia's failure to comply fully with the data declaration provisions of the Wyoming MOU and its implementing procedures. In the absence of full compliance with the Wyoming MOU, neither the Committee nor the Senate can overlook the distinct possibility that Russia intends to violate the CWC.

Inspections under the Wyoming memorandum of understanding

Phase II of the Wyoming MOU calls for five inspections of declared facilities and 10 challenge inspections—five during the time period that was supposed to occur between the Phase II data declarations and initialing the CWC, and another five while the two sides are considering ratification of the CWC. But these provisions of the Wyoming MOU have not fared well. As the following Executive branch answer to a question for the record from the Committee indicates, the inspections have been severely cut back:

> In March 1993, a policy decision was made [by the United States] to reduce the number of Phase II inspections to 10 and to eliminate inspections of undeclared sites in an attempt to "jump-start" the MOU. In November 1993, another policy decision was made to further reduce the number of inspections to five.

[20] *New York Times*, 6/23/94, p. 1; *Washington Times*, 6/24/94, p. 16.

Both of these policy decisions were made in an effort to assure that at least some MOU inspections would take place, and in spite of the obvious concern that reduced inspections would mean reduced ability to verify the accuracy of Russia's data declarations. The Committee understands that the March, 1993, decision also reflected U.S. concerns regarding the far-reaching inspections originally agreed to in the Wyoming MOU. Executive branch lawyers noted, moreover, that the United States could not guarantee inspector access to private facilities in the absence of implementing legislation providing for such access.

As noted earlier, implementing procedures for Phase II of the MOU were not finalized until January 14, 1994. Those procedures incorporated the following inspection provisions:

> Each side shall have the right to conduct two routine inspections of declared production or storage facilities, one trial challenge inspection, and two challenge inspections of declared facilities on the national territory of the other side * * *. The trial inspection on the territory of the Russian Federation shall take place at a declared chemical weapons storage facility * * *. All facilities for inspection shall be chosen by the inspecting side.[21]

Despite the very limited nature of the inspections agreed to in the implementing procedures, however, Russia further delayed implementation of the MOU. Thus, in bilateral discussions on inspection equipment, Russia initially rejected U.S. technical inspection and safety equipment. The most essential safety equipment was later accepted.

Pursuant to the MOU implementing procedures signed in Moscow this January (section F, paragraph 4), the trial challenge inspections were to be completed by August 27, and the other for inspections in each country are to occur between that date and November 10. In late August, the United States conducted a trial challenge inspection in Russia just as the window set by the implementation procedures was closing. Differences over inspection equipment remain, however, and discussions are ongoing with Russia regarding both the data declarations and inspection equipment.

In the Committee's view, the failure to implement all the on-site inspections originally agreed to in the Wyoming MOU is a cause for serious concern. The inspections under Phase II of the MOU are no longer likely to make a significant contribution to compliance monitoring or verification. Rather, as pared down in 1993 and in the final implementing procedures, they will continue the confidence-building process and help the two sides prepare for later inspections under the BDA and/or the CWC. Given Russia's refusal to permit a full suite of technical inspection equipment, even after most inspections and all challenge inspections of non-declared sites were eliminated, the Senate must assume that Russia may have something to hide.

To the extent that the successive U.S. agreements to scale back the Wyoming MOU data declaration and inspection obligations may have set a precedent, it is one that could undermine the BDA

[21] Section F, paragraph 3.

and threaten the effectiveness of the CWC itself. The provision in the implementing procedures (paragraph 2) that "the sides may agree not to follow those provisions * * * [of the CWC] that they mutually consider not appropriate" is also bothersome, although the procedures appear to be limited, fortunately, to the period before the CWC enters into force. The Committee urges the Executive branch to ensure that the effectiveness of the CWC, both in Russia and around the world, is the primary objective of U.S.-Russian CW policy.

III. POTENTIAL FOR IMPROVING U.S. MONITORING AND VERIFICATION

U.S. monitoring and verification of other countries' compliance with the Chemical Weapons Convention (CWC) can be improved, over time, in three major ways: (1) by improving unilateral U.S. monitoring capabilities, both technical and human-source; (2) by improving the capabilities of the Organization for the Prevention of Chemical Weapons (OPCW) to verify compliance through data declarations, on-site inspections, and the analysis of the data thus obtained; and (3) by obtaining maximum access to OPCW data and analysis, so that such material may be combined with information that the U.S. Government obtains through other means (which is discussed in Part IV of this Report). As the EAI Corporation's CWC verifiability assessment concludes:

> Technology to improve the verifiability of the CWC must continue to evolve into the future. A strong U.S. research and development program will contribute to enhanced verification by providing the Organization for the Prohibition of Chemical Weapons with better equipment, methods and techniques to conduct inspections, assess compliance, and verify the Chemical Weapons Convention.

The Executive branch is engaged in ongoing efforts in all three areas, but does not hold out much near-term hope of improved monitoring.

A. Improving U.S. and OPCW monitoring of CWC compliance

Research into CW sensors has been funded in a somewhat uncoordinated manner by many elements of the Intelligence Community, the Department of Defense and the Department of Energy. The Intelligence Community, the U.S. Arms Control and Disarmament Agency (ACDA), the Department of State's Bureau of Politico-Military Affairs, and an interagency committee under the Deputy Secretary of Defense (established pursuant to section 1605 of the FY 1994 National Defense Authorization Act) have all attempted to coordinate and rationalize these investments.

In response to a related question for the record, the Executive branch stated:

> The purpose of the NSC's PRD review of the coordination of research and development of Arms Control and Non-Proliferation Technologies is to address issues like this one. The goal is to establish a process that identifies

requirements, sets priorities, and ensures effective coordination of arms control and non-proliferation technology research and development. The Arms Control and Non-Proliferation Act of 1994 reaffirmed that the Arms Control and Disarmament Agency is responsible for the coordination with the U.S. Government of arms control, non-proliferation and disarmament research.

It will be difficult, however, for ACDA to fulfill this responsibility if that agency continues to confine its work to the SECRET level of classification. Thus, in answering questions for the record from the Committee regarding the CWC, this limitation forced the Executive branch on several occasions to provide incomplete answers (although it is not clear whether ACDA's role as lead agency was the reason for this self-imposed limitation). Perhaps ACDA can address more sensitive matters only in an NSC context. As noted below, a working group in which this could occur has been recommended by the interagency committee under the Deputy Secretary of Defense.

The interagency committee under the Deputy Secretary of Defense, in its May, 1994, "Report on Nonproliferation and Counterproliferation Activities and Programs," concluded that "certain technologies are not currently being pursued adequately," that "it has proved easier to develop promising *ideas* than to *field* useful new capability," and that there may well be "unnecessary redundancies within existing nonproliferation programs."[22] The interagency committee was unable to judge specific current R&D programs against agreed needs, but it did recommend establishment of a permanent Nonproliferation and Counterproliferation Technology Working Group that could make trade-offs between different agencies' programs. The working group would be under a new Standing Committee on Nonproliferation and Export Controls, which would report to the existing NSC-level Interagency Working Group (IWG) in that area. The Intelligence Committee understands that, in response to that recommendation, a Nonproliferation and Arms Control Technology Working Group has recently been formed.

The interagency committee under the Deputy Secretary of Defense found that nearly $1 billion would be spent in FY 1995 on activities uniquely or strongly related to countering CW proliferation, but did not break down those expenditures to distinguish sensor investments from such programs as military equipment and preparations. The Defense Department funded over 85 percent of the CW-related expenditures, and the FBI another 10 percent. ACDA, by contrast, would spend only $1.0 million in the CW proliferation area.

Between 1988 and 1993, pursuant to direction in the FY 1989 National Defense Authorization Act, DOE invested significant funds in CW and BW sensors, often using these funds to explore the relevance of devices being developed primarily as nuclear sensors. The FY 1994 Energy and Water Appropriations Act reduced DOE's verification and control programs by $2.8 million and barred DOE from funding such research in the CW and BW areas. The

[22] Emphasis in original.

Executive branch reports that this action has stalled efforts to develop remote sensing technology.

Research is ongoing, however, on several technologies that appear to be applicable to chemical weapons sensing. Some technologies could lead to remote sensing or airborne collection pursuant to either the CWC or the Open Skies Treaty. Others are more likely to produce devices for use by CWC inspectors. Specific technologies are noted in the classified version of this Report.

In May, the Committee asked the Executive branch to comment on the potential, likely costs and possible date of initial operational capability for 33 technologies (on which work is ongoing) that have been discussed at conferences or in DOE publications over the last three years. A comprehensive response could not be immediately provided, but three technologies funded by DNA were singled out as those likely to produce the earliest results: gas chromatography; ion trap mass spectrometry; and acoustic resonance spectroscopy. The Office of Technology Assessment (OTA) has described the use of gas chromatography and mass spectrometry as follows:

> First the gas chromatograph vaporizes the sample and passes it through a packed column or a hollow glass capillary tube lined with a fine polymer material. Various substances in the sample take different amounts of time to emerge from the tube, depending on their molecular weight and their attraction to the polymer lining. As they emerge from the chromatography, constituents of the sample are then introduced into a mass spectrometer, which breaks them up into a compound-specific set of molecular fragments and then measures their masses very precisely.[23]

The gas chromatography effort, a $1.3 million contract to a private firm, is expected to cost $5.3 million to completion three years from now and is intended "as a screening device to rapidly ascertain the presence on absence (at its detection level) of volatile CWC scheduled chemicals of interest." The detection level is listed as "sub-parts-per-million." The OTA study cited possible detection levels in the parts-per-trillion range, but added that such precision might be impossible in the field. The detection level sought by DNA may prove only marginally useful.

Research on the ion trap mass spectrometer is being conducted at the Army's Edgewood Research, Development and Engineering Center (ERDEC) and other locations by a team that includes two private contractors and the Oak Ridge National Laboratory. This program has cost $3.8 million, with another $0.9 million required in FY 1995 to achieve initial operational capability (IOC) and further algorithm and software funding required in the out-years to achieve its full potential.

Acoustic resonance spectroscopy is a method of distinguishing CW munitions from conventional or, conceivably, from incendiary munitions of the same size, shape and weight. By passing sound waves through an object and measuring its vibrational frequencies one can theoretically determine not only whether the fill is solid or

[23] Office of Technology Assessment, *Technologies Underlying Weapons of Mass Destruction*, Washington: December 1993, p. 60.

liquid, but even the identity (or at least the density) of the chemical agent. The Executive branch's answer cites the theoretical capability of this method, but goes on to say that the DNA-funded program is intended only for "rapidly ascertaining if munitions declared as being of one type do, in fact, present the same acoustic signature." This program at Los Alamos National Laboratory, with support from the Army's ERDEC, has cost $1.4 million since FY 1991 (and unknown amounts earlier). Another $0.2 million will be needed in FY 1995 to complete the program.

The DNA-funded programs are explicitly intended to produce capabilities that will be made available to the Technical Secretariat of the OPCW. The U.S. Government has been reticent, however, to support the efforts of U.S. companies to market their devices. While other countries have held events in The Hague to demonstrate their firms' products, the Executive branch has decided merely to "keep relevant U.S. industry informed of any opportunities to market their products, such as international trade fairs." It is unclear to the Committee whether that approach is based purely upon a concern to refrain from improper government lobbying or also upon a belief that nobody's currently available devices are that much better than anybody else's.

The interagency committee under the Deputy Secretary of Defense proposed a modest increase in CWC-related funding and substantial increases in proliferation-related funding that might assist in CWC monitoring, beginning in FY 1996. (Because the FY 1995 budget has already been submitted, Executive branch agencies will not propose changes in that budget.) A budget increase of $10 million is proposed for CWC and BWC sensor development and CWC implementation; another $25 million for other arms proliferation sensors and human-source intelligence; $25 million to improve the detection and tracking of shipments of weapons of mass destruction or of their precursors; $75 million for the detection and characterization of underground structures; and another $75 million for real-time (i.e., battlefield) detection and characterization of CW and BW agents, using either close-in or remote sensors.

The Committee endorses the call by the interagency committee under the Deputy Secretary of Defense for increased funding of CW sensor technology and urges the Executive branch to redirect FY 1995 funds for this purpose as well. The Committee also recommends that Congress rescind its restriction on DOE efforts to develop CW (and BW) sensors based upon technologies it is developing in the nuclear field.

The Committee believes, however, that funds invested in CW sensor technology may well be wasted unless the Executive branch institutes effective oversight of the multitude of agency programs in this field. The recent formation of a Nonproliferation and Arms Control Technology Working Group may provide an appropriate forum in which to deconflict and narrow the focus of agency programs and to fund the most promising avenues to ensure expeditious completion. The Executive branch should ensure that the body that makes such decisions is fully briefed on all relevant intelligence and defense programs. Even highly sensitive programs should not be immune from high-level interagency consideration to determine whether they warrant increased or lessened support.

B. Supporting the OPCW on-site inspection process

As described in Part IV of this Report, it appears that the United States is making progress in laying the groundwork for information sharing with the International Atomic Energy Agency (IAEA) and with United Nations Special Commission inspection teams in Iraq.

The Executive branch is far from confident, however, that such information sharing will produce significant results in the short run. Responses to questions for the record from the Committee suggest, moreover, that the Executive branch has not yet organized itself to produce the sort of information that would be most useful to the OPCW.

Other forms of support for OPCW inspections, such as training for inspectors and assistance in data handling, can more readily be provided. The Executive branch reports that the United States has offered the OPCW Preparatory Commission "extensive course materials" for training OPCW inspectors and has offered to provide a basic training course for some inspectors, instructors to help the Dutch train other inspectors, and specialist training in chemical sampling and analysis and in the conduct of facility inspections. The United States has also offered to provide sites for mock inspections by future OPCW inspectors. The U.S. Government is confident, on the whole, that high OPCW standards and the training that the United States and other countries have offered will result in a competent international inspectorate.

In addition, "[t]he United States has offered to provide to the Preparatory Commission, for use by the CWC Organization, an information-management system capable of monitoring declaration data." To the Extent that the OPCW does not share detailed information with States Parties, the ability of the Technical Secretariat to conduct its own analysis of the declarations provide pursuant to the Convention could be an important determinant of the Organization's success.

The United States could also be called upon to field its own inspectorate, if the U.S.-Russian Bilateral Destruction Agreement (BDA) comes into force and bilateral verification is largely substituted for OPCW inspctions. This would involve additional costs, but it would also bring the substantial benefit that U.S. personnel would make these important observations and the United States would thus have full access to inspection data on Russian sites. The Executive branch has assured the Committee that, even though all U.S. agencies have not budgeted for the use of their personnel in FY 1995, such personnel will be made available as needed.

The Committee believes that rather than waiting until the CWC enters into force, the Executive branch should begin preparing now to meet the likely need for U.S. support to OPCW inspections, including information that would be needed for challenge inspections of declared and undeclared sites pursuant to Part X of the CWC Verification Annex.

IV. ISSUES LEFT TO THE PREPARATORY COMMISSION AND U.S.-RUSSIAN NEGOTIATIONS

A. Issues left to the Preparatory Commission

The Chemical Weapons Convention, as complex as it is, leaves many technical details to be worked out by the Organization for the Prohibition of Chemical Weapons (OPCW). To assist the OPCW, which cannot come into existence until the CWC enters into force, a Preparatory Commission was established to make recommendations to the first OPCW Conference. The Preparatory Commission, or PrepCom, has been meeting since last year.

Paragraphs 10–13 of the Text on the Establishment of a Preparatory Commission list some 36 issues that the CWC text leaves for later decision. These include the following:

> 10. Elaboration of a detailed staffing pattern of the Technical Secretariat, including decision-making flow charts; assessments of personnel requirements; staff rules for recruitment and service conditions; preparation of administrative and financial regulations; and purchase and standardization of equipment;
>
> 11. Preparation of a work program and budget for the first year of activities of the OPCW, detailed budgetary provisions for the OPCW, the scale of financial contributions to the OPCW, administrative and financial regulations for the OPCW, and arrangements to facilitate the first election of the Executive Council;
>
> 12. (a) Guidelines on detailed procedures for verification and for the conduct of inspections;
>
> (b) Lists of items to be stockpiled for emergency and humanitarian assistance;
>
> (c) Agreements between the OPCW and the States Parties;
>
> (d) Procedures for the provision of information by States Parties on their programs related to protective purposes;
>
> (e) A list of approved equipment;
>
> (f) Procedures for the inspection of equipment;
>
> (g) Procedures concerning the implementation of safety requirements for activities of inspectors and inspection assistants;
>
> (h) Procedures for inclusion in the inspection manual concerning the security, integrity and preservation of samples and for ensuring the protection of the confidentiality of samples transferred for analysis off-site;
>
> (i) Models for facility agreements;
>
> (j) Appropriate detailed procedures for inspection of equipment by the inspected party and for the use of continuous monitoring equipment;
>
> (k) Deadlines for submission of detailed information on destruction facilities;
>
> (l) Recommendations for determining the frequency of systematic on-site inspection of storage facilities;
>
> (m) Recommendations for guidelines for transitional verification arrangements;

(n) Guidelines to determine the usability of chemical weapons produced between 1925 and 1946;

(o) Guidelines for determining the frequency of systematic on-site inspections of chemical weapons production facilities;

(p) Criteria for toxicity, corrosiveness and, if applicable, other technical factors;

(q) Guidelines to assess the risk to the object and purpose of the Convention posed by the relevant chemicals, the characteristics of the facility and the nature of the activities carried out at a small single facility permitted to produce Schedule 1 chemicals;

(r) Models for facility agreements covering detailed inspection procedure;

(s) Guidelines to assess the risk to the object and purpose of the Convention posed by the quantities of chemicals produced, the characteristics of the family and the nature of the activities carried out at very small facilities permitted to produce Schedule 1 chemicals;

(t) Guidelines for provisions regarding scheduled chemicals in low concentrations, including in mixtures;

(u) Guidelines for procedures on the release of classified information by the OPCW;

(v) A classification system for levels of sensitivity of confidential data and documents; and

(w) Recommendations for procedures to be followed in case of breaches or alleged breaches of confidentiality; and

13. Development of the Headquarters Agreement with the Host Country.

Many of these tasks are technical or administrative, with little bearing on the OPCW's verification capabilities. Thus, the scale of contributions to the OPCW may be of concern to the States Parties (including the United States), but will have little impact on how the OPCW does its job. But the OPCW budget, the standards and training for its employees (discussed in Part III of this Report), the rules for accepting information from States Parties and for sharing information with them, and the raft of decisions to be made on guidelines, procedures and equipment for on-site inspections are a different matter. All of these issues could affect the ability of the OPCW to make a major contribution to CWC verification. The rules for sharing information with States Parties could also affect the ability of the U.S. Government to monitor and verify CWC compliance.

U.S. access to OPCW information

Past arms control agreements have all involved verification by U.S. Government personnel. Even the Open Skies Treaty provides for some U.S. overflights, and the data from each country's observation flights may be obtained (for a fee) by any other State Party. The CWC is different, however, in that only an international inspectorate will take part in on-site inspections; and provisions

protecting confidential information will largely prevent States Parties from obtaining the raw data from on-site inspections. The United States would be able to send an observer with any challenge inspection team that was responding to a U.S. request, but the inspected party could keep that observer outside the observation perimeter. (If the U.S.-Russian Bilateral Destruction Agreement is implemented, U.S. inspectors will handle nearly all inspection of Russian facilities. There is no certainty, however, that agreement on BDA implementation will be achieved.)

The effect of these provisions is to significantly lessen the potential contribution of the CWC's on-site inspection provisions to each State Party's compliance monitoring capabilities, even if those inspections contribute significantly to the OPCW's understanding of activities in a country. The Executive branch, however, responding to a question for the record from the Committee, still takes a positive view:

> The Administration, including the Intelligence Community, has concluded that the CWC will improve our ability to obtain information about other countries' CW efforts. It will supplement U.S. monitoring and detection of clandestine activities by providing U.S. access to information otherwise unavailable, such as States Parties' detailed declarations on their chemical weapons, CW production facilities and storage sites and specified information from States Parties' declarations on relevant chemical industry facilities and activities. The U.S. will also have access to general information from routine inspections and will receive copies of all final reports on challenge inspections of declared and undeclared facilities and locations.

Although the United States will obtain the access to OPCW information described above, full access will not be provided. According to the Executive branch, "unrestricted access to inspection and declaration data * * * was not possible in light of the need to strike the right balance between access to and protection of information." The Executive branch adds the needs of U.S. agencies required this balance.

The Executive branch reports that in the Preparatory Commission, several countries with significant chemical industries have raised concerns regarding the sharing of industrial proprietary information. It adds, however, that "[t]he Convention is explicit in the types of data shared and who gets it, and therefore objections to data-sharing do not carry much support in the PrepCom." Thus, at least the Preparatory Commission is not recommending any additional restrictions on data-sharing.

The Committee agrees that the lack of U.S. access to raw data from on-site inspections will impede the Intelligence Community's monitoring of CWC compliance. It is reasonable to presume that if the United States had access to those data—and especially to actual samples from chemical plants or suspect sites—it would be able to subject the data to more searching and precise analysis than will be undertaken under OPCW auspices. Lacking such access, the U.S. Government will be that much more dependent upon

OPCW-sponsored analysis to discover relevant information, and upon the OPCW itself to learn the results of inspections.

OPCW use of information from the U.S. Government

International organizations that undertake on-site inspections have much to gain from accepting U.S. information. Thus, the United States has contributed significantly to the ability of the International Atomic Energy Agency to monitor North Korean nuclear activities and to focus world attention on North Korea's apparent reprocessing of more fuel rods (and over a longer time) than that country has declared. U.S. Information has also been crucial to the success of UNSCOM inspections in Iraq, as noted by Major Karen M. Hansen, a former UNSCOM team leader who now works for the DoD On-Site Inspection Agency:

> UNSCOM enjoyed unprecedentedly broad-based information-gathering resources. Inspections were guided by international contributions of information and direct access to a wide array of surveillance assets * * * *Shared Intelligence will be absolutely essential* in enabling the OPCW's vigilant watch on the world.[24]

The Preparatory Commission is given the task of recommending procedures for handling information. Paragraphs 46 and 47 of Article VIII of the Convention leave the impression, however, that the Technical Secretariat should not develop or encourage too close a relationship with any Member state:

> 46. In the performance of their duties, the Director-General, the inspectors and the other members of the staff shall not seek or receive instructions from any Government or from any other source external to the Organization. They shall refrain from any action that might reflect on their position as international officers responsible only to the Conference and the Executive Council
>
> 47. Each State Party shall respect the exclusively international character of the responsibilities of the Director-General, the inspectors and the other members of the staff and not seek to influence them in the discharge of their responsibilities.

These provisions raise the issue of whether the Secretariat will welcome or, in fact, even accept information from States Parties, including the United States. In response to a question for the record from the Committee, the Executive branch expressed confidence on this matter:

> During the CWC negotiations, many countries were concerned about U.S. or western control of verification assets for national purposes, fearing that they might be the targets of information or, at a minimum, that the [OPCW] would use its inspection assets to satisfy Western security needs rather than their own. However, the CWC provisions were drafted in such a way that the U.S. could provide such * * * information if it so desired * * *.

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[24] Karen M. Jansen, in Roberts, p. 81; emphasis added.

> There are provisions built into the CWC that allow for State Party provision of information both in routine inspections and in challenge inspection. There are also provisions in the Confidentiality Annex for the protection of information provided by States Parties.

This answer is reassuring as a statement of the U.S. Government's interpretation of the Convention, but the contrary views of some countries (and some informal comments by international officials) leave room for concern. The Executive branch concedes, moreover, that "[n]o formal mechanism has been established for the provision of * * * information to the OPCW."

The Committee urges the Executive branch to give high priority to enabling the OPCW to take full advantage of information from States Parties. It will be vital for OPCW challenge inspections, in particular, to be based upon accurate and reasoned analysis; and there is little hope of achieving this without assistance from States Parties.

The capabilities of on-site inspection equipment

The OPCW Preparatory Commission will largely decide what type of equipment inspectors will use. (Technically, the Preparatory Commission will make recommendations to the Conference of States Parties, which will likely adopt its recommendations.) the PrepCom will also make recommendations on such matters as the equipment's sensitivity and ability to identify chemicals not listed on any of the CWC Schedules of Chemicals.

The Committee understands that some countries in the Preparatory Commission talks are attempting to limit the capabilities of on-site inspectors by restricting the application of sampling and analysis, or to blind monitoring equipment to chemicals not listed in the Convention. The Executive branch has assured the Committee that these efforts are being resisted in the Preparatory Commission and that work continues on equipment to identify both scheduled and non-scheduled chemicals. As discussed in Part III of this Report, however, gas chromatography equipment being developed under a major DNA contract may have insufficient sensitivity. Overall, it is difficult to believe that the inspection equipment eventually recommended will have especially fine sensitivity.

The issue of whether inspection equipment should identify non-scheduled chemicals does not appear to have been decided yet. The importance of this issue has been highlighted by Russian dissident scientists who have charged that Russia had a program to develop new CW agents and binary agents based upon non-scheduled chemicals. The Executive branch indicates a strong commitment to giving inspectors this capability:

> We are * * * pursuing the acceptance by the Preparatory Commission of analytic equipment and techniques which would collect a broad spectrum of information, allowing the detection of suspected new agents. This broad capability is especially critical to challenge inspections.

> The CWC does not limit inspection equipment and procedures that detect and/or identify chemicals to only scheduled chemicals.* * * The U.S. believes it is critical that analytic equipment and procedures approved by the Preparatory Commission have as broad a capability as possible from the outset. Discussions are continuing in the Preparatory Commission on aspects of this issue, e.g., whether equipment and the type of results obtained from this equipment should be used to identify non-scheduled chemicals in all cases or whether separate categories should be developed for routine and challenge inspections.

The Executive branch even holds out some hope for success in this area, stating that "[t]he Preparatory Commission is trying to give inspectors the fullest possible range of equipment to collect data and make observations relevant to the purpose of specific inspections." But this hope is tempered by the realization that the equipment may not be used:

> To protect confidential business information, the verification aims provided for in the Convention for routine inspections allow plants to limit the scope of sample analysis to search only for chemicals listed on schedules. The equipment itself is, however, expected to be as sensitive as present technology allows:

In fact, subparagraph 48(e) of Part IX of the Verification Annex also permits the inspected State Party in a challenge inspection to require "[r]estriction of sample analysis to presence or absence of chemicals listed in Schedules 1, 2 and 3 or appropriate degradation products." So efforts in the Preparatory Commission to give inspectors the most sensitive equipment may have more impact on the OPCW's ability to detect listed chemicals than on its ability to detect and identify non-scheduled chemicals of interest.

The Executive branch reports that although the CWC permits the use of continuous on-site monitoring equipment at permitted Schedule 1 production facilities, "the Preparatory Commission believes it is not cost-effective to maintain continuous presence at a Single Small-Scale Facility or to maintain active monitoring equipment in the facility." Given current budget limitations, then, this is another monitoring capability that apparently will not be pursued.

Limitations imposed by the OPCW budget

There is inevitably a tension between our desire to maintain the best possible monitoring and verification capabilities and our need to limit expenditures and enforce budget discipline on international organizations to which the United States contributes. The OPCW has not been immune to the cost-benefit dilemma, which is implicit in the very text of the CWC. For example, paragraph 13 of Part VII of the Verification Annex specifies inspection priorities for Schedule 2 plant inspections during the first three years after entry into force (EIF); were money no object, there would be no need to do this.

Questions have been raised regarding the OPCW budget, and these are quite legitimate in light of U.S. agreement to cover 25

percent of that budget. The OPCW budget for 1994 is roughly $30 million, and a $55 million budget is likely for 1995. The latter budget is based upon assumptions that could well prove wrong, however, leaving the OPCW in the position of having to secure extra funds and ramp up its operations at the last minute. Thus, there is no certainty that the United States and Russia will agree on BDA implementation before the CWC enters into force. In this case, the OPCW would have to assume a major additional burden of inspections in the country with the largest CW infrastructure of all. The editor of The CWC Chronicle, a publication of the Henry L. Stimson Center, has warned that as a result of cutbacks in the initial number of inspectors requested by the Provisional Technical Secretariat, "the OPCW may be forced to deploy smaller teams for shorter lengths of time." In addition, the director of the verification division of the Provisional Technical Secretariat (PTS) has warned:

> [T]he figures for industrial facilities [subject to OPCW inspection] are likely to prove very conservative. We find the figures for schedule 1 and 2 facilities especially suspect. * * * Although the PTS will continue its efforts to obtain more accurate data, we may well have to await the initial declarations due in the 30 days after EIF before a clear picture finally emerges.[25]

The Committee recommends that the Executive branch and the committees of Congress with responsibility for U.S. contributions to the OPCW budget pay close attention to the OPCW's changing needs, so that the States Parties to the CWC can make additional funds available in a timely fashion if current planning assumptions prove too conservative. Otherwise the OPCW may fall seriously behind both in implementation of the CWC and in its ability to verify compliance with the Convention.

Overall, the United States appears to be making slow progress in the Preparatory Commission toward making the OPCW as effective an institution as possible within the parameters set by the CWC itself. The Committee cannot assure the Senate, however, that the Preparatory Commission's recommendations will improve CWC verification significantly.

B. Issues left to U.S.-Russian negotiations

The United States and the former Soviet Union signed two bilateral agreements relating to chemical weapons. The Memorandum of Understanding Regarding a Bilateral Verification Experiment and Data Exchange Related to Prohibition of Chemical Weapons was signed on September 23, 1989, in Jackson Hole, Wyoming (and is known as the "Wyoming MOU"). Eight months later, the Agreement on Destruction and Non-Production of Chemical Weapons and on Measures to Facilitate the Multilateral Convention on Banning Chemical Weapons (known as the "Bilateral Destruction Agreement," or BDA) was signed in Washington. As discussed in Part II of this Report, implementation of the Wyoming MOU has been uneven. The BDA has yet to enter into force, even though its implementation is a planning assumption in the OPCW budget, as noted in the previous section of this Report.

[25] John Gee, "The OPCW's Verification Capability: A Review of Progress," in Roberts, p. 69.

Further U.S.-Russian negotiations regarding these agreements could have a distinct impact upon CWC implementation and verification. Thus, bilateral agreements regarding the nature of MOU Phase II data declarations or inspection equipment could be seen as precedents for similar issues in the CWC. The United States would gain real monitoring benefits (and both sides could expect financial benefits) from implementing the BDA, rather than relying upon the OPCW alone to inspect declared Russian and U.S. facilities. Finally, any resolution of Russia's desire to convert, rather than destroy, its CW facilities could set a precedent for conversion under the CWC that would be used by other states.

The Wyoming Memorandum of Understanding

U.S.-Russian discussions regarding the Wyoming MOU data declarations and on-site inspection equipment took place in Moscow in early September and further talks are expected. These talks could prove to be difficult. As noted in Part II of this Report, Russia's stand on data declarations could be tied to its determination to use former CW facilities for non-CW purposes. Any significant progress may depend upon the willingness of Russian political authorities to force the various chemical industry and CW-related bureaucracies to fully comply with the Wyoming MOU (and, by extension, with the CWC). Were such progress to be achieved, it would be reflected most clearly in Russia's first data declaration pursuant to the CWC, which is to be submitted within 30 days after the Convention enters into force.

Any shortfalls in Russia's MOU data declarations also have implications for BDA implementation, at least until the CWC enters into force. Article VIII, paragraph 2, of the BDA applies its provisions to those facilities "that are subject to declaration under the Memorandum." Fortunately, paragraph 1 of Article VIII states that "the provisions of the multilateral convention shall take precedence over the provisions of this Agreement in cases of incompatible obligations therein." The provisions in Article IV of the CWC that permit bilateral verification under the Convention (paragraphs 13–15) do require, moreover, that such verification be consistent with CWC provisions and subject to OPCW monitoring, and that data declarations conform to CWC requirements.

Russia has yet to conduct its trial challenge inspection in the United States, and none of the other four inspections mandated by the Wyoming MOU implementing procedures has yet been conducted in either country. The inspection equipment issue may well prove intractable, at least until that issue is settled in the CWC context—which could be achieved in recommendations by the OPCW Preparatory Commission or might remain uncertain until the first session of the Conference of States Parties after the CWC enters into force. It seems unlikely that Russia will accept more capable inspection equipment in the MOU or BDA contexts than other countries accept pursuant to the CWC.

The Committee recommends that the President make full Russian implementation of the Wyoming MOU and the BDA an issue of high priority in U.S.-Russian relations and raise the matter personally at the highest levels. The Committee recommends that the Senate add a condition to the resolution of ratification of the CWC

requiring the President, 10 days after the CWC enters into force or 10 days after the Russian Federation deposits instruments of ratification of the CWC, whichever is later, either—

(a) to certify to the Senate that Russia has complied fully with the data declaration requirements of the Wyoming MOU; or

(b) to submit to the Senate a report on apparent discrepancies in Russia's Wyoming MOU data and the results of any bilateral discussions regarding those discrepancies.

The Committee further recommends that the Senate add a declaration to the resolution of ratification of the CWC expressing the sense of the Senate that if Russian data discrepancies remain unresolved 180 days after the United States receives information on Russia's initial CWC data declarations from the OPCW Technical Secretariat, the United States should request the Executive Council of the OPCW to assist in clarifying those discrepancies pursuant to Article IX of the Convention.

The Bilateral Destruction Agreement

The Bilateral Destruction Agreement of 1990 (BDA) calls for the immediate cessation of CW production,[26] for the destruction by December 31, 2002, of all U.S. and Russian chemical weapons except for up to 5,000 metric tons[27] and, if the CWC should enter into force, for destruction of all but 500 metric tons within eight years of that date—reflecting the U.S. negotiating position on the CWC as of 1990.[28] The BDA also mandates annual up-dates to the 1989 Wyoming MOU data exchange.

Paragraph 1 of Article V of the BDA provides for "systematic on-site inspection" of all CW production facilities. Paragraph 2 provides for "the continuous presence of inspectors and continuous monitoring with on-site instruments" at CW destruction facilities and the CW holding areas within those facilities. Paragraph 3 provides for close-out inspections and annual inspections of former CW storage facilities, until the CWC enters into force. Paragraph 5 provides for annual inspections of active CW storage facilities, also until the CWC enters into force. Paragraph 4 provides for an inspection of all storage facilities after the required CW destruction is completed. Paragraph 7 provides for later agreement on "[d]etailed provisions for the implementation of the inspection measures provided for in this Article," which the Parties agreed "to work to complete * * * by December 31, 1990." Paragraph 5 of Article VI calls for "trial challenge inspections at facilities not declared under the Memorandum or subsequently," the details of which are to be worked out within six months of the BDA signing.

At the time the BDA was signed, there was no expectation that in just over two years, the CWC would be initialed. The BDA was intended to set a good example for the rest of the world, to move the CWC negotiations along, and to mesh with a CWC that had not yet been completed. To deal with a future CWC, the Parties adopted paragraph 1 of Article VIII:

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[26] Article I, paragraph 1.
[27] Article IV, paragraph 1.
[28] Article VI, paragraph 1.

> After the multilateral convention enters into force, the provisions of the multilateral convention shall take precedence over the provisions of this Agreement in cases of incompatible obligations therein. Otherwise, the provisions of this Agreement shall supplement the provisions of the multilateral convention in its operation between the Parties. After the multilateral convention is signed, the Parties to this Agreement shall consult with each other in order to resolve any questions concerning the relationship of this Agreement to the multilateral convention.

In March, 1993, during negotiations in Geneva, the United States and Russia reached agreement ad referendum on the remaining protocols for implementation of the BDA. The Russians subsequently expressed dissatisfaction with the March, 1993, protocol, and then would not agree to a date to meet with a U.S. delegation to resolve their concerns. At least in theory, however, any discussions regarding inspection equipment pursuant to the Wyoming MOU could also apply to inspections under the BDA.

The Executive branch believes that there are major economic incentives for the Russians to implement the BDA, since the United States would contribute funds for CW destruction under that agreement, and insists that no problems are expected in getting agreement on MOU or BDA inspections. This confidence is buttressed by the determination with which such Russian officials as Sergei Kisselev, deputy chief of the Russian delegation to the Preparatory Commission, have argued that the rest of the world should share in the costs of Russian CW destruction, as they will share in the security benefits.[29] But some Executive branch personnel believe that no agreement will ever be reached on BDA implementation.

While some of Russia's backsliding may be attributable to past or continuing Russian CW activity that would violate the BDA or the CWC if they were in force, another explanation offered by Executive branch officials relates to Russia's desire not to be forced to destroy all of its former CW production facilities. Unlike the United States, Russia typically used the same facilities for CW or precursor that it used for other chemical production. To destroy all such facilities would entail the loss of substantial investment and, perhaps, some disruption of legitimate industry.

Article V of the CWC generally requires that all these facilities be destroyed. There is, however, an important exception in paragraphs 13–15 of that article:

> 13. A State Party may request, in exceptional cases of compelling need, permission to use a chemical weapons production facility . . . for purposes not prohibited under this Convention. Upon the recommendation of the Executive Council, the Conference of the States Parties shall decide whether or not to approve the request and shall establish the conditions upon which approval is contingent. . . .
>
> 14. The chemical weapons production facility shall be converted in such a manner that the converted facility is

[29] See Sergei N. Kisselev, "Getting Quickly to Entry into Force," in Roberts, p. 99.

> not more capable of being reconverted into a chemical weapons production facility than any other facility used for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes not involving chemicals listed in Schedule 1.
>
> 15. All converted facilities shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments * * *.

Russia has sought international support for such an exception for some of its major CW facilities, notably its facility at Volgograd. The international community has correctly noted that approval cannot be given until the CWC enters into force, as only the Conference of States Parties has the power to grant this exception. Russia, in turn, has pressed the United States to permit such conversion under the BDA. Such agreement would be of little use, however, if it did not suffice to win the confidence of the Conference of States Parties. Responding to a question for the record from the Committee on this matter, the Executive branch commented as follows:

> The U.S. will make clear to the Russians in further bilateral negotiations that the provisions of the BDA Implementation Protocol on the conversion of CW production facilities must be consistent with and as close as possible to the provisions of the CWC. For that reason, the U.S. cannot accept Russian proposals that deviated from the CWC. However, the U.S. is willing to consider specific Russian suggestions for resolving, through the guidelines, the concerns reflected in their conversion recommendations.

Russia has yet to agree to a date for further bilateral negotiations on BDA implementation. The Committee understands that experts have been impressed in recent months with Russia's efforts at the Volgograd facility. Perhaps if Russia can install conversion safeguards that fully meet CWC requirements, more progress can then be made on BDA implementation. The Conference of States Parties will have to resist any pressure accept less than the required safeguards, however, as any retreat from CWC requirements in the Russian case could become a precedent for Iran or other states with as-yet-undeclared CW programs.

Given the passage of one-and-a-half years since Russia and the United States reached ad referendum agreement on BDA implementation, and given the fact that the BDA mandates extensive on-site inspection by U.S. personnel, the Committee believes there is a real risk that the BDA will never enter into force, notwithstanding Russia's economic incentive to accept bilateral verification. In the absence of agreement on BDA implementation, the Committee advises the Senate that verification of Russian compliance would likely be based upon a smaller number of inspections than originally anticipated, that the inspections of Russian sites would be conducted by the OPCW inspectorate rather than by U.S. personnel, and that there would be no guaranteed U.S. access to the detailed inspection data. On the other hand, the OPCW is unlikely to exempt Russia from the requirements set forth in the CWC's provisions.

OPCW budget planning has proceeded on the assumption that the United States and Russia would handle the bulk of the monitoring of each other's CW facilities. If the BDA should not come into force by the time the CWC does, then the Technical Secretariat would be unable to field enough international inspectors to handle this significant task. The world community might be well advised, therefore, to revise OPCW planning assumptions and prepare for the possible need to monitor U.S. and Russian CW facilities.

The Committee recommended that the Senate add a condition to the resolution of ratification of the CWC, barring the deposit of instruments of ratification until the President certifies to Congress either: (a) that U.S.-Russian agreement on BDA implenentation has been or will shortly be achieved, and that the agreement verification procedures will meet or exceed those mandated by the CWC; or (b) that the OPCW will be prepared, when the CWC enters into force, to effectively monitor U.S. and Russian facilities, as well as those of the other States Parties. Relevant committees may also wish to consider whether it would be effective to attach conditions to one or more elements of U.S. economic assistance to Russia.

V. CWC SECURITY AND IMPLEMENTATION ISSUES

The security and implementation issues that the Chemical Weapons Convention raises for the United States are rather different from those in most arms control agreements. On the security side, only BDA implementation (if it comes to pass) will involve the usual counterintelligence and security concerns raised by the long-term presence of U.S. and Russian inspectors in each other's facilities. CWC implementation will involve the relatively new task of hosting of international inspectors (previously associated only with the Nonproliferation Treaty), especially at commercial chemical facilities. Many more private firms will be subject to inspection than in any previous arms control agreement, moreover, including firms that are not defense contractors; they must be helped (both before and during inspections) to safeguard both classified information and confidential business information (or "CBI") that inspectors do not require to do their jobs, but could gain in the course of their work if protective measures were not taken. And there will be costs associated with security measures taken by DoD facilities and/or by private industry, as well as costs in the event that classified or proprietary information is lost.

On the implementation side, the provision for an international inspectorate will obviate the need to field U.S. inspection teams (although U.S. personnel will be needed to inspect declared Russian CW facilities if the BDA enters into force). Implementation of the date declaration provisions will require reporting by private businesses for the first time; one purpose of the implementing legislation now before the Congress (S. 2221) is to institute a legal requirement for the affected firms to file these declarations, and the Executive branch is trying to get the word out to U.S. businesses regarding their likely obligations under the CWC and the new law. On-site inspections in the United States will also involve private firms, and a challenge inspection could even occur (in theory) at a

private residence; S. 2221 would enable the Executive branch to seek a warrant compelling the owners and managers of targeted facilities to provide the access needed for a properly authorized inspection. And the United States will incur substantial costs in the destruction of its chemical weapons stockpile pursuant to existing law, the BDA and the CWC, as well as in support to Russian destruction activities under the BDA.

A. Intrusiveness versus Secrecy

the United States has a verification interest in intrusive inspections, but also an information security interest in limiting inspections to the information required to verify compliance. The Executive branch discussed this balance in answers to questions for the record from the Committee:

> The challenge inspection regime contained in the final agreement largely reflects the regime proposed by the United States. Reflecting the need for intrusive inspections, the regime requires States Parties to accept a challenge inspection and to provide the greatest degree of access, taking into account any constitutional obligations they may have with regard to proprietary rights or searches and seizures. Access must be provided to and within the requested site within specified periods of time, with guaranteed perimeter monitoring activities allowed upon arrival at the site. Reflecting the need to protect sensitive non-CW related information and Constitutional rights, the regime allows States Parties to negotiate the extent and nature of access within the requested site on a managed access basis. This includes the right to take such measures as necessary to protect national security information unrelated to the Convention. However, the right to manage access is balanced with the obligation, in the event access is restricted, of that Party to make every reasonable effort to satisfy the non-compliance concern that generated the inspection. The degree and nature of access and cooperation provided by the inspected State Party will be included in the inspection team report.
>
> Prior to signing the CWC, the U.S. determined that the verification regime effectively balances the need for international intrusiveness and measures to address compliance concerns against the need to protect sensitive non-CW information, as well as Constitutional privacy rights and proprietary information.

ACDA estimates that initially U.S. industry will receive 53 routine inspections per year (40 at Schedule 1 and 2 sites, and 13 at Schedule 3 sites). This assumes that all Schedule 1 and 2 plant sites are inspected at least once in the first three years after entry into force of the CWC. There will be no inspection of "other chemical production facilities" until the fourth year after entry into force, when there could be up to 20 inspections per year of these facilities and Schedule 3 facilities combined. In addition, there could be challenge inspections at declared or undeclared facilities.

Although some loss of sensitive information will likely occur as a result of CWC data declarations and on-site inspections, the Committee is satisfied that the Executive branch is taking all reasonable steps to protect classified information that may be at risk. the Committee welcomes the recent increase in efforts to help U.S. industry, but believes that still more can be done to protect confidential business information held by private firms.

B. Provisions to protect classified or proprietary information

The CWC contains numerous provisions designed to protect both classified information and confidential business information (CBI) from unauthorized disclosure. These provisions were developed with the active participation of the U.S. Chemical Manufacturers Association and other trade associations representing the international chemical industry. Confidentiality provisions in the text of the Convention tend to be general statements:

> In conducting verification activities, the Technical Secretariat shall avoid undue intrusion into the State Party's chemical activities for purposes not prohibited under this Convention and, in particular, abide by the provisions set forth in the Annex on the Protection of Confidential Information (* * * "Confidentiality Annex").[30]
>
> Each State Party shall treat as confidential and afford special handling to information and data that it receives in confidence from the Organization in connection with the implementation of this Convention.[31]
>
> The Organization shall conduct its verification activities provided for under this Convention in the least intrusive manner possible consistent with the timely and efficient accomplishment of their [sic] objectives. It shall request only the information and data necessary to fulfill its responsibilities under this Convention. It shall take every precaution to protect the confidentiality of information on civil and military activities and facilities coming to its knowledge in the implementation of this Convention and, in particular, shall abide by the provisions set forth in the Confidentiality Annex.[32]
>
> Pursuant to a request for a challenge inspection of a facility or location * * * the inspected State Party shall have * * * [t]he obligation to provide access within the requested site *for the sole purpose of establishing facts relevant to the concern regarding possible non-compliance.*[33]
>
> The inspection team shall be guided by the principle of conducting the challenge inspection in the least intrusive manner possible, consistent with the effective and timely accomplishment of its mission.[34]

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[30] Article VI, paragraph 10.
[31] Article VII, paragraph 6.
[32] Article VIII, paragraph 5.
[33] Article IX, paragraph 11; emphasis added.
[34] Article IX, paragraph 19.

The Confidentiality Annex contains provisions designed to protect information designated confidential by States Parties and provided to the OPCW. While some of these provisions repeat the general principles set forth in the Convention itself, others are more specific. Thus, subparagraph 2(a) specifies that "[i]nformation shall be considered confidential if it is so designated by the State Party from which the information was obtained and to which the information refers." Subparagraph 2(b) states that data declarations shall be provided to States Parties (even, by implication, if they contain confidential information), while paragraph 17 states that inspection reports "shall be processed into less sensitive forms," if necessary, before being transmitted to other States Parties. Pursuant to paragraph 4 of Article XV of the Convention, the general provisions of the Confidentiality Annex and those provisions regarding inspections may not be changed without going through the formal process for amending the Convention.

Paragraph 2 also mandates the usual sort of information security practices that States parties use to protect classified information. The Preparatory Commission has agreed to recommend a three-tiered classification system that was proposed by the United States and other countries. According to the Executive branch, a U.S. security consultant has been provided free of charge "to advise the Provisional Technical Secretariat in the development of its internal physical security procedures."

The Confidentiality Annex contains several provisions regarding the employment and conduct of Technical Secretariat personnel. Paragraph 7 bars personnel from unauthorized disclosure of confidential information "even after termination of their functions," and paragraph 9 requires "individual secrecy agreements" that will extend for five years after personnel leave the OPCW. Paragraph 19 requires the Director-General to investigate allegations of breaches of confidentiality, and paragraph 20 requires the Director-General to punish violators. "In cases of serious breaches, the immunity from jurisdiction may be waived by the Director-General," thus exposing an OPCW staff member to prosecution by a State Party. Paragraph 22 exempts the OPCW as an entity however, from any legal liability for breaches of confidentiality by its personnel.

The Executive branch added, in response to a question for the record from the Committee, that it might become possible for the OPCW, itself, to subject its personnel to court action:

> The current draft of the future agreement between the CWC Organization and the Government of the Netherlands (the seat of the Organization) provides the legal capacity of the Organization to initiate suits in Dutch courts. Thus, the provisions of paragraphs 7 and 9 could be enforced by the Organization directly in this manner. In addition, the Administration's proposed legislation provides for criminal penalties, including fines and imprisonment, for unauthorized disclosure of information by, *inter alia,* employees of the Technical Secretariat.

Pursuant to paragraph 23 of the Confidentiality Annex, breaches of confidentiality "involving both a State Party and the Organization" are to be considered by a "'Commission for the settlement of disputes related to confidentiality', set up as a subsidiary organ of the Conference [of States Parties]." The implementation of this provision is left to the opening session of the Conference. The Executive branch, responding to a question for the record from the Committee, described current thinking on this provision as follows:

> The U.S., as well as other countries, has proposed a three-person team be selected from among individuals of recognized standing, one by each party involved in the alleged breach and one to be jointly selected by the two to act as chairman. To date, the Preparatory Commission has not reached final agreement on a recommendation.

Paragraph 2(c) of the Confidentiality Annex permits release of confidential information "with the express consent of the State Party to which the information refers." This paragraph also provides for release "only through procedures which ensure that the release of information only occurs in strict conformity with the needs of this Convention," procedures that will be adopted by the Conference of States Parties and could provide a means for public release of information over the objection of a State Party. The Executive branch has informed the Committee that in the more routine cases, however, notice will be provided to affected companies:

> The Administration's proposed CWC implementing legislation provides for advance notice to the supplier of information or materials pursuant to the CWC in appropriate cases when the U.S. Government intends to exercise the national interest provision to release information or materials. Where notice has been provided, the information or materials cannot be released until after 30 days have elapsed. This provision [S. 2221, Subsection 302(b)] is designed to provide affected persons with the opportunity to, *inter alia,* make their concerns about release known to the U.S. Government.

S. 2221, the proposed implementing legislation, also contains provisions to protect sensitive information. Section 302 begins by stating that "information or materials * * * obtained by" the U.S. Government "under this Act or the Chemical Weapons Convention may be withheld from disclosure or provision only to the extent permitted by law." Such "information or materials * * * that are not already in the public domain, shall not be required to be disclosed" under the Freedom of Information Act. The Executive branch indicates that the word "materials" would apply to samples taken by inspectors.

When confidential CWC information is made available to relevant committees or subcommittees of Congress, pursuant to paragraph 302(a)(2) of S. 2221, it may not be disclosed by "such committee or subcommittee, or member thereof." This provision, which the Administration's section-by-section analysis indicates is modeled after similar language in the Export Administration Act (50 App. U.S.C. 2411(c)(1)), raises some question. For example, it is not

clear whether a committee or member of Congress would be permitted to disclose CWC information even to an Executive branch official such as the President or the Secretary of State. Neither is it clear whether one committee could disclose such information to another committee with a legislative or oversight interest in the material. Finally, while paragraph 302(a)(4) permits the U.S. National Authority to disclose CWC information "in the national interest," there is no provision for such disclosure by Congress, even pursuant to the provisions of Senate Resolution 400 (94th Congress). That resolution permits the Intelligence Committee to disclose classified information to the public over the objections of the President if the full Senate, acting in a secret session, votes to uphold such disclosure. While the need for such disclosure would be extremely remote, the implementing legislation as written appears to bar public disclosure by Congress even of a violation of U.S. law (e.g., by U.S. agencies or companies) or of the CWC. The Committee recommends that the Senate Committee on Foreign Relations pay particular attention to whether section 302 of S. 2221 provides for sufficient disclosure of information to Congress and, if necessary, to the public.

Subsection 302(c) provides that those who knowingly violate the non-disclosure provision of the law "shall be fined under title 18, United States Code, or imprisoned for not more then five years, or both." Subsection 302(d) applies all of the section to "employees of the Technical Secretariat," thus permitting prosecution of such personnel if the Director-General of the OPCW should waive their immunity.

Some public disclosure of sensitive information is still possible under S. 2221, as well as under the CWC itself. Thus, paragraph 302(a)(4) says that information "may be disclosed if the United States National Authority determines that the disclosure of which [sic] is in the national interest." The likely impact of this provision is unclear. But chemical plants are already subject to many government inspections, some of which occasionally lead to the loss of confidential information. This forms the context for a bottom-line assurance that the Executive branch provided in answer to a question for the record from the Committee:

> Industry representatives have stated that if implemented properly, the risk of the release of information through the international organization will be not greater than the risk of release of information from the U.S. Government.

C. Disclosure of classified or proprietary information in data declarations

The CWC requires extensive data declarations from government and industry. S. 2221, the implementing legislation introduced (by request) by Senator Pell, would make such declarations a matter of law. There is clearly a risk that the data declarations will result in the disclosure of classified or proprietary information. One task of the U.S. Government has been to limit such disclosures to the minimum necessary for the OPCW to do its job. Another task has been to make the process of filing the declarations as easy as possible, so as to encourage voluntary filing and to limit the direct

costs of complying with the law. In response to a question for the record from the Committee, the Executive branch described its efforts in this area as follows:

> Draft industrial data declaration forms have been prepared by the Provisional Technical Secretariat (PTS) in The Hague, based on policy guidelines developed by the Expert Group on Chemical Industry Issues. The draft forms have already gone through several revisions in a deliberate effort to simplify them and make them more user-friendly. ACDA, working in close cooperation with CMA [the Chemical Manufacturers Association], has actively participated in this process by organizing a voluntary test of the draft forms by 25 U.S. chemical companies, ranging from small batch processors to major manufacturers. The participating companies were sent a complete declaration package, asked to fill out the relevant forms for one of their plant sites, and then invited to respond to a detailed questionnaire on how the content and layout of the forms could be improved. Comments provided by industry were then passed to the U.S. PrepCom delegation in The Hague, which provided them to the PTS. Many of industry's comments were subsequently incorporated into the next iteration of the forms. Overall, participating companies found the forms much easier to use than they had expected.
>
> Although the industrial declarations will require some disclosure of confidential business information (CBI), there is strong support among participating countries in The Hague for minimizing the amount of CBI in declarations, and for strict protection of all such information provided. Indeed, States Parties will be empowered to classify all confidential information submitted in national declarations according to a three-tier OPCW classification system (OPCW-Restricted, OPCW-Protected, and OPCW-Highly Protected). Detailed handling, protection, and release procedures are being worked out by the PrepCom to ensure the security of such classified information within the Organization. In addition, the Administration's proposed implementing legislation contains provisions prohibiting public release of declarations, with limited exceptions.
>
> The Administration plans to base the declaration forms for U.S. industry on the forms being developed by the PTS for declarations by the National Authority. The only additional information to be requested from industry will be a precise address and point of contact for each declared facility and specific figures for the production of Schedule 3 chemicals, [which] will then be aggregated into ranges prior to submission to the OPCW. There is no intention to require industry to supply data unrelated to the CWC, such as information on compliance with environmental or health and safety regulations.

In recent weeks, both ACDA and the Department of Commerce have continued working with U.S. industry to make the data declaration process as manageable as possible. Thus, the Executive

branch is preparing computer software that it will provide to industry for use in compiling and submitting the required data. In the process of making the declarations as simple as possible, the Executive branch also affords industry further opportunity to question any excessive data requirements. Industry association representatives appear to be content with the requirements set forth in the implementing legislation introduced by Senator Pell.

D. Counterintelligence and security concerns in U.S.-Russian BDA inspections

If agreement is reached on implementation of the U.S.-Russian Bilateral Destruction Agreement (BDA), and if the BDA both comes into force and is accepted by the OPCW as the major means for verifying U.S. and Russian compliance with CWC provisions relating to declared CW facilities, then the U.S. Government will have to both field and host inspectors who may engage in intensive monitoring of declared CW facilities and of the CW destruction process. The counterintelligence and security issues raised by this activity are quite similar to those encountered in previous arms control agreements. Thus, one can presume that Russian inspection and escort teams will include a substantial proportion of intelligence officers.

The Executive branch is quite familiar with these challenges and already has well-functioning institutions to deal with them. The DoD On-Site Inspection Agency (OSIA), in particular, routinely manages the inspection process under other arms control agreements, including the provision of security and counterintelligence assistance. While there were some difficult encounters with Soviet personnel during the early years of arms control inspections, no serious compromises of classified information appear to have resulted from past arms control inspections.

The Director of OSIA has assured the Committee that OSIA is ready from a counterintelligence (CI) perspective to implement the CWC and BDA with resources currently on hand. A CI program, used primarily to protect OSIA personnel who monitor other arms control agreements, is already in place. U.S. inspectors and escorts are fully trained regarding the intelligence threat they will face. OSIA also helps the security countermeasures community with assistance as requested or needed.

E. The adequacy of access limitations

The CWC inspection regime has two basic protections for classified and priority information:

(a) various access limitations, as reflected in detailed "facility agreements" to govern routine inspections of declared facilities involved in Schedule 1 or Schedule 2 chemicals or in CW destruction, in an agreed access requirement during routine inspections of Schedule 3 facilities, and in "managed access" to facilities in challenge inspections; and

(b) provisions requiring the OPCW to respect the confidentiality of sensitive information that it may acquire in the inspection process, as discussed earlier.

Two years ago, while the CWC was still being negotiated, a working group prepared a report for the National Security Council

on counterintelligence and security implications of the CWC. That report concluded that inspections at declared facilities pose manageable risks, but that inspections of declared facilities pose a serious threat to proprietary information. The report also concluded that challenge inspections at non-CW-related sites can be managed, but only with great difficulty and security costs. It cited the manner in which managed access is handled as the key element in risk management.

One major source for the Arms Control Working Group report was a study by Lawrence Livermore National Laboratory (LLNL) that found that CWC inspectors could readily learn classified information. LLNL analyzed several mock inspections at both U.S. industrial facilities and sensitive government facilities, including nuclear and rocket-motor production facilities. In recent months, Kathleen C. Bailey of Lawrence Livermore has cited the same LLNL study in reaching a very pessimistic evaluation of the security implications of the CWC:

> Although a treaty annex allows for protection of national security information during * * * [challenge] inspections, detecting or preventing illicit collection of samples for the purpose of espionage will be virtually impossible. U.S. trial inspections have already proved that sensitive and classified information can be obtained if samples are taken offsite, which would allow an array of analytical methods to be used. For example, in one experiment samples were collected only on the outside of a rocket propellant production facility. Among the alarming results was the fact that classified formulations—such as oxidizers, energetic binders, and burn rate modifiers—could be determined from sample analysis.[35]

The Executive branch remains confident of its ability to protect classified information, so long as proper defensive measures are taken, and has assured the Committee that vulnerabilities identified at sites subject to challenge inspection under the CWC will be protected through the prudent use of managed-access procedures. They note three rights that officials at the inspected site are provided under the treaty: negotiating in advance of the inspection (initially at the point of entry and then at the final perimeter) the perimeter of the inspection area and the limits of access to be permitted; offering alternatives to requests for access (while making every reasonable effort to satisfy the concern that generated the inspection request); and shrouding, concealing, or removing sensitive items which are not related to the purposes of the inspection. The CWC also permits the inspected State Party to turn off computers and "data indicating devices."[36]

In response to a question for the record from this Committee regarding the LLNL study, the Executive branch argued that actual CWC inspections will proceed differently from those early mock inspections:

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[35] Kathleen C. Bailey, "Why the Chemical Weapons Convention Should Not Be Ratified" in Roberts, p. 56.

[36] Verification Annex, Part X, paragraph 48.

> [T]he vulnerabilities highlighted by these studies have been largely addressed in that there are provisions in the CWC to allow a State Party to protect sensitive information not connected to chemical weapons.
>
> *However, there will always be some risk of disclosure of classified information.* The actual risk will depend on the effort devoted to identifying classified information and then protecting it at facilities during inspections.[37]

There may well be an unavoidable risk of losing such classified or proprietary information as can be obtained from outside the perimeter in a challenge inspection. The Executive branch recognizes a sampling risk, but tends not to differentiate between perimeter sampling and sampling inside the perimeter, which is subject to negotiation with the inspected State Party. Paragraph 48 of Part X of the CWC Verification Annex states that sampling inside the perimeter may be limited to testing for the "presence or absence of chemicals listed in Schedules 1, 2 and 3 or appropriate degradation products." Paragraph 36, however, explicitly permits challenge inspectors to "[t]ake wipes, air, soil or effluent samples" at the perimeter. The Committee believes that some loss of classified or proprietary information in challenge inspections is likely, at least through perimeter monitoring. It will be especially important, therefore, for the OPCW to have effective regulations and procedures guarding against disclosure of such information by OPCW personnel.

There is no question that proprietary information will be as much at risk as classified information. Thus, the working group report to the NSC described "a trial inspection at a U.S. chemical plant that would be considered a declared site under the Convention," where "the managers stated that important proprietary materials handling technology was compromised," an apparent reference to a National Trial Inspection at a Monsanto Agricultural Company plant in Luling, Louisiana (NTI–3 of September, 1990). The Executive branch responded to a question for the record from the Committee as follows:

> This NTI simulated a challenge inspection at the plant, which produces a phosphorus herbicide. One element of the exercise was to assess the potential for industrial espionage during a CWC inspection. The team that performed the trial inspection included a Monsanto chemical engineer, unfamiliar with the operation of the Louisiana plant, who was asked to determine how much useful proprietary data he could collect during the course of the inspection. By visually examining the plant and auditing plant records, he was able to deduce some proprietary information about the production process. Nevertheless, this scenario was not realistic in that the Monsanto engineer was allowed to concentrate on his "spying" assignment for two and a half days, did not perform regular inspection duties, and was not as closely supervised as the other team members.

[37] Emphasis added.

> The trial inspection pointed out the need for companies to prepare carefully for inspections. Firms can take a number of measures to minimize the risk of industrial espionage, including the negotiation of a facility agreement, development of an inspection plan, training of facility managers and workers, and escorting of inspection team members. These measures, and the importance of preparing for inspections generally, have been and will continue to be highlighted in government-industry seminars and discussions.

There is disagreement about how readily inspectors might obtain proprietary information. Some chemical engineers assert that visual observation of a plant's layout and the size and shape of reactor vessels could suffice. The Executive branch believes that fewer concerns are warranted. In answer to a question for the record from the Committee, they also described some steps that could be taken to protect information:

> An inspector could deduce little if any information about the proprietary chemical process taking place inside a reactor vessel merely by viewing its external shape. The most sensitive information in a commercial chemical plant usually relates to unpatented process technologies, such as temperature, pressure, catalysts, and so forth. In order to protect such information, the inspected facility will be entitled to shroud control panels and other sensitive items of equipment. Facility managers may also restrict access to sensitive plant records and limit sampling locations to prevent collection of samples containing proprietary catalysts.

F. The adequacy of U.S. Government sssistance

The experience of past arms control agreements has been that preparation for likely on-site inspections was critical to handling those inspections without compromising sensitive information. The Department of Defense faces a particular challenge, given the large number of facilities that either must be declared under CWC rules or might still look like possible CW facilities to a foreign observer. The Executive branch provided the following answer to a question for the record from the Committee on its preparedness in this area:

> In the event of CWC inspections of DoD facilities, both government sites and civilian plants with DoD contracts, the Defense Treaty Inspection Readiness Program (DTIRP) has the ability to inform sites quickly and to prepare them properly for inspection. DTIRP, which is managed by the On-Site Inspection Agency (OSIA), maintains a database of all government facilities and over 11,000 DoD contractors. In addition to prompt notification, the program is designed to assess risks to national security and proprietary information and to provide cost-effective countermeasures prior to and during the conduct of actual inspections.
>
> To date, OSIA has expended nearly 5,000 man days conducting no fewer than 118 field training exercises and mock inspections at DoD and DoD-contract facilities in preparation for the CWC. OSIA has visited, on a recurring

basis, every DoD CW-related facility in the US that will be declared under the requirements of the CWC. In addition to assistance visits and routine training exercises, a total of 35 full mock inspections that been conducted and the activity is continuing. The result is that our OSIA inspectors and escorts are the best prepared in the world to implement the CWC in the most cost-effective manner possible.

The Executive branch reports that the DTIRP database will enable OSIA to quickly inform DoD-related facilities in the event of a challenge inspection. It should also enable OSIA to make policymakers aware of the site's security needs and alternative perimeter preferences for the inspection. Speed will be important, because there could be as little as 12 hours between the time the United States is informed of the specific site to be inspected and the time the inspection team arrives at the U.S. point of entry.[38] Military quick-reaction teams will assist local commanders in making preparations, and OSIA will escort the teams inspecting DoD facilities while the teams are on U.S. territory. OSIA will also be in charge of inspecting the equipment brought in by each inspection team to ensure that it consists only of equipment approved for use by the international inspectors, pursuant to paragraph 29 of Part II of the Verification Annex.

U.S. escorts will be very important in helping an inspected facility monitor and control the activities of on-site inspectors. The Executive branch is also counting on these personnel, many of whom serve as U.S. inspectors under bilateral arms control agreements, to help handle the inevitable disputes that arise between inspectors and site managers.

The provision of U.S. excorts for non-DoD inspection sites is a more complicated matter. The "U.S. Host Team" will include a representative of the U.S. National Authority (who will be versed in the rights and responsibilities both of inspected site managers and of the inspectors) and a representative of the "Lead Agency," generally the Department of Commerce (who will be charged with the task of representing the site's interests in protecting CBI) for industry sites that are not engaged in Defense contracts. (ACDA is the likely "Lead Agency" for inspections of non-profit research institutes, and Commerce will work out with DoD the handling of private firms with defense contracts.) If issues arise that exceed the Host Team's authority or prompt disagreement within it, the U.S. National Authority (consisting of an interagency committee to make policy decisions and a staff at ACDA for routine implementation) will be available in Washington to handle these matters. Some industry facilities may prefer not to have more than a token Host Team presence at their sites, however, and the Executive branch will not provide on-site escorts unless requested to do so.

While OSIA will escort inspectors at DoD and DOE facilities, it will provide this service for DoD contractors only on a reimbursable basis. If a non-defense firm asks for U.S. escorts to help watch the inspectors, OSIA is not chartered to provide that service on any basis. The Executive branch intends in the latter cases, therefore, to provide escorts from ACDA and/or the Department of Commerce.

[38] See CWC Verification Annex, Part X, paragraph 6.

While some ACDA personnel, in particular, are quite familiar with procedures followed in arms control inspectors, as a whole ACDA lacks OSIA's depth of on-site experience. These limitations on the use of OSIA will all tend to make firms try to protect themselves on their own, with a likely result that they (as well as non-DoD government agencies) will spend more funds than necessary and achieve less protection than is required. The Committee recommends that Congress amend the CWC implementing legislation (S. 2221) to give OSIA authority to escort inspectors on non-DoD sites, when asked to so do by the owners or managers of those sites, on a non-reimbursable basis to the extent that funds are available.

For non-defense industries, more than escort assistance will be needed. Although many of these firms are used to dealing with government inspectors (e.g., from the Environmental Protection Agency or the Occupational Safety and Health Administration), the are unfamiliar with arms control inspections and their rights to safeguard confidential business information. ACDA has had a small program to prepare training materials for industry, and the Commerce Department is preparing to increase those efforts. Thus, a contractor-prepared video on shrouding techniques has been prepared for distribution to affected firms. ACDA and Commerce plan to prepare briefing materials for industry and also to encourage firms to hold trial inspections of their facilities. As noted below in the section on industry preparedness, however, the Executive branch has had difficulty reaching firms that do not think of themselves as chemical manufactures.

Subsection 401(b) of S. 2221, in language drawn from the Toxic Substances Control Act (15 U.S.C. 2610(a)), requires the U.S. Government to give notice to the owner, operator, or agent in charge of a facility to be inspected. In order to fully meet U.S. obligations under the terms of the CWC, however, the proposed implementing legislation also states that "* * * failure to receive a notice shall not be a bar to the conduct of the inspection." This is partly because it may not be possible for the Executive branch to locate a previously unknown private facility during the short time after notification of a challenge inspection target is received from the OPCW. The Committee recommends that the Department of Commerce, with assistance from the Department of Defense, develop a database similar to the DTIRP database, to which interested firms could voluntarily contribute information on security needs at their facilities in the event of a CWC inspection. Such a database would greatly ease the burden of responding in a timely fashion, with both notice and assistance, once the U.S. Government was notified that a particular site was to be inspected.

G. Lesser protections: Rejecting proposed inspectors or frivolous inspection requests

A State Party also has the right to reject specific inspectors or inspection assistance for any reason prior to notification of an inspection.[39] Sometimes diplomatic sensitivities or the fear of retaliatory rejections of U.S. inspectors can weigh against rejecting an inspector. Reciprocity concerns should not be relevant in the CWC case, however, since the U.S. Government may not influence or seek special information from U.S. member of the international inspectorate without violating the Convention (and therefore has little to lose if a U.N. national is rejected as an inspector). The Committee urges the Executive branch to exercise its right to reject a proposed inspector or inspection assistant when the facts indicate that this person is likely to seek information to which the inspection team is not entitled or to mishandle information that the team obtains. The Committee further urges the Executive branch not to let routine diplomatic sensitivities keep the United States from exercising its rights in this regard.

One intended protection against frivolous or malicious challenge inspections is Article IX, paragraph 17, under which the Executive Council, within 12 hours of a request, may reject that request by a vote of 31 of its 41 members. But the state to be inspected may not vote, so a request regarding the United States could be blocked only if 31 states other than the United States voted to reject it. Given the geographical distribution of Executive Council membership, the United States simply cannot rely upon this mechanism to block an unjustified challenge inspection request. An Executive branch response to a question for the record from the Committee confirms this assessment:

> During the Geneva negotiations, the United States sought to preclude the possibility of a challenge request by the United States being blocked by others. In taking this position, the U.S. argued that protection against frivolous or malicious requests could be found in the procedures for managed access which protect sensitive information and facilities. Other countries believed there should be some "filter" mechanism to preclude such requests. Thus, to balance these interests, the Convention contains the provision for the Executive Council to review challenge inspection requests, but requires ¾ opposition vote of all members within a 12-hour period to prevent the inspection from being carried out. These strict requirements make it unlikely that challenge inspections will be blocked.

H. U.S. willingness to deny access to inspectors

Although the CWC requires each State Party to allow inspectors to conduct both routine and challenge inspections, it also allows States Parties "to take measures to protect sensitive installations, and to prevent disclosure of confidential information and data, not related to this Convention."[40] Thus, in a challenge inspection,

[39] CWC Verification Annex, Part II; paragraph 4.
[40] Article IX, paragraph 11(c).

"[t]he extent and nature of access to a particular place or places * * * shall be negotiated between the inspection team and the inspected State Party of a managed access basis."[41]

These and other, similar CWC provisions effectively permit the United States to deny access to much or all of a facility if the national security would otherwise be endangered, or if a person's Constitutional rights would otherwise be violated. The Committee therefore asked the Executive branch questions for the record regarding U.S. readiness or willingness to take such drastic action if it should become necessary. The Executive branch responded as follows:

> There are portions of certain U.S. facilities to which access would be unacceptable for national-security reasons. The United States would make every effort to meet compliance concerns using managed-access techniques and would restrict access as a last resort. In the event of restricted access, the U.S. would, in accordance with the CWC, offer alternative means of addressing the compliance concern. Such decisions will be made by the U.S. National Authority on a case-by-case basis, taking into account the concerns of the lead agency for the facility, U.S. obligations under the CWC and broader political considerations.
>
> With regard to non-DoD facilities, the Executive branch generally believes: *** that the various provisions of the CWC for protecting information involving managed access will provide an adequate framework for protecting a company's sensitive information. The decision process with regard to the application of these protections would involve an evaluation of the company's concerns and, in the case of a government contractor, the implications for national security, as well as broader political considerations.

Executive branch personnel concede, however, that an unfounded challenge inspection of, say, a private residence might be judged to violate a person's Constitutional rights. If no means could be found to satisfy the inspection team's concerns without violating those rights, Executive branch personnel agree that the Constitution need not be balanced against "broader political considerations."

I. Readiness of U.S. industry for the CWC

U.S. industry has a significant responsibility under the terms of the CWC. Chemical facilities across the country will have to comply with both data declaration and inspection requirements. While the largest chemical manufacturers and trade associations have been involved with the CWC negotiations from the beginning, successful CWC implementation by the United States depends on informing all affected facilities. Industry representatives have warned for some time, however, that many firms still do not realize that they will be covered by CWC requirements.[42]

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[41] Verification Annex, Part X, paragraph 38.

[42] See Will D. Carpenter, "Understanding Chemical Industry Support for the CWC and Its Concerns about Implementing Legislation," in Roberts, p. 31; and Amy E. Smithson, editor, *Implementing the Chemical Weapons Convention: Counsel from Industry* (Henry L. Stimson Center, Washington: January 1994), p. 1.

ACDA and the Department of Commerce have taken the lead in industry outreach activities. Beginning in 1993 and continuing in 1994, ACDA conducted a series of CWC informational seminars. Thousands of companies were contacted by form letter and through advertisements in trade journals and in the Federal Register. In 1993, 191 seminar attendees took part, representing a total of 110 companies. In 1994, a total of 246 people attended representing 142 companies. The Committee pressed ACDA and Commerce, both in its CWC hearing and in later questions for the record, regarding the scope and success of their industry outreach efforts. Responses to the Committee's questions for the record included the following:

> The largest fraction of companies were large, diversified chemical manufacturers, which are likely to be members of the Chemical Manufacturers Association (CMA), a trade association that has been closely involved in the CWC process. Such large manufacturers are also most likely to be producers of chemicals on the CWC Schedules.
>
> Industry outreach activities are continuing on at least four tracks. First, ACDA has published a series of information papers for industry describing various aspects of the CWC, and additional papers will be forthcoming. Second, in cooperation with the Department of Commerce, ACDA will conduct a follow-up to the industry survey completed in February 1994 to develop a comprehensive list of U.S. companies affected by the CWC, and will use this list to focus outreach efforts. Third, also in cooperation with the Department of Commerce, ACDA plans to hold a series of industry outreach seminars during the six-month ramp-up period prior to entry into force of the CWC. Finally, in an effort to inform smaller batch producers and downstream processors and consumers, many of which are not members of the Chemical Manufacturers Association (CMA), ACDA has made a deliberate effort to reach out to smaller trade associations, including the Synthetic Organic Chemical Manufacturers Association (SOCMA) and the Pharmaceutical Manufacturers Association (PMA).

The industry response to the CWC information seminars and outreach efforts has been modest at best. Given industry's important role in data declarations, the first of which must be submitted by the United States only 30 days after the CWC enters into force, the Committee finds the risk that industry unpreparedness will lead to inaccurate U.S. declarations to be a cause for concern.

A number of factors may explain the poor response by chemical industry, as measured by attendance at CWC information seminars. The list of Scheduled Chemicals and their precursors is long, and includes chemicals used in everyday products. There may be a general reluctance within the chemical industry to associate itself with the CWC. Taking part in discussions related to a chemical weapons agreement may lead to the negative impression that a chemical facility is using highly toxic or dangerous chemicals. In addition, without previous knowledge of the wide reach of the CWC, many industries may assume the CWC has nothing to do

with their specific industry and ignore the inventions to receive addition information.

The Executive branch has suggested some other possible explanations for the low turnout:

> First, due to the bureaucratic structure of many large corporations, seminar announcements may have failed to reach the target individuals at various facilities in a timely manner. Second, many of the smaller trade associations have not understood the implications of the CWC for their members or have judged it a low priority, and some contend that national organizations such as the CMA should take the lead in this area. Finally, even when companies understand the CWC does affect them, they may assume that there is no need to begin preparations until the treaty has been ratified by 65 signatories and entry into force is certain. Particularly during a recession, smaller firms are generally reluctant to invest scarce human and financial resources to implement new regulations until there is a clear legal requirement to do so. For this reason, such firms may prefer to wait until CWC ratification and passage of the implementing legislation before commencing preparations. As the reality of implementation nears, however, such companies would be expected to show greater interest.

There is, in fact, some justification for a slow response by industry regarding possible inspections. For those firms that do not handle Schedule 1 or Schedule 2 chemicals, the first routine inspection would not take place until at least two years after the CWC enters into force. But even those firms will be expected to provide the necessary data for aggregation into the initial and annual U.S. data declarations, perhaps half a year after U.S. ratification of the Convention.

The problem of insufficient outreach continues to challenge the Executive branch. Thus, the Chemical Manufacturers Association (CMA), with encouragement from the Executive branch, recently broadened its CW Work Group that meets with ACDA and the Department of Commerce. The broader group now includes representatives from other associations, as well as CMA member companies. But only six such associations are participating: the Synthetic Organic Chemical Manufacturers Association, the Pharmaceutical Manufacturers Association, the American Fiber Manufacturers Association, the Soap and Detergent Association, the Distilled Spirits Association and the National Association of Manufacturers. By contrast, the CMA representative to the CWC negotiations has said that "another 60 to 80 trade associations" will be affected by the CWC. These include the automotive, paint and varnish, electronics and food processing industries, in addition to those now meeting with the CMA group. The CMA representative warns:

> An overwhelming number of these companies are not aware of the implications of the Chemical Weapons Convention despite a continuing effort by ACDA, the CMA, and other organizations to get the word out.[43]

The Commerce Department plans to spend much more money on CWC implementation than ACDA devoted to industry outreach in recent years. But there will be little time in which to organize this effort, especially if agencies wait until the planned Executive order on CWC implementation to be promulgated after enactment of implementing legislation. The Committee urges the Commerce Department to undertake a substantially-increased outreach program to inform companies that do not yet understand their data declaration obligations, in particular. Because U.S. ratification of the CWC may well precede enactment of implementation legislation, the Committee urges the Commerce Department to begin this effort now, rather than waiting for a formal designation as the lead agency for this effort.

In addition to Executive branch efforts, other U.S. Government and private institutions have addressed issues raised by the CWC and increased industry awareness of their rights and responsibilities under the Convention. One example is the Office of Technology Assessment of the U.S. Congress, which published a Background Paper on the "The Chemical Weapons Convention—Effects on the U.S. Chemical Industry" in August, 1993. The Henry L. Stimson Center's "CWC Implementation Project" has provided extension materials on issues surrounding the CWC to industry.

At least two private companies have advertised their availability to help firms cope with CWC declaration and inspection provisions. The Executive branch believes that DoD assistance "should be sufficient to meet the needs of most defense contractors." In response to a specific question for the record from the Committee, the Executive branch does say, however:

> A defense contractor may obtain U.S. Government-funded private assistance if such assistance is specifically provided for in the contract. A defense contractor may also obtain U.S. Government-funded private assistance if such assistance can be justified within the spirit of the contract.

The value of private services to non-defense industry is harder to judge. It may well depend upon how effectively ACDA and the Department of Commerce develop materials and an on-site assistance capability in the coming months and years. The Executive branch made clear in answers for the record that it hopes companies will not think that use of a private firm substitutes for keeping in touch with relevant Federal agencies:

> The CWC is a complex document, and the Preparatory Commission in the Hague is still working many of the technical details pertaining to declarations and inspection procedures required to implement the provisions of the

[43] Will D. Carpenter, in Roberts, p. 31

> Convention. U.S. Agencies are able to provide industry information regarding the technical, legal and policy implications of the treaty. [The Chemical Manufacturers Association] * * * has recommended to their member companies to consult ACDA if they have questions. ACDA has then taken any unresolved issues or ambiguities in the CWC back to the Expert Group discussions in The Hague for consideration and resolution. ACDA, as the Chair for the interagency CWC Task Force, is also able to work closely with * * * [Commerce] and DoD in coordinating responses and resolving issues raised by either defense or commercial facilities. ACDA and other agencies will continue to offer as much assistance as possible to facilities facing CWC declaration and inspection requirements.

The Executive branch has indicated to the Committee that, "[a]s with domestic regulatory regimes, industry is expected to bear the expense of protecting information as 'cost of doing business.'" Chemical firms, at a minimum, appear to agree that the costs are acceptable. This reflects both their desire to end their industry's role in chemical weapons and the fact that the costs will be spread among all companies in the industry, world-wide. So long as costs are borne equally, all firms can pass the costs along to their customers and no firm loses much business as a result.

J. Funding CWC implementation

The OPCW budget

The 1994 budget for the Provisional Technical Secretariat of the OPCW (PTS) is around $30 million, and the U.S. share is roughly 25 percent. As discussed in Part IV of this Report, the head of the PTS Verification Division has publicly criticized that funding level and warned that the 1995 budget—as the Convention enters into force—will have to be much higher. The ACDA Budget as submitted to Congress includes $14 million for the U.S. share of the 1995 Preparatory Commission/OPCW assessment.

Funds for industry outreach and implementation

The Under Secretary of Commerce for Export Administration testified before the Committee that his department would need to spend roughly $5 million in the first year after CWC entry into force. He went on to say, however, that such funds had been budgeted only for Fiscal Year 1996: "There has been no money requested for '95. If the Convention enters into effect on the anticipated dates, we'd have to come in with a request." In response to a question for the record from the Committee, the Executive branch provided further information on Department of Commerce budgeting for CWC:

> The Commerce Department * * * has no funds allocated for these activities in the FY 1995 budget and is funding its current preparations for implementation out of its current operating budget. In order to carry out the functions of collecting and compiling CWC declarations from industry to ensure compliance with the Treaty, Commerce will require additional resources. Since Under Secretary

> Reinsch's testimony before the Committee, Commerce has reduced its estimate of the funds needed for the first year to $3,042,000. Until the Administration has more information about the entry into force of the CWC, however, a decision on a supplemental request would be premature.

Despite the uncertainty of the Commerce Department's budget for the industry portion of CWC implementation, steps have been taken to develop the administrative structure necessary to take on this task. The Commerce budget will be, in any case, at least ten times larger than ACDA's yearly funding for CWC industry outreach programs, which has ranged between $200,000 and $300,000. As noted above, the Committee believes that Commerce Department action to improve industry outreach should begin immediately.

CWC and BDA implementation costs

ACDA included $25 million in its Fiscal Year 1995 budget request for implementation efforts. Some $15 million would be for work with the OPCW and the Preparatory Commission; another $10 million would fund the new Office of the National Authority for CWC implementation. ACDA's requested industry outreach funding was $300,000.

The Department of Defense requested $82 million in Fiscal Year 1995 funds for CWC and BDA implementation. This includes $39 million for the military services, $25 million for OSIA and $18 million for the Defense Nuclear Agency's verification technology R&D program. DoD will also have to devote substantial sums to the maintenance and destruction of CW stockpiles ($950 million) and to CW defense ($509 million for CW and BW combined). The latter expenditures will be required irrespective of whether the CWC and/or the BDA enter into force; stockpile maintenance and CW defense are regular U.S. military programs, and U.S. law already require DoD to destroy its non-binary CW stockpile.

The current total cost estimate for the U.S. chemical weapons destruction program is about $10 billion over the period of destruction. The cost of destroying other items, as required by the CWC (e.g., chemical weapons production equipment) is approximately $1 billion. These funds are contained in the Chemical Agents and Munitions Destruction, Defense (CAMD, D) account, which includes budget lines for research and development, procurement, operations and maintenance, and military construction.

Defraying Russia's CW destruction costs

The Executive branch provided the following information in response to a question for the record from the Committee:

> Under the Cooperative Threat Reduction Program (Nunn-Lugar), the United States has agreed to provide up to $55 million in assistance to the Russian chemical weapons destruction program. This assistance will include the provision of a U.S. contract or to aid in the development of a comprehensive plan and the equipping of a central analytical laboratory. The laboratory will be responsible for

environmental baseline studies at the destruction sites and for monitoring to ensure safe destruction activities.

The U.S. has agreed to consider additional measures as appropriate to assist the Russian chemical weapons destruction program. The Russians have asked on several occasions that additional support focus on efforts to develop one or two nerve-agent destruction facilities. This request is now under consideration. The total cost of the Russian destruction program will not be known until the Russian Government completes its chemical weapons destruction plan.

Executive branch officials have stated in other fora that they would like to use additional Nunn-Lugar money to fund for at least one of the Russian destruction facilities, partly to move the Russians along and partly to encourage substantial contributions from other countries.

K. The potential security costs of inspections

The Executive branch estimates that industrial facilities subject to routine inspection should be able to compile their data declarations and host an initial inspection for no more than $10,000 in direct personnel costs. These costs to U.S. industry are estimated to total $14 million for the initial declarations and inspections, with $12 million of that total being shared by some 6,000 Schedule 3 and "other chemical production" facilities that must file simple declarations and will be subject to up to 20 U.S. inspections per year beginning three years after the CWC enters into force. Costs are expected to fall to half those levels after the initial inspection.

Some challenge inspections of non-CW facilities could pose great difficulty from an economic standpoint. This would be particularly true in those inspections that required lengthy postponement of sensitive activities; and a challenge inspection may last three-and-a-half days.[44] The Executive branch believes that its continuing assistance to potential inspection sites will minimize those costs, but concedes that some facilities may encounter problems:

> Some facilities will have a more difficult time employing managed-access techniques, such as shrouding and protecting sensitive projects from visual observation. Inspections could also be costly, if they interfere with normal production and/or force a shutdown at a site.
>
> Programs may also be susceptible to ripple effects, meaning the impact of an inspection on other sensitive programs not at the inspected site. For example, a vendor might be delayed in delivering a part, holding up the production of a priority item.

The Executive branch's general approach to this problem is to encourage companies (and to require DoD-related facilities) to develop "a readiness plan that describes the possible scenarios and possible costs" and then to test the plan in a mock inspection. Significant

[44] See Verification Annex, Part X, paragraph 57.

effort has been put into preparing DoD facilities, and many industrial plants are at least used to handling government environmental and safety inspectors. There is clearly at least a small risk, however, that a challenge inspection will result in millions of dollars of losses to a company or to the Defense Department.

L. Indemnity for losses

The Committee inquired as to the liability of the U.S. Government if proprietary information should be disclosed as the result of an inspection—and especially of a challenge inspection of a plant that is not in a highly-regulated industry. This issue had been the subject of extensive discussion within the Executive branch earlier this year, and had not been settled by the time of the Committee's hearing on the CWC.

This summer, the Executive branch responded that neither the CWC nor the Administration's proposed implementing legislation provides for assumption of any liability. The Executive branch also decided not to propose any Government-sponsored insurance mechanism for recovering damages due to unauthorized disclosures, largely because it would be so difficult for a company to prove that a disclosure had occurred. Industry representatives agree that it would generally be very difficult for them to meet any reasonable standard of proof in such a case.

The Executive branch notes that the "Commission for the settlement of disputes related to confidentiality" to be established by the Conference of States Parties could examine compensation for losses to U.S. industry caused by the actions of another State Party. Also, an aggrieved company might attempt to seek compensation from the U.S. Government through a civil suit based on the "Takings Clause" of the Fifth Amendment to the U.S. Constitution, although the problems of proof would be at least as difficult in such a suit as in an insurance claim.

M. Forced access to U.S. facilities and the use of information so acquired

Subsection 301(a) of S. 2221 authorizes the Commerce Department to promulgate regulations requiring reports from industry for the CWC data declarations, and section 303 makes it "unlawful for any person to fail or refuse to" comply with such regulations. Similarly, section 403 makes it "unlawful for any person to fail or refuse to permit entry or inspection, or to disrupt, delay or otherwise impede an inspection as required by this title." Section 405 allows the Government to seek injunctive relief, and subsections 406(b) and 406(c) permit the Government to obtain subpoenas or "to use reasonable types and levels of force, as necessary," in order to implement the CWC.

The Executive branch emphasizes that forced searches may well be extremely rare. Most inspections will be routine inspections of CW facilities and a few hundred facilities that make or us large quantities of Schedule 2 chemicals. These firms tend to be highly regulated already, and they often have already been involved in working out CWC provisions and implementation procedures. All will be required to reach facility agreements, moreover, in which the OPCW's inspection rights will be worked out in advance. The

estimated 6,000 firms that deal in Schedule 3 or other organic chemicals will have to host no more than 20 routine inspections per year, which amounts to a 3 percent a priori risk that a particular facility would be inspected in a given year.[45]

The number of challenge inspections that might be directed at the United States cannot be predicted, but even these are far more likely to be targeted at DoD or major chemical industry facilities than at firms less used to hosting inspections. If any particular country should persist in unfounded requests for challenge inspections of U.S. facilities, moreover, the CWC (at Article VIII, paragraph 36) does consider "abuse of the rights provided for under this Convention" to be a form of non-compliance that may warrant Executive Council action.

Use of inspection information in an unrelated prosecution

Paragraph 302(a)(3) of S. 2221 states that information "*shall* be disclosed to other agencies or departments for law enforcement purposes * * * and *may* be disclosed or otherwise provided when relevant in any proceeding. * * *"[46] From the standpoint of assuring the maximum cooperation from industry, it might have been better to provide that information obtained by U.S. personnel could *not* be used for law enforcement purposes unrelated to the CWC. But chemical plants are already subject to many government inspections, the results of which are similarly provided to relevant agencies if an inspector happens to observe evidence of a violation of law. Representatives of such industry groups as the Chemical Manufacturers Association and the Synthetic Organic Chemical Manufacturers Association have stated that their members are used to such a regime.

The Committee asked several questions for the record relating to the propriety to allowing the U.S. Government to force a private facility to permit a CWC inspection on its premises, while requiring that U.S. escorts report to the relevant agency any evidence of an unrelated offense (such as an EPA or OSHA violation) that they might observe in the course of the inspection. One concern that motivated these questions was the distinct possibility that a country that was the target of a challenge inspection requested by the United States might retaliate by requesting a challenge inspection of a U.S. facility. While such an inspection would most likely target a DoD or major chemical industry facility, any private facility is theoretically at risk. The foreign policy interests of the United States, moreover, might strongly encourage cooperation in such an unwarranted inspection.

The Executive branch's answers to the Committee's questions included the following:

> All facility owners have an on-going obligation to obey existing law. The purpose of the CWC-related inspections is not to discover violations of other laws, but to verify and monitor CWC compliance. Nevertheless U.S. escorts will not be barred from reporting what they see, including violations of U.S. or local laws unrelated to the CWC. If such

[45] See Verification Annex, Part VIII, paragraph 16, and Part IX, paragraph 13.
[46] Emphasis added.

a violation is reported, the government believes that it would be justified in prosecuting.

As previously cited, information from inspections may be publicly released for law enforcement reasons. This provision is not unique to this legislation. The Environmental Protection Agency and the Department of Health and Human Services have memoranda of understandings that provide for exchange of information gathered during their domestic inspections. The Administration expects that the implementation of the CWC will operate in a similar fashion.

The Administration believes that since the vast majority of plant owners and managers already obey the law, there is little reason for concern about whether suspected violations of law unrelated to the CWC may be discovered. Moreover, inasmuch as the CWC inspection team and escorts will be lawfully on their property, plant owners and managers are likely to be as cooperative as they would be for any EPA or OSHA inspection to which they are also subject. Finally, when the first draft of the implementing legislation was submitted to the Chemical Manufacturers Association (CMA) for its review, no objection was raised to this provision.

The Executive branch has endeavored to minimize any risk of intentional acquisition during an inspection of information unrelated to the CWC. Aside from those CWC provisions that limit the scope of inspections, paragraph 401(3)(2) of S. 2221 limits the cooperation that U.S. persons must provide:

(2) To the extent possible consistent with the obligations of the United States pursuant to the Chemical Weapons Convention, no inspection under this title shall extend to—

(A) financial data;

(B) sales and marketing data (other than shipment data);

(C) pricing data;

(D) personnel data;

(E) research data;

(F) patent data; or

(G) data maintained for compliance with environmental or occupational health and safety regulations.

Judicial review of CWC inspections

Subsection 406(a) of S. 2221 requires the Executive branch to obtain a federal warrant in order to force cooperation with an inspection. Subsection 406(d), in turn, limits judicial intervention as follows:

No court shall issue an injunction or other order that would limit the ability of the Technical Secretariat to conduct, or the United States National Authority or Lead Agency to facilitate, inspections as required or authorized by the Chemical Weapons Convention.

In response to questions for the record posed by the Committee regarding the limit on judicial intervention, the Executive branch provided the following additional information:

> The intent of this provision is to reach physical, rather than legal, actions by plant owners or managers.
>
> The Administration's proposed CWC implementing legislation does not prohibit facility owners from appealing to the U.S. courts to prevent access to the perimeter of the facility, or to inside the facility. However, the proposed legislation prohibits injunctions or other orders that would limit the ability of the Technical Secretariat to conduct, or the U.S. Government to facilitate, inspections as required or authorized by the CWC.
>
> The U.S. Government would not force a plant owner to accept any inspection that was not authorized under the CWC. Nevertheless, if the inspection is valid, the U.S. is under an affirmative obligation to allow it to proceed.

Thus, a facility owner could go to court to challenge an inspection, but could not stop it. Presumably, the facility owner could seek damages, refusal to allow the use of certain evidence in a prosecution, and/or an injunction requiring that proper procedures be followed in future cases.

There is always the possibility that a court would rule that a particular CWC inspection violated the U.S. Constitution. If this were to occur, the court presumably could declare subsection 406(d) of S. 2221 unconstitutional insofar as it purported to prevent the court from upholding the Constitution. The warrant procedure in S. 2221 parallels an administrative search scheme suggested by legal scholars, however, so there might not be a justiciable issue unless and until a forced inspection were to result either in demonstrable losses to the company or in prosecution of the company for some offense. (In the view of some scholars, S. 2221's lack of specified means to seek compensation for damages may increase the risk of a court finding a CWC inspection unconstitutional.)[47] Such a case could not be brought until after the inspection had occurred, so there is little likelihood of a judge actually trying to stop an imminent or ongoing inspection.

Obeying state and local regulations

Legal scholars and industry executives have warned that the conflict between safety regulations (many of which take the form of state laws and local ordinances that vary greatly from one jurisdiction to another) could prove a difficult aspect of CWC implementation.[48] These concerns may be assuaged somewhat by paragraph 401(f)(2) of S. 2221, which requires that inspectors and escorts "observe safety regulations established at the premises to be inspected, including those for protection of controlled environments within a facility and for personal safety." This language, which is taken from the CWC Verification Annex (Part II, paragraph 43),

[47] See Barry Kellman and Edward Tanzman, "Implementing the Chemical Weapons Convention: Legal Issues" (Lawyers Alliance for World Security and Committee for National Security, Washington: July 1994).

[48] See Kellman and Tanzman, pp. 8–9, and Smithson, pp. 7–9.

should give legal backing to facility managers in any dispute with inspectors over the safety of a proposed inspection activity (e.g., taking a sample at a particular location or using equipment that has not been fully tested to confirm that it will not cause a spark).

SUMMARY: FINDINGS AND RECOMMENDATIONS

This summary largely repeats the findings and recommendations contained in the body of the Committee's report. The reader is encouraged to consult the full text to understand the context of those findings and recommendations and the reasons for them.

Implications of the CWC text

The Committee pursued several issues of treaty interpretation in its hearing and in questions for the record, and the answers provided by the Executive branch were generally reassuring. The lack of a definition of "law enforcement purposes" could lead, however, to compliance disputes.

If the CWC is ratified, a new Executive order will be needed to minimize the risk of American use of riot control agents in ways that would raise compliance questions.

It is likely that some States Parties to the CWC will assert that the Convention requires substantial changes in the functioning of the Australia Group. The Committee trusts that the United States and other Australia Group members will prepare to counter such arguments both publicly and in international fora.

Recommendation No. 1.—The Senate should make its consent to ratification of the CWC conditioned upon a binding obligation upon the President that the United States be present at all Amendment Conferences and cast its vote, either positive or negative, on all proposed amendments made at such conferences, thus ensuring the opportunity for the Senate to consider any amendment approved by the Amendment Conference.

Monitoring and verification

A single, all-encompassing judgment cannot be made regarding the verifiability of the CWC or U.S. capability to monitor compliance with the Convention. In some areas our confidence will be significantly higher than others. Like the Executive branch, however, the Committee largely accepts the Intelligence Community's pessimistic assessment of U.S. capability to detect and identify a sophisticated and determined violation of the Convention, especially on a small scale. The Committee also notes the Intelligence Community's assessment that the CWC would give the U.S. Government access to useful information, relevant to potential CW threats to the United States, that would not otherwise be obtainable.

It is likely that some countries that ratify the CWC will seek to retain an offensive chemical weapons capability. While it is unlikely that they would do so by diverting declared CW stocks, the convert stockpiling of undeclared agent or munitions could well occur. Monitoring such illicit behavior will be the single most challenging task for the CWC verification regime and U.S. monitoring.

OPCW investigators, if not blocked from gaining needed access to sites and affected persons, should be able to determine whether chemical weapons have been used in a particular case.

Recommendation No. 2.—The Executive branch should work to foster OPCW procedures that would permit on-site inspectors to identify and record the presence of non-scheduled chemicals, while taking extraordinary steps, if necessary, to protect any confidential information thereby acquired.

If the international inspectorate is determined, well trained, and well equipped, and if U.S. or other States Parties provide accurate and timely leads to the OPCW, there may well be some occasions in which on-site inspection will produce evidence of CWC violations. It will be vital, however, that the OPCW not lose sight of that objective.

In addition, U.S. and international monitoring will, at times, be sufficient to raise well-founded questions. In order to maintain the effectiveness of the Convention and to deter potential violators, the United States and the OPCW must pursue such questions vigorously, even to the point of seeking international sanctions if a State Party does not adhere to the principle set forth in paragraph 11 of Article IX of the CWC, that "the inspected State Party shall have the right and the obligation to make every reasonable effort to demonstrate its compliance with this Convention." U.S. verification policy and investment in monitoring technologies should start from the principle that monitoring can contribute to effective international action even if it cannot conclusively demonstrate a country's violation of the Convention.

Recommendation No. 3.—The Executive branch should adhere to an arms control verification policy that does not require agencies to prove a country's noncompliance before issues are raised (either bilaterally or in such international flora as the OPCW or the United Nations) and appropriate unilateral actions are taken.

The deterrent effect of the CWC is extremely difficult to predict. A strong U.S. commitment to the enforcement of the CWC will be essential to the effectiveness of the Convention. It may in fact be possible to achieve a measure of both enforcement and deterrence, but only if the United States is prepared to make compliance with the CWC a major element of its foreign policy stance toward each State Party to the Convention.

Improving U.S. monitoring and verification

Recommendation No. 4.—The Committee endorses the call by the interagency committee under the Deputy Secretary of Defense for increased funding of CW sensor technology and urges the Executive branch to redirect FY 1995 funds for this purpose as well. The Committee also recommends that Congress rescind its restriction on DOE efforts to develop CW (and BW) sensors based upon technologies it is developing in the nuclear field.

Funds invested in CW sensor technology may well be wasted, however, unless the Executive branch institutes effective oversight of the multitude of agency programs in this field. The recent formation of a Nonproliferation and Arms Control Technology Working Group may provide an appropriate forum in which to deconflict and narrow the focus of agency programs and to fund the most promising avenues to ensure expeditious completion. The Executive branch should ensure that the body that makes such decisions is fully briefed on all relevant intelligence and defense programs.

Even highly sensitive programs should not be immune from high-level interagency consideration to determine whether they warrant increased or lessened support.

Cooperation with the OPCW

The lack of U.S. access to raw data from on-site inspections will impede the Intelligence Community's monitoring of CWC compliance.

Progress is being made in The Hague on enabling the OPCW to take advantage of the information resources of States Parties; the Executive branch should give this matter high priority.

Recommendation No. 5.—Rather than waiting until the CWC enters into force, the Executive branch should begin preparing now to meet the likely need for U.S. support to OPCW inspections, including information that would be needed for challenge inspections of declared and undeclared sites pursuant to Part X of the CWC Verification Annex.

The Committee cannot assure the Senate that the Preparatory Commission's other recommendations will improve CWC verification significantly, but it is encouraged by the reported general direction of those talks.

The Question of Russian compliance

The Committee views with great concern Russia's failure to comply fully with the data declaration provisions of the Wyoming MOU and its implementing procedures. In the absence of full compliance with the Wyoming MOU, neither the Committee nor the Senate can overlook the distinct possibility that Russia intends to violate the CWC.

The failure to implement all the on-site inspections originally agreed to in the Wyoming MOU is another cause for serious concern. The inspections under Phase II of the MOU are no longer likely to make a significant contribution to compliance monitoring or verification. Rather, as pared down in 1993 and in the final implementing procedures, they will continue the confidence-building process and help the two sides prepare for later inspections under the BDA and/or the CWC. Given Russia's refusal to permit a full suite of technical inspection equipment, even after most inspections and all challenge inspections of nondeclared sites were eliminated, the Senate must assume that Russia may have something to hide.

Recommendation No. 6.—The President should make full Russian implementation of the Wyoming MOU and the BDA an issue of high priority in U.S.-Russian relations and raise the matter personally at the highest levels. The Committee recommends that the Senate add a condition to the resolution of ratification of the CWC requiring the President, 10 days after the CWC enters into force or 10 days after the Russian Federation deposits instruments of ratification of the CWC, whichever is later, either—

(a) to certify to the Senate that Russia has complied fully with the data declaration requirements of the Wyoming MOU; or

(b) to submit to the Senate a report on apparent discrepancies in Russia's Wyoming MOU data and the results of any bilateral discussions regarding those discrepancies.

The Committee further recommends that the Senate add a declaration to the resolution of ratification of the CWC expressing the sense of the Senate that if Russian data discrepancies remain unresolved 180 days after the United States receives information on Russia's initial CWC data declarations from the OPCW Technical Secretariat, the United States should request the Executive Council of the OPCW to assist in clarifying those discrepancies pursuant to Article IX of the Convention.

Given the passage of one-and-a-half years since Russia and the United States reached ad referendum agreement on BDA implementation, and given the fact that the BDA mandates extensive on-site inspection by U.S. personnel, the Committee believes there is a real risk that the BDA will never enter into force, notwithstanding Russia's economic incentive to accept bilateral verification. In the absence of agreement on BDA implementation, the Committee advises the Senate that verification of Russian compliance would likely be based upon a smaller number of inspections than originally anticipated, that the inspections of Russian sites would be conducted by the OPCW inspectorate rather than by U.S. personnel, and that there would be no guaranteed U.S. access to the detailed inspection data. On the other hand, the OPCW is unlikely to exempt Russia from the requirements set forth in the CWC's provisions.

Recommendation No. 7.—The Senate should add a condition to the resolution of ratification of the CWC, barring the deposit of instruments of ratification until the President certifies to Congress either: (a) that U.S.-Russian agreement on BDA implementation has been or will shortly be achieved, and that the agreed verification procedures will meet or exceed those mandated by the CWC; or (b) that the OPCW will be prepared, when the CWC enters into force, to effectively monitor U.S. and Russian facilities, as well as those of the other States Parties. Relevant committees may also wish to consider whether it would be effective to attach conditions to one or more elements of U.S. economic assistance to Russia.

Recommendation No. 8.—The Executive branch and the committees of Congress with responsibility for U.S. contributions to the OPCW budget should pay close attention to the OPCW's changing needs, so that additional funds can be made available in a timely fashion if current planning assumptions prove too conservative.

Recommendation No. 9.—The Executive branch should ensure that the effectiveness of the CWC, both in Russia and around the world, is the primary objective of U.S.-Russian CW policy.

Protecting classified and proprietary information

Although some loss of sensitive information will likely occur as a result of CWC data declarations and on-site inspections, the Executive branch is taking all reasonable steps to protect classified information that may be at risk. The Committee welcomes the recent increase in efforts to help U.S. industry, but believes that still more can be done to protect confidential business information held by private firms.

Some loss of classified or proprietary information in challenge inspections is likely, at least through perimeter monitoring. It will be

especially important, therefore, for the OPCW to have effective regulations and procedures guarding against disclosure of such information by OPCW personnel.

Recommendation No. 10.—The United States should exercise its right to reject a proposed inspector or inspection assistant when the facts indicate that this person is likely to seek information to which the inspection team is not entitled or to mishandle information that the team obtains.

Recommendation No. 11.—Congress should amend the CWC implementing legislation (S. 2221) to give the DoD On-Site Inspection Agency (OSIA) authority to escort inspectors on non-DoD sites, when asked to do so by the owners or managers of those sites, on a non-reimbursable basis to the extent that funds are available.

Recommendation No. 12.—The Department of Commerce, with assistance from the Department of Defense, should develop a database similar to the Defense Treaty Inspection Readiness Program (DTIRP) database, to which interested firms could voluntarily contribute information on security needs at their facilities in the event of a CWC inspection.

Given industry's important role in data declarations, the first of which must be submitted by the United States only 30 days after the CWC enters into force, the risk that industry unpreparedness will lead to inaccurate U.S. declarations is a cause for concern.

Recommendation No. 13.—The Commerce Department should undertake a substantially-increased outreach program to inform companies that do not yet understand their data declaration obligations, in particular. Because U.S. ratification of the CWC may well precede enactment of implementation legislation, the Commerce Department should begin this effort now, rather than waiting for formal designation as the lead agency for this effort.

Recommendation No. 14.—The Senate Committee on Foreign Relations should pay particular attention to whether section 302 of S. 2221 provides for sufficient disclosure of information to Congress and, if necessary, to the public.

ADDITIONAL VIEWS OF SENATOR JOHN GLENN

I support the Committee's report and concur with its recommendations.

The Chemical Weapons Convention (CWC) is unparalleled in its scope and intrusiveness, banning an entire class of weapons of mass destruction and creating an unprecedented international norm. I believe that the CWC, even with its limitations, is a significant achievement in arms control. Accordingly, I intend to vote in support of the Chemical Weapons Convention when it is considered by the full Senate.

Of particular interest to me is the fact that the CWC is inherently a non-proliferation agreement. In my almost 20 yeas in the Senate, I have been more concerned with the proliferation of weapons of mass destruction than any other national security issue. I cannot emphasize strongly enough the important non-proliferation aspect of the CWC. The Convention includes provisions which ban the development, production, acquisition, stockpiling and retention of chemical weapons, but also prohibits Member states from assisting other nations in prohibited activities, and restricts trade in relevant specified chemicals with non-Member states. Implementation of the CWC will establish a new international norm against the proliferation of chemical weapons and will therefore serve as the foundation for international pressure against non-Member states which possess—or are seeking to possess—chemical weapon programs.

In the past, our nation relied upon its chemical weapon stockpile to deter a chemical weapon attack against U.S. interests. I agreed with the policy decision to end America's reliance on chemical weapons as a deterrent. In May, 1991, President Bush set Administration policy by announcing that the U.S. was committed to banning chemical weapons for any reason when the Convention enters into force. It was decided that our nation's ability to deter chemical weapons under a CWC regime will be based both on a robust chemical weapons defense capability, as well as our overwhelming conventional force to retaliate against any CW attack. As JCS Chairman John Shalikasvili stated in testimony before the Senate Armed Services Committee on August 11 of this year:

> First, a chemical weapons defense program is essential not only to protect U.S. forces but also to ensure their combat effectiveness in a chemical environment. A well trained and protected force is not as vulnerable to a chemical weapons attack as a force lacking these essential attributes. These factors would naturally impact the decision of any would be aggressor when contemplating the deployment of chemical weapons against U.S. forces.

> Second, while the U.S. will forego CW retaliation in kind upon the Convention's entry into force it still retains a retaliatory capability second to none. Desert Storm proved that retaliation in kind is not required to deter the use of chemical weapons. Should deterrence fail, a chemical attack against U.S. forces would be regarded as an extremely grave action subject to an appropriate non-chemical response of our choosing. As was stated by Secretary Cheney during the Gulf War, the U.S. response to a chemical weapons attack would be "absolutely overwhelming" and "devastating."

I am troubled, however, by Russia's failure to comply fully with the data declaration provisions of the Wyoming MOU and its implementing procedures, as well as its reluctance to accept on-site inspections with the most effective monitoring equipment. I strongly concur with the Committee Report's recommendation that President Clinton make these issues a high priority in U.S.-Russian relations, and that if the bilateral effort to resolve data discrepancies is unsuccessful, that matter should be taken up with the Executive Council of the Organization for the Prohibition of Chemical Weapons (OPCW), which is responsible for overseeing the Convention's compliance verification.

Some have argued that the appropriate response to these Russian discrepancies is to delay U.S. ratification of the Convention until the Russians provide a satisfactory explanation. I am persuaded, however, that it is more desirable for the Senate to act favorably on the convention at the earliest possible date, thereby accelerating pressure on other nations, including Russia—which has inherited the world's largest chemical weapons stockpile—to ratify the CWC. Swift ratification of the CWC will also enable inspectors to obtain access to Russian sites of concern through the Convention's inspection provisions, and make a determination as to whether or not cheating has occurred.

As this report notes, the U.S. Intelligence Community's ability to detect and identify "a sophisticated and determined violation of the Convention, especially on a small scale" is daunting at best. Unlike monitoring nuclear weapons and missiles which have distinctive and easily identifiable characteristics, a nation's chemical weapon infrastructure tends to be small and portable and is comparatively easier to conceal. Many industrial chemicals are dual-use and can be utilized for military purposes. Nevertheless, the CWC provides for the most intrusive and comprehensive monitoring regime of any arms control accord. The CWC regime provides for routine monitoring and inspection for military—as well as civilian—facilities. In addition, the Convention's challenge inspection provisions expand compliance monitoring to suspect sites—a significant provision of the CWC.

The difficulty in monitoring chemical weapons underscores the importance of maintaining a highly capable U.S. Intelligence Community. The world has become much more complex and uncertain with the end of the Cold War, and this has increased—rather than diminished—our need for a strong intelligence capability. The end of the Cold War has also resulted in the need to monitor increasingly complex arms control regimes that are multilateral rather

than bilateral. As we move into the implementation phase of the CWC, we must be vigilant to insure that adequate intelligence capabilities exist to effectively monitor this and other arms control agreements.

ADDITIONAL VIEWS OF SENATOR JOHN F. KERRY

The report of the Senate Select Committee on Intelligence (hereinafter "the Committee") accurately collects the salient information presented to the Committee during its hearings and other examinations of the Chemical Weapons Convention and the implications of ratification by the United States. It also appropriately contains findings based on that information and presents several recommendations to other committees of the Congress and to the Executive Branch for addressing some of the problems and undesirable consequences that may flow from ratification.

The Committee's report states in its concluding section titled "Summary: Findings and Recommendations" that "[t]he Committee * * * notes the Intelligence Community's assessment that the CWC would give the U.S. Government access to useful information, relevant to potential CW threats to the United States, that would not otherwise be obtainable." This is accurate and, in my judgment, a very important observation. Nonetheless, the report does not directly address what I believe to be two questions the answers to which are far more important, by many orders of magnitude, than any others the Senate must answer before it votes to ratify or refuse to ratify the Convention:

> Is it more probable that the security of the United States will be enhanced in net, or that it will be harmed in net, by ratification of the Convention?
>
> If it is adjudged probable that the security of the United States will be enhanced in net by ratifying the Convention, will the security of the United States be harmed in one or more specific ways that are so severe that they should be considered affordable risks indicating the Convention should not be ratified?

I concur with the Committee's conclusion that its role in the advice and consent process is more limited than offering its judgment on these two central questions—which properly should be addressed by the Senate Committee on Foreign Relations. Nonetheless, I believe the Senate can and does properly look to the Intelligence Committee to answer derivatives of each of these two central questions:

> Is it more probable that the ability of the United States to acquire significant intelligence about the chemical weapons capability, intentions, production, and stocks of, and their use by, other nations—and therefore that our nation's knowledge with respect to these matters—will be enhanced in net, or that it will be harmed in net, by ratification of the Convention?
>
> If it is adjudged probable that the ability of the United States to acquire significant intelligence about the chemical weapons capability, intentions, production, and stocks of, and their use by, other nations—and therefore that our nation's

knowledge with respect to these matters—will be enhanced in net by ratification of the Convention, is there a significant likelihood that the ability of the United States to acquire one or more specific kinds of such significant intelligence—or such significant intelligence about one or more key nations—will be harmed by ratifying the Convention and, if so, is this likely harm considered an unaffordable risk indicating the Convention should not be ratified?

It is important to note that these questions are quite different—and may result in very different answers—from asking what is the level of confidence of the Intelligence Community that adherence by all States Parties to the CWC can be monitored and verified. The Committee's report clearly and at some length provides the Community's answer to that question—which is neither optimistic nor terribly encouraging.

But, again, while it is very important that the Senate know the answer to that question and the reasons for the answer the Intelligence Community has provided, that answer is not and must not be seen as the predominant basis for making the decision to ratify or refuse to ratify the CWC. Chemical weapons and chemical weapons programs now exist in a number of the world's nations. Acquiring intelligence about those nations' chemical weapons programs and capabilities already is a very different challenge. The essential intelligence question for the Senate to consider is whether the CWC will make that task more or less difficult.

Although the Committee's public (unclassified) report does not directly provide answers to the two detailed parts of that question as they are presented above, I believe the Intelligence Community and other officials of the United States government have provided unequivocal answers in their sworn testimony to the Senate.

Some of these answers are contained in the National Intelligence Estimate (NIE) on United States monitoring capabilities. The NIE is classified, and it is impermissible to include classified quotations from it in this unclassified document. But it is permissible to infer from the NIE that (1) the nation's intelligence-gathering and monitoring capabilities relative to chemical weapons capability, intentions, production, and stocks of, and their use by, other nations will, on net, be enhanced, not harmed, by United States ratification of the Convention, and (2) there are no "fatal flaws" in the Convention that pose unacceptable risks that the ability of the United States to acquire one or more specific kinds of such significant intelligence—or such significant intelligence about one or more key nations—will be harmed by ratifying the Convention.

As the Committee's report noted in Section II—"U.S. Monitoring Capabilities"—Part A—"Overall Monitoring Evaluations," "[a]t the Committee's hearing on the CWC, the chief of the DCI's Arms Control Intelligence Staff testified: 'Despite the [Intelligence] Community's cautions about our degree of confidence for each of the monitoring tasks, we see the Convention as a net plus in our efforts to assess and warn of potential chemical warfare threats to the United States. Over the years the accumulation of data provided by the OPCW will assist in our monitoring task."

With respect to the task inescapably faced by the United States Intelligence Community—regardless of whether the CWC is in

force or not—in intelligence-gathering and monitoring of the chemical weapons capability, intentions, production, and stocks of, and their use by, other nations, the Community believes not only that it and its efforts are overall enhanced by ratifying the CWC and placing it into force, but also that some more specific intelligence and monitoring benefits will accrue from ratifying the CWC. For example, the Committee report notes that while "[the] A[rms] C[ontrol and] D[isarmament] A[gency] has warned Congress that routine CWC inspections are not designed to detect noncomplaint, undeclared activity, * * * the U.S. Intelligence Community believes that, overall, the provisions of the CWC will contribute significantly to confirming the information provided about declared munitions, bulk storage, and production sites."

While the Committee report understandably and properly limits its comments, recitations of testimony, findings, and recommendations to information presented orally or in writing to the Committee, the Intelligence Community has in other Senate fora—notably including the Senate Foreign Relations Committee—elaborated on its judgments with respect to the answers to the two critical questions about chemical weapons intelligence-gathering and monitoring. Director of Central Intelligence James Woolsey, testifying before the Committee on Foreign Relations on June 23, 1994, made the following statements:

> Throughout the many years of the CWC negotiations, representatives of the intelligence community were fully consulted on these tradeoffs; *we participated in and supported the choices that were made* [emphasis added].
>
> The Intelligence Community has the broader mission—with or without the treaty—of detecting the existence of and assessing the threat from chemical weapons programs of any country. This mission must be carried out regardless of whether we have the additional requirement to assess such activities against the provisions of a treaty. *And it is to this broader mission that the CWC can make a significant contribution* [emphasis added].
>
> The CWC will * * * strengthen our ability to deal with a problem that we confront with or without the convention—the requirement to discover which states are developing and producing chemical weapons when these activities are difficult to distinguish from legitimate commercial endeavors.
>
> In sum, what the chemical weapons convention provides the intelligence community is a new tool to add to our collection tool kit. It is an instrument with broad applicability which can help resolve a wide variety of problems. Moreover, it is a universal tool which can be used by diplomats, politicians, and intelligence specialists alike to further a common goal—elimination of the threat of chemical weapons.

John D. Holum, Director of the U.S. Arms Control and Disarmament Agency, also testified before the Senate Foreign Relations Committee on June 23, 1994. Included in his testimony were the following comments:

> * * * I take with the utmost seriousness my responsibility to report to Congress the Administration's assessment of the verifiability of arms control agreements. On March 23, 1994, I forwarded our Section 37 report on the CWC to Congress. This report reflected the consensus conclusions of the Executive Branch that the CWC is effectively verifiable and that its implementation is very much in the national security interests of the United States. Like the previous Administration, we have carefully reviewed the benefits and risks and concluded that when the CWC's declaration and inspection provisions are in force, we will be in a better position than we are now to detect and identify, and therefore deter, clandestine chemical activities of other States Parties.

Mr. Holum also noted that "[t]he CWC verification regime will heighten the risk of discovery [of illicit chemical weapons activities] and potentially provide an additional source of evidence. The larger, more systematic and sustained the violation, the higher the probability that we will obtain evidence of the illicit CWC activity."

Finally, and importantly, Mr. Holum states that "[t]he crucial point is that we will face the very difficult task of detecting clandestine activities of concern to the U.S. with or without the Chemical Weapons Convention. The Chemical Weapons Convention does *not* interfere in any way with the ability of our national intelligence means to assess treaty compliance or monitor activities of concern. Rather than Convention supplements and enhances these abilities by providing capabilities not otherwise available" [emphasis in original].

The record is clear in answering the two intelligence-related questions posed above. The Intelligence Community spoke unequivocally to this Committee, indicating that our intelligence-gathering and monitoring capabilities pertaining to chemical weapons activities of other nations, both overall and in some key specific respects, will be enhanced by placing in force the CWC, and by U.S. ratification. When the record before this Committee is supplemented by the record of statements by officials of the Community before other Senate committees, the Community's view is unequivocal, solid, and beyond misinterpretation. It is this fact that I believe the Senate should derive from this Committee's careful and thorough deliberations on the Chemical Weapons Convention, and which will significantly assist first the Foreign Relations Committee and ultimately the full Senate to answer the broader question of whether ratifying the Convention is in the best interests of the United States.

ADDITIONAL VIEWS OF SENATOR MALCOLM WALLOP

Although I have serious reservations concerning the Chemical Weapons Convention (CWC) and the proposed implementing legislation, I voted in favor of the Senate Intelligence Committee's report on CWC verification and monitoring (the SSCI report). While I do not agree with the SSCI report in every instance. I do believe that, overall, it is a balanced and revealing study.

I appreciate the fact that a specific recommendation on the overall merits of the CWC is beyond the purview of the SSCI report. Indeed, its general avoidance of advocacy is one of the reasons I support the report. Nevertheless, I do believe that the Intelligence Committee should have met to discuss the report's findings and recommendations and to vote specifically on whether or not the CWC is adequately verifiable. By not taking a clear position on this matter, or documenting the range of views through debate and a vote, the Committee has sent an ambiguous signal to the Senate and avoided an important responsibility.

Although the recommendations contained in the SSCI report could marginally improve the CWC if implemented—and I endorse them as such—they are not sufficient to overcome my strong opposition to the CWC. In my view, the CWC is flawed beyond repair and should be rejected by the Senate. This conclusion is based on a multitude of factors, some of which are outside the purview of the SSCI report.

In the first instance, I oppose the CWC because I do not believe that it will accomplish what it sets out to do. Instead, I fear that it will have a number of negative consequences that far outweigh whatever advantage it may provide. While some countries will probably use the CWC as a vehicle for giving up offensive chemical weapons programs, or as a reason for not obtaining such a program in the first place, the countries that pose the greatest chemical weapons threat are likely to reject the CWC or simply maintain a covert capability in violation of the Convention.

The SSCI report makes it clear that a concerted effort to cheat will be almost impossible to detect. The Intelligence Community has essentially concluded that we can verify compliance on the part of those who want to comply, but that we will have great difficulty detecting prohibited activity, especially by those who pose the greatest threat. Thus, the CWC is likely to be a flawed tool for dealing with the real problem.

At the same time, however, the CWC intrudes in an excessive way into the lives of thousands of American businessmen and entrepreneurs. American industry is already over-burdened by domestic regulation. I am unable to accept any agreement that creates a new layer of international regulation on a sector that is already suffocating. The CWC is insufficiently intrusive to perform its most

important job (catching the bad guys), but yet it intrudes in numerous ways in the lives of innocent Americans who have nothing to do with chemical weapons. Unfortunately, there is no way to solve this dilemma. The more one tries to balance the equation, the more unbalanced it becomes. The Executive branch has argued that a proper balance has been struck, but I remain unconvinced. While they undoubtedly sought—and may indeed have accomplished—the best balance possible under the circumstances, I strongly disagree that the outcome is satisfactory. In exchange for a new regulatory burden imposed by international bureaucrats, we have gotten at best a highly ineffectual mechanism for catching CWC cheaters.

Protection of private business is not the only U.S. interest to be sacrificed in exchange for the CWC. The Convention is likely to have a negative impact on our military readiness to deal with a future chemical threat. Most importantly, we are giving up the right to maintain a chemical retaliatory capacity and hence a critical element of deterrence. The United States has obligations that are different from most countries, given our unique superpower status. Just as we must maintain a nuclear deterrent force, we should maintain a small but significant chemical deterrent force. It was a mistake for the previous Administration to give up this capability and it would be a mistake to codify this error. In so doing, the U.S. would implicitly endorse the argument made by some non-nuclear countries that the U.S. should get rid of its nuclear deterrent in order to make the Nuclear Non-Proliferation Treaty more effective.

As has been the case with all arms control agreements, the CWC will likely breed a sense of complacency and the view that we have dealt with the threat and are now safe. As we have done time and again in other areas of arms control, this agreement will inevitably lead us to reduce our defensive efforts against chemical weapons. With an eroded ability to deter and defend, I fear that the CWC may actually encourage the use of chemical weapons in the future.

At the same time that the United States rushes to get out of the chemical weapons business, Russia seems determined to retain and refine some form of offensive chemical weapons capability. As the SSCI report all but concludes, the Russians seem to be preparing to cheat on the CWC and/or find ways to circumvent its provisions by developing chemical agents that are not prohibited by the Convention. It seems that Russia—not to mention North Korea, Iran, Iraq and the likes—does not share the United States Government's utopian view that we can simply ban the instruments of war that we do not particularly like.

Despite all the talk of a "new global norm," the CWC is unlikely to change the underlying incentives for some countries to seek offensive chemical weapons. Since the utopian days of the 1920s and 1930s, the United States has sought every conceivable form of arms control, including the outright prohibition of war. These agreements have had virtually no effect on the causes and results of armed conflict. If anything they have reduced our ability to deal with aggression and to defend vital national interests. The CWC is likely to continue this undistinguished record.

APPENDIXES

APPENDIX A

KEY PROVISIONS OF THE CHEMICAL WEAPONS CONVENTION

Proscribed activities

States that join the CWC agree not to develop, produce, acquire, stockpile, retain, or transfer chemical weapons. The Convention also bans use of chemical weapons under any circumstances, including retaliating against an enemy or against one's own population. The use of riot-control agents "as a method of warfare" also is prohibited. The CWC requires signatories to destroy their chemical weapons and all CW production facilities. In special cases, countries may be allowed to convert their plants to civilian purposes or, temporarily, to a CW destruction plant.

Verification measures

To monitor compliance with its provisions, the CWC establishes the Organization for the Prohibition of Chemical Weapons (OPCW) and its several components. All signatories belong to a Conference of States Parties, and 41 members will serve in an Executive Council, generally on a rotating basis. A Technical Secretariat will oversee and conduct the CWC's two primary verification activities: declarations and on-site inspections.

Data declarations

The Convention requires each nation to declare all of its chemical weapons, CW production plants, and storage sites to the OPCW. Declarations are to provide the location and a diagram of each site and list its inventory of CW agents, precursors, munitions, or equipment. Declarations also must be submitted for facilities producing specified chemicals, even if they are manufactured for non-CW purposes. Agents that must be declared fall into three categories:

Schedule 1 contains most chemicals used solely as CW agents, precursors with little or no legitimate use and two toxins.

Schedule 2 chemicals have legitimate commercial applications but also can be used either as CW agents or key agent precursors.

Schedule 3 includes other dual-use chemicals that could "pose risks" to the CWC's goals.

Chemical production facilities that do not produce scheduled chemicals, but that could pose a risk to the goals of the CWC, also must be declared.

Routine inspections

Having made their declarations concerning CW stocks and chemical production sites, parties will be subject to routine inspections designed to monitor the destruction of CW production facilities and stocks and the operation of commercial facilities. All declared Schedule 1 and 2 plants will receive initial inspections. Schedule 3 sites will be selected randomly for initial inspection, most likely on the basis of assessed risk. Schedule 1 chemical can be produced at declared facilities but only in small amounts—for purposes not in conflict with the CWC. Plants that produce at least 10 tons of Schedule 2 chemicals or over 30 tons of Schedule 3 chemicals per year can be inspected twice a year. Inspectors will seek to verify that such production is not the CW purposes and can conduct broad searches for scheduled chemicals. Tagging declared munitions is allowed. Routine inspections of declared sites are conducted with at least 72 hours advance notice before the inspectors arrive at a designated point of entry. If a prearranged accord that governs inspections, called a facility agreement, already has been negotiated, only 24 hours advanced warning will be given for a declared site.

Challenge inspections

A member state can petition the Executive Council to conduct a challenge inspection of an undeclared facility in another member state. The Executive Council ensures that requests are not frivolous and can veto them within 12 hours by a three-fourths vote. A challenging state does not necessarily have the right to have one of its citizens serving as an inspector on the challenge inspection team but does have the right to name an observer to accompany the team. The inspected state cannot refuse the challenge and must allow access within the requested site boundary, called the final perimeter, within 120 hours (five days) of the challenge. An inspected state has 12 hours advance notice before an inspection team's arrival at the point of entry, 36 hours to transport the team to the site, and 72 hours to conclude negotiations on the site's final perimeter and provide access. If agreement cannot be reached on the perimeter, the inspected state's preference is designated as the final perimeter. Sampling can be performed at the perimeter but is not a right within the perimeter. Under the rules of managed access that govern challenge inspections, the inspected state can take measures to protect sensitive non-CW-related installations or their contents. For example, it can:

Shroud equipment, remove papers, and log off computers.

Refuse entry to individual inspectors and grant access to specific locations on the inspection site to only selected inspectors.

Deny access to a particular building within a site. If access is denied, the challenged country must make reasonable efforts to demonstrate compliance.

Challenge inspections can last up to 84 hours on site, and teams file their report with the Executive Council on the conclusion of the inspection. Members of the Council may not have access to the raw data collected by the team.

APPENDIX B

U.S. ARMS CONTROL AND DISARMAMENT AGENCY,
Washington, March 1, 1994.

JOHN W. WARNER,
Vice Chairman, Select Committee on Intelligence, U.S. Senate.

DEAR MR. VICE CHAIRMAN: Secretary of State, Warren Christopher, has asked the U.S. Arms Control and Disarmament Agency to convey his appreciation for your letter of December 15, 1993 regarding the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.

Enclosed are unclassified answers to question you submitted subsequent to the transmittal of the Convention to the Senate for its advice and consent to ratification. Several classified answers are provided under separate cover.

If you have any further questions or need additional information please do not hesitate to contact me.

Sincerely,

IVO SPALATIN,
Senior Policy Advisor.

Enclosure.

QUESTIONS RELATING TO THE CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION, STOCKPILING, AND USE OF CHEMICAL WEAPONS AND ON THEIR DESTRUCTION

Question 1. Article I of the Convention states in part (p. 3):

> Each State Party to this Convention undertakes never under any circumstances:
>
> (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons . . .

a. If the Convention enters into force for the U.S., would the obligation never under any circumstances to acquire or retain chemical weapons prevent the U.S. from acquiring for intelligence analysis purposes chemical weapons developed, produced, otherwise acquired, stockpiled or retained by a foreign country? If so, why, and if not, why not?

b. Does the quoted portion of the Convention conflict with the statute specifically providing that "the Secretary of Defense may acquire any chemical agent or munition at any time for purposes of intelligence analysis" (50 U.S.C. 1521(h)(2)(A)? If so, why, and if not, why not?

Answer. 1.a.b See attached classified annex.

Question 2. Article I of the Convention states in part (p. 3):

> 5. Each State Party undertakes not to use riot control agents as a method of warfare.

a. If the Convention enters into force for the U.S., what uses of riot control agents by the U.S. would be permitted? (Please list what uses would not the used as a method of warfare.)

b. If the Convention enters into force for the U.S., would the U.S. armed forces be permitted to use riot control agents in war in defensive military modes to save lives? If so, why, and if not, why not?

c. If the Convention enters into force for the U.S., would the U.S. armed forces be permitted to use riot control agents in riot control situations in areas under direct and distinct U.S. military control, to include controlling rioting prisoners of war? If so, why, and if not, why not?

d. If the Convention enters into force for the U.S., would the U.S. armed forces be permitted to use riot control agents in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided? If so, why, and if not, why not?

e. If the Convention enters into force for the U.S., would the U.S. armed forces be permitted to use riot control agents in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners? If so, why, and if not, why not?

f. If the Convention enters into force for the U.S., would the U.S. armed forces be permitted to use riot control agents in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations? If so, why, and if not, why not?

Answer 2. a.b.c.d.e.f. The Administration is reviewing each of the uses of riot control agents specified in Executive Order 11850 to determine which, if any, may be inconsistent with the prohibition in the Chemical Weapons Convention (CWC) on the use of riot control agents as a method of warfare and, if so, what revisions may be necessary in the Executive Order.

Question 3. Article VI, Paragraph 1 states (p. 17):

> 1. Each State Party has the right, subject to the provisions of this Convention, to develop, produce, otherwise acquire, retain, transfer and use toxic chemicals and their precursors for purposes not prohibited under this Convention.

Article II, Paragraph 9 of the Convention states that "Purposes Not Prohibited Under This Convention" means (p. 6):

"(a) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;

"(b) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;

"(c) Military purposes not connected with the use of chemical weapons and not dependent on the use of toxic properties of chemicals as a method of warfare;

"(d) Law enforcement including domestic riot control purposes."

Question 3a. What are some examples of the "other peaceful purposes" not prohibited under the Convention under Article II.9(a)?

Answer 3a. The CWC negotiators recognized the need for an illustrative list of peaceful purposes not prohibited by the CWC. At the same time they acknowledged that such a list could not and

should not be exclusive; thus the phrase "and other peaceful purposes" was added to the list. It was intended to cover peaceful purposes, such as firefighting, or other purposes that may be developed in the future.

Question 3b. In Article II.9.(b), does the use of the word "namely" mean that the "protective purposes" not prohibited under the Convention are only the two named in that subparagraph—protection against toxic chemicals and protection against chemical weapons?

Answer 3b. Yes. The use of the word "namely" was intended by the CWC negotiators to limit the purposes of protective programs allowed by the CWC by specifying only those purposes directly related to protection against toxic chemicals and to protection against chemical weapons.

Question 3c. Under Article II.9.(b), protection against toxic chemicals or toxic weapons is a purpose not prohibited under the Convention. Would U.S. Government acquisition of chemical weapons of foreign countries for intelligence analysis purposes, with the aim of using such analysis to assist the U.S. Government in protecting its armed forces or citizens from potential use of such weapons thus be a purpose not prohibited under the Convention?

Answer 3c. See attached classified annex.

Question 3d. What are some examples of "military purposes not connected with the use of chemical weapons and not dependent on the use of toxic properties of chemicals as a method of warfare" not prohibited under the Convention under Article II.9.(c)?

Answer 3d. Examples of "military purposes not connected with the use of chemical weapons and not dependent on the use of toxic properties of chemicals as a method of warfare" are the use of chemicals as fuels, lubricants and cleaners for military equipment.

Question 4. Article VII, Paragraphs 1 and 2 of the Convention provide in part (p. 19) that:

> 1. Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:
>
> (a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;
>
> (b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and
>
> (c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.
>
> 2. Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.

Question 4a. Article VII, Paragraph 1 would obligate each State Party to adopt penal legislation to prohibit the conduct of activities prohibited by the Convention to a State Party by (1) natural and legal persons on its territory or elsewhere in its jurisdiction, and (2) natural persons, but not by legal persons, of that State's nationality, undertaken anywhere. Why was the decision made not to require a State Party to enact penal legislation to prohibit such activities by legal persons of that State's nationality wherever undertaken, as is required with respect to natural persons of that nationality?

Answer 4a. The U.S. sought to maximize the legal coverage of the CWC. Most of the other negotiating states, however, oppose extra-territorial extensions of jurisdiction. This was a reaction to U.S. attempts to extend its jurisdiction in other areas (e.g., the early 1980s USSR/European natural gas pipeline controversy) and to concerns by their legislative bodies regarding the legality of such extensions under international law. The extension to only natural persons (i.e., individual covers most, if not all, activities sought to be covered since the activities of legal persons (i.e., legal entities such as corporations) will be *de facto* regulated by the regulation of individuals within the legal entities. At the same time, it was agreed that there are clear examples of extra-territorial application of legislative jurisdiction to natural persons, e.g., war crimes, thus making such a provision acceptable to legislative bodies.

This requirement also recognizes that the nationality of individuals is subject to less dispute than the nationality of legal entities. Accordingly, it is anticipated that the requirement will be easier to apply and subject to less challenge, both internationally and domestically, than application to all persons.

Question 4b. Article VII, Paragraph 1, subparagraph (b) provides that a State Party must not permit in any place under its control any activity prohibited to a State Party under the Convention. If the Convention enters into force for the U.S., would this obligate the U.S. not to permit any activity prohibited to a State party under the Convention in foreign territory that is under occupation by the U.S. armed forces?

Answer 4b. Yes.

Question 5. Article VIII, Paragraph 5 provides in part (p. 21) that the Organization for the Prohibition of Chemical Weapons (hereafter the "(Organization") "shall take every precaution to protect the confidentiality of information on civil and military activities and facilities coming to its knowledge in the implementation of this Convention and, in particular, shall abide by the provisions set forth in the Confidentiality Annex."

a. If the Convention enters into force for the U.S., do each of the following categories fall within the meaning of military activities for purposes of this provision (if not, state which do not):

(i) activities conducted by the U.S. Armed Forces?

(ii) activities conducted by the elements of the U.S. Department of Defense other than the Armed Forces?

(iii) activities conducted by the U.S. Central Intelligence Agency?

b. If the Convention enters into force for the U.S., do each of the following categories fall within the meaning of military facilities for purposes of this provision (if not, state which do not):

(i) facilities owned or occupied by the U.S. Armed Forces?

(ii) facilities owned or occupied by the elements of the U.S. Department of Defense other than the Armed Forces?

(iii) facilities owned or occupied by the U.S. Central Intelligence Agency?

c. If the Convention enters into force for the U.S. do each of the following categories fall within the meaning of civil activities for the purposes of this provision (if not, state which do not):

(i) activities conducted by elements of the U.S. Government other than the U.S. Armed Forces?

(ii) activities conducted by the U.S. Central Intelligence Agency?

(iii) activities conducted by a State or local government?

(iv) activities conducted by a corporation, partnership, other private sector venture?

(v) activities conducted by an academic institution?

d. If the Convention enters into force for the U.S., do each of the following categories fall within the meaning of civil facilities for purposes of this provision (if not, state which do not):

(i) real estate owned or occupied by elements of the U.S. Government other than the U.S. Armed Forces?

(ii) real estate owned or occupied by a State or local government?

(iii) real estate owned or occupied by a corporation, partnership, or other private sector venture?

(iv) real estate owned or occupied by an academic institution?

Answer 5. The CWC verification regime is meant to cover all activities by States Parties related to the development, production, other acquisition, stockpiling or retention of chemical weapons or their transfer directly or indirectly. The use of the terms "civil" and "military" in Article VIII(5) and elsewhere is an alternative to a more general formulation, not a limiting term. Accordingly, all of the activities and facilities listed in this question are covered by Article VIII(5), regardless of which specific term applies to them.

Question 6. Article VIII, Paragraphs 7 and 8 of the Convention provide in part (p. 21):

> 7. The costs of the Organization's activities shall be paid by States Parties in accordance with the United Nations scale of assessment adjusted to take into account differences in membership between the United Nations and this Organization, and subject to the provisions of Articles IV and V.
>
> 8. A member of the Organization which is in arrears in the payment of its financial contribution to the Organization shall have no vote in the Organization if the amount of its arrears equals or exceeds the amount of the contribution due from it for the preceding two full years. The Conference of the States Parties may, nevertheless, permit such a member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the member.

Article VIII, Paragraph 21 (p. 23) provides that the Conference of the States Parties shall "decide on the scale of financial contributions to be paid by States Parties in accordance with paragraph 7."

Question 6a. What, if anything, prevents the Conference of States Parties from imposing on the U.S. under Paragraph 21 unreasonable amounts or proportions of the costs of the Organization's activities, which, when the U.S. declines to pay unreasonable amounts or proportions over time, would eventually deprive the U.S. of its vote under Paragraph 8?

Answer 6a. An increase in the proportion of costs assessed to the U.S. would have to be achieved through an amendment to the UN-based formula referred to in Article VIII(7). In accordance with Article XV(3), a single State Party can block a proposed amendment.

Question 6b. In some circumstances, the U.S. Government has withheld its financial contributions to international organizations until the organizations instituted reforms to ensure that they are run effectively and efficiently. Under Paragraph 8, the U.S. could follow such a strategy for improving the functioning of the Organization only if the U.S. is prepared to give up its vote in the Organization. Why is it in the interest of the U.S. to have Paragraph 8 in the Convention?

Answer 6b. The provisions in Article VIII(8) are similar to Article 19 of the UN Charter and are found in the basic texts of most major international organizations. The U.S. has consistently taken the view that such a penalty is an important incentive to those who might otherwise fail to fulfill their obligations of membership.

However, it should be noted that the U.S. is not alone in its concern that costs and operations of the CWC be kept to the minimum necessary for effective implementation. Both developed and developing countries share this concern. To this end, several provisions in the CWC provide for ongoing technical and political scrutiny of the budget and periodic reviews of the effectiveness of the operation of the CWC.

Question 6c. Paragraph 8 provides that a member of the Organization "shall have no vote in the Organization" when its arrearage climbs to the specified level. If the U.S. had an arrearage that climbed to the level specified in Paragraph 8, would it lose its vote in the Conference of States Parties? If the U.S. had an arrearage that climbed to that specified level, and the U.S. was at that time a Member of the Executive Council, would the U.S. lose its vote in the Executive Council?

Answer 6c. If the U.S. had an arrearage that rose to the level specified in Article VIII(8), it could lose its vote in the Conference of the States Parties (Conference) and the Executive Council, both organs of the Organization for the Prohibition of Chemical Weapons (OPCW). However, it should be noted that if a State Party is unable to pay due to conditions beyond its control, paragraph 8 provides for the Conference to permit continued voting in such a case.

Additionally, the U.S. has political as well as financial influence in the OPCW. The CWC budget is submitted by the Executive Council to the Conference for approval. The U.S. has, effectively, a permanent seat on the Executive Council (as discussed in Answer

7, a.b.) and the Western and other like-minded countries could constitute a blocking one-third vote. Thus, U.S. concerns could be resolved through the political bodies of the CWC without recourse to U.S. withholding funding.

Question 7. Article VIII, Paragraph 23 (p. 24) sets forth the composition of the 41-Member Executive Council. The U.S. would have a seat on the Executive Council only if it were designated under subparagraph 23(e), which provides that "Western European and other States" will designate from among their number ten States to serve on the Council, of which "5 members shall, as a rule, be the States Parties with the most significant national chemical industry in the region as determined by internationally reported and published data * * *" and if the U.S. were thereafter elected by the Conference of the States Parties.

Question. 7a. Which countries are the States Parties in the "Western European and Other States" region who, as determined by internationally reported and published data, have the most significant national chemical industry?

Answer 7a. The determination of which five members of the Western European and Other States group (WEOG) qualify for industry-based seats in the Executive Council will be a WEOG decision made prior to entry-into-force of the CWC. It is premature for the U.S. to speculate to which members will be selected.

Question 7b. What is the likelihood that periods will occur in which the United States will not be a member of the Executive Council?

Answer 7b. In addition to having the most significant chemical industry in the WEOG, the U.S. has reached a political agreement within the group that the U.S. will have a permanent seat on the Executive Council. Thus, assuming the U.S. is a State Party, there should be no periods in which the U.S. is not a member.

Question 8. Article VIII, Paragraph 34, subparagraph (a) (p. 27) provides that the Executive Council shall "conclude agreements or arrangements with States and international organizations on behalf of the Organization, subject to prior approval by the Conference * * *". Article VIII, Paragraph 39, subparagraph (a) (p. 28) provides that the Technical Secretariat shall "negotiate agreements or arrangements relating to the implementation of verification activities with States Parties, subject to approval by the Executive Council.

Question 8a. Does "subject to prior approval by the Conference" in Article VIII.34. (a) mean agreements or arrangements described in that provision take effect only if and when approved by the Conference? If not, what does it mean?

Answer 8a. Yes. "Subject to the prior approval" means that the Executive Council cannot take the steps necessary to legally bind the OPCW through agreements and arrangements until after the Conference has given approval for such action.

Question 8b. Does "subject to approval by the Executive Council" in Article VIII.39. (a) mean agreements or arrangements described in that provision take effect only if and when approved by the Executive Council? If not, what does it mean?

Answer 8b. Yes.

Question 8c. What is the significance or legal impact of the use of the phrase "prior approval" in Article VIII.34. (a) relating to the Conference's authority, but of the word "approval" in Article VIII. 39. (a) relating to the Executive Council's authority?

Answer 8c. The term "approval" allows for subsequent approval while the term "prior approval" does not. Under the CWC, the Executive Council, but not the Technical Secretariat, has the authority to legally bind the OPCW through agreements or arrangements. Accordingly, requiring prior approval for all types of agreements or arrangements except for those few specified in the CWC ensures proper control of this power by the Conference, the ultimate governing entity. By contrast, the Technical Secretariat does not have the power to legally bind the Organization through agreements or arrangements, rather it negotiates and the Executive Council binds the Organization.

Question 8d. What is the significance or legal impact of the use of the verb "conclude" in Article VIII.34. (a) relating to the Executive 8 Council's authority, but of the verb "negotiate in Article VIII.39. (a) relating to the Technical Secretariat's authority?

Answer 8d. "Conclude" means to legally bind while "negotiate" means the process of reaching agreement on terms. Agreements or arrangements negotiated by the Technical Secretariat become legally binding with approval by the Executive Council.

Question 9. Article IX, Paragraph 11 states in part (p. 33):

"11. Pursuant to a request for a challenge inspection of a facility or location, and in accordance with the procedures provided for in the Verification Annex, the inspected State Party shall have:

"(b) The obligation to provide access within the requested site for the sole purpose of establishing facts relevant to the concern regarding possible non-compliance; and

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

Question 9a. What actions by the United States are necessary to establish a domestic legal regime that satisfies both the obligation to provide access within the requested site under Article IX.11. (b) and the Fourth Amendment to the U.S. Constitution when a requested site is private property?

Answer 9a. The United States must adopt implementing legislation requiring all facilities and locations in the territory of the United States or in any other place under its jurisdiction or control to provide access to inspection teams from the OPCW and to accompanying U.S. Government personnel. The implementing legislation must contain procedures for obtaining access that are consistent with the Fourth Amendment, such as procedures for obtaining warrants where necessary. The Administration has provided to Congressional staff a discussion draft of proposed U.S. CWC implementing legislation that contains these requirements and procedures.

Question 9b. Article IX.11. (c) appears susceptible of two readings. Which of the following captures accurately the proper reading of Article IX.11. (c)

(i) Each State party has the right (1) to take measures to protect sensitive installations, and (2) to prevent disclosure of

confidential information and data not related to this Convention.

(ii) Each State party has the right (1) to take measures to protect sensitive installations not related to this Convention, and (2) to prevent disclosure of confidential information and data not related to this Convention.

Answer 9b. The proper reading of Article IX(11)(c) is that each State Party has the right (1) to take measures to protect sensitive installations not related to the CWC, and (2) to prevent disclosure of confidential information and data not related to the CWC.

Question 10. Article IX, Paragraph 17 (p. 34) provides:

"17. The Executive Council may, not later than 12 hours after having received the inspection request, decide by a three-quarter majority of all its members against carrying out the challenge inspection, if it considers the inspection request to be frivolous, abusive or clearly beyond the scope of this Convention as described in paragraph 8. Neither the requesting nor the inspected State Party shall participate in such a decision. If the Executive Council decides against the challenge inspection, preparations shall be stopped, no further action on the inspection request shall be taken, and the States Parties concerned shall be informed accordingly."

Question 10a. Does the reference to "three-quarter majority of all its members" mean (i) a three-quarter majority of the 41 member positions on the Executive Council, without regard to whether any positions are vacant (in which case a three-quarter majority would require 31 votes) or (ii) a three-quarter majority of all the members who have, at the time the vote is taken, been elected to the Executive Council by the conference of States Parties (in which case a three-quarter majority may consist of less than 31 votes, if there are vacancies).

Answer 10a. The reference to "three-quarter majority of all its members" means a three-quarters majority of all 41 member positions (i.e., 31 or more) without regard to whether any positions are vacant. Membership in the Executive Council will be arranged prior to entry into force of the CWC to preclude the possibility of vacant seats hampering its operation. Given the political importance of the Executive Council and its substantive role in the day-to-day implementation of the CWC, vacant seats are expected to be an unlikely occurrence.

Question 10b. Does the phrase "not later than 12 hours after having received the inspection request" mean that if, 13 hours after receiving an inspection request, the Executive Council voted by more than the necessary three-quarter majority against carrying out the challenge inspection because it considered the request to be frivolous, the challenge inspection nevertheless must go forward because the Executive Council's vote deciding the matter did not occur within 12 hours after the Executive Council received the request?

Answer 10b. Yes.

Question 10c. Does the statement that "neither the requesting nor the inspected State party shall *participate* in such a decision," (emphasis added) mean those two States parties *may not vote* if there is a motion in the Executive Council against carrying out the challenge inspection?

Answer 10c. Yes.

Question 10d. Does the statement that "neither the requesting nor the inspected State Party shall *participate* in such a decision," (emphasis added) mean those two States Parties *may not speak* in any deliberations on a motion in the Executive Council against carrying out the challenge inspection?

Answer 10d. No.

Question 10e. Does the statement that "neither the requesting nor the inspected State Party shall *participate* in such a decision," (emphasis added) mean those two States Parties *may not be present* during any deliberations on a motion in the Executive Council against carrying out the challenge inspection?

Answer 10e. No.

Question 11. Article XII, Paragraph 2 states in part (p. 40):

"2. In cases where a State Party has been requested by the Executive Council to take measures to redress a situation raising problems with regard to its compliance, and where the State Party fails to fulfill the request within the specified time, the Conference may, inter alia, upon the recommendation of the Executive Council, restrict or suspend the State Party's rights and privileges under this Convention until it undertakes the necessary action to conform with its obligations under this Convention."

Article XII.2 provides a general means and procedure for penalizing a State Party for failure to comply with the Convention. Article VIII.8 (p. 21) provides a specific penalty—loss of vote in the Organization—when a State Party is in arrears on payment of its financial contribution in an amount that equals or exceeds the amount of the contribution due from it for the preceding two full years (hereafter "above-threshold arrearage"), unless the Conference permits voting because the failure is beyond the State-Party's control.

Question 11a. Could the Organization use Article XII.2 to restrict or suspend the rights and privileges under the Convention—beyond the right to vote, which is automatically lost by operation of Article VIII.8—of a State-Party due to its being in above-threshold arrearage?

Answer 11a. Arrearage of financial dues was viewed by CWC negotiators as a technical violation and thus they provided a penalty for such under Article VIII. The negotiators intended the provisions in Article XII(2) to address concerns and cases of non-compliance arising primarily from unsatisfactory challenge inspections.

Question 11b. In a situation in which a State-Party is in arrearage on its financial contribution, but not in above-threshold arrearage, Article VIII.8 would not take away the right of the State-Party to vote in the Organization. Could the Organization use Article XII.2 to restrict or suspend the rights and privileges of that State-Party under the Convention due to that arrearage? If so, could the restriction or suspension consist of or include the loss of the right to vote in the Organization?

Answer 11b. As mentioned in Answer 11.a., financial arrearage was intended to be handled under the provisions of Article VIII.

Question 12. Article XIV, Paragraph 5 (p. 41) provides:

"5. The Conference and the Executive Council are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to

give an advisory opinion on any legal question arising within the scope of the activities of the Organization. An agreement between the Organization and the United Nations shall be concluded for this purpose in accordance with Article VIII, paragraph 34(a)."

Question 12a. Does Article XIV.5 require a separate agreement between the Organization and the United Nations for each request by the Conference or the Executive Council to the International Court of Justice (ICJ) for an advisory opinion?

Answer 12a. No. The OPCW can enter into an agreement with the United Nations authorizing the Conference and the Executive Council to request advisory opinions of the International Court of Justice as needed. Examples of international organizations that are authorized to request advisory opinions include the International Atomic Energy Agency and the International Civil Aviation Organization.

Question 12b. Would an advisory opinion of the ICJ issued in response to a request by the Conference or the Executive Council under this provision be binding upon the Organization as a matter of international law?

Answer 12b. No.

Question 12c. Would an advisory opinion of the ICJ issued in response to a request by the Conference or the Executive Council under this provision be binding upon the States-Parties to the Convention as a matter of international law?

Answer 12c. No.

Question 12d. If the Convention enters into force for the United States, would an advisory opinion of the ICJ issued in response to a request by the Conference or the Executive Council under this provision be binding upon the United States as a matter of U.S. domestic law?

Answer 12d. No.

Question 12e. The provision separately empowers the Conference and the Executive Council to seek an advisory opinion from the ICJ. May the Conference prohibit the Executive Council from exercising this power, or restrict the Executive Council's exercise of this power, pursuant to the Conference's power to oversee the activities of the Executive Council and to issue guidelines to the Executive Council under Article VIII, Paragraph 20?

Answer 12e. No.

Question 13. Article XV, Paragraph 3 provides (p. 42):

> 3. Amendments shall enter into force for all States Parties 30 days after deposit of the instruments of ratification or acceptance by all the States Parties referred to under subparagraph (b) below:
>
> (a) When adopted by the Amendment Conference by a positive vote of a majority of all States Parties with no State Party casting a negative vote; and
>
> (b) Ratified or accepted by all those States Parties casting a positive vote at the Amendment Conference.

Question 13a. Assume that: (1) a State-Party to the Convention—call it Country X—is, for whatever reason, not present at an Amendment Conference, or, for whatever reason, is present but abstains from voting; (2) the Amendment Conference adopts an

amendment by a positive vote of a majority of all States Parties with no State Party casting a negative vote; (3) all States Parties who had cast a positive at the Amendment Conference subsequently deposited instruments of ratification for the amendment; and (4) 30 days have passed since the deposit of all such instruments of ratification. Is the amendment to the Convention in force with respect to Country X?

Answer 13a. Yes.

Question 13b. In the situation assumed in the previous paragraph, if Country X were the United States, would the amendment be in force as a matter of U.S. domestic law (i.e., would the amendment to the Convention be the supreme law of the land as a treaty made under the authority of the United States)? If so, what has happened to the role of the Senate under the Constitution with respect to advice and consent in this amendment situation?

Answer 13b. If the United States Senate gives its advice and consent to ratification of the CWC, it will have consented to the procedures for amendments as set forth in Article XV(3). Therefore, an amendment adopted by an Amendment Conference by a positive vote of a majority of all States Parties, and to which no State Party casts a negative vote,that is then ratified or accepted by all those States Parties casting a positive vote at the Amendment Conference, would enter into force for the United States and thereby be the supreme law of the land.

On this point, it should be stressed that the United States will be present at all Amendment Conferences and will cast its vote either positive or negative, on all proposed amendments made at such conferences, thus ensuring the opportunity for the Senate to consider any amendment approved by the Amendment Conference.

Question 14. Article XV, Paragraph 1 provides (p. 42):

> 1. Any State Party may propose amendments to this Convention. Any State Party may also propose changes, as specified in paragraph 4, to the Annexes of this Convention. Proposals for amendments shall be subject to the procedures in paragraphs 2 and 3. Proposals for changes, as specified in paragraph 4, shall be subject to the procedures in paragraph 5.

Article XV, Paragraphs 4 and 5 provide in part (pp. 42–43):

> 4. In order to ensure the viability and effectiveness of this Convention, provisions in the Annexes shall be subject to changes in accordance with paragraph 5, if proposed changes are related only to matters of an administrative or technical nature. All changes to the Annex on Chemicals shall be made in accordance with paragraph 5. Section A and C of the Confidentiality Annex, part X of the Verification Annex, and those definitions in part I of the Verification Annex which relate exclusively to challenge inspections, shall not be subject to changes in accordance with paragraph 5.
>
> 5. Proposed changes referred to in paragraph 4 shall be made in accordance with the following procedures:
>
> (d) If the Executive Council recommends to all States Parties that the proposal be adopted, it shall be

considered approved if no State Party objects to it within 90 days after receipt of the recommendation. If the Executive Council recommends that the proposal be rejected, it shall be considered rejected if no State Party objects to the rejection within 90 days after receipt of the recommendation;

(e) If a recommendation of the Executive Council does not meet with the acceptance required under subparagraph (d), a decision on the proposal, including whether it fulfills the requirements of paragraph 4, shall be taken as a matter of substance by the Conference at its next session;

(g) Changes approved under this procedure shall enter into force for all States Parties 180 days after the date of notification by the Director-General of their approval unless another time period is recommended by the Executive Council or decided by the Conference.

Question 14a. Are the following statements true? If so, so state. If not, state why.

(i) The Convention (including the Annexes, which are in integral part of the Convention per Article XVII) can be amended by an "amendment" under Article XV.I, 2, and 3.

(ii) The Annexes of the Convention also can be changed by a "change" under Article XV.1, 4, and 5, if the change is administrative or technical in nature, except that the following are not subject to such a change: Sections A and C of the Confidentiality Annex, Part X of the Verification Annex, and those definitions in Part I of the Verification Annex which relates exclusively to challenge inspections.

(iii) The Annexes of the Convention can be amended by an "amendment" that is non-administrative and non-technical in nature under Article XV.I, 2, and 3.

(iv) Sections A and C of the Confidentiality Annex, Part X of the Verification Annex, and those definitions in Part I of the Verification Annex which relate exclusively to challenge inspections can be amended by an "amendment" under Article XV.I, 2, and 3.

Answer 14a. Yes.

Question 14b. Article XV.4 states that changes to the Annexes can be made in accordance with paragraph 5 "if proposed changes are related only to matters of an administrative or technical nature" and that "all changes to the Annex on Chemicals shall be made in accordance with paragraph 5." Does the requirement that a proposed change be related only to matters of an administrative or technical nature apply with respect to proposed changes to the Annex on Chemicals?

Answer 14b. Based on the subject matter of the Annex on Chemicals, the negotiating states presumed that any change to the Annex would be of a technical or administrative nature. Therefore, all such changes to the Annex on Chemicals were made subject to the paragraph 5 procedures.

Question 14c. What is the purpose of the statement that: "All changes to the Annex on Chemicals shall be made in accordance with paragraph 5."? What would have been different if the sentence

had not been included? Does the statement bar amendments to the Annex on Chemicals under Article XV.I, 2, and 3?

Answer 14c. As discussed in Answer 14.b., the purpose of the statement is to make clear that the negotiating states presume that all changes to the Annex on Chemicals would be of a technical or administrative nature. The statement does not include amendments to the Annex on Chemicals. Article XV(1) clearly provides that "Any State Party may propose amendments to the Convention" and, pursuant to Article XVII, references to the Convention include the Annexes.

Question 14d. If the Convention enters into force for the U.S., is an Annex of this Convention the supreme law of the land in the U.S. as a treaty made under the authority of the U.S.? If so, when the Executive Council recommends adoption of a change to an Annex under Article XV.5. (d); no State Party objects (including the U.S., whose Executive Branch remains silent) within 90 days after receipt of the recommendation; and the change takes effect for all States Parties, what has happened to the role of the Senate under the Constitution with respect to advise and consent in this change situation? If not, what is the legal status under U.S. domestic law of the Annexes?

Answer 14d. If the United States Senate gives its advice and consent to ratification of the CWC, it will have consented to the procedures for changes of a technical or administrative nature as set forth in Articles XV (4) and (5). If the CWC enters into force, its Annexes, as integral parts of the CWC, are the "supreme law of the land." Any changes of a technical or administrative nature to the Annexes are part of the CWC, and thus also become the supreme law of the land. It should be noted, however, that the changes of a technical or administrative nature contemplated by the paragraph 5 procedures, by their very nature, do not involve substantive rights or obligations. As with similar provisions in other arms control agreements (e.g., the Conventional Forces in Europe Treaty), the reason a provision permitting such changes is required is the likelihood, given the highly complicated verification-related provisions in the Annexes, that such procedures would have to be modified or changed to improve their viability and effectiveness, as a result of lessons learned in the course of their implementation. Such changes thus facilitate the subsequent implementation of the CWC regime.

Given the technical or administrative nature of any such changes, the Administration believes it would be neither necessary nor practical to submit each change to the Senate for advice and consent. Moreover, the Administration intends to take a careful approach to using this authority, applying it only to areas that do not involve substantive rights and obligations. This will include a careful approach to the proposals for changes made by other States Parties to the Convention. As has been done with other arms control agreements, the Administration will promptly provide any such changes to the appropriate Congressional committees, along with a description of their content.

Question 14e. Under Article XV.5 (d) through (g), if the Executive Council recommends adoption of a proposed change to an Annex; one or more States Parties timely objects; and the Conference takes

it up as a matter of substance and adopts the proposed change by a vote of more than two-thirds of the members present and voting, does the change thereafter enter into force for all States Parties at the time provided by Article XV.5(g)? If the United States was one of the States Parties that lodged an objection to the Executive Council's recommendation and the United States voted against its adoption in Conference, is the United States bound by the change as a matter of U.S. domestic law? If so, what has happened to the role of the Senate under the Constitution with respect to advice and consent in this change situation?

Answer 14e. Yes. The legal status and role of the U.S. Senate with regard to such changes of a technical or administrative nature would be the same as those for which the United States voted yes or on which the U.S. abstained.

Question 15 Does the Treaty Power under the Constitution extend to the making of a Treaty by the President, by and with the advice and consent of the Senate, that contains a provision for amendments to the Treaty to enter into force for the United States by a means other than through the treaty or lawmaking process set forth in the Constitution? Can the President, by and with the advice and consent of the Senate, by treaty delegate to foreign or international authorities the power to make the supreme law of the land for the U.S.?

Answer 15. The Treaty Power under the Constitution does extend to the making of a Treaty, by and with the advice and consent of the Senate, that contains a provision for amendments to the Treaty to enter into force for the United States by a means other than through the treaty or lawmaking process set forth in the Constitution.

Accordingly, if the Senate gives its advice and consent to ratification of the CWC, an amendment adopted by an Amendment Conference by a positive vote of a majority of all States Parties with no State Party casting a negative note, and ratified or accepted by all those States Parties casting a positive vote at the conference, would enter into force for the United States and thereby become the supreme law of the land. However, as stated in Answer 13, the United States will be present at all Amendment Conferences and will cast its vote, either positive or negative, on all proposed amendments made at such conferences; therefore, the opportunity for the Senate to give its advice and consent to any amendment approved at such a conference is ensured.

Question 16. Article XXII (p. 45) provides that "the Articles of this Convention shall not be subject to reservations, and that "the Annexes of this Convention shall not be subject to reservations incompatible with its object and purpose."

Question 16a. If the Senate consents to ratification of the Convention with a reservation as to one or more Articles of the Convention, would that prevent the United States from ratifying the Convention?

Answer 16a. Yes.

Question 16b. If the Senate consents to ratification of the Convention with one or more reservations as to Annexes of the Convention, how is it determined whether the reservations are incompatible with the object and purpose of the Convention?

Answer 16b. If the U.S. ratifies the CWC with reservations to the Annexes, it would be up to States Parties to the CWC to determine whether or not they believe the reservations are incompatible with the object and purpose of the CWC. If there was such concern, it would likely be raised as an issue at the meeting of the Conference shortly after the CWC enters into force.

Question 17. The Verification Annex, Part II, Paragraph 11 (p. 67) provides that members of inspection teams shall have the inviolability enjoyed by diplomatic agents pursuant to Article 29 of the Vienna Convention on Diplomatic Relations; also, presumably, the Organization and its personnel will be designated under the U.S. statute known as the International Organizations Immunities Act. Accordingly, inspectors will be immune from suit in U.S. courts for their official acts, such as the conduct of inspections in the implementation of the Convention. What arrangements will exist for ensuring that American firms or individuals have a remedy for damage to persons, property, or proprietary interests caused by inspectors in the course of inspections?

Answer 17. American firms and individuals may have a cause of action against inspectors and other members of the inspection team if the Director-General of the Technical Secretariat waives their immunity from suit in U.S. courts for their official acts, as provided for in Part II(14) of the Annex on Implementation and Verification and paragraph 20 of the Confidentiality Annex.

In addition, these firms may have a cause of action against the United States under the Just Compensation Clause of the Fifth Amendment to the Constitution (Takings Clause). In practice, such an action would be brought before the Court of Federal Claims pursuant to the Tucker Act (28 U.S.C. Sec. 1491(a)), or in the alternative, before a Federal District Court (28 U.S.C. Sec. 1346(a)(2)), where money damages are limited to $10,000.

Question 18. The Verification Annex, Part II, Paragraph 11, subparagraph (c) (p. 68) provides that "the inspection team shall have the right to use codes for their communications with the Technical Secretariat." Why?

Answer 18. The right of the inspection team to use codes for their communications is to ensure that communication between the team and the Technical Secretariat is protected from unauthorized personnel. There are three examples that are relevant to this provision:

> Interception of the communications by a State Party undergoing an inspection. The team might use codes when informing the Technical Secretariat of proposed or planned future activities, or of ambiguities that the team wishes to pursue further. It is possible that the Technical Secretariat might also use codes when providing information to the team that could redirect the inspection or improve the inspection's thoroughness. Interception of such information by the inspected State Party could jeopardize the success of the inspection.
>
> Interception by a third party of inspection-related communication containing confidential information. The inspection

team is obligated by the Confidentiality Annex to prevent disclosure of information deemed confidential by either the inspected State Party or the Technical Secretariat to other parties. To ensure that possibly confidential information is not inadvertently disclosed to a third party, codes might be used if the team reports back to the Technical Secretariat.

Interception of personal-related transmissions regarding an inspection team member. The activities of an inspection team member might mandate that the team leader request guidance from the Technical Secretariat via coded transmission. Conversely, personal information relevant to a team member might be transmitted via code by the Technical Secretariat. Intercepts by the inspected State Party of such transmission could be used to target the team member for abuse, ridicule or harassment.

Question 19. The Verification Annex, Part II, Paragraphs 46 and 47 (p. 74–75) provides:

> 46. Inspectors shall have the right to interview any facility personnel in the presence of representatives of the inspected State Party with the purpose of establishing relevant facts. Inspectors shall only request information and data which are necessary for the conduct of the inspection, and the inspected State Party shall furnish such information upon request. The inspected State Party shall have the right to object to questions posed to facility personnel if those questions are deemed not relevant to the inspection. If the head of the inspection team objects and states their relevance, the question shall be provided in writing to the inspected State Party for reply. the inspection team may note any refusal to permit interviews or to allow questions to be answered and any explanations given, in that part of the inspection report that deals with the cooperation of the inspected State Party.
>
> 47. Inspectors shall have the right to inspect documentation and records they deem relevant to the conduct of their mission.

Question 19a. Does the inspectors' "right to interview any facility personnel" create a legal duty for the interviewed facility personnel to provide the answers to the inspectors' questions?

Answer 19a. No. Facility personnel are not required to answer inspectors' questions, and thus, with regard to this provision, the Fifth Amendment rights of personnel at U.S. facilities are protected.

Question 19b. Suppose an inspection is conducted of a private sector firm's chemical facility in the U.S., the inspectors seek to interview firm employees at the facility, and the employees decline to be interviewed. What means, if any, will the proposed implementing U.S. legislation provide for compelling the facility personnel to be so interviewed and to provide answers to inspectors' questions?

Answer 19b. The Administration's discussion draft of proposed U.S. CWC implementing legislation contains no provisions for compelling facility personnel to be interviewed and to provide answers

to inspectors' questions during an inspection. However, the proposed legislation does provide for the issuance of a subpoena to require testimony of a witness and provision of answers in order to meet the U.S. Government's obligations and the CWC.

Question 20. The Verification Annex, Part II, Paragraphs 62 and 63 provides in part (p. 77–78):

> 62. Not later than 10 days after the inspection, the inspectors shall prepare a factual, final report on the activities conducted by them and on their findings. . . . The Report shall be kept confidential.
>
> 63. The final report shall immediately be submitted to the inspected State Party. Any written comments, which the inspected State Party may immediately make on its findings shall be annexed to it. The final report together with annexed comments made by the inspected State Party shall be submitted to the Director General not later than 30 days after the inspection.

Question 20a. Paragraph 62 provides that the Report "shall be kept confidential." From whom is it to be kept confidential, and who will have access to it?

Answer 20a. The report referenced in Part II(62) may only be provided to the inspected State Party. The phrase "kept confidential" is intended to limit its distribution to only that State Party and requires special access handling within the Inspectorate and Technical Secretariat.

Question 20b. Does the word "confidential" as used in Paragraph 62 mean the same thing as "confidential" defined in the Confidentiality Annex, Paragraph 2, subparagraph (a)? Will the procedures for release of information classified as confidential, for which the Confidentiality Annex, Paragraph 2, subparagraph (c) (iii) provides, apply to the Report required to be "kept confidential" by Paragraph 62?

Answer 20b. The term "kept confidential" in Part II(62) means that the Director General has no discretion as to whether the report is "confidential." The procedures for release of information classified as "confidential" in paragraph 2(c)(iii) of the Confidentiality Annex, would apply to the report required to be "kept confidential" by Part II(62). Accordingly, while the report may only be provided to the inspected State Party, selected information from the report could be released to others in accordance with paragraph 2 of the Confidentiality Annex.

Question 20c. Will the U.S. Senate have access to final reports on inspections of facilities in the United States that are submitted under Paragraph 63 to the U.S. as the inspected State Party? Will the U.S. Senate have access to the written comments of the U.S. as the inspected State Party annexed to such reports? If the answer to either or both questions is anything other than an unqualified yes, state the circumstances and conditions under which the Senate will and will not have access to such reports or comments.

Answer 20c. The Administration's discussion draft of proposed U.S. CWC implementing legislation provides that:

> Information or materials obtained from declarations or inspections required by the Chemical Weapons Convention, that

> are not already in the public domain, shall be withheld from disclosure or provision and shall not be required to be disclosed pursuant to section 552 of title 5, United States Code, except that such information or material shall be made available . . . to any committee or subcommittee of Congress of appropriate jurisdiction upon the written request of the chairman or ranking minority member of such committee or subcommittee, except that no such committee or subcommittee, or member thereof, shall disclose such information or material. . . .

Access of the Senate to final reports on inspections of facilities in the United States that are submitted under Part II(63) of the Annex on Implementation and Verification would be provided in accordance with this provision. Access of the Senate to written comments of the U.S. that are annexed to this report would be provided in accordance with either this provision or the provisions of U.S. law governing the release of classified information.

Question 21. Will the U.S. Senate have access to reports under the Convention on inspections of facilities in the United States to which the U.S. has access as the inspected State Party? Will the U.S. Senate have access to reports under the Convention on inspections of facilities elsewhere to which the U.S. has access as a State party? If the answer to either or both questions is anything other than an unqualified yes, state the circumstances and conditions under which the Senate will and will not have access to such reports.

Answer 21. Access of the Senate to reports under the CWC on inspections of facilities in the United States would be provided in accordance with the draft disclosure provision discussed in Answer 20c. The Administration's discussion draft of proposed U.S. CWC implementing legislation also provides that:

> Any information or materials reported to, or otherwise obtained by, the United States National Authority or the Lead Agency or any other agency or department under this Act or the Chemical Weapons Convention may be withheld from disclosure or provision only to the extent permitted by law. . . .

Access of the Senate to reports under the CWC on inspections of facilities elsewhere to which the U.S. has access as a State Party would be provided in accordance with the provisions of U.S. law governing the release of classified information.

Question. 22. In cases in which the Convention provides a right of access for inspectors to facilities of private firms or individuals within the United States, what means will be provided, by the proposed implementing U.S. legislation or otherwise, to guarantee to Americans their rights under the Fourth Amendment to the U.S. Constitution? Under what circumstances would the Fourth Amendment require the U.S. Government to obtain a warrant before the inspectors could enter the private facilities and perform their duties? Under what circumstances could such entry and search proceed without a warrant? What legal standards would govern the issuance of a warrant in cases in which the Fourth Amendment requires a warrant for the inspectors to enter and search? Will the proposed implementing U.S. legislation provide for notice and an opportunity to be heard in U.S. court, prior to issuance of a search

warrant or court order providing for inspectors' access, for the U.S. private firms or individuals whose facilities are to be inspected?

Answer 22. The Administration's discussion draft of proposed U.S. CWC implementing legislation assumes that access will be voluntarily granted by facilities for the vast majority of inspections under the CWC. In such cases, no Fourth Amendment concerns are directly implicated.

The inspection regime set forth in the proposed legislation is patterned after similar administrative inspection regimes already in force in the United States, e.g., inspections of chemical industry under the Toxic Substances Control Act. Accordingly, even in cases where the inspection is conducted voluntarily, as with these other schemes, the proposed legislation contains a number of provisions designed to protect individual rights. Under the proposed legislation, an inspection may be made only upon submission of a written notice to the owner and to the operator, occupant or agent in charge of the premises (owner/operator) to be inspected (although failure to receive a notice will not prevent an inspection). The notice must be submitted to the owner/operator as soon as possible after the Government receives it from the Technical Secretariat. The notice must include all appropriate information supplied by the Technical Secretariat regarding the basis for the selection of the facility, including, for challenge inspections, appropriate evidence or reasons provided by the requesting State Party with regard to that State Party's concerns.

In addition, the proposed legislation provides that if the owner/operator is present, a member of the inspection team and, if present, the U.S. Government representative must present appropriate credentials. Consistent with the timeframes in the CWC, each inspection must be commenced and completed with reasonable promptness and conducted at reasonable times, within reasonable limits, and in a reasonable manner. The U.S. Government must endeavor to ensure that, to the extent possible consistent with the CWC, each inspection is commenced, conducted and concluded during ordinary working hours. (Although it must be noted that the timelines under the CWC are in continuous hours; therefore inspectors have a right to work around-the-clock.) Finally, to the extent possible consistent with the CWC, no inspection can extend to financial, sales and marketing (other than shipment), pricing, personnel, or research data.

In the presumably rare case in which access is not voluntarily granted, the proposed legislation provides procedures for requesting and issuing a search warrant from any official authorized to issue search warrants in accordance with the Fourth Amendment. These procedures are designed to meet the Constitutional requirements for the issuance of warrants on the basis of "administrative probable cause," i.e., the standards for issuing warrants under administrative inspections rather than the standards used for criminal searches. (These procedures can also be used to obtain criminal search warrants, however.)

Under the proposed procedures for requesting and issuing search warrants, the Government must provide to the official authorized to issue search warrants all appropriate information supplied by the Technical Secretariat regarding the basis for the selection of

the facility or location, including, for challenge inspections, appropriate evidence or reasons provided by the requesting State Party with regard to its concerns about compliance with the Convention at the facility or location. The Government would also be required to provide any other appropriate information available to it bearing upon the reasonableness of the selection of the location for the inspection.

Under the proposed legislation, the official authorized to issue search warrants would then be required to promptly issue a warrant authorizing the requested inspection if an affidavit is submitted by the Government showing that the CWC is in force for the United States; the facility sought to be inspected is subject to the specific type of inspection requested; the procedures established under the CWC and the implementing legislation for initiating an inspection have been complied with; and the Government undertakes to ensure that the inspection is conducted in a reasonable manner and will not exceed the scope or duration set forth in or authorized by the CWC or the implementing legislation. The warrant must specify the type of inspection authorized; the purpose of the inspection; the type of facility to be inspected; the items, documents and areas that may be inspected; the commencement and concluding dates and times of the inspection; and the identities of the inspection team, if known, and, if applicable, the representatives of the U.S. Government.

The Administration believes that these procedures fully protect individual rights under the Fourth Amendment. The Administration further believes that provision of a hearing prior to an inspection would frustrate the inspection scheme and is not required under the Constitution. Accordingly, the proposed U.S. CWC implementing legislation, as with other domestic administrative inspection regimes, does not provide for a hearing prior to an inspection.

Question 23. U.S. Government personnel will accompany inspectors in most or all circumstances in which inspectors are conducting inspections under the Convention of the facilities in the U.S. of private firms or individuals. Because the inspectors have under the Convention rights of access to information which they may exercise in the presence of the U.S. Government personnel, the U.S. Government personnel may obtain information during the course of an inspection which they would not otherwise have obtained. Will the U.S. Government be permitted to use information so obtained in regulatory, civil proceedings, or criminal proceedings against the private firm or individual? If so, under what circumstances would the Government be permitted to do so? If not, what prevents the Government from doing so?

Answer 23. The Administration's discussion draft of the proposed U.S. CWC implementing legislation strictly controls disclosure of information obtained during inspections. Nonetheless, if U.S. Government personnel accompanying inspectors happen to witness evidence of a crime, the Government would not be precluded from using such information in any subsequent prosecution. The proposed legislation provides that while, in general, information obtained during inspections cannot be disclosed, such information

must be disclosed to government agencies for law enforcement purposes. In addition, it provides that such information may be disclosed when relevant in any proceeding, except that disclosure in such a proceeding must be made in such a manner as to preserve confidentiality to the extent practicable without impairing the proceeding.

This proposed provision would, therefore, permit the Government to use information or materials obtained during inspections in regulatory, civil or criminal proceedings conducted for the purpose of law enforcement, including those that are not directly related to enforcement of the CWC.

The proposed legislation also contains an exception to the nondisclosure provisions for cases in which the Government determines that disclosure is in the national interest. This exception could allow for use of information obtained during inspections in any regulatory, civil, or criminal proceeding.

Question 24. The Verification Annex: Alleged Use of Chemical Weapons, Paragraph 21 (p. 165) provides in part that "the inspection team shall have access to medical histories, if available, and be permitted to participate in autopsies, as appropriate, of persons who may have been affected by the alleged use of chemical weapons."

Question 24a. Will this provision be implemented in the U.S. in a manner consistent with physician-patient confidentiality recognized by the U.S. medical profession and the physician-patient privilege recognized by the law of evidence in the U.S.?

Answer 24a. Yes. Additionally, if the U.S. provided such information to the OPCW it would require that the Technical Secretariat protect it as confidential information.

Question. 24b. How will such physician-patient confidentiality be protected when inspectors seek access to medical histories of patients who are living?

Answer 24b. See Answer 24a. The same protection would be available whether the patients are living or deceased.

Question 25. The Confidentiality Annex, Paragraph 2, subparagraph (a) (p. 168) provides:

> 2. The Director-General shall have the primary responsibility for ensuring the protection of confidential information. The Director-General shall establish a stringent regime governing the handling of confidential information by the Technical Secretariat, and in doing so, shall observe the following guidelines:
>
> (a) Information shall be considered confidential if:
>
> (i) It is so designated by the State Party from which the information was obtained and to which the information refers; or
>
> (ii) In the judgment of the Director-General, its unauthorized disclosure could reasonably be expected to cause damage to the State Party to which it refers or to the mechanisms for implementation of this Convention.

Question 25a. In some circumstances, the United States is likely to wish to, or to be called upon by the Organization to, provide to the Organization classified U.S. intelligence concerning compliance or non-compliance with the Convention by foreign powers. Such information would not meet the definition of "confidential information" under subparagraph (a)(i) because the information does not refer to the U.S.—it refers to foreign powers. Thus, if the classified U.S. intelligence is to be treated as "confidential information" under the Convention regime, it will be at the mercy of the judgment of the Director-General under subparagraph (a)(ii) as to whether its unauthorized disclosure could reasonably be expected to cause damage to the State Party to which it refers or to the mechanisms for implemenation of the Convention. How will the U.S. ensure the protection of U.S. intelligence provided to the Organization?

Answer 25a. States Parties are not required to provide any intelligence data to the Technical Secretariat regarding concerns or allegations of non-compliance. The information required in the challenge inspection request does not require such data. If the U.S. decided to provide the Organization with information it desired to keep confidential, it would require the Director General to treat the information as confidential pursuant to paragraph 2(a)(ii) of the Confidentiality Annex as a condition of the information's provision. It should be noted that rules for protection of sensitive information in any organization cannot absolutely guarantee no unauthorized disclosure.

Question 25b. Paragraph 2 requires the Director-General to establish a stringent regime governing the handling of confidential information by the Technical Secretariat. Will elements of the Organization other than the Technical Secretariat have access to information considered confidential under the Convention? If so, what arrangements exist to provide for a stringent regime to protect confidential information handled by elements of the Organization other than the Technical Secretariat?

Answer 25b. Yes, other organizational bodies of the OPCW may have access to information considered confidential. Paragraph 2(h) of the Confidentiality Annex states that access to confidential information shall be regulated in accordance with its classification. The dissemination of confidential information within the Organization shall be strictly on a need-to-know basis. Paragraph 2 of the Confidentiality Annex requires the Director General to establish a stringent regime governing the release of confidential information by the OPCW. The Preparatory Commission for the OPCW will develop detailed implementing provisions in this regard. As with the other work of the Preparatory Commission, these provisions will be subject to approval by the Conference at its meeting shortly after the CWC enters into force.

Question 25c. Does the power of the Conference under Article VIII of the Convention to set its own rules of procedure and to provide decisions and guidelines that bind the Executive Council, and of the Executive Council to supervise the activities of the Technical

Secretariat, provide a legal basis for the Conference to establish a regime that is applicable Organization-wide to ensure the protection of information that should be kept secret, whether or not that information meets the definition of "confidential" in Paragraph 2 of the Confidentiality Annex (to which definition the classification system for which subparagraph 2(d) provides is tied)? If the Convention enters into force for the U.S., and the U.S. seeks to provide any classified U.S. intelligence to the Organization, will the U.S. seek to have the Conference implement binding rules applying Organization-wide that provide protection for U.S. intelligence provided to the Organization that is adequate in the judgment of the United States to protect that U.S. intelligence?

Answer 25c. It would not be necessary to seek a separate regime for the protection of "secret" information, since the existing regime and the term "confidential" in the Confidentiality Annex are intended to cover all sensitive information. Paragraph 2(d) of the Confidentiality Annex provides for development of a classification system to ensure appropriate handling and protection for differing levels of sensitive information. The United States will play an active role in the development of the classification system by the Preparatory Commission and the OPCW.

Question 26. The Confidentiality Annex, Paragraph 2(c) provides (p. 169):

> (c) No information obtained by the Organization in connection with implementation of this Convention shall be published or otherwise released, except, as follows:
>
> (i) General information on the implementation of this Convention may be compiled and released publicly in accordance with the decisions of the Conference or the Executive Council;
>
> (ii) Any information may be released with the express consent of the State party to which the information refers;
>
> (iii) Information classified as confidential shall be released by the Organization only through procedures which ensure that the release of information only occurs in strict conformity with the needs of this Convention. Such procedures shall be considered and approved by the conference pursuant to Article VIII, paragraph 21(i);

The Confidentiality Annex, Paragraph 4 provides in part (p. 170) that "Each State Party shall treat information which it receives from the Organization in accordance with the level of confidentiality established for that information."

Question 26a. Implementation of the Convention is likely to result in many cases in the provision to States-Parties of information classified as confidential under the Convention. If the Convention enters into force for the U.S., the U.S. is the recipient of information classified as confidential under the Convention, and the U.S. Department which has received such information for the U.S. receives a request under the Freedom of Information Act (5 U.S.C. 552) for records containing such information that is confidential

under the Convention, will the Department withhold the information that is confidential under the Convention? If so, under which FOIA Exemptions (5 U.S.C. 552(b) (1)–(9)) could it be withheld and why?

Answer 26a. Information received by the U.S. from the OPCW that is identified by the OPCW as confidential will be withheld from disclosure under 5 U.S.C. Sec. 552(b)(3). Such information will be considered not releasable under either U.S. laws governing classified information or the draft disclosure provision discussed in Answer 20.c., which prohibits, with limited exceptions, the disclosure of information or materials obtained from declarations or inspections required by the CWC that are not already in the public domain. The draft disclosure provision is specifically intended to meet the requirements of an Exemption 3 withholding statute.

Question 26b. If the Convention enters into force for the U.S., the U.S. is the recipient of information classified as confidential under the Convention, and the U.S. Department which has receives such information for the U.S. received a request under the Freedom of Information Act (5 U.S.C. 552) for the records containing such information classified as confidential under the Convention, will the above-quoted sentence of Paragraph 4 of the Confidentiality Annex—or the U.S. implementing legislation that implements this obligation—constitute a specific disclosure exemption statute for purposes of FOIA Exemption (b)(3) (5 U.S.C. 552(b)(3))?

Answer 26b. See Answer 26a.

Question 26c. If the Convention enters into force for the U.S. and the U.S. receives information that is confidential under the Convention, will the U.S. Senate have access to that information? If the answer is anything other than an unqualified yes, state the circumstances and conditions under which the Senate will and will not have access to such information.

Answer 26c. Access of the Senate to such information would be in accordance with either the provisions of U.S. law governing the release of classified information or the draft disclosure provision discussed in Answer 20c.

Question 27. The Confidentiality Annex, Paragraph 2, subparagraph (e) (p.169) provides in part:

> (e) Confidential information shall be stored securely at the premises of the Organization. Some data or documents may also be stored with the National Authority of a State Party.

Question 27a. If the Convention enters into force for the U.S., and the U.S. receives information classified as confidential under the Convention, does this provision require that data or documents memorializing that information classified as confidential under the Convention must be stored exclusively with whatever U.S. Government entity is designated as the National Authority of the U.S. under the Convention?

Answer 27a. No.

Question 27b. If the Convention enters into force for the U.S., and the U.S. receives information classified as confidential under the Convention, does this provision in any way restrict the ability

of the National Authority to disseminate within the U.S. Government the data or documents memorializing the information classified as confidential under the Convention that the U.S. has received? If so, how does it restrict that ability?

Answer 27b. No.

Question 27c. If the Convention enters into force for the U.S., and the U.S. receives information classified as confidential under the Convention, does this provision in any way restrict the ability of the U.S. Senate to gain access to data or documents memorializing the information classified as confidential under the Convention that the U.S. has received? If so, how does it restrict that ability?

Answer 27c. See Answer 26.c.

Question 28. The Confidentiality Annex, Paragraphs 7, 9, and 10 provide (p. 170):

> 7. The Director-General, the inspectors and the other members of the staff shall not disclose even after termination of their functions to any unauthorized persons any confidential information coming to their knowledge in the performance of their official duties. They shall not communicate to any State, organization or person outside the Technical Secretariat any information to which they have access in connection with their activities in relation to any State Party.
>
> 9. The staff shall enter into individual secrecy agreements with the Technical Secretariat covering their period of employment and a period of five years after it is terminated.
>
> 10. In order to avoid improper disclosures, inspectors and staff members shall be appropriately advised and reminded about security considerations and of the possible penalties that they would incur in the event of improper disclosure.

Question 28a. Are the following statements concerning Paragraph 7 true? If so, so state. If not, state why.

(i) The Director-General, the inspectors and the other members of the staff cannot communicate to any State, to any organization, or to any person outside the Technical Secretariat any information to which they have access in connection with their activities in relation to any State Party, without regard to whether the information is confidential information under the Convention or not.

Answer 28a. (i). The prohibition on "communication" is meant to prohibit Technical Secretariat personnel from transferring any information, regardless of its classification, to unauthorized recipients, i.e., transfer outside of the provisions of the CWC and their implementing regulations authorizing disclosure of information.

(ii) The Director-General, the inspectors and the other members of the staff shall not disclose information that is confidential information under the Convention coming to their knowledge in the performance of their official duties to any unauthorized persons.

Answer 28a. (ii). Yes.

(iii) The duties under Paragraph 7 of the Director-General, the inspectors and the other members of the staff not to disclose information that is confidential under the Convention to unauthorized

persons, and not to communicate to anyone outside the Technical Secretariat any information to which they have access in connection with their activities in relation to any State Party, apply in perpetuity.

Answer 28a.(iii). Yes.

Question 28b. Paragraph 7 sets not time limitation on the duties of the Director-General, inspectors and other staff of the Technical Secretariat not to disclose information that is confidential under the Convention to unauthorized persons, and not to communicate to anyone outside the Technical Secretariat any information to which they have access in connection with their activities in relation to any State Party. The individual secrecy agreements required by Paragraph 9 expire five years after termination of employment. Does the five-year time limitation in paragraph 9 on the secrecy agreement in any way set a time limit on the duty not to disclose under Paragraph 9 and the duty not to communicate Paragraph 7?

Answer 28b. No.

Question 28c. By what means, and by whom, would the secrecy agreements under Paragraph 9 between the Technical Secretariat and its staff be enforceable against a Technical Secretariat staff member, or within 5 years from termination of employment a former Technical Secretariat staff member, who has violated or is about to violate his or her secrecy agreement?

Answer 28c. The secrecy agreements for employees of the Technical Secretariat have not yet been drafted and therefore, the Administration is unable at this time to specify what actions will be taken against employees of the Technical Secretariat that violate their secrecy agreements. However, it should be noted that, pursuant to Article VIII(50), the Organization will enter into an agreement with the government of the Netherlands regarding the legal capacity, privileges, and immunities of the Organization. The enforceability of secrecy agreements by the Organization in the courts of the Netherlands could be provided for in this agreement. See also Answer 29b.

Question 28d. With regard to the staff, under Paragraph 10, what are the "possible penalties that they would incur in the event of improper disclosure?" Would there be any incur in the event of improper disclosure?" Would there be any avenue of redress for private firms or individuals damaged by such an improper disclosure?

Answer 28d. Possible penalties that would be incurred in the event of improper disclosure have yet to be developed. The Preparatory Commission is developing further detailed implementing procedures for the handling and disclosure of confidential and sensitive information. See also Answer 17.

Section D of the Confidentiality Annex contains procedures for cases of breaches or alleged breaches of confidentiality and calls for the Preparatory Commission to develop further detailed procedures in this regard. Under these provisions, Sates Parties could address grievances by their private firms or individuals alleging damage by improper disclosure by members of the Technical Secretariat staff.

Question 28e. Paragraph 7 bars the Director-General, the inspectors, and the other staff of the Technical Secretariat from furnishing to any State, organization, or non-Technical Secretariat person

any information to which the Director-General, the inspectors, and the other staff have access in connection with their activities in relation to any State Party. Does Paragraph 7 thus bar the Director-General, the inspectors, and the other staff from providing such information to the Conference of States Parties or the Executive Council? If so, can the Conference and the Council perform their duties effectively without any such information? If not, what is the basis for concluding that Paragraph 7 does not bar providing such information to the Conference and the Council?

Answer 28e. No, paragraph 7 of the Confidentiality Annex would not bar the Director General, inspectors or other staff from furnishing information gained from access in connection with activities in relation to any State Party to the Conference of States Parties or the Executive Council. However, paragraph 2(h) of the Confidentiality Annex provides that the dissemination of confidential information with the Organization, which includes the Conference and the Executive Council, shall be strictly on a need-to-know basis.

This paragraph recognizes the potential need for, e.g., the Executive Council to have access to sensitive information to carry out its responsibilities. However, as specified in paragraph 2, the Director General is required to establish a stringent regime governing the handling of confidential information by the Technical Secretariat. See also Answer 29(a)(i).

Question 29. The Confidentiality Annex, Paragraph 20 provides (p. 172):

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

Question 29a. Paragraph 20 provides for appropriate punitive and disciplinary measures against Technical Secretariat staff members who violate their obligation to protect information that is confidential under the Convention. Is there any means under the Convention for imposing appropriate punitive and disciplinary measures against Technical Secretariat staff members who violate their obligation under the second sentence of Paragraph 7 of the Confidentiality Annex not to communicate outside the Technical Secretariat "any information to which they have access in connection with their activities in relation to any State Party," which in some cases may not be "confidential information" as defined in Paragraph 2 of the Confidentiality Annex?

Answer 29a. The provision in paragraph 20 for punitive and disciplinary measures against Technical Secretariat staff members who violate their obligation to protect "confidential" information would not exclude the application of such measures against Technical Secretariat members who violate their obligation under the second sentence of paragraph 7 not to communicate outside the Technical Secretariat "any information to which they have access in connection with their activities in relation to any State Party," even if the information may not be "confidential." However, such measures, unlike for disclosure of confidential information, are not mandatory.

Question 29b. If a Technical Secretariat staff member has committed a serious breach of his or her obligation to protect information that is confidential under the Convention, and the Director-General waives immunity from jurisdiction, what civil or criminal actions could be taken, and by whom, against the staff member for redress of damage resulting from the breach of the obligation?

Answer 29b. The Administration's discussion draft of proposed U.S. CWC implementing legislation provides for criminal penalties, including fines and imprisonment for up to five years, for unauthorized disclosure of information obtained from declarations and inspections pursuant to the CWC. The proposed legislation specifically subjects employees of the Technical Secretariat to these provisions, although prosecution would require waiver of their immunity by the Director-General. Such cases would be brought by the U.S. Government.

Question 30. The Confidentiality Annex, Paragraph 23 provides (p. 172):

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

Question 30a. Please provide examples of what would constitute "breaches involving both a State Party and the Organization" for purposes of Paragraph 23.

Answer 30a. An illustrative example of a breach involving both a State Party and the OPCW would be a case in which confidential information supplied by the OPCW to a State Party was alleged to be improperly disclosed by that State Party. Another example could be that confidential information supplied by a State Party to the OPCW was alleged to be improperly disclosed by the OPCW.

Question 30b. Assuming that the Commission found that "breaches involving both a State Party and the Organization" have occurred, what remedial action could the Commission or the Organization take?

Answer 30b. The Preparatory Commission is in the process of developing implementing procedures for handling breaches of confidentiality; therefore, examples of possible remedial action taken by the Commission or the OPCW can only be speculative and illustrative at this point. The Commission could recommend to the OPCW that staff members be disciplined through future restriction of access, or possible termination of employment. In cases of serious breaches, the Director General is empowered to waive the immunity of staff members from jurisdiction. The Commission could also recommend, and the OPCW could consider, actions such as temporary restriction of access to information.

Question 31. The Preparatory Commission Text (p. 174 ff.) provides for a Preparatory Commission for the Organization for the Prohibition of Chemical Weapons.

Question 31a. On what date did the Preparatory Commission first convene?

Answer 31a. The Preparatory Commission ws convened February 8, 1993 and has been meeting continuously since.

Question 31b. Describe what work the Preparatory Commission has performed since it was first convened.

Answer 31b. The Preparatory Commission is in the process of developing detailed technical and administrative implementing procedures for the Convention. Much work has been accomplished in the development of technical procedures, e.g., for processing declarations and carrying out inspections. However, work in a number of technical areas is related to ongoing work in other technical areas; thus development of many of the technical implementing provisions continues in an iterative process. Additionally the Preparatory Commission is establishing the OPCW structure and the financial and staffing regulations and responsibilities of that organization. The Preparatory Commission has developed and approved financial and staff regulations for itself, which will serve as a basis for work on such regulations for the OPCW. The Preparatory Commission has also established a provisional support organization (the Provisional Technical Secretariat) as the predecessor of the administrative and operational arm of the OPCW; as such it will gradually take shape and, upon approval of States Parties, it will become the operational Technical Secretariat of the OPCW shortly after entry into force of the CWC.

Question 31c. What voluntary or other financial contributions has the United States made for the costs of the Preparatory Commission? What voluntary or other financial contributions has the United States pledged to make for the costs of the Preparatory Commission?

Answer 31c. The formula for cost-sharing by signatory states of expenses of the Preparatory Commission is the same formula set forth in the CWC for the eventual funding of the OPCW.

The 1994 budget for the Preparatory Commission is 56,462,100 Dutch guilders (or approximately $29,716,842). This budget is to be paid by signatory states in two installments—Part I (Provisional Technical Secretariat baseline expenses for the whole of 1994) and Part II (the final six-month preparatory phase before entry into force). The 1994 assessed contribution of the United States is 25.01 percent of this total, or approximately $7.5 million, of which the U.S. has already paid $4,461,046.11 (Part I). (This dollar figure is set according to the exchange rate for the Dutch guilder at the time U.S. payment is made.) The 1993 U.S. contribution to the Preparatory Commission was $2,100,000.

Other voluntary contributions made by the U.S. included development of an information management system for the Provisional Technical Secretariat, provision on a temporary basis of technical experts to the Provisional Technical Secretariat, financial support for a legal study in support of Preparatory Commission technical work on legal issues and a U.S. program to develop a training course for international inspectors. The Arms Control and Disarmament Agency and the Department of Defense funded these voluntary contributions.

Question 32. What protections under the Convention will ensure that implementation of the Convention, and in particular of its inspection regimes, will not result in the disclosure of information

that is proprietary to American firms or individuals, disclosure of which may prejudice the commercial interests of those firms or individuals?

Answer 32. The CWC verification regime contains a range of provisions intended to protect non-relevant or sensitive information. This includes, e.g., the right of the inspected facility to have a facility agreement specifying the nature of access and procedures to be carried out in routine inspections, the right of the facility to manage access in challenge inspections, the right of the inspected facility to take the photographs or samples requested by the inspection team, and the right of the inspected State Party to inspect the inspection equipment brought in by the inspection team. The provisions of the Confidentiality Annex are also intended to provide for the protection of information designated confidential by States Parties that is provided to the OPCW. Finally, the Confidentiality Annex also establishes procedures to address concerns or allegations of breaches of such information and provides for punitive measures where appropriate.

Question 33. The Preamble to the Convention states in part (p. 1) that:

> The States Parties to this Convention,
> Determined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction,
> Have agreed as follows: * * *

The quoted portion of the Preamble states in a sweeping fashion, not limited to chemical weapons or weapons of mass destruction, that the States Parties are acting with a view to achieving effective progress toward general and complete disarmament—i.e., a world with no arms—under strict and effective international control.

Question 33a. Is it the policy of the United States to seek to achieve "general and complete disarmament under strict and effective international control?"

Answer 33a. Yes, however, the U.S. has always viewed this as a theoretical long-term goal to be attained in the context of our security interests and not through rigid priorities and timelines. The language is similar to language contained in other arms control agreements to which the United States is a party, e.g., the Biological Weapons Convention.

Question 33b. If the Convention enters into force for the U.S., will the quoted language from the Preamble have any binding legal effect on the U.S., either as a matter of international law or U.S. domestic law?

Answer 33b. The preambular language does not express an obligation and has no binding legal effect on the U.S., either as a matter of international law or domestic law. It is an expression of policy, describing the context in which the CWC was negotiated.

Question 33c. Is the policy expressed by the statement that the U.S. (as one of the "States Parties") is "determined to act with a view to achieving effective progress towards general and complete

disarmament under strict and effective international control" consistent with the Second Amendment to the U.S. Constitution, which protects Americans against infringement of the right to bear arms? If so, why, and if not, why not?

Answer 33c. Yes. See Answers 33a., b., and d.

Question 33d. Would the Executive Branch object to inclusion in the committee reports or floor statements relating to the Senate's consideration of the Convention of a statement that:

> The Preamble to the Convention states in part that the States Party to the Convention are 'Determined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control * * * .' The Executive Branch has assured that the reference to 'general and complete disarmament under strict and effective international control' in the Preamble is only explanatory language; that the reference was developed with the armaments of nation-states in mind, and in particular their weapons of mass destruction; that protection of U.S. interests and settlement of international disputes on terms and in a manner favorable to U.S. interests remain foreign policy objectives of the U.S.; that the reference is not intended to indicate that decisions concerning what armaments the United States should have should be made by an international authority, rather than by the United States Government; and that the reference has no binding legal effect on the United States under international law or U.S. domestic law. In particular, the The Executive Branch has assured that this language in the Preamble was not intended to, and does not, have any purpose or effect inconsistent with the right of Americans to bear arms protected by the Second Amendment to the U.S. Constitution.

Answer 33d. No.

Question 34. If the Convention enters into force for the United States, what instrumentality of the U.S. Government will be designated under Article VII, Paragraph 4 as the National Authority of the United States for purposes of the Convention?

Answer 34. The U.S. National Authority will have two main components: a formal interagency decision-making body and an executive secretariat called the Office of the National Authority. After the CWC enters into force, the decision-making body will be the chemical weapons interagency working group, chaired by the National Security Council staff. This group will include representatives of the Department of State, the Department of Defense, the Department of Commerce, the Department of Justice, the Department of Energy, the Intelligence Community, the Joint Chiefs of Staff, and the Arms Control and Disarmament Agency (ACDA). Other agencies will participate as appropriate. Functional activities associated with CWC implementation will be coordinated by the Office of the National Authority, which is to be operated by ACDA. In addition to facilitating administrative and logistical matters, the Office of the National Authority will serve as the U.S. Government's point of contact with the OPCW and other States Parties.

U.S. ARMS CONTROL
AND DISARMAMENT AGENCY,
Washington, DC, July 11, 1994.

Hon. DENNIS DECONCINI,
Chairman, Select Committee on Intelligence, U.S. Senate.

DEAR MR. CHAIRMAN: John D. Holum, Director, U.S. Arms Control and Disarmament Agency (ACDA) has asked me to convey his appreciation for the opportunity to testify before the Senate Select Committee on Intelligence on the Chemical Weapons Convention.

Following the hearing on May, 17, 1994, ACDA received written questions for the Record from you and Senator Warner. Please find enclosed the unclassified answers to questions ACDA received. Classified responses are under separate cover.

If you have any further questions or need any additional information, please do not hesitate to contact me.

Sincerely,

IVO SPALATIN,
Director of Congressional Affairs.

Enclosure.

QUESTIONS AND ANSWERS ON THE CHEMICAL WEAPONS CONVENTION FOR THE SENATE SELECT COMMITTEE ON INTELLIGENCE

Question 1. Professor Matthew Meselson of Harvard University, a co-author of the "Chemical Weapons Convention Verifiability Assessment" prepared by EAI Corporation for the U.S. Arms Control and Disarmament Agency (ACDA), has warned that the Chemical Weapons Convention (CWC) exemption for "law enforcement" purposes could be a major loophole. What problems and ambiguities do you see resulting from this provision?

Answer 1. Professor Meselson asserts that because the CWC permits the use of toxic chemicals for law-enforcement purposes without defining which chemicals may be used, "a State Party could produce chemical weapons but claim they are intended for law enforcement." The Administration believes that the CWC adequately addresses this issue. Pursuant to paragraph 1 of Article II, for toxic chemicals to be permitted for law-enforcement purposes, the type and quantity of the chemicals used must be consistent with such purposes. During the CWC negotiations, the only law enforcement use of lethal chemicals that was discussed was for capital punishment. See also answer A2.

Question 2. Does the CWC permit the use of chemical weapons for law enforcement purposes?

Question 2(a). Would that include the use of lethal chemicals to combat a terrorist group that was holding hostages? Or the same group, if it were not holding hostages at the moment, but were engaged in or threatening some other action?

Question 2(b). If so, how will the international community differentiate between terrorist groups and other groups (say, in a civil war) that engage in similar actions?

Question 2(c). How, in the U.S. view, does the law enforcement exemption apply to peacekeeping operations? Would the United

States, if engaged in a Somalia-like peacekeeping operation, be permitted to use lethal chemicals, or other toxic chemicals that did not fall under the "riot control agent" provisions?

Answer 2. The CWC does not permit the use of chemical weapons under any circumstances. Therefore, the CWC does not permit the use of chemical weapons for law enforcement purposes. It does, however, permit the use of toxic chemicals that are not chemical weapons for law enforcement purposes. Pursuant to paragraph 1 of CWC Article II, toxic chemicals used for law enforcement purposes are not "chemical weapons" for purposes of the Convention, provided they are of a type and quantity consistent with such a purpose.

Answer 2(a). During the CWC negotiations, the only law enforcement use of lethal chemicals that was discussed was for capital punishment. With respect to terrorist situations, the type and quantity of toxic chemical used must be consistent with the specific law enforcement purposes for which it is used.

Answer 2(b). As discussed in answer A2, toxic chemicals may only be used for law enforcement purposes if they are of a type and quantity consistent with such purposes. The use of lethal chemicals against humans in the conduct of an internal armed conflict such as a civil war would not constitute a law enforcement or other permitted purpose, and therefore would not be permissible under the CWC.

Answer 2(c). As discussed in answer A2, toxic chemicals may only be used for law enforcement purposes if they are of a type and quantity consistent with such purposes. The use of lethal chemicals or other toxic chemicals to conduct an armed conflict that might arise in the course of a peacekeeping operation would not constitute a law enforcement or other permitted purpose, and therefore would not be permissible under the CWC.

Question 3. How will we or the Organization for the Prohibition of Chemical Weapons determine whether toxic chemicals ostensibly kept for law enforcement purposes are in a "types and quantities * * * consistent with such purposes?" Was this issue left to the Preparatory Commission? Or will it be decided on a case-by-case basis?

Question 3(a). How will the types and quantities of toxic chemicals for use against criminals and terrorists differ from those for use against some other foreign or domestic enemy?

Answer 3. Assessing whether the types and quantities of toxic chemicals are consistent with law enforcement purposes will be decided on a case-by-case-basis. The drafters of the CWC chose not to place a quantitative threshold on the amount of toxic chemicals retrained for "law enforcement purposes, including domestic riot control." These quantities could vary given a state's size and domestic security needs. If the convention prohibited the use of toxic chemicals for law enforcement, if would ban the use of chemicals for capital punishment, i.e., gas chambers and lethal injection. The U.S. chose not to permit such a provision in the Convention.

Answer 3(a). No toxic chemical of any type or quantity may be used against a foreign or domestic enemy unless for a permitted purpose, such as law enforcement. As noted in answer 1, toxic

chemicals used for law-enforcement purposes, e.g., against criminals or terrorist or for any other permitted purpose, must be of a type and quantity consistent with such purposes.

Question 4. Three months ago, in response to a question for the record from Vice Chairman Warner, the Executive branch wrote: "The Administration is reviewing each of the uses of riot control agents specified in Executive Order 11850 to determine which, if any, may be inconsistent with the prohibition in the Chemical Weapons Convention (CWC) on the use of riot control agents as a method of warfare and, if so, what revisions may be necessary in the Executive Order." What findings and recommendations have resulted from that review?

Answer 4. On June 23, 1994, President Clinton informed the Senate of the results of the review, which are as follows:

> Article I(5) of the CWC prohibits Parties from using RCAs as a "method of warfare." That phrase is not defined in the CWC. The U.S. interprets this provision to mean that:
>
> > The CWC applies only to the use of RCAs in international or internal armed conflict. Other peacetime uses of RCAs, such as normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and noncombatant rescue conducted outside such conflicts are unaffected by the Convention.
> >
> > The CWC does not apply to all uses of RCAs in time of armed conflict. Use of RCAs solely against noncombatants for law enforcement, riot control, or other noncombat purposes would not be considered as a "method of warfare" and therefore would not be prohibited. Accordingly, the CWC does not prohibit the use of RCAs in riot control situations in areas under direct U.S. military control, including against rioting prisoners of war, and to protect convoys from civil disturbances, terrorists and paramilitary organizations in rear areas outside the zone of immediate combat.
> >
> > The CWC does prohibit the use of RCAs solely against combatants. In addition, according to the current international understanding, the CWC's prohibition on the use of RCAs as a "method of warfare" also precludes the use of RCAs even for humanitarian purposes in situations where combatants and noncombatants are intermingled, such as the rescue of downed air crews, passengers and escaping prisoners and situations where civilians are being used to mask or screen attacks. However, were the international understanding of this issue to change, the U.S. would not consider itself bound by this position.

Upon receiving the advice and consent of the Senate to ratification of the Chemical Weapons Convention, a new Executive order outlining U.S. policy on the use of RCAs under the Convention will

be issued. The Office of the Secretary of Defense will also be directed to accelerate efforts to field non-chemical, non-lethal alternatives to RCAs for use in situations where combatants and noncombatants are intermingled.

Question 10. Although Paragraph 2 of Article I of the CWC holds each State Party responsible for "chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control," it is not clear how the Convention is to be enforced regarding the actions of extremist ethnic or terrorist groups that may operate with or without the tacit approval of a host government.

Question 10(a). What punitive actions against States Parties does the CWC provide for in the event such activity is discovered?

Question 10(b). May a requesting State Party refer CWC violations to the International Court of Justice?

Question 10(c). Does the CWC provide in any way for personal responsibility and accountability on the part of senior government officials or other citizens of a State Party if they should violate the CWC and not be prosecuted by that State?

Answer 10(a). Paragraph 1 of CWC Article VII requires each State Party to prohibit individuals and legal entities within its territory or any other place under its jurisdiction (e.g., its aircraft or vessels), regardless of their nationality, from engaging in activities that are prohibited to the State Party under the Convention. Paragraph 1 further requires each State Party to enact "penal" legislation implementing this prohibition (i.e., criminal, administrative, military or other sanctions) and to extend such legislation to all individuals outside the State Party possessing its citizenship. Finally, paragraph 1 requires each State Party to not permit such activities within places under its control, e.g., occupied territory.

Accordingly, a State Party would be responsible for prohibiting actions of terrorist groups that violate the CWC if such actions occur within its territory or other places under its jurisdiction, regardless of whether the members of the group are citizens of that State Party. A State Party would also be responsible for prohibiting such actions outside its territory if they are perpetrated by its citizens. It is understood that for a State Party to "prohibit" activities it must enact and enforce legislation governing the conduct of private individuals and non-government entities. Finally, for places under its control a State Party would be required to not allow such activities to occur.

If a State Party fails to undertake these obligations, e.g., it knowingly tolerates the production of chemical weapons by terrorists within its borders, then it would be in violation of the CWC. CWC Article XII provides for a number of possible penalties for violations, including restriction or suspension of the offending State Party's rights and privileges under the Convention and collective measures by State Parties, including sanctions, against the offending State Party.

Answer 10(b). CWC Article XIV, paragraph 2, provides that disputes between two or more States Parties can, by mutual consent, be referred to the International Court of Justice. However, Article XIV, paragraph 6, makes clear that this right does not prejudice other rights a State Party might have, such as requesting challenge inspections and clarifications in response to concerns, nor does it

prejudice the right of the CWC Organization to take measures to redress a situation, including sanctions.

Answer 10(c). As discussed in answer 10(a), a State Party is responsible for prosecuting such individuals and if it fails to do so that State Party may be subject to penalties. Such individuals may also be subject to prosecution by other States, e.g., if the individuals' actions amount to war crimes.

Question 11. If the CWC should enter into force, will it supercede U.N. Security Council Resolutions? In particular, would the CWC allow Iraq to use or convert any of its chemical weapons production facilities, rather than destroying them as required by the UNSC?

Answer 11. The CWC would not supercede UNSC Resolutions. The CWC contains general provisions applicable to all States Parties, while the UNSC Resolutions in question apply specifically to Iraq. There is no evidence in the text or the negotiating record of the CWC that the negotiating countries intended the Convention to supercede UNSC Resolutions in any way. Moreover, the CWC provisions are not incompatible with those contained in the UNSC Resolutions relating to Iraq. If Iraq were to sign and ratify the CWC, it would be required under both the CWC and the UNSC Resolutions to destroy its chemical weapons destruction facilities. The only right Iraq currently has is to make a request to the UN Security Council to be allowed to convert such facilities. If Iraq becomes a party to the CWC, any conversion would be subject to the CWC Organization's approval and verification.

Question 12. Is the 10-year deadline (or 15 years with an extension) for destruction of chemical weapons a realistic goal for Russia and the United States? Or is at least one country unlikely to meet this objective?

Question 12(a). What is the U.S. plan to carry out destruction? What is the estimated cost of such destruction and where are those funds in the budget?

Answer 12. The U.S. plans to complete destruction of its chemical weapons within the 10-year deadline provided in the Convention. Senior Russian officials who are familiar with their chemical weapons destruction program have stated that the Russians intend to meet their destruction obligations as defined in the CWC. The Russians made clear during the CWC negotiations that they might have difficulty meeting the 10 year deadline for destruction. Thus, the CWC allows for a State Party to request approval for an extension of the deadline up to a maximum of 15 years. The U.S. believes that with U.S. assistance, it is possible for the Russians to meet this deadline.

Answer 12(a). The U.S. plans to destroy its chemical weapons using the baseline incineration method. After studying alternative technologies, the National Research Council of the National Academy of Sciences concluded that the baseline method is safe and effective, and that greater risks will be incurred by continuing to store chemical weapons than by proceeding with their destruction. Concurrent with destruction, the Army plans to conduct research into two of the alternative technologies recommended for further study by the NRC, neutralization and neutralization followed by biological treatment. These processes are different from other destruction technologies and incineration in that they operate at low

temperature and low pressure. Based on the results of the study, the U.S. may decide to use one of these technologies for low volume bulk agent storage sites. The Army is also incorporating many of the NRC's other findings into their program to make it even more safe and cost-effective.

The current life-cycle cost estimate for the U.S. chemical weapons destruction program is about $10 billion over the period of destruction. The cost of destroying other items, as required by the CWC (e.g., non-stockpile material such as chemical weapons production equipment) is approximately $1 billion. These figures do not include treaty verification costs. Funds for this program are contained in the Chemical Agents and Munitions Destruction, Defense (CAMD,D) account, which includes budget lines for research and development, procurement, operations and maintenance, and military construction.

Question 13. To what extent will the United States have to underwrite the costs of destroying Russian CW materials? What costs have we offered to defray, and what others should we plan on financing if we really want Russia to meet the CWC 10-year or 15-year deadline?

Answer 13. Under the Cooperative Threat Reduction Program (Nunn-Lugar), the United States has agreed to provide up to $55 million in assistance to the Russian chemical weapons destruction program. This assistance will include the provision of a U.S. contractor to aid in the development of a comprehensive plan and the equipping of a central analytical laboratory. The laboratory will be responsible for environmental baseline studies at the destruction sites and for monitoring to ensure safe destruction activities.

The U.S. has agreed to consider additional measures as appropriate to assist the Russian chemical weapons destruction program. The Russians have asked on several occasions that additional support focus on efforts to develop one or two nerve-agent destruction facilities. This request is now under consideration. The total cost of the Russian destruction program will not be known until the Russian Government completes its chemical weapons destruction plan.

Question 14. The United States has a verification interest in intrusive inspections; we also have an information security interest in limiting inspections to the information required to verify compliance. How was this balance struck in U.S. proposals during the CWC negotiations and in the final agreement?

Answer 14. The U.S. objective was to ensure that an appropriate balance was struck in the final provisions of the CWC among the need to protect sensitive non-CW related information, the privacy protections guaranteed in the U.S. Constitution, and the need for intrusiveness in the application of verification procedures. The challenge inspection regime contained in the final agreement largely reflects the regime proposed by the U.S. Reflecting the need for intrusive inspections, the regime requires States Parties to accept a challenge inspection and to provide the greatest degree of access taking into account any constitutional obligations they may have with regard to proprietary rights or searches and seizures. Access must be provided to and within the requested site within specified

periods of time, with guaranteed perimeter monitoring activities allowed upon arrival at the site. Reflecting the need to protect sensitive non-CW related information and Constitutional rights, the regime allows States Parties to negotiate the extent and nature of access within the requested site on a managed access basis. This includes the right to take such measures as necessary to protect national security information unrelated to the Convention. However, the right to manage access is balanced with the obligation, in the event access is restricted, of that Party to make every reasonable effort to satisfy the non-compliance concern that generated the inspection. The degree and nature of access and cooperation provided by the inspected State Party will be included in the inspection team report.

Prior to U.S. signature, the U.S. interagency conducted a review of the entire text and determined that the balances struck in the CWC adequately protect U.S. interests and enhance our national security.

Question 20. Will the CWC, if ratified, actually lead to reduced production or use of chemical weapons? Or will countries that want those weapons still find a way to get them?

Answer 20. The CWC requires States Parties to cease production of chemical weapons and prohibits the use of CW under any circumstances, including for retaliation, against anyone. Almost three fourths of countries believed to possess or to be seeking to acquire CW programs have already signed the CWC. The verification mechanisms under the CWC will make it more difficult for a State Party to continue production clandestinely. While it is impossible to totally prevent rogue states from acquiring chemical weapons, we believe the net effect of the CWC provisions will increase not only the risk of detection but also the political price of non-compliance, thus serving to deter potential CWC violators. The CWC will also have a deterrent effect on countries remaining outside. States Parties will be prohibited from assisting anyone in activities prohibited by the CWC and are required to ban trade in certain chemicals of relevance to CW production with non-States Parties. Additionally, the CWC will establish an unprecedented international norm against virtually every aspect of an offensive CW program, thus enhancing the political pressure brought to bear against countries continuing to engage in such programs.

Question 35. Three months ago, in response to a question for the record from Vice Chairman Warner, the Executive branch stated: "Membership in the Executive Council will be arranged prior to entry into force of the CWC to preclude the possibility of vacant seats hampering its operation." Since the membership of the OPCW (and hence the pool of countries from which Executive Council members may be chosen) may be changing right until entry into force, how (and in what form) can Executive Council members be chosen in advance?

Answer 35. The Executive Council is made up of representative countries from five geographic regional groups. Each group is allotted a specific number of seats, and as a rule, a sub-set of these seats are reserved for countries with the most significant chemical industry. Therefore each group has a responsibility to coordinate among themselves to select representative members. The Western

European and Others Group (WEOG) has already come to an agreement that designates its Executive Council membership for the first seventeen years after the CWC enters into force (EIF). The WEOG has recommended to others to begin discussing their respective group's membership now and come to agreements prior to EIF.

Should a signatory state selected as a member of the Executive Council not ratify the Convention, its seat would have to be filled as soon as it became apparent that the state would not be eligible for the seat. This has been considered for the WEOG. Should the country be among the significant chemical producers, the next largest producer would take the vacant seat. If the seat were a rotating seat, the next country in line to rotate into a seat would take the seat.

Question 36. Why has the United States not arranged for a forum in which U.S. manufacturers of equipment with inspection or data-management uses could present their ideas and products to Preparatory Commission members who are engaged in setting standards for inspection equipment? Since other countries reportedly have helped their companies make such presentations, will the United States follow suit?

Answer 36. The U.S. supports an open-bid process for procurement of inspection and data-processing equipment by the OPCW. Within this framework, we will keep relevant U.S. industry informed of any opportunities to market their products, such as international trade fairs. We have also informed U.S. companies, upon request, of the proper avenue for sending information about their products to the Provisional Technical Secretariat (PTS) in the Hague.

Question 51. What will the U.S. role be in training international inspectors? How confident is the Executive Branch that the inspectors will be of high quality and will begin their work with all the training that they need?

Answer 51. The United States has provided the Preparatory Commission with extensive course materials developed by the Department of Defense for the training of international inspectors and has offered to sponsor training for international inspector candidates.

The material provided to the Preparatory Commission was developed through U.S. experience in training our own OSIA inspectors and by conducting two pilot courses designed for international chemical weapons inspectors. The material includes lesson plans, outlines, exams, and supplemental reading material. This material has been well received by the Dutch, who will instruct half the international organization's inspectors. The U.S. will provide instructors to the Dutch for chemical weapons related topics. The U.S. has also offered to train fifty inspectors in the basic inspector's course at no cost to the international organization and will use the same material. Additional materials have been developed by the Defense Department for the training of specialists in chemical sampling and analysis, and in chemical weapons production, storage, and destruction facility inspections. The U.S. has offered to conduct this specialist training. The U.S. has also informed the Preparatory Commission that training sites will be made available within the

U.S. for mock inspections by international inspectors as part of their training program.

The CWC states that the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. This requirement, along with the U.S. role, as outlined above, provide us confidence that the inspectors will be sufficiently qualified and prepared to undertake their responsibilities.

Question 52. The CWC includes an automatic ban on shipment of Schedule 1 agents to non-member states. It also includes a ban on shipment of Schedule 2 chemicals to non-member states after three years. Are the Intelligence Community and all the relevant policy agencies ready to implement such bans regarding U.S. shipments and to monitor other countries compliance with such bans?

Question 52(a). How effective is the current monitoring and enforcement of compliance with authorities Group bans on such shipments?

Question 52(b). What is being done, and what more is needed, to improve information management systems for OPCW or U.S. Government use to monitor declaration data and/or CW precursor shipments?

Answer 52. The United States already has in place the necessary mechanisms to review and enforce regulations governing exports of CW-relevant chemicals and equipment from the United States. Trade in CW-related materials such as munitions and actual agents is regulated by the Department of State through the International Trade in Arms Regulations (ITAR) and is enforced by the U.S. Customs Service, with appropriate support by the intelligence community. Similarly, trade in dual-use chemicals and production equipment is regulated by the Department of Commerce through the Export Administration Regulations (EAR) and is also enforced by the U.S. Customs Service, and by the Department of Commerce's export enforcement personnel. Current export controls do not cover all Scheduled chemicals. The DOC will amend export regulations to ensure that they are consistent with trade restrictions required by the CWC.

The Department of State chairs an interagency working group known as Shield, which reviews license applications for U.S. Exports of dual-use chemicals and equipment and coordinates U.S. Interdiction efforts of foreign supplies of CW-related materials to proliferants. Shield brings together members of the policy, intelligence and enforcement communities, such as the Departments of State, Defense and Commerce, and the Arms control and Disarmament Agency, as well as members of the intelligence and enforcement communities (the Customs Service, FBI and Commerce enforcement office). The Shield working group provides an existing mechanism for ensuring both U.S. Exporter compliance with the CWC's trade restrictions and other countries compliance with CWC trade restrictions. Given the increased volume of chemicals to be monitored once the CWC enters into force, however, more intelligence and enforcement resources may be required.

Answer 52(a). The authorities Group does not ban any of the items on its control lists as such, although there may be a de facto

presumption of denial for some item to certain destinations, such as Libya or Iraq. In general, U.S. exporters appear to be complying with U.S. export regulations covering CW-related dual-use items (the authorities Group list), i.e., by requesting the necessary export licenses as required. As for other AG members, recent authorities Group meetings have devoted greater attention to improving coordination among members in enforcement of existing controls, and have noted the growing effort by proliferants to seek CW-related materials from non-AG suppliers—an indication that AG controls are cutting off the supply of chemicals and production equipment from member states. AG members have, in response to this development, devoted even more effort to persuading non-member suppliers to adopt AG-comparable export controls.

Answer 52(b). The United States has offered to provide to the Preparatory Commission, for use by the CWC Organization, an information-management system capable of monitoring declaration data. Within the U.S., ACDA is studying the needs of the future Office of the National Authority regarding information management.

Question 57. How many firms have been invited to each ACDA-sponsored seminar on the CWC, and how many have actually attended? How many of those firms are not members of trade associations such as the Chemical Manufacturers Association, which has worked closely with ACDA on this Convention?

Answer 57. Seminar attendance was not based on invitations. ACDA contacted thousands of companies by form letter and also ran ads in trade journals and in the Federal Register. For the 1993 seminar series, this major outreach effort resulted in 191 seminar attendees from the targeted industry, representing a total of 110 companies. The 1994 seminar series had a total of 246 attendees, representing 142 companies. Although precise statistics are not available, the largest fraction of companies attending were large, diversified chemical manufacturers, which are likely to be members of CWC. Such large manufacturers are also most likely to be producers of chemicals on the CWC Schedules.

Question 58. What precise steps will the Commerce Department and other federal agencies take, above and beyond what has already been done, to inform chemical industry firms—and especially firms that are not members of the big industry associations with whom ACDA has worked over the years—of their responsibilities under the CWC?

Answer 58. Industry outreach activities are continuing on at least four tracks. First, ACDA has published a series of information papers for industry describing various aspects of the CWC, and additional papers will be forthcoming. Second, in cooperation with the Department of Commerce, ACDA will conduct a follow-up to the industry survey completed in February 1994 to develop a comprehensive list of U.S. companies affected by the CWC, and will use this list to focus outreach efforts. Third, also in cooperation with the Department of Commerce, ACDA plans to hold a series of industry outreach seminars during the six-month ramp-up period prior to entry into force of the CWC. Finally, in an effort to inform smaller batch producers and downstream processors and consumers, many

of which are not members of the Chemical Manufacturers Association (CMA), ACDA has made a deliberate effort to reach out to smaller trade associations, including the Synthetic Organic Chemical Manufacturers Association (SOCMA) and the Pharmaceutical Manufacturers Association (PMA).

Question 59. Given the scope and intrusiveness of CWC verification provisions, why has there been fairly low attendance at CWC information briefings that have been held across the country? What will be done to improve on this before the CWC goes into force?

Answer 59. The modest response can be attributed to a number of factors. First, due to the bureaucratic structure of many large corporations, seminar announcements may have failed to reach the target individuals in a timely manner. Second, many of the smaller trade associations have not understood the implications of the CWC for their members or have judged it a low priority, and some contend that national organizations such as CMA should take the lead in this area. Finally, even when companies understand that the CWC does not affect them, they may assume that there is no need to begin preparations until the treaty has been ratified by 65 signatories and entry into force is certain. Particularly during a recession, smaller firms are generally reluctant to invest scarce human and financial resources to implement new regulations until there is a clear legal requirement to do so. For this reason, such firms may prefer to wait until CWC ratification and passage of the implementing legislation before commencing preparations. As the reality of implementation nears, however, such companies will naturally show greater interest. In the meantime, ACDA continues to work through CWC and other trade associations to spread the word about the treaty.

Question 62. What is being done to make the data declarations easy to fill out? What is being done to limit the compromise of classified or proprietary information in those declarations? Will the data declarations require the disclosure to the OPCW of classified or proprietary information, despite your best efforts to limit that?

Question 62(a). What will the Executive branch do to ensure that U.S. companies are not required to provide (in declarations, in particular) more information than is actually required by the CWC, with resultant unnecessary costs?

Answer 62. Draft industrial data declaration forms have been prepared by the Provisional Technical Secretariat (PTS) in the Hague, based on policy guidelines developed by the Expert Group on Chemical Industry Issues. The draft forms have already gone through several revisions in a deliberate effort to simplify them and make them more user-friendly. ACDA, working in close cooperation with CMA, has actively participated in this process by organizing a voluntary test of the draft forms by 25 U.S. chemical companies, ranging from small batch processors to major manufacturers. The participating companies were sent a complete declaration package, asked to fill out the relevant forms for one of their plant sites, and then invited to respond to a detailed questionnaire on how the content and layout of the forms could be improved. Comments provided by industry were then passed to the U.S. PrepCom delegation in The Hague, which provided them to the PTS. Many of industry's comments were subsequently incorporated

into the next iteration of the draft forms. Overall, participating companies found the forms much easier to use than they had expected.

Although the industrial declarations will require some disclosure of confidential business information (CBI), there is strong support among participating countries in The Hague for minimizing the amount of CBI in declarations, and for strict protection of all such information provided. Indeed, States Parties will be empowered to classify all confidential information submitted in national declarations according to a three-tier OPCW classification system (OPCW-Restricted, OPCW-Protected, and OPCW-Highly Protected). Detailed handling, protection, and release procedures are being worked out by the PrepCom to ensure the security of such classified information within the Organization. In addition, the Administration's proposed implementing legislation contains provisions prohibiting public release of declarations, with limited exceptions.

Answer 62(a). The Administration plans to base the declaration forms for U.S. industry on the forms being developed by the PTS for declarations by the National Authority. The only additional information to be requested from industry will be a precise address and point of contact for each declared facility and specific figures for the production of Schedule 3 chemicals, will then be aggregated into ranges prior to submission to the OPCW. There is no intention to require industry to supply data unrelated to the CWC, such as information on compliance with environmental or health and safety regulations.

Question 63. One protection against frivolous or malicious challenge inspections is Article IX, paragraph 17, under which the Executive Council, within 12 hours of a request, may reject that request by a vote of 31 of its 41 members. But the state to be inspected may not vote, so a request regarding the United States could be blocked only if 31 states other than the United States voted to reject it. Given the geographical distribution of Executive Council membership, will the United States be able to rely upon this mechanism to block any unjustified challenge inspection request?

Answer 63. During the Geneva negotiations, the United States sought to preclude the possibility of a challenge request by the United States being blocked by others. In taking this position, the U.S. argued that protection against frivolous or malicious requests could be found in the procedures for managed access which protect sensitive information and facilities. Other countries believed there should be some "filter" mechanism to preclude such requests. Thus, to balance these interests, the Convention contains the provision for the Executive Council to review challenge inspection requests, but requires a three-quarters opposition vote of all members within a 12 hour period to prevent the inspection from being carried out. These strict requirements make it unlikely that challenge inspections will be blocked. That said, the U.S. continues to believe that the Convention's managed access provisions provide adequate protection against unjustified or frivolous challenge inspection requests.

Question 69. Will there be a single office that gives guidance to U.S. Government contractors regarding the protection of classified

information during inspections? Or may contractors receive one set of demands from DOE, another from DOD, and still another from CIA?

Question 69(a). Will there be an office that serves as a point of contact for companies to share their experiences with or complaints about the conduct of declarations or inspections?

Answer 69. The Defense Treaty Inspection Readiness Program (DTIRP) Office will serve as a single point of contract for U.S. Government contractors regarding the protection of classified information during inspections. There may be instances, however, where there is a question as to where responsibility lies for particular contractors who have contracts with multiple departments. As these cases are identified, the Office of the National Authority (ONA), housed within ACDA, will work with the responsible departments or agencies to resolve the matter.

Answer 69(a). The Department of Commerce will identify a single point of contact for companies to interact with regarding questions on rights or obligations under the CWC or regarding declarations or inspections or experiences during inspections. Additionally, the ONA will keep responsible departments and agencies informed as to reports or information received from the OPCW regarding declarations and inspections requirements. U.S. facilities/companies can interact with the ONA should they not be able to satisfy their concerns through their lead agency.

Question 72. What measures has the United States proposed regarding procedures regarding a classification system for OPCW information, pursuant to paragraph 12(v) of the Text on the Establishment of a Preparatory Commission, and what has the Preparatory Commission recommended on this?

Answer 72. The U.S., as well as other countries, proposed a three-level classification system for use in protecting information provided to or generated by the OPCW. This classification scheme has since been adopted by the Preparatory Commission. It provides for a three tier classification system: OPCW-restricted, OPCW-protected, and OPCW-highly protected. The U.S. has also made available a cost-free expert to advise the Provisional Technical Secretariat in the development of its internal physical security procedures.

Question 73. What measures that United States proposed regarding procedures to be followed in case of breaches or alleged breaches of confidentiality, pursuant to paragraph 12(w) of the Text on the Establishment of a Preparatory Commission, and what has the Preparatory Commission recommended on this?

Answer 73. The U.S., as well as other countries, has proposed a three-person team be selected from among individuals of recognized standing, one by each party involved in the alleged breach and one to be jointly selected by the two to act as chairman. The Preparatory Commission has not reached final agreement on a recommendation yet.

Question 76. What provisions of the CWC and of the proposed U.S. implementing legislation are intended to protect confidential business information?

Question 76(a). Paragraph A.2(c)(ii) of the CWC "Confidentiality Annex" permits release of confidential information "with the express consent of the State Party to which the information refers."

How will the concerns of private firms be taken into account when the U.S. Government considers whether to authorize the release of such information?

Question 76(b). What is the legal justification for the U.S. Government maintaining the authority to consent to the release of a private firm's proprietary information?

Answer 76. In response to industry's concerns, the Convention contains numerous provisions designed to protect confidential business information (CBI) from unauthorized disclosure. These provisions (contained in, *inter alia,* Articles VI, VIII, IX, Parts II and VI–X of the Annex on Implementation and Verification, and the Annex on the Protection of Confidential Information) were developed during the treaty negotiations in Geneva with the active participation of the U.S. Chemical Manufacturers Association and other trade associations representing the international chemical industry.

The major provisions designed to protect CBI unrelated to the Convention include: the opportunity for an inspected facility to negotiate a facility agreement specifying the nature of access and the information to be collected during routine inspections; the right of the United States to manage access during challenge inspections; the right of the inspected facility to take the photographs or samples requested by the inspection team; and the right of the United States to inspect the inspection equipment brought in by the inspection team. In addition, the CWC Annex on the Protection of Confidential Information contains provisions designed to protect information designated confidential by States Parties and provided to the OPCW. This Annex also establishes procedures to address concerns or allegations of breaches of such obligations, and provides for punitive measures where appropriate.

The Administration's proposed CWC implementing legislation also contains a number of provisions for safeguarding CBI. Title III, Section 302 restricts the public disclosure of the information and materials required by the CWC, provides criminal penalties for wrongful disclosure, and applies these provisions to the international inspectors. Subsection 302(a) provides, with certain exceptions, for an extensive prohibition on the public disclosure of information or materials (e.g., samples of chemicals) obtained from declaration or inspections required under the CWC. This provision is designed to provide chemical industry and other persons affected by declarations and inspections under the CWC with the greatest amount of protection possible for their information and materials. Specifically, this provision makes clear that information or materials obtained from declarations or inspections shall not be required to be disclosed pursuant to the Freedom of Information Act, and may be disclosed only in accordance with the criteria set forth in the provision. Subsection 302(c) provides for criminal penalties for the unauthorized willful disclosure of information or materials obtained pursuant to the CWC. This provision is designed to strengthen the non-disclosure protections afforded chemical industry affected by the CWC.

Answer 76(a). The Administration's proposed CWC implementing legislation provides for advance notice to the supplier of information or materials pursuant to the CWC in appropriate cases when

the U.S. Government intends to exercise the national interest provision to release information or materials. Where notice has been provided, the information or materials cannot be released until after 30 days have elapsed. This provision is designed to provide affected persons with the opportunity to, *inter alia,* make their concerns about release known to the U.S. Government.

Answer 76(b). Under the Administration's proposed CWC implementing legislation, chemical industry is required to submit to the Government such reports as the Government may reasonably require pursuant to the CWC. The proposed Act prohibits the public disclosure of information or materials (e.g., samples) obtained pursuant to declarations and inspections under the CWC except to the CWC Organization and States Parties, to appropriate committees and subcommittees of the Congress, for law enforcement purposes, and when disclosure is determined to be in the national interest.

Question 79. If there is a disagreement between a facility owner and the international inspectors regarding the extent of access required during an inspection, does the owner have the right to appeal to the U.S. courts to prevent access to the perimeter of the facility, or to inside of the facility?

Answer 79. The Administration's proposed CWC implementing legislation does not prohibit facility owners from appealing to the U.S. courts to prevent access to the perimeter of the facility, or to inside the facility. However, the proposed legislation prohibits injunctions or other orders that would limit the ability of the Technical Secretariat to conduct, or the U.S. Government to facilitate, inspections as required or authorized by the CWC.

Question 80. If a plant owner or manager believes that the order to open a plant to inspectors is legally flawed, may that order be appealed in the U.S. courts?

Question 80(a). Would a plant owner or manager who appealed such an order be liable to criminal prosecution for acting "to disrupt, delay or otherwise impede an inspection as required by" the implementing legislation? If so, would this be the case even if the appeal were lodged before the constitutionality of the CWC implementing legislation had been tested in the courts?

Answer 80. See answer 79.

Answer 80(a). The Administration's proposed CWC implementing legislation provides that it shall be unlawful for any person to fail or refuse to permit entry or inspection, or to disrupt, delay or otherwise impede an inspection as required by the implementing legislation or the CWC. The intent of this provision is to reach physical, rather than legal, actions by plant owners or managers.

Question 81. If the U.S. Government were to force a plant owner to accept a challenge inspection purely for foreign policy reasons (e.g., in return for another country facilitating an inspection that the United States had requested against one of that country's plants) and if inspectors or U.S. escorts discovered a violation of law unrelated to the CWC, would the Government still be justified in prosecuting the plant owner? If so, why?

Answer 81. The Administration's proposed CWC implementing legislation draws no distinction as to the underlying purpose or motive regarding any inspection pursuant to the CWC. However, pursuant to paragraph 9 of CWC Article IX, A State Party requesting

a challenge inspection must keep the inspection request within the scope of the CWC, provide all appropriate information on the basis of which a concern about non-compliance has arisen, and refrain from unfounded inspection requests. The U.S. Government would not force a plant owner to accept any inspection that was not authorized under the CWC. Nevertheless, if the inspection is valid, the U.S. is under an affirmative obligation to allow it to proceed.

The proposed implementing legislation provides that otherwise protected information or materials obtained during an inspection may be provided to Government officials for law enforcement purposes. This exception is designed primarily for the situation in which U.S. Government personnel accompanying inspectors happen to witness evidence of a crime. In such a case, the Government would not be precluded from using such information in any subsequent prosecution. This exception would, therefore, permit the Government to use information or materials obtained during inspections in regulatory, civil or criminal proceedings conducted for the purpose of law enforcement, including those that are not directly related to enforcement of the CWC.

All facility owners have an ongoing obligation to obey existing law. The purpose of the CWC-related inspections is not to discover violations of other laws but to verify and monitor CWC compliance. Nevertheless, U.S. escorts will not be barred from reporting what they see, including violations of U.S. or local laws unrelated to the CWC. If such a violation is reported, the Government would be justified in prosecuting.

Question 82. How will proposed implementing legislation deal with a situation in which information on a possible law violation unrelated to chemical weapons is found during a CWC inspection? Will this provision promote cooperation on the part of plant managers and owners?

Answer 82. As discussed in answer 81, information from inspections may be publicly released for law enforcement reasons. This provision is not unique to this legislation. The Environmental Protection Agency and the Department of Health and Human Services have memoranda of understandings that provide for exchange of information gathered during their domestic inspections. The Administration expects that the implementation of the CWC will operate in a similar fashion.

The Administration believes that since the vast majority of plant owners and managers already obey the law, there is little reason for concern about whether suspected violations of law unrelated to the CWC may be discovered. Moreover, inasmuch as the CWC inspection team and escorts will be lawfully on their property, plant owners and managers are likely to be as cooperative as they would be for any EPA or OSHA inspection to which they are also subject. Finally, when the first draft of the implementing legislation was submitted to the Chemical Manufacturers Association (CMA) for its review, no objection was raised to this provision.

Question 83. What safeguards in the CWC will prevent or deter international inspectors and other members of the Technical Secretariat from using information they have obtained through this Convention for competitive commercial uses once they leave the Technical Secretariat? How effective will those safeguards be?

Answer 83. The Confidentiality Annex, which governs procedures for limiting access to sensitive information, was developed in close coordination with the international chemical industry and satisfies their concerns about the protection of information by the international organization. Industry representatives have stated that if implemented properly, the risk of the release of information through the international organization will be no greater than the risk of release of information from the U.S. Government.

Paragraph 7 of the CWC Confidentiality Annex provides that inspectors and other members of the Technical Secretariat—

> shall not disclose *even after termination of their functions* to any unauthorized persons any confidential information coming to their knowledge in the performance of their official duties. . . . (Emphasis added).

In addition, paragraph 9 of the CWC Confidentiality Annex requires that—

> the staff [of the Technical Secretariat] shall enter into individual secrecy agreements covering their period of employment and a period of five years after it is terminated.

The current draft of the future agreement between the CWC Organization and the government of the Netherlands (the seat of the Organization) provides the legal capacity for the Organization to initiate suits in Dutch courts. Thus, the provisions of paragraphs 7 and 9 could be enforced by the Organization directly in this manner. In addition, the Administration's proposed legislation provides for criminal penalties, including fines and imprisonment, for unauthorized disclosure of information by, *inter alia*, employees of the Technical Secretariat. Prosecution by the United States would require waiver by the Director-General of the Technical Secretariat of the employees' immunity provided for in the CWC, however.

The Preparatory Commission is developing a classification system to safeguard sensitive information gained through declarations and inspections, secrecy agreements for all employees, and procedures to investigate and settle disputes related to confidentiality. The Convention's provisions require only the information necessary to carry out its verification and monitoring aims.

Question 84. To what extent will the implementing legislation submitted by the Executive Branch permit civil or criminal action against the U.S. or foreign inspectors who disobey the CWC and misuse information they learn?

Answer 84. The Administration's proposed CWC implementing legislation provides for criminal penalties for unauthorized willful disclosures of information or materials obtained pursuant to the CWC. Specifically, it provides that—

> any officer or employee of the United States or former officer or employee of the United States, who by virtue of such employment or official position has obtained possession of, or has access to, information or materials the disclosure or other provision of which is prohibited * * *, and who knowing that disclosure or provision of such information or

materials is prohibited . . ., willfully discloses . . . the information or materials in any manner to any person, including persons located outside the territory of the United States, not entitled to receive it, shall be fined * * *, or imprisoned for not more than five years, or both.

The proposed implementing legislation also specifically provides for application of the disclosure provisions to the members of the international inspection teams and other Technical Secretariat personnel, although such efforts could be constrained by the availability of immunity pursuant to the CWC.

Question 86. What are the estimated overall costs of a routine inspection—including lost time or earnings from work stoppage, and expenses to ensure the protection of sensitive information?

Answer 86. The following is a very rough estimate for the cost impact of CWC routine inspections at U.S. industry sites.

Chemical schedule	Plant sites	Decl. prep time (hours)		Prep and on-site verification cost
		Initial	Annual	
1 & 2	100	96	48	$10,000
3	200	48	24	5,000
Other	6,000	8	4	2,000

This estimate is based on the following assumptions:

The average cost of an industry employee's time is $40/hour.

An average of two hours of CWC training is needed per employee.

For Schedule 1, 2, and 3 facilities, there are 60 trained employees per plant site; for "other" chemical production facilities, 2 trained employees per plant site.

CWC training costs during subsequent years are 50% of the initial cost.

ACDA's rough estimate is that initially U.S. industry will receive 53 inspections per year (40 at Schedule 1 and 2 sites, 13 at Schedule 3 sites). The 40 inspections per year of Schedule 1 and 2 facilities assume that all of these plant sites are inspected at least once in the first three years after entry into force of the CWC. There will be no inspections of "other chemical production facilities" until the fourth year after entry into force, when there could be up to 20 inspections per year of these facilities and Schedule 3 facilities combined.

Question 87. What is the liability of the U.S. Government if proprietary information is leaked as the result of an inspection—and especially of a challenge inspection of a plant that is not in a highly-regulated industry?

Question 87(a). Will any mechanism be set up (or proposed in implementing legislation) for an inspected firm to seek compensation for its costs incurred in protecting sensitive information or due to the loss of such information?

Answer 87. Neither the CWC nor the Administration's proposed legislation provide for assumption of any liability by the U.S. Government.

Answer 87(a). As with domestic regulatory regimes, industry is expected to bear the expense of protecting information as a "cost

of doing business." With regard to the loss of information, paragraph 23 of the CWC Confidentiality Annex provides for the establishment of a "Commission for the settlement of disputes related to confidentiality" where there are breaches of confidentiality involving both a State Party and the CWC Organization. This Commission could examine compensation for losses to U.S. industry caused by the actions of another State Party. Also, an aggrieved company might attempt to seek compensation from the U.S. Government through a civil suit based on the "Takings Clause" of the Fifth Amendment to the U.S. Constitution.

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